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BERNARD DRUCKER, SPECIAL ADMINISTRATOR OF THE ESTATE OF BESSIE MAE DRUCKER, APPELLEE, V. GOSCAR, INC., A CORPORATION, APPELLEE, IMPLEADED WITH BETHEL HOMES, INC., A CORPORATION, APPELLANT.
168 N. W. 2d 534

Filed June 6, 1969. No. 37117.

**New Trial: Appeal and Error.** An assignment in a motion for a new trial that errors of law occurred at the trial does not present the correctness of giving or refusing instructions.

Appeal from the district court for Fillmore County: JOSEPH ACH, Judge. Reversed and remanded with directions.

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

Matthews, Kelley, Cannon & Carpenter and Keenan & O'Neal, for appellee Drucker.

Fitzgerald, Brown, Leahy, McGill & Strom, for appellee Goscar, Inc.

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

SMITH, J.

Bessie Drucker, a hemiplegic receiving care from Bethel Homes, Inc., defendant, fell while a nurse's aide was moving her from bed to wheel chair. The fall led to Bessie's personal injury claim on which a jury returned a verdict for defendant. Her motion for a new trial was sustained without specification of reasons. Defendant appeals. Plaintiff contends that the evidence established defendant's liability as a matter of law and that evidentiary rulings and an instruction were prejudicially erroneous.

Mary Burns, a nurse's aide in defendant's home at Exeter, Nebraska, undertook on February 21, 1966, to move Bessie, age 67. She knew that Bessie, victim of a stroke in 1962, could not use either left limb or sit

up by herself. Mary had been moving Bessie to wheel chairs approximately 9 times a week since October 1, 1965.

During the movement Margaret Nordmeyer, a nurse's aide, was standing behind a wheel chair at the foot of the bed. Bessie was set up on the side of the bed, right leg touching the floor and right arm encircling Mary's neck. Mary toed a line parallel with the bed, her feet wide apart, and her arms around Bessie's waist. When she heard Bessie's statement of readiness, Mary pulled up and back and moved her right foot back several inches. The work which transferred the load from bed to right leg quickly brought Bessie to a standing position. Mary, however, could not stop the motion. The women fell together, Bessie atop Mary, away from the wheel chair. Extension of the line on which they lay to a line along the side of the bed formed an angle of 70 degrees. Bessie, the only one injured, voiced no criticism. She anxiously asked whether Mary was hurt, and upon reassurance she broke into laughter.

Bessie preferred Mary's assistance, although she outweighed Mary, 200 to 112 pounds. She complained of pain on pressure at her left armpit and on use of a Hoyer lift, a hydraulic sling device. A nurse's aide of Mary's size, according to expert testimony, was physically qualified to move Bessie, for strength is requisite. Positioning of the feet is of course important. At the trial Mary did not recall whether she had moved either foot subsequent to beginning the transfer and prior to losing balance. Margaret ascribed the fall to Bessie shifting weight and to Bessie's right leg bending. On the other hand, Mary conceded that Bessie had cooperated fully and that the leg had not given way. She could not account for the accident. Bessie, near death, could not testify.

A jury might reasonably find from the evidence that defendant was not negligent.

The record of two evidentiary rulings is as follows:

Margaret testified on direct and cross-examination that she had moved Bessie by herself. Over plaintiff's objection of immateriality and irrelevance she affirmatively answered this question on cross-examination: "Was this the way you were taught to do it?"

A question defendant's counsel put to Martha Maseman, an expert witness, assumed Bessie had made "complaints of pain upon movement of the left or paralyzed arm." No evidence justified the hypothesis, but the court overruled plaintiff's objection which was timely, specific, and well taken. Martha's lengthy answer, however, seems remote from the unsupported hypothesis in comparison with pain at the left armpit. Both rulings were free of prejudicial error. See Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

The contention about instructional error concerns No. 8 in which the court defined the standard of conduct required of defendant. Plaintiff attempted to raise the objection in the motion for a new trial by general assignment under section 25-1142(8), R. R. S. 1943. It was insufficient. An assignment in a motion for a new trial that errors of law occurred at the trial does not present the correctness of giving or refusing instructions. Phoenix Ins. Co. v. King, 52 Neb. 562, 72 N. W. 855.

The judgment is reversed and the cause remanded with directions to reinstate the verdict and to render judgment on the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

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GERTRUDE C. BECK, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.
168 N. W. 2d 532

Filed June 6, 1969. No. 37162.

**Workmen's Compensation.** In a workmen's compensation case death caused by (1) heart disease that was a personal risk and

(2) emotional strain that was an employment risk is not compensable in these circumstances: The strain was no greater than that of nonemployment life.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Reversed and dismissed.

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

Donald E. Endacott and Mason, Knudsen, Berkheimer & Endacott, for appellee.

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

SMITH, J.

A state director performing official duties experienced emotional strain that combined with chronic coronary artery disease to cause his death. The Workmen's Compensation Court initially awarded death benefits to the widow, but on rehearing it dismissed her claim. The district court on appeal reversed the order of dismissal, and the State of Nebraska has appealed. We review law and facts related to causation.

Plaintiff is the widow of Leo J. Beck, who was Director of Veterans' Affairs from 1963 to his death. As director, he served on a board of inquiry and review that exercised limited jurisdiction over the Nebraska Soldiers' and Sailors' Home at Grand Island. The board had authority to recommend policy and to determine eligibility of members of the home. General management of the home was vested in the Department of Public Institutions. See § 80-304, R. R. S. 1943. The section creating the Department of Veterans' Affairs provides: "He (the director) shall be appointed by the Governor, subject to confirmation by the Legislature. . . . The director shall serve until a new director to succeed him is appointed and has qualified." § 80-401.02, R. R. S. 1943.

The emotional strain contributing to Beck's death resulted from the introduction of L. B. 128 at the 77th

Session of the Nebraska Legislature (1967). The bill described a large unimproved part of the tract of land that was the site of the home. It authorized the Governor to transfer the described land to the County of Hall for educational purposes. Emotional strain on Beck was visible on February 21, 1967, at the conclusion of a telephone call to him from the office of the Governor. On the same day in response to the call Beck wrote the sponsor of the bill: "Regarding Legislative Bill 128, these few lines will reiterate my statement made . . . last Friday to the effect that we would accept any decision that Governor Tiemann might see fit to make regarding the disposition of this bill."

Beck in 1958 had sustained a posterior lateral myocardial infarction. An electrocardiogram in 1964 revealed residual heart damage. Beck died in Angola, Indiana, on March 4, 1967, at age 70. The attending physician wrote: "Impression: Coronary thrombosis with acute myocardial failure terminating in death." A post-mortem examination was not made.

Dr. G. H. Misko, who had treated Beck in 1958 and subsequent years, reported: "Leo Beck's chronic coronary artery disease and the emotional strain resulting from his experience involving the telephone call and letter combined to precipitate certain pathological processes which culminated in his coronary thrombosis. His disturbing experience of February 21, 1967, produced at the time objective symptoms, such as vasoconstriction and increased pulse rate and blood pressure. . . . It is a well-known fact that emotional disturbances . . . react upon the circulatory system in such a way as to add an extra work load to a myocardium which has already been damaged and may, therefore, precipitate a new myocardial infarction."

In a workmen's compensation case death caused by (1) heart disease that was a personal risk and (2) emotional strain that was an employment risk is not compensable in these circumstances: The strain was no

greater than that of nonemployment life. See Brokaw v. Robinson, 183 Neb. 760, 164 N. W. 2d 461.

". . . when the employee contributes some personal element of risk—e.g., . . . a personal disease which figures causally in his injury—the employment must contribute something substantial to increase the risk. The reason is that the employment risk must offset the causal contribution of the personal risk. . . . If there is some personal causal contribution *in the form of a previously weakened or diseased heart,* a heart attack would be compensable only if the employment contribution takes the form of an exertion greater than that of non-employment life. Note that the comparison is not with *this employee's* usual exertion *in his employment,* but rather with the exertions present in the normal *non-employment* life of this or any other person." Arthur Larson, "The 'Heart Cases' in Workmen's Compensation: An Analysis and Suggested Solution," 65 Mich. L. Rev. 441 at 469.

Plaintiff's claim is not compensable. The judgment is reversed and the claim dismissed.

REVERSED AND DISMISSED.

SPENCER, J., participating on briefs.

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NICK JAMSON, APPELLANT, V. JOHN POULOS ET AL., APPELLEES.
168 N. W. 2d 526

Filed June 6, 1969. No. 37191.

1. **Covenants: Property.** A provision in a lease granting the lessee an option to purchase the property during the term is supported by the consideration paid for the lease and cannot without the consent of the lessee be revoked during the period granted for its exercise.
2. ———: ———. Where a lease of real property contains an agreement giving the lessee the privilege of purchasing the property covered by the lease which is not specifically restricted to the lessee, such covenant runs with the land and the

option to purchase passes upon assignment of the lease to the assignee thereof.

3. ———: ———. Covenants in a lease against assignment or underletting are not favorably regarded by the courts and are liberally construed in favor of the lessee.

4. ———: ———. An option to purchase real estate contained in a lease agreement is not terminated by the death of the lessee during the term and before the exercise of the option, in the absence of express limitation.

5. ———: ———. Where the rights of an assignee of a lease have been recognized by a lessor notwithstanding prohibition against assignment of the lease, and no forfeiture of the lease for the lessee's breach of covenant or condition has been declared during the term thereof, the assignee may exercise the option given the lessee by the lease to purchase the leased property.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded with directions.

Cunningham & Blackburn, for appellant.

John R. Higgins and Albert P. Madgett, for appellees.

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

SPENCER, J.

This is an action for specific performance of a contract with option to purchase real estate. The matter was tried on a stipulation of facts. The trial court dismissed plaintiff's petition and he perfected an appeal to this court.

On August 22, 1959, John Poulos and Amorfia Poulos were the joint owners of the following described real estate: The north 22 feet of the south 64 feet of Lot 1, Block 56, Original Town, now City of Grand Island, Hall County, Nebraska, upon which was situated a two-story brick building, the ground floor of which had been used for business and commercial purposes and the upstairs floor of which was unimproved and vacant. On that day, the Pouloses entered into an agreement with

Karl A. Rasmussen who was the owner of adjoining property upon which was situated the Koehler Hotel and Tavern, leasing to him the following described property: "The second floor of the building situated on the North Twenty-two (22) Feet of the South Sixty-four (64) Feet of Lot One (1), Block Fifty-six (56), Original Town, Grand Island, Hall County, Nebraska," for a term of 10 years for the sum of $360 per year, payable in advance. Said lease contained the following provision: "Second party must furnish heat and water and is given the right to install a door or passageway between the leased property and the property owned by second party immediately adjoining to the North and to make such repairs and improvements desired all at his own expense. Second party agrees, at the end of the lease, to close the passageway and fix the door as it was originally, providing second party has not bought the above described real estate. Second party is given the option of purchasing, at any time during the term of the lease, the above described real estate for $22,000.00 and to give first parties notice, in writing, of his intention to purchase. In case the Second Party accepts his option to purchase, then the taxes and rents will be pro rated to the date of sale."

Karl A. Rasmussen went into immediate possession of the second floor of said building, installed a doorway between the leased property and the Koehler Hotel property, and made expensive and permanent improvements to the leased premises. Rasmussen died December 31, 1959, and by the terms of his last will and testament and by assignment of his heirs, the Koehler Hotel property and the leased premises were assigned to his son, Harold B. Rasmussen.

On October 7, 1961, Harold B. Rasmussen sold and conveyed the Koehler Hotel property and assigned his interest in the lease agreement to the plaintiff herein, who took possession of said premises and made further repairs and improvements thereon. The Pouloses did

not at any time give consent in writing to any of the assignments. However, the assignments were made with their knowledge, and defendants accepted rental payments from the assignees.

The lease in question is on a Huffman form which contains the following printed provision: "* * * that he will not sell, assign, underlet or relinquish said premises without the written consent of the lessor, under penalty of forfeiture of all his rights under this lease, at the election of the parties of the first part * * *."

Defendants admit that because of their acceptance of the rent payments there is a valid lease in effect for the balance of the term of the original lease, but contend that the option was personal to Karl A. Rasmussen and terminated at his death in the absence of a further agreement with the Pouloses. On July 3, 1962, the defendants Poulos conveyed the property to their daughter, Antonia J. Poulos, now Antonia J. Poulos Giallourakis, who is the present record holder of said property. Subsequent to said conveyance, Antonia accepted the annual rental payments from the plaintiff.

On October 20, 1966, Antonia entered into a lease with Rex Haberman for the main floor and basement of the building situated on the above-described premises. Said lease agreement contains the following stipulation: "Lessor shall put in a new ceiling in the above premises. Second party shall pay all utilities, plumbing, repairs and general up-keep. Second party may remove own equipment at expiration of Lease, but must leave building in as good condition as when he took over Lease—fair wear and tear excepted. If building sold, second party has right to take his equipment. In the event Nick Jamson does not exercise his option to purchase the building in three years first party reserves the right to sell the building at the end of three years to another party in which event second party shall be entitled to a 30-day notice. First party hereby gives second party

a 5-year option to lease said premises to be exerciseable if first party still owns said building."

On July 31, 1967, plaintiff notified the defendants Poulos and Antonia that he had decided to exercise the option for the purchase of the real estate for the sum of $22,000, and tendered a certified check for 5 percent of the purchase price. This certified check was returned to the plaintiff by the defendant Antonia. On August 18, 1967, plaintiff caused to be served upon the defendants Poulos and Antonia a written notice of his decision to exercise the option, together with a certified check in the sum of $22,000, payable to the three of them, and requested delivery of a deed conveying the real estate. Said defendants refused to recognize plaintiff's right to exercise the option, and this action resulted. John Poulos died intestate during the pendency of the action, and it was revived in the name of his wife and daughter.

A provision in a lease granting the lessee an option to purchase the property during the term is supported by the consideration paid for the lease and cannot without the consent of the lessee be revoked during the period granted for its exercise. Harper v. Runner, 85 Neb. 343, 123 N. W. 313.

Defendants concede that where a lease of real property contains an agreement giving the lessee the privilege of purchasing the property covered by the lease which is not specifically restricted to the lessee, such covenant runs with the land and the option to purchase passes upon assignment of the lease to the assignee thereof.

It is the position of the defendants that the present lease by its terms does restrict the option to purchase to the original lessee. They draw this inference from the fact that the lease is made out to Karl A. Rasmussen alone and does not mention his wife or heirs, and that the lease refers only to Karl A. Rasmussen either as "second party" or with the pronoun "he" or "his." There is

no merit to this contention. The lease was made with a single individual and was so drawn. The option was an integral part of the lease. If lessors intended it to be personal to the lessee only, they could have so provided at the time the lease was executed. The law was well established in this jurisdiction that covenants against assignment or underletting are not favorably regarded by the courts and are liberally construed in favor of the lessee. Chesnut v. Master Laboratories, 148 Neb. 378, 27 N. W. 2d 541.

Defendants also contend that the option to purchase terminated with the death of Karl A. Rasmussen. An option to purchase real estate contained in the lease agreement is not terminated by the death of the lessee during the term and before the exercise of the option, in the absence of express limitation.

Defendants further contend that the lessee cannot exercise an option different in scope from the precise option conferred in the lease, on the theory that the option is limited to the second story of the property, which was the portion used by the plaintiff. We do not so construe the lease. The phrase, "the above described real estate," in the option refers to the entire tract and not to only the second floor. This intent is obvious from the instrument. Even if defendants had not so construed the instrument themselves, it would strain credulity to believe any one would agree to pay $22,000 for a second floor of a building renting for $360 per year.

Defendants have continuously recognized the rights of the assignee to the lease of the property, and they concede that the lease is valid for a term of 10 years. The defendants had the right to elect to forfeit the lease upon the assignments, but they did not elect to do so. Instead, they accepted the benefits of the original lease for 8 years, receiving the annual rental payment from two different assignees. They permitted the assignees to make extensive improvements to the second floor of the building, and could not help but realize that because

of the improvements there was a reasonable likelihood that the option would be exercised. Where the rights of an assignee of a lease have been recognized by a lessor notwithstanding prohibition against assignment of the lease, and no forfeiture of the lease for the lessee's breach of covenant or condition has been declared during the term thereof, the assignee may exercise the option given the lessee by the lease to purchase the leased property. Chesnut v. Master Laboratories, 148 Neb. 378, 27 N. W. 2d 541.

We have referred previously to the construction placed upon the lease by the defendants. It is evident that when the present title holder leased the ground floor and basement of the premises in question to Rex Haberman, she believed there was a good possibility that plaintiff would exercise the option. In this respect, it is also to be noted that if the option was limited only to the second floor, the provision in the lease would have been unnecessary, but that other definite provisions covering the problems of a divided ownership would have been considered.

For the reasons given, we reverse the judgment herein and remand the cause with directions to grant the plaintiff's petition for specific performance.

REVERSED AND REMANDED WITH DIRECTIONS.

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CATHRINE FOTINOS, APPELLANT AND CROSS-APPELLEE, V. GEORGE FOTINOS, APPELLEE AND CROSS-APPELLANT.

168 N. W. 2d 698

Filed June 13, 1969. No. 37060.

1. **Divorce: Property.** Although a voluntary conveyance of real property from a husband to a wife without consideration except love and affection will vest her with legal title, in an action for dissolution of the marriage the court will inquire as to the source of the accumulated property and in the exercise of discretion will divide the property between the parties awarding to the husband his equitable portion thereof.

2. **Divorce.** In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.
3. **Divorce: Attorney and Client.** A reasonable attorney's fee in any proceeding is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorneys concerned.

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

Cunningham & Blackburn and Wagoner & Grimminger, for appellant.

Kelly & Kelly, for appellee.

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

HASTINGS, District Judge.

Plaintiff began an action for divorce on June 26, 1967, on the grounds of cruelty. Defendant denied such conduct and by cross-petition sought to be divorced from plaintiff on the grounds of misconduct and cruelty on her part. The court granted plaintiff's petition; awarded plaintiff her clothing, jewelry, and other items of personal property, alimony in the sum of $3,500 and an attorney's fee of $250. Defendant was awarded the

remaining property of the parties consisting of certain items of furniture, and title was quieted in defendant to a house in Grand Island worth approximately $13,000, and a farm worth from $39,000 to $48,000 subject to a mortgage of $18,000. The court then granted plaintiff's motion for a new trial, and on May 6, 1968, again granted plaintiff a divorce and made a similar award of property, except that plaintiff was also given a sewing machine, permanent alimony was increased to $3,750, and she was awarded an additional attorney's fee totaling $300. Plaintiff has appealed alleging that the trial court erred in the amount of the award of permanent alimony, in quieting title to the real estate in the defendant, and in the amount of attorney's fees. Defendant also cross-appealed assigning as error the excessiveness of the award of alimony.

Plaintiff and defendant were married on September 6, 1966. The plaintiff was a Greek citizen and at the time of the first trial was 56 years of age. She read or spoke no English. This was plaintiff's third marriage, her first marriage having ended with the death of her husband, and her second marriage by divorce. She has two grown children by her first marriage. Defendant was 72 years of age at the time of the new trial, of Greek descent, who could speak but not read or write English. This was his second marriage, his first marriage having terminated after 35 years with the death of his wife. He has five adult children.

The marriage between the two parties resulted after a visit by the plaintiff to certain friends of Greek extraction living in Omaha. It could possibly be classified as a marriage of convenience. There was evidence that defendant had agreed to move from the farm where the parties first resided to a house in Grand Island. This was accomplished by the purchase of the house which was placed in the plaintiff's name alone. There was some indication that this arrangement was in fulfillment of a promise made to the plaintiff to provide for

her future, although the defendant claims it was done simply at her insistence.

Shortly after the marriage, disagreements arose between the parties having to do with defendant's refusal to attend church, some of his personal habits, and over money matters. Although defendant's conduct could not be classified as aggravated, nevertheless there was sufficient evidence to justify the trial court in awarding the divorce.

In addition to the property previously mentioned, defendant owned a Buick automobile and various pieces of farm equipment. Additionally, defendant also received Social Security, and had net income for the years 1962 to 1967 ranging from approximately $500 to $3,500. Plaintiff received some income from an apartment house in Athens, Greece, but the question of ownership of this property was not raised by the pleadings nor decided by the decree.

It is plaintiff's contention that by placing the house in the name of the plaintiff, defendant had created an irrevocable gift, and that the trial court was without authority to disturb this estate. Plaintiff cites several cases relating to the presumption created by such a transaction. However, none of those cases involved divorce.

The correct rule in Nebraska is expressed in Bartunek v. Bartunek, 109 Neb. 437, 191 N. W. 671. In that case this court said: "Under the authority of Myers v. Myers, 88 Neb. 656, and Bristol v. Bristol, 107 Neb. 321, the district court has power to consider all the property accumulated by the joint efforts of both husband and wife, and to adjust their respective property rights. By the voluntary conveyance of the home farm to the wife without consideration except love and affection, she has become vested with the legal title to the major portion of the joint accumulation; but the court will look behind this and decree according to the equities of the situation."

In the instant case property was not accumulated by

the joint efforts of the parties, but rather all of the consideration was furnished by the defendant.

The general rule relating to guidelines to be used by the trial court in awarding alimony is set forth in Safar v. Safar, 173 Neb. 292, 113 N. W. 2d 206, wherein this court said as follows: "In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just."

Considering that this marriage lasted but approximately 9 months, and all of the other circumstances previously related, it is our opinion that the trial court's action in the award of alimony and the division of property was correct.

Likewise the amount of attorney's fee is largely within the discretion of the trial court. In Strasser v Strasser, 153 Neb. 288, 44 N. W. 2d 508, this court set forth the following rule: "A reasonable attorney fee in any proceeding is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorneys concerned." It does not appear

that the trial court abused its discretion in this regard.

For the reasons set forth above, the judgment of the trial court is affirmed. Plaintiff is awarded the sum of $350 for services of her attorney in this appeal.

AFFIRMED.

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ONA SHORT, APPELLEE AND CROSS-APPELLANT, V. WILLARD KISSINGER ET AL., APPELLANTS AND CROSS-APPELLEES.
168 N. W. 2d 917

Filed June 13, 1969. No. 37109.

**Municipal Corporations: Public Officers and Employees.** A civil service commission certifying eligibles for fire chief has broad discretion in the absence of legislative restriction to choose between examinations for promotion and examinations for original entrance.

Appeal from the district court for Adams County: EDMUND NUSS, Judge. Reversed and remanded.

George D. McArthur, for appellants.

William M. Connolly and David N. Shepherd, for appellee.

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

SMITH, J.

The civil service commission of Hastings, Nebraska, in order to certify eligibles for fire chief, held an examination for original entrance, not for promotion. The highest scorer, an outsider, won the appointment, but a taxpayer challenged it in this mandamus action. After a trial the district court awarded peremptory mandamus. On appeal by respondents the question concerns authority for the examination.

For years no one held the rank of assistant chief in the Hastings fire department, a captain occasionally acting as chief. Since the chief was to retire in April

1968, the mayor requested the civil service commission to certify eligibles between ages 30 and 55. In the opinion of commission members the vacant position of assistant chief precluded promotional competitive examination. The examination for original entrance was taken by three fire captains of Hastings and scores of applicants diligently solicited outside the department. The commission certified three eligibles: (1) Aurcle Bradshaw, age 50, chief instructor in the fire department of Wichita, Kansas, and the highest scorer; (2) a fire captain in Denver, Colorado; and (3) a fire prevention officer in Silver Spring, Maryland. Bradshaw was appointed.

An ordinance provided: "For Fire Service an applicant shall not be less than 25 years nor more than 35 years of age. . . . Vacancies in positions above the lowest grades in the competitive class that are not filled by transfer, reinstatement or reduction, shall be filled as far as practicable by competitive promotional tests . . . (8) . . . Promotions in the Fire . . . Department shall be from class to class, from the lowest to the highest class in the department. . . . (9) Vacancies. Insofar as practical, all vacancies to highest position shall be filled by promotion."

Statutory provisions governing Hastings read: "It shall be the duty of the civil service commission to: . . . (9) certify, on a written request, when a vacant position is to be filled, to the appointing authority the name of the person highest on the eligible list for the class. If there is no such list, to authorize a provisional or temporary appointment list of such class." § 19-1804, R. R. S. 1943. "Whenever a position in the classified service becomes vacant, the appointing power shall make requisition upon the commission . . .. The commission shall certify the names of the persons willing to accept such employment who are the three highest on the eligible list for the class to which the vacant position has been allocated. . . . If there is no appropriate eligible

list for the class, the commission shall certify . . . the names of the persons on its list who are held appropriate for such class." § 19-1810, R. S. Supp., 1967.

The district court awarded peremptory mandamus along these lines: The city council was to select a provisional chief from the three captains. Notification of the examination was to go to (1) all Hastings firemen and (2) others who satisfied requirements of residence and age between 21 and 35 years. Should candidates who were probably qualified be too few, the commission would have authority to open the examination to nonresidents between ages 21 and 35.

A civil service commission certifying eligibles for fire chief has broad discretion in the absence of legislative restriction to choose between examinations for promotion and examinations for original entrance. Cf. Timmins v. Civil Service Commissioners, 276 Mass. 142, 177 N. E. 1, 75 A. L. R. 1232. We interpret the ordinance as follows: The maximum age specification of 35 years for original entrance into fire service related only to the lowest rank, fireman. Promotional examination for chief was required if practical. The commission acted within the bounds of its discretion to certify eligibility on merit. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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STATE OF NEBRASKA, APPELLEE, V. REGINALD COUNTRY, APPELLANT.

168 N. W. 2d 918

Filed June 13, 1969. No. 37111.

**Criminal Law: Trial.** The asking of improper questions of a witness to which objections are sustained by the court do not constitute prejudicial error in the absence of a showing that defendant was thereby deprived of a fair and impartial trial.

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

A. Q. Wolf and Thomas D. Carey, 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.

CARTER, J.

Defendant was charged in the district court for Douglas County with burglarizing the Keynote Bar in Omaha. The jury returned a verdict of guilty and defendant has appealed.

The evidence shows that on June 19, 1968, at approximately 1:30 a.m., defendant and one Harlan were taken into custody in the Keynote Bar by officer O'Brien of the Omaha Police Department. The plate glass window of the bar was broken and three bottles of wine were sitting outside the broken window. Both men were put under arrest and taken to police headquarters in a police car. Officer O'Brien asked defendant his name and he gave his name. Officer Gentleman attempted a conversation with Harlan who responded that he would not say anything without his lawyer. Officer Gentleman was asked if defendant said the same thing in his presence to which he replied: "Not in my presence, no." Defendant objected after the answer was given that the question was immaterial and prejudicial, and moved for a mistrial. No motion to strike the answer was made, but the trial court sustained the objection and overruled the motion for a mistrial. Defendant contends that the evidence was prejudicial by developing an inference of guilt from mere silence.

Defendant relies on State v. Whited, 182 Neb. 282, 154 N. W. 2d 508, and State v. Morgan, 182 Neb. 639, 156 N. W. 2d 799. These cases do not support the contention for which they are cited. In the instant case, it is

argued that the answer of officer Gentleman, "Not in my presence, no," to the question, "Did Mr. Country say the same thing in your presence?" leaves the inference that it was said to some one else and is therefore prejudicial. We see no merit in this. The sustaining of the objection by the trial court removed any possible prejudice to the defendant, assuming that prejudice otherwise existed, which appears doubtful.

The mere asking of such a question from a witness is not such misconduct sufficient to taint the entire proceeding and deny defendant a fair and impartial trial. State v. Hunt, 178 Neb. 783, 135 N. W. 2d 475; State v. Roan Eagle, 182 Neb. 535, 156 N. W. 2d 131.

We find no prejudicial error in the record and the judgment of the district court is affirmed.

AFFIRMED.

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GERTRUDE HILKER, APPELLANT, V. N. P. DODGE BUILDING COMPANY, A CORPORATION, ET AL., APPELLEES.
168 N. W. 2d 701

Filed June 13, 1969. No. 37113.

1. **Licensees and Invitees: Negligence: Torts.** A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he should realize that it involves an unreasonable risk of harm to such invitees, and should expect that they will not discover or realize the danger, or will fail to protect themselves against it.
2. ———: ———: ———. A person lawfully on the premises of another assumes the dangers which are open and obvious and which can be seen readily and avoided by the exercise of ordinary care.

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

Martin A. Cannon, Robert Burkhard, and Matthews, Kelley, Cannon & Carpenter, for appellant.

Eugene P. Welch, Joseph R. Moore, Gaines, Spittler,

Neely, Otis & Moore, and Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellees.

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

NEWTON, J.

Plaintiff seeks to recover for personal injuries received in a fall alleged to have been occasioned by a defective sidewalk on the property of defendants. At the close of plaintiff's evidence, the court sustained motions of defendants for directed verdicts or, in the alternative, for a dismissal of plaintiff's petition. The sole issue presented is the propriety of this action by the trial court. We affirm the judgment of the district court.

The defendant N. P. Dodge Building Company constructed a 3-story building which was set back several feet from the street to the east. A 7-foot wide sidewalk was constructed adjacent to the building and beyond the sidewalk, the area running out to the street, was paved for automobile parking purposes. When cars were parked in this area, pedestrians on the city sidewalks were obliged, in passing the building, to walk either in the street or on the walk so constructed on defendant's property. The walk was commonly used by the public. The basement and first floor of the building were leased to the defendant Cris' Rexall Drug Co. The remainder of the building was leased to other tenants and the walk mentioned was for the common use of all tenants. The lease provided that the drug company should keep the leased premises in good repair "excepting only the exterior of said premises."

In the early afternoon of July 22, 1965, plaintiff, with other members of her family, drove into a parking lot owned by the defendant N. P. Dodge Building Company across an alley or driveway from the drugstore, parked, paid the parking fee, walked across the alley, entered onto the sidewalk adjacent to the drugstore, and walked on by the drugstore enroute to a theater. They returned

by the same route about 5 p.m. The day was bright and the sun shining. At this time plaintiff stepped into an area of the walk measuring approximately 14-inches wide, 41-inches long, and 1-inch deep, which was described as "dish shaped" with shallow sides and deeper in the center. In this area the concrete surface had deteriorated and there was some loose sand or gravel. Plaintiff said that her foot slipped. She fell and was injured. The defective area was adjacent to the parking area and was readily observable from a distance of at least 50 feet.

As to the lessee drug company, which was not chargeable with the maintenance of the sidewalk, it clearly appears that no ground of liability is present.

The primary question is the correctness of the trial court's ruling as it pertains to the lessor or owner of the premises. Some space in the briefs has been devoted to the contention that plaintiff was a "public invitee" as distinguished from a "licensee." We see no need to determine that question. In neither event has a basis for liability been established. Restatement 2d, Torts, § 343, p. 215, provides: "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) * * * *should realize* that it involves *an unreasonable risk* of harm to such invitees, and (b) *should expect* that they will *not discover or realize* the danger, or *will fail to protect themselves* against it, * * *." (Emphasis supplied.) See, also, McCullough v. Omaha Coliseum Corp., 144 Neb. 92, 12 N. W. 2d 639; Darrach v. Trustees of S. F. Medical Assn., 121 Cal. App. 2d 362, 263 P. 2d 469; Morrison v. Suburban Trust Co., 213 Md. 64, 130 A. 2d 915; Goodman v. Theatre Parking, Inc., 286 Mich. 80, 281 N. W. 545.

In each case, the question of liability must be determined upon the basis of the circumstances attendant upon the accident. Here the sidewalk defect was of a minor nature. Certainly defendant had no reason to realize or conclude that it constituted an unreasonable

risk of harm to passers-by. See Hupfer v. City of North Platte, 134 Neb. 585, 279 N. W. 168. This is not a case involving a latent or concealed danger. The sidewalk defect was open and obvious and could be seen from a considerable distance. The accident occurred in broad daylight. Plaintiff had already passed by that way a short time before. Should defendant have expected that plaintiff would not discover or realize any danger inherent in the condition of the sidewalk or would fail to protect herself against it? We do not believe so.

A person lawfully on the premises of another assumes the dangers which are open and obvious and which can be seen readily and avoided by the exercise of ordinary care. See, Thompson v. Young Men's Christian Assn., 122 Neb. 843, 241 N. W. 565; Restatement 2d, Torts, § 343A, p. 218.

We affirm the judgment of the district court.

AFFIRMED.

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WESTERN PLASTICS CORPORATION, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. WESTINGHOUSE ELECTRIC CORPORATION, A CORPORATION, APPELLEE AND CROSS-APPELLANT.

169 N. W. 2d 1

Filed June 13, 1969. No. 37125.

1. **Contracts: Warranty.** Where there is a contract to sell goods by description, there is an implied warranty under the statute existing in 1961 that the goods shall correspond with the description.
2. **Sales: Warranty: Statutes.** Where a seller expressly refuses to warrant the subject matter of a sale in certain particulars under the statutory law existing in 1961, there can be no implied warranty of a character covering those particulars, and such a disclaimer of warranty is not voided by the Uniform Sales Act.
3. **Sales: Warranty.** In an action to recover for a breach of warranty, the burden of proof is on the plaintiff to show that

the goods were defective at the time of sale. He must show a basis of recovery over and above mere speculation and conjecture.

4. ———: ———. In such a case the plaintiff must show by proof that a breach of warranty occurred beyond the scope of a disclaimer of warranty made prior to the purchase.

5. **Trial: Motions, Rules, and Orders.** The entertainment of a belated motion to strike testimony, no objection having been previously made thereto, is discretionary with the trial court.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Reversed and remanded with directions.

Lyle E. Strom and Fitzgerald, Brown, Leahy, McGill & Strom, for appellant.

Crossman, Barton & Norris, for appellee.

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

CARTER, J.

Western Plastics Corporation brought this action against Westinghouse Electric Corporation to recover damages for a breach of warranty of quality covering a 25 horsepower adjustable voltage drive manufactured by Westinghouse and sold to Western Plastics f.o.b. Buffalo, New York. The jury returned a verdict for Western Plastics and against Westinghouse in the amount of $5,686.02. The trial court sustained the motion of Westinghouse for a new trial and Western Plastics has appealed.

Western Plastics is engaged in the business of manufacturing plastic pipe varying in diameter from ½ to 6 inches. Plastic pipe is manufactured by an extrusion process whereby a molten material of heavy consistency is forced through a heated cylinder, through a die, and pulled away through a water cooler after which it maintains its rigid shape and form. The auger-like screw which forces the material through the die was powered by electric motors and belts causing the shaft of the screw to turn. The motor and the means of conveying

the power generated by the motor to the screw are referred to in this record as the drive. The machine to which the power is applied is known in the business as an extruder.

In the early summer of 1961, Western Plastics was using a 25 horsepower high and low voltage U. S. vari-drive on a 3½-inch extruder. It was described as a mechanical drive which Western Plastics desired to replace with an electrical drive because of shaft breakage on the vari-drive and the need for more speed in operating the extruder. It placed an order with Dutton-Lainson Company of Hastings, a representative of Westinghouse, for a 25 horsepower adjustable voltage electrical drive. The order specified a speed range of 215 to 2,500 revolutions per minute in contrast with the vari-drive range of 1,250, the maximum and minimum rates of producing speeds not being shown by the record other than that one witness testified it had a maximum speed of 2,150 revolutions per minute. Westinghouse, through Clifford E. Pickering, advised either a 30 horsepower adjustable voltage drive with a speed range of 175 to 2,500 revolutions per minute, or a 40 horsepower adjustable voltage drive with a speed range of 175 to 3,450 revolutions per minute dependent on certain conditions not important here. The advice of Westinghouse was not accepted and it proceeded to furnish a 25 horsepower adjustable voltage drive, but advised Western Plastics by letter in parts as follows: "We cannot accept responsibility for guaranteed performance of this drive in view of the foregoing horsepower recommendations we feel are required." Western Plastics, through its president, John Lainson, admits the receipt of the letter and full knowledge of the import of its contents before the drive was ordered.

It is the contention of Western Plastics that in purchasing the 25 horsepower adjustable voltage drive from Westinghouse, the latter, in writing, represented and warranted the drive as being suitable for speed adjust-

ment from 218 to 2,500 revolutions per minute at continuous 24-hour per day usage. It is alleged that the drive failed to properly operate and was unable to maintain a stable speed at any rate in excess of 1,400 revolutions per minute. It is further alleged that Westinghouse attempted to correct the defects in the drive without success and that said drive in its defective condition is wholly worthless. Westinghouse in its answer alleges that it sold Western Plastics a 25 horsepower adjustable voltage drive only after recommending a 30 or 40 horsepower adjustable voltage drive and that Western Plastics, through its president, accepted all responsibility for the 25 horespower drive, as evidenced by a letter by which it refused to guarantee performance of the 25 horsepower drive. Westinghouse further alleges that the difficulties experienced with the 25 horsepower drive were caused by Western Plastics in its application, operation, and maintenance of the drive. Westinghouse also alleges that on August 20, 1964, a settlement of the controversy was had by the parties and that Western Plastics is estopped from denying that a full accord and satisfaction was had. The reply was a general denial.

The equipment was shipped by Westinghouse f.o.b. its Buffalo plant in August 1961. It was received by Western Plastics about September 1, 1961, in a damaged condition. The witnesses primarily involved in the controversy which ensued are the following: John J. Lainson, president of Western Plastics; William G. Phillips, vice president of Dutton-Lainson; Clifford E. Pickering, division specialist and Pacific Coast regional sales manager of Westinghouse; Robert D. Newman, field service engineer for Westinghouse; Harvey B. Crane, electric service supervisor for Westinghouse; Lawrence Merryfield, a district engineer reviewing applications for power equipment for Westinghouse; and Thomas C. Sage, industrial district sales manager for Westinghouse. We shall hereafter refer to these witnesses by their surnames as a matter of convenience.

Lainson testified that the power drive had to maintain a consistent and stabilized speed otherwise the product coming through the extruder would produce a variance in the plastic pipe walls and otherwise produce an unmerchantable product. The necessity for a consistent, stabilized source of power to produce satisfactory plastic pipe is not disputed in this record. Nor is it questioned that any oscillation in the shaft driving the auger-like screw would destroy the effectiveness of the extruder in the production of quality plastic pipe. In other words, anything which would develop an instability of pressure such as loose connections in the wiring or an overloading of the source of power would result in a defective and unmerchantable product.

Upon the receipt of the drive in a damaged condition, Westinghouse was employed to make the necessary repairs to put it in condition to properly operate. Newman came to Hastings, made the necessary repairs, checked the equipment, and determined that it was in proper condition to operate. The drive was thereafter installed by the A.B.C. Electric Company of Hastings.

On or about September 21, 1961, Western Plastics discovered a want of control of the drive. Newman was again called and discovered a loose solder joint of the speed-setting potentiometer which he repaired. The loose joint had damaged the rectifier tubes so that control fuses were blown in starting. These tubes and fuses were replaced and the drive then worked properly on starting at all speeds. Subsequently, after complaint, it was found that the direct current motor had a raised bar that Newman corrected on August 2, 1962. Western Plastics replaced the rectifier tubes in December 1962, which had caused the drive to swing. The swing was thereafter diminished.

On June 15, 1963, Western Plastics reported drive fluctuation due to the overheating of the external incoming line fuse panel. A new fuse panel corrected this difficulty. Drive fluctuations or oscillations continued

and on December 13, 1963, Newman found a loose connection on the speed potentiometer which he repaired. Rectifier and control tubes were replaced and the drive appeared to work satisfactorily. On February 8, 1964, oscillation was again reported. Newman found loose leads in a tube grid circuit which resoldering corrected. Newman stated that the trouble appeared to be in the power amplifier panel where a loose intermittent connection was difficult and expensive to find. A new power amplifier panel was installed on April 1, 1964, at the expense of Westinghouse.

In April 1964, Crane went to the plant of Western Plastics to check out the drive, determine if malfunctions existed, and, if there were, what they were. He tested the drive with an oscillograph. He found by the use of a tachometer that the drive would operate at 1,950 revolutions per minute on the usual load without oscillating and that when that rate was exceeded it began to oscillate. He locked the control at 1,950 revolutions per minute so that the oscillating speed could not be reached. In other words, when the speed of the drive exceeded 1,950 revolutions per minute, the drive lacked sufficient power to operate in the stable manner required to produce merchantable plastic pipe. Crane testified that he discussed the matter with Lainson and informed him that a speed of 1,950 revolutions per minute on load was the limit of the capability of the drive to perform its function properly. Crane further testified that there was no defect in the drive; that 1,950 revolutions per minute was simply the limit of the capability of the drive in performing the work load required of it.

Newman testified that some of the difficulties arose in exterior portions of the equipment used, some were the result of inadequate expert maintenance, and that the drive was ordinarily operated at 2,000 revolutions per minute which exceeded the capability of the drive causing oscillation. He further stated that the drive

would run at 4,000 revolutions per minute when disconnected from the extruder. Crane stated that the limit of 1,950 revolutions per minute was because of the undersized motor and not due to any defect in the equipment. Merryfield testified that the change from the 25 horsepower vari-drive to a 25 horsepower adjustable voltage drive and increasing the speed without changing load characteristics resulted in an undersized motor and the resulting oscillation on reaching the limit of capability. Lainson testified that the drive continued to oscillate when run over 1,400 revolutions per minute. Many complaints and conversations about the drive appear to have been held by Lainson and Newman that were not referred to in the written correspondence received in evidence.

The foregoing is a brief summary of the complaints made by Western Plastics and the actions taken by Westinghouse with respect thereto. Westinghouse billed Western Plastics for the repair work performed by it on the drive except for the replacement of the power amplifier panel on April 1, 1964, and for the services of Crane in testing the drive in April 1964.

The purchase order was for a 25 horsepower adjustable voltage drive to operate at 215 to 2,500 revolutions per minute base speed for application on a plastic extruder. Newman tested the drive without load in early September 1961. He found that it met the specifications which included the attaining of a speed of 2,500 revolutions per minute by application of the 25 horsepower motor. This is a compliance with the representation rating of the drive. The trial court instructed the jury that it must consider the warranty as to horsepower and speed range as a warranty of an unloaded horsepower and speed range. No exception was taken to this instruction. We find no evidence in this record that the drive would not operate without load in accordance with the specifications of the purchase order.

Where there is a contract to sell goods by description,

there is an implied warranty under the statute existing in 1961 that the goods shall correspond with the description. § 69-414, R. R. S. 1943 (Reissue of 1958).

Westinghouse relies on section 69-471, R. R. S. 1943 (Reissue of 1958), which provided at the time of the purchase order in this case, as follows: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

When a seller has expressly refused to warrant the subject matter of a sale in certain particulars, there can be no implied warranty of a character covering those particulars, and such a disclimer of warranty is not voided by the Uniform Sales Act. Kennedy v. Cornhusker Hybrid Co., 146 Neb. 230, 19 N. W. 2d 51, 160 A. L. R. 351.

Westinghouse clearly disclaimed any warranty for performance of the drive if powered by a 25 horsepower motor which it deemed inadequate. The only warranty existing was that the drive would operate without load over a speed range of 218 to 2,500 revolutions per minute and produce 25 horsepower while doing so. The evidence shows no breach of this warranty. Western Plastics urges that Westinghouse warranted the drive to operate at 218 to 2,500 revolutions per minute on load in the manner in which the extruder had been operated in the past. But this is not the contract. It certainly would be most unusual to warrant the horsepower of a motor and the speed at which it would operate regardless of the character of the load.

There is some contention that there were admissions made that justified the submission of the case to the jury. It is contended that Newman admitted that there was an inherent defect in the drive. The difficulty is that the alleged admission did not admit that the defect

existed when it was shipped f.o.b. Buffalo, or whether or not it was due to the in-transit damage, or the failure of the maintenance required to keep the drive properly operating, or the undersizing of the power to properly operate the extruder. Some contention is also made that the efforts of Westinghouse to keep the drive in operating order estopped Westinghouse from asserting a want of liability under its warranty. We find no merit in these contentions for the reason that, after considering the alleged admissions, there is no proof that the defect, if any, which was never found, was due to a breach of any warranty on the part of Westinghouse. As to estoppel, the record shows that Westinghouse generally billed Western Plastics for parts and labor furnished in making the repairs and was generally paid by the latter although a compromise of the amount of these charges was made along with other matters having no relation to the drive.

Lainson testified that the drive was taken out of service in December 1965. On September 22, 1965, he informed Phillips of the continued oscillation of the drive, that he wanted it remedied within 30 days, and threatened suit. Western Plastics called John J. McCarty as a witness. He testified that he was a partner in A.B.C. Electric Company, that he qualified himself as an electrician only through experience, and that he was not an electrical engineer. He testified that at Lainson's request he checked the revolutions per minute and the amperage, etc., on the drive in October 1965. He stated the drive would not exceed 1,420 revolutions per minute without fluctuating and that it was generating about 13.9 horsepower, all without load. Westinghouse moved to strike this testimony as not the best evidence and was overruled. Three more unimportant questions were asked. After another witness had testified, McCarty was called back to the witness stand and clarified some of his previous testimony. Westinghouse then moved to strike the evidence of McCarty because

of want of foundation as to competency that the evidence was too remote. There was no evidence of any kind that the drive tested in October 1965 was in the same condition as when it was purchased. The motion was sustained and Western Plastics assigns this as error.

It is the contention of Western Plastics that the failure of Westinghouse to object to the testimony of McCarty constituted a waiver of objections to it and that the trial court erred in sustaining the motion to strike. The cases cited by Western Plastics hold that a failure to object to the admission of evidence in the trial court precludes one from raising the objection for the first time on appeal. Anderson v. Walsh, 109 Neb. 759, 192 N. W. 328; Kehr v. Kehr, 173 Neb. 532, 114 N. W. 2d 26. But this is not the question before us. While there is a division in the authorities in other jurisdictions, we think the proper rule is: The entertainment of a belated motion to strike testimony, no objection having been previously made thereto, is discretionary with the trial court. Combs v. Owens Motor Co., 121 Neb. 5, 235 N. W. 682; McClellan v. Hein, 56 Neb. 600, 77 N. W. 120; Gran v. Houston, 45 Neb. 813, 64 N. W. 245; Glatstein v. Grund, 243 Iowa 541, 51 N. W. 2d 162, 36 A. L. R. 2d 531; American Workmen v. Ledden, 196 Ark. 902, 120 S. W. 2d 346, 120 A. L. R. 201. We think the evidence was too remote in time and so lacking in foundation that the court did not abuse its discretion in sustaining the motion to strike under the circumstances shown.

In this action to recover for a breach of warranty, the burden of proof is on Western Plastics to show that the drive was defective when it was shipped f.o.b. Buffalo. It must show a basis for relief over and above mere speculation and conjecture. Frame v. Hohrman, 229 Minn. 468, 39 N. W. 2d 881. It must show by such proof that a breach of warranty occurred beyond the scope of the disclaimer of warranty made prior to the purchase. This it has not done. We find no evidence in this record to sustain a finding that a defective condition as

to design and manufacture existed at the time the drive was supplied by Westinghouse. Consequently the evidence will not support a verdict for Western Plastics.

The trial court sustained the motion of Westinghouse for a new trial. Western Plastics appealed and Westinghouse filed a cross-appeal, contending the trial court erred in not granting its motion for a judgment notwithstanding the verdict. Even though we view the evidence in the light most favorable to Western Plastics, which we are required to do, we still find no adequate proof from the record that the 25 horsepower adjustable voltage drive was defective at the time of purchase. The drive was used for 4 years before it was taken out of service. There is no evidence that it was not used during that time for the purpose of producing plastic pipe. We think the trial court erred in granting a new trial rather than a judgment for Westinghouse notwithstanding the verdict. The judgment of the district court granting a new trial is reversed and the cause remanded with directions to enter judgment notwithstanding the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

SPENCER, J., participating on briefs.

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LOREN S. HIGGS, APPELLANT, V. HALL COUNTY, NEBRASKA, ET AL., APPELLEES.

168 N. W. 2d 920

Filed June 13, 1969. No. 37231.

**Pleadings: Trial.** If a petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded.

E. Merle McDermott and John E. Story, for appellant.

Gerald B. Buechler, for appellees.

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

CARTER, J.

This is an action by the plaintiff for a refund of all personal and real estate taxes unlawfully collected from him for the use of the city of Grand Island and School District No. 2 because of the unlawful annexation of his real estate to the city of Grand Island for the years 1964, 1965, and 1966 under the provisions of section 77-1736.04, R. S. Supp., 1967. The court sustained a demurrer to the petition and dismissed the action. Plaintiff has appealed.

Plaintiff was, during the years of 1964, 1965, and 1966, the owner of Lot 10, Holcomb Highway Homes Addition to the city of Grand Island. This real estate was purportedly annexed to Grand Island and also became a part of School District No. 2 by virtue of Ordinance No. 4075 enacted in November 1963. On or about February 13, 1968, the district court for Hall County, in a case entitled Pokorski v. City of Grand Island, adjudged Ordinance No. 4075 to be unconstitutional and void and that the taxes levied in 1964, 1965, and 1966 by the city and school district were likewise void. Plaintiff filed his claim for a refund pursuant to section 77-1736.04, R. S. Supp., 1967, which provides in part as follows:

"If, by judgment or final order of any court of competent jurisdiction in this state, in an action not pending on appeal or error, it has been or shall be adjudged and determined that any personal property or real estate tax, assessment, or penalty or any part thereof, was illegal and such judgment or order has not been made or shall not be made in time to prevent the collection or payment of such tax, assessment, or penalty, then such tax, assessment, or penalty, whether expended or not, which has been collected pursuant to such illegal tax, assessment or penalty for the year such tax, assessment or penalty is determined to be illegal shall be re-

paid and refunded in the county where originally paid to the person paying such tax, assessment, or penalty. * * * If the tax, assessment, or penalty has been distributed by the collecting officer, then the person claiming a refund, or the agent or authorized representative of such person, shall file a claim with the county treasurer for such refund within two years after the final judgment is entered declaring such tax, assessment, or penalty as illegal. If such refund is found to be legal and valid, which determination shall be made within sixty days, the county board shall certify the claim to the collecting officer, who shall pay the same from funds in his possession belonging to the taxing districts to the extent that such taxing districts profited from the overpayment of taxes by the claimant; Provided, * * * It shall be the responsibility of the governing body of each taxing district to determine the amount of the liability of such district for refunds and to make provision in its budget therefor."

In February 1968, the district court found the annexation ordinance to be unconstitutional and void in Pokorski v. City of Grand Island. No appeal was taken and the judgment became final. Subsequent to February 13, 1968, plaintiff filed his claim for a refund of taxes. On September 23, 1968, the claim was disallowed by the county board and an appeal was taken. It is the contention of the city and school district that the judgment in the Pokorski case listed the names of the persons entitled to refunds, that the name of plaintiff was not included therein, and for that reason he is barred from claiming a refund.

Plaintiff was not a party to the Pokorski case. There is no copy of the Pokorski judgment before this court. The petition alleges and the demurrer admits that the annexation ordinance was declared unconstitutional and void, from which judgment no appeal was taken. The listing of the persons in that judgment who were entitled to refunds appears to be nothing more than a

gratuitous attempt to avoid a multiplicity of actions and in no way binds persons not parties to the action. The defendants cite no authorities and we have found none holding to the contrary.

The petition alleges that the annexation ordinance has been held unconstitutional and void by a court of competent jurisdiction, the plaintiff paid taxes on his property in 1964, 1965, and 1966, and he made claim therefor within 2 years after the judgment. The petition states a cause of action under section 77-1736.04, R. S. Supp., 1967, and the general demurrer thereto was improperly sustained. Pfeifer v. Ableidinger, 166 Neb. 464, 89 N. W. 2d 568.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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MARY TRAUSCH, APPELLANT AND CROSS-APPELLEE, V. ROBERT LEE KNECHT, APPELLEE AND CROSS-APPELLEE, RESERVE INSURANCE COMPANY, GARNISHEE-APPELLEE AND CROSS-APPELLANT.

169 N. W. 2d 269

Filed June 20, 1969. No. 37044.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. On motion for rehearing. See *ante* p. 134, 165 N. W. 2d 738, for original opinion. Former opinion withdrawn. Affirmed.

Edward Shafton and Bernard Vinardi, for appellant.

John R. Douglas and Cassem, Tierney, Adams & Henatsch, for garnishee-appellee.

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

CARTER, J.

This is an action in garnishment involving the ques-

tion of the liability of the Reserve Insurance Company on a policy of insurance issued by it on the automobile of Robert Lee Knecht. A statement of the facts in the case will be found in Trausch v. Knecht, *ante* p. 134, 165 N. W. 2d 738. After a trial, a judgment was entered for the plaintiff and against the Reserve Insurance Company in the amount of $10,000. The motion of the Reserve Insurance Company for a new trial was sustained. The plaintiff appealed from the grant of a new trial and the Reserve Insurance Company, the garnishee, cross-appealed. This court by its opinion in Trausch v. Knecht, *supra,* affirmed the action of the trial court in granting a new trial, but directed a dismissal of the action.

After a reconsideration of the case on rehearing, in the light of new arguments advanced in the briefs on rehearing, we have concluded that the trial court was correct in sustaining the motion for a new trail and that we were in error in directing a dismissal of the action. The inconclusiveness of material evidence and the indefiniteness of the parties in the applicability of certain principles of law flowing therefrom requires, in the interest of justice, that a retrial be had in the district court.

We therefore withdraw our former opinion and direct that the cause be remanded to the district court for a new trial on all issues. In other words, the sustaining of the motion for a new trial by the trial court is affirmed.

AFFIRMED.

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JACK JOHNSON, A MINOR, BY AND THROUGH G. L. JOHNSON, HIS FATHER AND NEXT FRIEND, APPELLANT, V. THE MUNICIPAL UNIVERSITY OF OMAHA, APPELLEE.
169 N. W. 2d 286

Filed June 20, 1969. No. 37061.

1. **Municipal Corporations: Torts.** A municipal university organ-

ized under section 14-1303, R. R. S. 1943, is subject to suit.

2. ———: ———. Cities, counties, and all other governmental subdivisions, and local public entities of this state, including municipal universities, are not immune from tort liability arising out of a physical condition affirmatively and voluntarily created by the public body on its premises, where the existence of the condition is not reasonably visible or apparent, and where the condition constitutes an unreasonable risk of harm to persons authorized to use and reasonably using the premises for the purposes intended.

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

Matthews, Kelley, Cannon & Carpenter, for appellant.

Thomas A. Walsh and Boland, Mullin, Walsh & Cooney, for appellee.

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

MCCOWN, J.

The plaintiff, Jack Johnson, participated in a track meet held on the premises of the defendant, University of Omaha, on May 12, 1967. While pole vaulting, Johnson fell upon a wooden box which had been placed by the defendant beneath the pole vault standards. This action was for damages resulting from the injuries sustained.

The petition alleged negligence on the part of the defendant in placing hard, sharply projecting wooden boxes at a place which would unreasonably endanger such persons as the plaintiff; in failing to protect vaulters from the hazard; and in failing to warn plaintiff of the presence of the boxes. The district court sustained the general demurrer of the defendant university. The action was dismissed and plaintiff has appealed. The only issues briefed and argued on appeal are whether or not the defendant is subject to suit, and whether or

not the defendant is immune from tort liability.

At the time of the accident here, the defendant was a corporation established under the authority of an act of the Legislature. § 14-1303, R. R. S. 1943. The defendant possesses all powers and privileges necessary for the discharge of the functions of a municipal university including incidental powers. § 14-1319, R. R. S. 1943. Although the act does not expressly state that the defendant may sue and be sued, we think it was the intention of the Legislature to vest in the defendant those powers which are normally vested in corporations of this nature. The defendant's contention that it is not subject to suit is without merit.

The issue of governmental immunity from tort liability remains. The traditional common law rule of sovereign or governmental immunity has been subject to both legislative and judicial modification and reshaping. See The Doctrine of Governmental Immunity in Nebraska, Creighton L. Rev., V. 1, No. 1, p. 79. The reasons supporting a broad brush application of the traditional common law doctrine in its old form are no longer defensible. This court has adopted a course of reexamination and gradual transition, rather than sweeping and complete abrogation. The court's processes and procedures are more effectively directed to the pattern of solution embodied in the process of inclusion and exclusion, case by case, and step by step. The legislative processes and procedures can be more effectively applied to a comprehensive solution. See Brown v. City of Omaha, 183 Neb. 430, 160 N. W. 2d 805.

The issue of immunity and the issue of liability are two complete and distinct issues. The removal of governmental immunity in a specified area of tort actions does not impose absolute liability in place of immunity. It only makes a governmental entity subject to the same rules which apply to nongovernmental persons or corporations who do not have the shield of sovereign governmental immunity. In the posture of the case before

us, the demurrer to the petition can be sustained only if the doctrine of governmental immunity applies to this case in its full traditional sweep. The allegations of the petition must be taken to be true as against a demurrer. If governmental immunity is not a bar, the issues of negligence and liability or nonliability cannot now be determined as a matter of law on the present record. In addition, assumption of risk or contributory negligence by a participant in athletic contests are affirmative defenses and are not before us. See Annotation, Tort Liability of Public Schools and Institutions of Higher Learning, 86 A. L. R. 2d 489.

The record discloses an allegation, subsequently stricken, that the defendant carried liability insurance to indemnify itself against liability of the kind asserted. The existence of such insurance has, in itself, been treated as a waiver of immunity in many states. See, Brown v. City of Omaha, *supra;* Annotation, Liability or Indemnity Insurance Carried by Governmental Unit as Affecting Immunity from Tort Liability, 68 A. L. R. 2d 1437, and supplements.

We now hold that cities, counties, and all other governmental subdivisions, and local public entities of this state, including municipal universities, are not immune from tort liability arising out of a physical condition affirmatively and voluntarily created by the public body on its premises, where the existence of the condition is not reasonably visible or apparent, and where the condition constitutes an unreasonable risk of harm to persons authorized to use and reasonably using the premises for the purposes intended.

This holding applies to all causes of action arising after a date one month following the filing date of this opinion. In respect to other causes of action, the new rule applies if, but only if, the city, governmental subdivision, or local public entity was insured against such liability on the date the claim arose, and then only to the extent of the maximum applicable amount of its insurance cov-

erage. This holding is applicable to the case at bar.

The judgment is reversed and the cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, C. J., BOSLAUGH and NEWTON, JJ., dissenting.

CARTER, J., took no part in the consideration or decision of this case.

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ANNA BERANEK, INDIVIDUALLY AND AS ASSIGNEE OF L. J. BERANEK, APPELLEE, V. THOMAS D. PETRACEK, APPELLEE, IMPLEADED WITH WILLIAM D. WARNER, APPELLANT.
169 N. W. 2d 275

Filed June 20, 1969. No. 37124.

1. **Negligence: Torts.** A tort-feasor is answerable for all the consequences that, in the natural course of events, flow from his unlawful or negligent acts, although those results are brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrongdoer, or were the natural consequences of his original wrongful act.
2. ———: ———. The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred.
3. ———: ———. It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.
4. **Trial: Witnesses.** A party should not be permitted to cross-examine a witness as to a matter foreign to the scope of the direct examination. The rule of strict cross-examination has been adopted and is in force in this state.
5. ———: ———. Violation of the strict rule of cross-examination will not be considered ground for reversal unless it clearly results in prejudice to the substantial rights of the party complaining.
6. **Trial: Evidence: Appeal and Error.** The admission or rejection

of photographs in evidence is largely within the discretion of the trial court. Error may not be predicated thereon in the absence of a showing of an abuse of discretion.

7. **Trial: Instructions: Appeal and Error.** Instructions to the jury must be considered as a whole, and when thus considered, if the law is correctly stated and the case fairly submitted, and the jury could not have been misled, a claim of prejudicial error in the instructions is not available.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Cobb, Swartz & Wieland, for appellant.

Morris J. Bruckner, Marti, O'Gara, Dalton & Bruckner, Patrick L. Cooney, and Boland, Mullin, Walsh & Cooney, for appellee Beranek.

Kennedy, Holland, DeLacy & Svoboda, for appellee Petracek.

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

CARTER, J.

This is an action for personal injuries arising out of an automobile accident on July 4, 1967. The plaintiff was a guest passenger in a car owned and operated by the defendant Thomas D. Petracek. The accident purportedly happened when the defendant, William D. Warner, drove his automobile into a passing lane being used by Petracek, causing the latter to swerve to his left and into a bridge abutment, and causing severe injuries to the plaintiff which made her a permanent quadriplegic. The jury returned a verdict for the plaintiff in the amount of $65,000. Motions for a new trial were filed by both defendants which were overruled. The defendant Warner alone appeals.

Petracek and his wife had been visiting the plaintiff, his grandmother, in Milligan, Nebraska. They decided to visit an aunt in Fremont and invited the plaintiff to accompany them which she did. Petracek drove the car

with his wife in the front seat with him and the plaintiff riding in the rear seat. The accident occurred on U. S. Highway No. 77 about 1.3 miles south of Ceresco shortly after noon. The road was dry, the weather clear, and visibility was good. Shortly before the accident, he came upon three other automobiles traveling north. They were about two car lengths apart and traveling from 50 to 55 miles per hour.

Petracek testified that he could see at least a mile down the road when he pulled out to pass the car immediately in front of him. He said that after passing the first car he undertook to pass the second car driven by Warner. When the front of his car was even with the front door of the Warner car the latter unexpectedly pulled into the passing lane. Petracek continued on until hitting the abutment of the bridge. The negligence of Petracek is not important here since the judgment against him has become final. It is only to the extent that Petracek's conduct bears upon the alleged negligence of Warner that it is pertinent in this case.

Warner testified that before attempting to pass the car ahead of him he looked in his rear vision mirror and side view mirror and saw the Petracek car at the rear of the line of cars. He said the latter car was "plenty far away" but he could not estimate its speed. He thereupon looked through the mirrors again when he was in the passing lane and saw the Petracek car start around the car immediately behind him. He said he turned on his directional signal as he turned into the passing lane. He testified that his car was bumped or tapped twice from behind but he did not thereafter look back. He said he was a block from the bridge when his car was bumped.

The testimony of Petracek is that the front of his car was even with the front door of the Warner car when the latter turned into the passing lane, causing him to swerve to the left and off the pavement. The testimony of Warner is that he was completely in the passing lane

when Petracek turned into the passing lane to pass the first car ahead of him. This creates a material conflict in the evidence. If the jury found, as it did, that Warner turned into the passing lane when it was occupied by Petracek without first determining that he could use the passing lane with reasonable safety, it is evidence of negligence. § 39-746.04, R. R. S. 1943. A violation of the foregoing statute is evidence of negligence. Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355.

Giving the evidence of the plaintiff its most favorable construction, as we are required to do, the jury could find that Petracek was about to pass the Warner car and that Warner turned into the passing lane causing Petracek to swerve off the pavement. The jury could find that Warner failed to ascertain that Petracek was back far enough and driving at such a speed that Warner could pass with reasonable safety. Where the Petracek car was when Warner entered the passing lane is in dispute. Warner testified that after he entered the passing lane he proceeded straight ahead without looking back. Under these circumstances the negligence of Warner was a question for the jury. The jury could well find that but for the negligent conduct of Warner, Petracek would have safely passed the cars traveling the righthand side of the highway. The trial court did not err in submitting the question of Warner's negligence to the jury.

Warner assigns as error the failure of the trial court to sustain objections to the cross-examination of Warner when he was on the witness stand. Warner testified that he did not apply his brakes after entering the passing lane, that he was traveling 55 or 60 miles per hour, and that he never reduced that speed. He also testified to the number and location of the cars on the road and was then excused as a witness. His testimony had largely been placed in the record by deposition. The trial court permitted the cross-examination to extend

into other factual matters than his oral testimony, over Warner's objection.

It is the general rule that a party should not be permitted to cross-examine a witness as to matters foreign to the scope of the direct examination, particularly where it relates to matters that are collateral to the issues in the case. In such situations a party is usually required to call the witness as his own and thus present the evidence material to the case. Where the cross-examination is within the scope of the issues, the trial court has a discretion as to the extent of the cross-examination to be permitted and it is only an abuse of such discretion that constitutes prejudicial error. In the instant case, Warner's deposition had been read in evidence which covered his version of the pertinent facts. The extent of cross-examination to be permitted in testing the accuracy and credibility of the witness usually poses a matter of discretion by the trial court. We have closely examined the evidence produced by the cross-examination of Warner and we can find no prejudice which had the effect of denying Warner a fair and impartial trial. In Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701, we said: "The rule of strict cross-examination has been adopted and is in force in this state. The ruling of the trial court in regard to the scope of cross-examination will be sustained unless it is an abuse of discretion." It is our opinion that the extended cross-examination of Warner, a defendant in the action, was not prejudicial to his right to a fair and impartial trial and, even if it may have exceeded the discretion lodged in the trial court, it furnishes no basis for a reversal of the judgment in the absence of a showing of prejudice. Bunselmeyer v. Hill, 179 Neb. 140, 137 N. W. 2d 354; Manley State Bank v. Spangler, 130 Neb. 196, 264 N. W. 459.

It is the contention of Warner that his occupancy of the passing lane was a condition and not an act of negligence constituting a proximate cause of plaintiff's in-

jury. In support of this contention, he cites the case of Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531, 82 A. L. R. 2d 714.

"A tort-feasor is answerable for all the consequences that, in the natural course of events, flow from his unlawful or negligent acts, although those results are brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or were the natural consequences of his original wrongful act." Paup v. American Telephone & Telegraph Co., 124 Neb. 550, 247 N. W. 411. In distinguishing between a proximate cause and a condition, this court has said: "To constitute proximate cause, under authority of the adjudicated cases, the injury must be the natural and probable result of the negligence, and be of such a character as an ordinarily prudent person could have known, or would or ought to have foreseen might probably occur as the result. It is not sufficient that the negligence charged does nothing more than furnish a condition by which the injury is made possible, and if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury." Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117.

If the evidence of Warner was established to the effect that he was already in the passing lane and proceeding down the highway in a proper manner, and an accident thereafter occurred without any negligence of his contributing thereto, the presence of his car in the passing lane could well be a condition and not a proximate cause of the accident. But the evidence of Petracek is in direct conflict on this issue. It was for the jury to resolve these conflicts and it having done so adversely to Warner, the contention that Warner's car created a condition without negligence on his part cannot be sustained.

Warner complains of the rejection of certain photographs being admitted into evidence. The photographs were exhibits 44, 45, and 46 and were taken to demonstrate the view of Warner in the rear view and side view mirrors in the same car and under the same conditions and at the same place as testified to by Warner at the time of the accident. What he was able to see through these rear view mirrors is not disputed in the evidence. Under these circumstances, the rejection of the photographs was not prejudicial error. Peterson v. Skiles, 173 Neb. 470, 113 N. W. 2d 628; Markey v. Hunter, 170 Neb. 472, 103 N. W. 2d 221; Zancanella v. Omaha & C. B. St. Ry. Co., 93 Neb. 774, 142 N. W. 190.

Warner complains of the failure of the trial court to give his requested instruction No. 4. This instruction deals with the duty of an operator of an automobile in turning into a passing lane. The requested instruction is a verbatim statement of our holding in Schwartz v. Hibdon, 174 Neb. 129, 116 N. W. 2d 187, and is a correct statement of the existing case law. The court in its instructions to the jury properly covered this issue although not in the form in which Warner requested that it be submitted. A trial court is not required to give all requested instructions even if they constitute correct statements of the law where the substance is otherwise covered. Warner also complains of the giving of instruction No. 8 which defines the duties of drivers on the public highways to keep a lookout and have their automobiles under reasonable control, and to exercise due care for themselves and the safety of others in the avoidance of accidents. Instructions to the jury must be considered as a whole, and when thus considered, if the law is correctly stated and the case fairly submitted, and the jury could not have been misled, a claim of prejudicial error in the instructions is not available. We find no error in the giving of this instruction.

It is true, as the jury found, that Petracek was operating his car in a grossly negligent manner at the time

of the incident out of which the accident arose. But where the jury finds, as here, that a third party contributed to the accident by negligent conduct but for which there would have been no accident, both parties may be held responsible for the concurring negligence of both. Where there is evidence to sustain a finding of concurrent negligence on the part of both, the issues are properly submitted to the jury for its determination. The jury having found under the evidence and the instructions of the court that Petracek and Warner were concurrently negligent, which negligence operated concurrently to produce the injuries for which the plaintiff seeks redress, the verdict is sustained by the evidence and the judgment must be affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. ROBERT ELLIS, APPELLANT.
169 N. W. 2d 267

Filed June 20, 1969. No. 37131.

1. **Criminal Law: Constitutional Law: Trial.** The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.
2. ———: ———: ———. An unexplained delay of 43 days between arrest and a preliminary hearing, standing alone, does not demonstrate a violation of the constitutional guarantee of speedy trial, in the absence of a showing of prejudice.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

A. Q. Wolf and Lynn R. Carey, Jr., 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, Robert Ellis, was found guilty of the crime of burglary on September 10, 1968, and sentenced to a term of 8 years. The issue on appeal is whether a delay of 43 days in holding a preliminary hearing was a violation of his right to a speedy trial guaranteed by the state and federal Constitutions.

The burglary was committed on July 13, 1968. On July 15, 1968, complaint was filed in the municipal court of the City of Omaha charging the defendant with the crime. A warrant for arrest was issued and the record shows that the defendant appeared in the municipal court on July 15, 1968, represented by counsel, and bond was set at $2,500. On August 27, 1968, defendant filed a habeas corpus action in the district court, alleging that he had been denied a preliminary hearing for more than 43 days, and that he was unlawfully detained without probable cause. On the same day, the district court directed the sheriff to appear forthwith. The court then denied the writ, but provided in the order that unless the defendant was afforded a preliminary hearing by August 30, 1968, the court would entertain another writ. On August 29, 1968, the defendant was arraigned in municipal court and pleaded not guilty. Preliminary hearing was held, and the defendant bound over to the district court with bond fixed at $3,500. The information against the defendant was filed in the district court on September 3, 1968. On September 9, 1968, the defendant's jury trial began, and on September 10, 1968, the jury found him guilty.

The defendant contends that the delay in holding the preliminary hearing deprived him of his constitutional right to a speedy trial.

Our statutes require that a person charged with a felony shall be brought before a magistrate, and that the magistrate "shall proceed as soon as may be," to inquire into the complaint. This and other statutory provisions have been interpreted by our decisions to mean

that the accused must be brought before the magistrate in the first instance as soon as is practical under the existing circumstances. See State v. O'Kelly, 175 Neb. 798, 124 N. W. 2d 211.

The United States Supreme Court has consistently held that: " 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.' " United States v. Ewell, 383 U. S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627.

This court has also affirmed those principles and has held that the right to a speedy trial must be asserted by affirmative action on the part of the defendant, at least when the accused has been admitted to bail, or is not within the custody of the court. See State v. Bruns, 181 Neb. 67, 146 N. W. 2d 786.

In Harling v. United States, 401 F. 2d 392 (C. C. A., D. C., 1968), the court stated: "It is settled that infringement of the right to a speedy trial depends upon several factors, including not only the length of the period between arrest and trial, the reasons for the delay, and the blameworthiness of the prosecution and the defense, but also the prejudice to the defendant." See, also, United States v. Richardson, 291 F. Supp. 441 (1968).

It must be noted here also that the total time that elapsed between the time the defendant was arrested and the time of his actual trial and conviction by a jury was less than 2 months. He was represented by counsel at the time of his first appearance before the municipal court on July 15, 1968. No request for a date for preliminary hearing was made. The defendant had his preliminary hearing 2 days after his counsel took affirmative action by filing the habeas corpus proceeding. He was tried and convicted less than 2 weeks later. There could be no complaint that the actual jury trial was not prompt and speedy. The defendant's complaint is only that the preliminary hearing was delayed.

There might be some question as to whether a pre-

liminary hearing, standing by itself, comes within the ambit of the constitutional guarantee of a speedy trial. Nevertheless: "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of the accused to defend himself." United States v. Ewell, *supra.*

Here there is no showing as to the reasons for the delay, nor that the delay was purposeful or oppressive. The only showing by the defendant on the issue of possible prejudice by the delay is that one witness subpoenaed by the defendant for trial on September 9, 1968, was not located by the sheriff. There is no showing that that witness was available or could have been served at any time between July 15 and August 29, 1968, nor any showing as to what testimony the witness could have given if available on any of the dates. Any claim of possible prejudice to the defendant resulting from the delay in preliminary hearing is completely insubstantial and speculative.

Whether delay amounts to an unconstitutional deprivation of rights depends upon the circumstances. The delay must not be purposeful or oppressive. The essential ingredient is orderly expedition and not mere speed. United States v. Ewell, *supra.*

We do not condone unjustified delay in holding a preliminary hearing, particularly when it results in undue or oppressive incarceration prior to trial. Neither do we imply approval of any disregard of the statutory command that the preliminary hearing "shall proceed as soon as may be." There may be cases where the length of the delay alone might be such as to establish prejudice as a matter of law, but we do not believe that point has been reached here. We hold that an unexplained delay of 43 days between arrest and a preliminary hearing, standing alone, does not demonstrate a violation of the

constitutional guarantee of speedy trial, in the absence of a showing of prejudice.

The district court properly overruled the defendant's plea in abatement. The defendant's constitutional rights to due process and a speedy trial were not violated, and the judgment is affirmed.

AFFIRMED.

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WILLIS HIDY, APPELLEE, V. TRACY F. HIDY ET AL., APPELLEES, RENA HIDY SYDOW, INTERVENER-APPELLANT.
169 N. W. 2d 285

Filed June 20, 1969. No. 37158.

**Statutes: Judgments.** In determining whether a retrospective statute allowed a reasonable period for enforcement of a judgment lien, a court may consider a time interval between passage and effective date of the statute.

Appeal from the district court for Hitchcock County: VICTOR WESTERMARK, Judge. Affirmed.

Bosley & Bosley, for intervener-appellant.

Russell, Colfer & Frazier, for appellees.

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

SMITH, J.

Rena Hidy Sydow intervened in a partition suit to collect a judgment for alimony and child support. Lonnie R. Hidy, the debtor, demurred on the ground that the judgment liens had ceased under a retrospective statute. Rena contended that application of the statute would invade her property rights in the judgment contrary to federal and state guarantees of due process and to section 16 of the Nebraska Bill of Rights which prohibits impairment of obligations of contracts. The district court dismissed Rena's claim and she appealed.

The decree was rendered on February 5, 1936. It awarded Rena (1) $1,000 alimony, Lonnie to pay $100 forthwith and the balance in semiannual installments of $100; and (2) $7.50 a month for support of each of two minor children until the child attained age 18 years. Rena filed the petition of intervention on August 23, 1968, wholly negativing payment and, we take it, issuance of execution.

Statutes in effect from the date of the decree to 1959 had received this construction: "A decree awarding alimony and child support . . . does not become dormant by lapse of time and the defense of the statute of limitations is not available to defeat recovery of delinquent payments." Finnern v. Bruner, 167 Neb. 281, 92 N. W. 2d 785.

The lien section, as amended by addition of subsections (2) and (3) in 1959 and of subsection (4) on March 4, 1961, reads in part:

"(2) A judgment . . . for alimony shall cease to be a lien upon property ten years from the date on which (a) the judgment . . . was entered, (b) the most recent payment was made as shown on the records . . ., or (c) the most recent execution was issued on such judgment . . ., whichever date is the latest, and such lien shall not be subject to reinstatement.

"(3) A judgment . . . for child maintenance shall cease to be a lien upon property ten years from the date on which (a) . . . the youngest child if there be more than one, for whose benefit such judgment . . . was entered, attains the age of twenty-one years, or (b) the most recent execution was issued on such judgment . . ., whichever date is the later, and such lien shall not be subject to reinstatement.

"(4) The lien of any judgment . . . that would have been extinguished on or before October 9, 1961, if subsections (2) and (3) of this section had been in force on the date such judgment . . . was rendered shall be extinguished one year after October 9, 1961, unless pro-

ceedings to enforce such lien shall be started within one year after October 9, 1961." § 42-319, R. R. S. 1943. See, also, Laws 1959, c. 187, § 1, p. 679; Laws 1961, c. 203, § 1, p. 609.

Rena had a constitutional right at best to a reasonable time for enforcement of her lien. Cf. Wheeler v. Jackson, 137 U. S. 245, 11 S. Ct. 76, 34 L. Ed. 659; Norris v. Tower, 102 Neb. 434, 167 N. W. 728. See, 1 Black on Judgments (2d Ed., 1902), § 399, p. 631; 2 Freeman on Judgments (5th Ed., 1925), § 917, p. 1931. In determining whether a retrospective statute allowed a reasonable period for enforcement of a judgment lien, a court may consider a time interval between passage and effective date of the statute. Atkinson v. Uttley, 98 Neb. 722, 154 N. W. 247. See IV American Law of Property (1952), § 18.96, p. 840.

The claims of unconstitutionality are without merit.

AFFIRMED.

SPENCER, J., participating on briefs.

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LIBERTY FINANCE CORPORATION, A CORPORATION, APPELLEE, v. MARY C. JONES, APPELLANT.

169 N. W. 2d 289

Filed June 20, 1969. No. 37188.

1. **Trial: Judges.** A district judge is not disqualified to hear a case because he previously presided in a proceeding involving one of the parties.
2. **Actions: Property: Appeal and Error.** An action to quiet title to real estate and to enforce a contract and agreement is an equitable action and is in this court for trial de novo on the record.

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

Mary C. Jones, pro se.

Abrahams, Kaslow & Cassman and Frank F. Pospishil, for appellee.

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

MCCOWN, J.

This is an action to quiet title to certain real estate in Omaha, Nebraska. The trial court determined that the defendant, Mary C. Jones, had an option to purchase the premises. If the defendant failed to exercise the option and pay the purchase price of $7,000 within 90 days from September 26, 1968, title was quieted in the plaintiff. The defendant has appealed, appearing in this court pro se.

The defendant had resided on, or had possession of, the premises involved, continuously since 1951, except for 1 day as hereafter noted. On November 5, 1964, the property was sold at a sheriff's sale in a mortgage foreclosure instituted by the Omaha National Bank, Trustee, against Mary C. Dozier, now Mary C. Jones, the defendant here. The plaintiff here, Liberty Finance Corporation, was the purchaser at the mortgage foreclosure sale. The purchase price paid was $4,971. The sheriff's deed recites that under the decree, there was due to the Omaha National Bank, Trustee, the sum of $2,684.13, together with interest, which was a first lien; that there was also due to N. P. Dodge Company, the sum of $1,860.93, together with interest, which was a second lien; and that there was also due and owing to Liberty Finance Corporation, the plaintiff in this action, the sum of $1,733.18, together with interest, which was a third lien. Plaintiff's purchase price of $4,971 paid off the first and second liens with interest and costs of foreclosure. The indebtedness of the defendant to the plaintiff here of $1,733.18 made a net investment for the plaintiff in the property of $6,704.18 at the time of the sheriff's sale on November 5, 1964.

Following the sheriff's sale and in December 1964, the

plaintiff here, Liberty Finance Corporation, and the defendant, Mary C. Jones, entered into a written lease of the premises for a term of 6 months from December 30, 1964, to June 30, 1965, for a total rental of $1,100, payable at the rate of $100 per month in advance and a balance of $500, payable on June 30, 1965. In the event rentals were promptly paid, there was an option for renewal for an additional 6-month period for the same amount and payable in the same fashion. On the same date this lease was executed, the plaintiff, Liberty Finance Corporation, executed and delivered to the defendant, Mary C. Jones, a written memorandum dated December 24, 1964, which read:

"With reference to the lease agreement between ourselves today, it is understood that you have the option to purchase the home at any time and that 50% of the monthly payments will be applied to the original debt, and 50% as rent. If the terms of the first six months have been fulfilled the full payments during the second six months will be applied to the indebtedness. Interest is at 6%.

"This is all contingent on the home being improved to the extent of about $2,000.00 during the year."

The defendant paid to the plaintiff the sum of $100 on February 12, 1965; $90 on April 12, 1965; $100 on May 5, 1965; $100 on May 28, 1965; $25 on August 6, 1965; and $25 on August 12, 1965, a total of $440. No other payments were made by the defendant during 1965 or 1966.

On June 22, 1967, the plaintiff filed a forcible entry and detainer action against the defendant in the municipal court of Omaha for restitution of the premises. Sometime between June 22 and September 20, 1967, the defendant paid to the plaintiff $100 in cash, and delivered a check for $200. The check was never paid. On July 7, 1967, the plaintiff wrote on the bottom of the option of December 24, 1964, the following: "The above is still correct in that the home may be purchased for

a price to be agreed upon at any time." On August 8, 1967, a decree of restitution was entered against the defendant in the municipal court. On September 20, 1967, the constable evicted the defendant in accordance with the writ from the municipal court. On the same day, the defendant filed an injunction proceeding against Liberty Finance Corporation in the district court to enjoin it from further prosecuting the forcible entry and detainer action. On May 15, 1968, decree was entered in the district court permanently enjoining Liberty Finance Corporation from further prosecuting its forcible entry and detainer action, apparently on the grounds that the defendant had an interest in the premises by virtue of the written agreements.

On June 6, 1968, the plaintiff filed this action against the defendant praying that the purported option agreement be declared null and void and be canceled; foreclosing defendant of all title and equity of redemption; quieting title to the premises in the plaintiff and against the defendant; and requiring defendant to vacate the premises.

The evidence at the trial showed that the total amount paid by the defendant to the plaintiff after November 24, 1964, was the sum of $540. Plaintiff also had paid at least $1,400 in real estate taxes, and approximately $300 in sidewalk assessments on the premises after 1964. The manager of the plaintiff testified at the trial that plaintiff would be willing to sell the property to the defendant, Mary C. Jones, for $7,500 to $8,000, although plaintiff had more than that sum invested in it.

The defendant, Mary C. Jones, claimed that she had made substantial improvements to the premises during her occupancy. She filed a mechanic's lien against the property on December 29, 1967. It included repairs and improvements over a period of 14 years, 1954-1967, which she claimed totaled $8,440. She introduced in evidence one cement contractor's statement to her in 1967 for

$918.18. The defendant, Mary C. Jones, also testified that $6,000 to $6,500 was a fair price for the premises.

On September 26, 1968, the district court entered its decree that the defendant was deemed to have an option to purchase. The court determined that the purchase price under the option was $7,000, and that the option was to be exercised by the defendant within 90 days. The court further decreed that in the event defendant failed to exercise the option and pay the purchase price within the time specified, title was quieted in the plaintiff with writ of assistance to place plaintiff in possession.

Among numerous assignments of error, the defendant devotes a substantial portion of her brief to the denial of a request for disqualification of the trial judge. The basis for the request for disqualification was that Judge Burke, the trial judge, had been the judge in a previous divorce action involving the defendant.

A district judge is not disqualified to hear a case because he previously presided in a proceeding involving one of the parties. Under section 24-315, R. R. S. 1943, the trial judge would not be disqualified even if the action here involved a proceeding to vacate the judgment in the defendant's divorce case itself. See Chicago, B. & Q. R.R. Co. v. Kellogg, 54 Neb. 138, 74 N. W. 403.

The defendant's intimations that she did not receive fair and impartial consideration by the trial court in this case are untenable. An action to quiet title to real estate and to enforce a contract and agreement is an equitable action and is in this court for trial de novo on the record. See Neylon v. Parker, 177 Neb. 187, 128 N. W. 2d 690. The record in this case is overwhelming. The trial court granted the defendant a continuance to enable her to retain an attorney and prepare her defense. The trial court offered the defendant the services of qualified counsel to undertake her defense without cost to her as a matter of professional obligation. At the trial in the district court, the defendant was represented by counsel employed by her and was permitted to par-

ticipate herself. The trial court allowed the defendant to introduce all available testimony and documents regardless of materiality and did not permit the plaintiff to cross-examine her. The record establishes without question a conscientious consideration for the defendant's rights in all respects.

The defendant contends that she placed extensive improvements on the premises over the years since 1954. Any interest the defendant had in improvements made prior to November 1964, would have been divested by the mortgage foreclosure proceedings at that time. See Hammond v. Harrington, 150 Neb. 1, 33 N. W. 2d 293.

There is no evidence of any increase in value of the real estate created by improvements made after 1964. There is no evidence as to the value of the property without the post-1964 improvements. Also, the evidence shows that the defendant never offered to pay the plaintiff the value the real estate had without whatever post-1964 improvements were made. Even if the Occupying Claimant's statute applied, that refusal would defeat her rights under that statute. See § 76-301, R. R. S. 1943, and cases annotated to it.

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

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. ERNST J. BANSE, APPELLANT.
169 N. W. 2d 294

Filed June 20, 1969. No. 37194.

1. **Criminal Law: False Pretenses: Pleadings.** Ordinarily, necessary elements required to be alleged in charging the crime of obtaining property by false pretenses include reliance of the defrauded party upon such false pretenses and the obtaining of something of value by the party making the false representations.

2. ———: ———: ———. In addition to facts establishing venue and the time of the offense, the essential elements of the offense set forth in section 28-1216, R. R. S. 1943, are: (1) That defendant knowingly made, in writing, a false statement of defendant's financial condition; (2) that the statement was made with the intent that it be relied upon; (3) that it was made for the purpose of procuring the delivery of money or property, or the extension of a credit, for the benefit of defendant; (4) that the party to whom such false statement was made believed it to be true and acted thereon by parting with money or property, or extending credit; and (5) the nature and value or amount of the money or property parted with, or the credit extended.

3. ———: ———: ———. To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent.

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

Ross & O'Connor and Clayton H. Shrout, 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.

NEWTON, J.

Defendant was charged with a violation of section 28-1216, R. R. S. 1943, which makes it an offense to obtain money, property, or credit by means of a false statement of financial condition. Defendant's motion to quash the information being overruled, he entered a plea of nolo contendere and was sentenced to a term in the Nebraska Penal and Correctional Complex. Defendant's motion for a new trial was overruled and he has appealed to this court.

The only contention here made by defendant is that the information fails to charge an offense. We sustain this contention.

Section 28-1216, R. R. S. 1943, insofar as it is per-

tinent here, provides: "Whoever shall knowingly make * * * any false statement in writing, with intent that it shall be relied upon, respecting the financial condition or means or ability to pay, of himself * * *, for the purpose of procuring in any form whatsoever, either the delivery of personal property, the payment of cash, * * * the extension of a credit, * * * for the benefit of himself * * *; * * * and the party or parties to whom such representations have been made or have come, *believe the same to be true and acting thereon part with money or property of any value, or extend any credit,* shall be punished * * *." (Emphasis supplied.) The statute provides a lesser penalty if the property or credit obtained is less than $35 than where it equals or exceeds that amount.

The information fails to allege that the party to whom the statement was made either relied or acted upon it, or parted with any credit, money, property, or thing of value.

Ordinarily, necessary elements required to be alleged in charging the crime of obtaining property by false pretenses include reliance of the defrauded party upon such false pretenses and the obtaining of something of value by the party making the false representations. See 32 Am. Jur. 2d, False Pretenses, § 64, p. 215, § 65, p. 216.

In addition to facts establishing venue and the time of the offense, the essential elements of the offense as set forth in the statute are: (1) That defendant knowingly made, in writing, a false statement of defendant's financial condition; (2) that the statement was made with the intent that it be relied upon; (3) that it was made for the purpose of procuring the delivery of money or property, or the extension of a credit, for the benefit of defendant; (4) that the party to whom such false statement was made believed it to be true and acted thereon by parting with money or property, or extending credit; and (5) the nature and value or

amount of the money or property parted with, or the credit extended.

The first four of these elements are specifically required by the language of the statute defining the offense. The fifth is necessarily implied by the nature of the penalty provided, the extent of which is dependent on the value of the money, property, or credit received. A failure to include one or more of these elements renders the information defective. Here the intent was alleged but not the fact that the party to whom the statement was made actually relied and acted upon it.

The statute is designed to prohibit the obtaining of something of value by means of false pretenses. Reliance of the defrauded party upon the false pretenses and the obtaining thereby of something of value by the defendant are necessary elements of the offense and must be charged in the information. "To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent." Nelson v. State, 167 Neb. 575, 94 N. W. 2d 1.

In view of the insufficiency of the information, this judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

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STATE OF NEBRASKA, APPELLEE, V. NATHANIEL GOODWIN, JR., APPELLANT.
169 N. W. 2d 270

Filed June 27, 1969. No. 37138.

1. **Criminal Law: Appeal and Error.** In a criminal case this court will not interfere with a verdict of guilty based upon the evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. **Criminal Law: Weapons and Firearms.** A loaded pistol locked

in the glove compartment is concealed on or about the person of the driver.

3. **Criminal Law: Weapons and Firearms: Words and Phrases.** The words "concealed on or about the person" mean concealed in such close proximity to the driver as to be convenient of access and within immediate physical reach.
4. **Criminal Law: Weapons and Firearms.** A weapon is concealed when it is hidden from ordinary observation and is readily accessible on his person or in a motor vehicle operated by the defendant.
5. ———: ———. To be within the exception provided by section 28-1001, R. R. S. 1943, one must be engaged in a lawful business, calling, or employment, and the circumstances must be such as to justify a prudent person in carrying the weapon for defense of his person, property, or family.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Paul E. Watts, 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.

Defendant was convicted of possession of a fire bomb and carrying a concealed weapon. He was fined $100 for carrying the concealed weapon and was sentenced to 1 to 3 years in the Nebraska Penal and Correctional Complex for possession of a fire bomb.

On the evening of March 5, 1968, three officers in a police cruiser were watching for possible attempts to start fires on the north side in Omaha when they were alerted to be on the lookout for a car which had been seen in the vicinity of an earlier fire. They observed a car answering the description given and immediately started to pursue it. The car pulled to the curb and came to a stop when the cruiser was approximately 50 feet away. The cruiser drove to within 4 to 5 feet of the stopped car. During that interval the officers ob-

served the right rear door of the car come partially open and a brown paper sack come out of the car. One of the officers also observed the throwing of a silver object from the front window on the driver's side. After the cruiser stopped, the defendant, who was the owner and driver of the car, came back to the cruiser.

The sack which was found near the car contained three liquor bottles filled with a liquid described as ethylene dichloride and diethyl lead, a highly inflammable and explosive material. The silver object was identified as a bottle with a rag sticking out of the top, filled with the same liquid, which the officers testified smelled like gasoline and which they described as a Molotov cocktail. The officers also found a large number of rocks on the floor board on both sides of the rear seat.

Defendant testified that he had spent the early evening of March 5, 1968, with his girl friend, and about 11 p.m went to Twenty-fourth and Lake Streets to have a beer. Shortly thereafter he picked up a friend who lived near him and another young man, both of whom rode in the front seat. He also picked up three other young men who asked for rides and who got into the back seat. The defendant, who was 26, was the oldest of the occupants of the car. The two boys in the front seat were 19 and 16, while those in the back were from 18 to 22. Defendant testified that they rode around awhile and the only time they stopped was when the police stopped them. This was shortly after 12 o'clock. Defendant denied any knowledge of the sack of bottles found next to the car or the rocks found in the car. He also testified that he did not see anything thrown from the car. He was positive that none of the items were in the car before he picked up the other occupants. None of these occupants were called to testify. Defendant testified he did not try to get them because they were not being prosecuted.

When the car was searched at the police station a

loaded pistol was found in the locked glove compartment. Defendant testified it belonged to his father; had been in the car for over a year; and that he carried it because he had been abused a couple of times when he made deliveries on his part-time job.

The assignments of error we deem pertinent herein are as follows: (1) The State failed to prove beyond a reasonable doubt physical or constructive possession of a fire bomb; (2) a weapon locked in a glove compartment is not within the ambit of section 28-1011.19, R. S. Supp., 1967; and (3) the court erred in restricting defendant's explanation as to why he had a loaded weapon locked in the glove compartment of his car.

In a criminal case this court will not interfere with a verdict of guilty based upon the evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt. Phillips v. State, 154 Neb. 790, 49 N. W. 2d 698.

Section 28-1011.17, R. S. Supp., 1967, so far as material herein, provides as follows: "It shall be unlawful for any person to * * * possess * * * or manufacture any bomb, bombshell, grenade, bottle, or other such container containing an explosive substance, such as but not limited to black powder bombs and Molotov cocktails; * * *."

Section 28-1011.19, R. S. Supp., 1967, provides: "The presence in an automobile other than a public vehicle of any weapon, instrument or substance referred to in sections 28-1011.14 to 28-1011.19 shall be prima facie evidence that it is in the possession of, and is being carried by, all persons occupying such automobile at the time such weapon, instrument or substance is found, except: (1) If such weapon, instrument or instrumentality is found upon the person of one of the occupants therein, or (2) if such weapon, instrument or substance is found in an automobile operated for hire by a duly licensed driver in the due, lawful and proper pursuit of

his trade, then such presumption shall not apply to the driver."

The prima facie evidence of possession under the circumstances herein, as well as the rocks in the car, were certainly sufficient to pose a jury question. However, we also have direct evidence that the Molotov cocktail was thrown from the defendant driver's window immediately before the defendant was apprehended. This case, while analogous, is much stronger than Smith v. United States (8th Cir., 1964), 331 F. 2d 265, in which a highway patrolman, while 300 feet behind a car he was pursuing, saw an object moving across the highway which later turned out to be a sea bag containing burglary tools. The patrolman dodged the object and continued the chase, observing numerous objects fluttering in the air. He concededly did not see the object thrown from the car. The court there said: "The jury's conclusions that the appellant and his cohorts in the fleeing car threw the damaging evidence consisting of the sea bag with its tools, concededly used in the burglary, into the path of the pursuing officer and that they threw the checks, currency and deposit slips from the Altoona Bank out of the car as they fled in front of the officer, are parallel inferences deduced from uncontroverted evidence. * * * The evidence against the appellant is, of course, circumstantial, but it is also very convincing and we hold it to be sufficient to justify the jury's conclusion that the appellant was one of those who participated in the burglary of the Altoona Bank."

Is a loaded pistol locked in a glove compartment concealed on or about the person of the driver? We determine that it is. The words "concealed on or about the person" mean concealed in such close proximity to the driver as to be convenient of access and within immediate physical reach. As we said in Kennedy v. State, 171 Neb. 160, 105 N. W. 2d 710, a weapon is concealed when it is hidden from ordinary observation and is readily accessible on his person or in a motor vehicle

operated by the defendant. In that case the arresting officer opened the back door of defendant's car and found two loaded revolvers on the back seat.

In Phillips v. State, 154 Neb. 790, 49 N. W. 2d 698, two loaded revolvers found under the right front seat were determined to be on or about the defendant's person. We there said: "* * * section 28-1001, R. R. S. 1943, containing exceptions having no application here, makes it a felony to carry a revolver concealed on or about his person. In Bright v. State, 125 Neb. 817, 252 N. W. 386, a conviction was affirmed where the evidence disclosed that defendant was carrying a revolver concealed but readily accessible either in a motor vehicle operated by him or on his person while operating the same. The weight of authority sustains such position."

While the question is no longer an open one in this jurisdiction there is no real consistency in the cases from other jurisdictions as to what constitutes "on or about the person." The reasoning in the case of City of Cleveland v. Betts, 107 Ohio App. 511, 148 N. E. 2d 708, is particularly pertinent herein because it also involved a loaded pistol in a locked glove compartment. The Ohio court there said: "The defendant's contention, that a concealed weapon in a glove compartment of an automobile, then in his charge and being driven by him, is not concealed on or about his person cannot be supported. The fact that the glove compartment was locked when the officers searched the automobile is of no moment. The defendant was in complete control of the situation with the key at his immediate command. Whether the compartment was locked or unlocked was a matter of the defendant's choice. The presence of defendant's revolver within easy reach was clearly 'on or about' his person."

Section 28-1001, R. R. S. 1943, provides as follows: "Whoever shall carry a weapon or weapons concealed on or about his person such as a revolver, pistol, bowie knife, dirk or knife with a dirk blade attachment, brass

or iron knuckles, or any other dangerous weapon, shall upon conviction be fined in any sum not exceeding one thousand dollars or imprisoned in the Nebraska Correctional and Penal Complex not exceeding two years; Provided, however, if it shall be proved from the testimony on the trial, or at a preliminary hearing of such case that the accused was, at the time carrying any weapon or weapons as aforesaid, engaged in any lawful business, calling or employment, and the circumstances in which such person was placed at the time aforesaid were such as to justify a prudent person in carrying the weapon or weapons aforesaid, for the defense of his person, property or family, the accused shall be acquitted or discharged."

The last question presented is whether defendant was within the exception stated above. Defendant testified that he had worked for the Union Pacific Railroad Company since 1965 as a chair car attendant, but did not work steadily because he was still on the extra board. He supplemented his income by working for a Mr. Paul who operated a 24-hour delivery service. He worked erratic hours on call. However, he testified he was not working at the time in question, and that he did not cart people around when he was on duty. After this testimony on direct, defendant attempted to explain the presence of a gun in the car. Some of this evidence was excluded. The pertinent record is as follows: "Q. Now, on this gun, you did have a gun in the glove compartment? A. Yes. Q. It was loaded? A. Yes. Q. No question about that, is there? A. No, sir. Q. When did you put the gun there? A. Oh, about a year ago. Q. About a year ago? A. Yes. Q. And why did you have a gun in the car? A. For the purpose of working at the delivery service and I needed protection. Q. Why do you say you needed protection? A. Because I had been abused a couple times by different guys on the streets. Q. You had been abused? What do you mean? A. Threatened a couple times. MR. LEAHY: Wait. Your Honor, at this

point I will object for the reason that I feel that this is, without further foundation, self-serving. MR. WATTS: Your Honor, certainly the defendant is allowed to tell why he was in possession of a gun. As his defense he can say why he had the gun. MR. LEAHY: My objection is that there is certainly a lack of proper foundation at this point for that question. THE COURT: Sustained. BY MR. WATTS: Q. How long did you say you were working for Paul's? A. Right at two years, about a year and a half. Q. During the course of your deliveries and while you were working for Mr. Paul, on any occasions during the 18 months up to March 5, 1968, did you have any difficulties while delivering for him by people attacking you? MR. LEAHY: At this point I will again object until it is established that this defendant was at the time that he was found with this weapon performing some duty on a particular mission for his employer. Then I will object that this is incompetent, irrelevant, and immaterial. THE COURT: Sustained. BY MR. WATTS: Q. You weren't working when you were arrested, were you? A. Right, sir. Q. The area north of Cuming between 16th and 42nd, how would you characterize the area? BY MR. LEAHY: To which the State will object for the same reason: it's incompetent, irrelevant, and immaterial. THE COURT: Sustained."

The defendant then made an offer of proof to the effect that if the witness had been permitted to testify he would testify that he had been attacked while making a delivery; that the area was highly volatile; and that he was carrying the gun for his own protection. By the defendant's own testimony he was not in the course of any employment at the time in question. The objection was properly sustained.

To be within the exception provided by section 28-1001, R. R. S. 1943, one must be engaged in a lawful business, calling, or employment, and the circumstances must be such as to justify a prudent person in carrying

the weapon for defense of his person, property, or family.

For the reasons stated, we conclude that defendant's assignments of error are without merit. The judgment is affirmed.

AFFIRMED.

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NELL WILSON, APPELLANT, V. L. C. JOHNS, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.
169 N. W. 2d 434

Filed June 27, 1969. No. 37163.

**Automobiles: Statutes.** The offense of operation of a motor vehicle without a Nebraska motor vehicle operator's license is a traffic violation for which 2 points are to be assessed under section 39-7,128, R. R. S. 1943.

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

Van Steenberg, Winner & Wood, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

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

BOSLAUGH, J.

The plaintiff appeals from the judgment of the district court affirming the order of the Director of the Department of Motor Vehicles revoking the plaintiff's motor vehicle operator's license and privilege to operate a motor vehicle in Nebraska.

The revocation resulted from the plaintiff having acquired a total of 12 points for traffic violations within a period of 2 years. The question presented is whether operation of a motor vehicle without a Nebraska operator's license is an offense for which points may be as-

sessed. The plaintiff argues that the purpose of the point system is to remove dangerous drivers from the road; that lack of an operator's license is not evidence of negligence; and that the assessment of points for operation without a proper license does not contribute to the protection of the public.

The language of the statute is controlling in this case. Subsection (12) of section 39-7,128, R. R. S. 1943, provides: "All other traffic violations involving the operation of motor vehicles by the operator, for which reports to the Department of Motor Vehicles are required under sections 39-794 and 39-795, not including parking violations, muffler violations, or overloading of truck—2 points."

By referring to "all other traffic violations" for which reports are required, except parking, muffler, and truck overloading violations, we think the Legislature intended to include the offense of operation without a Nebraska motor vehicle operator's license, a violation for which a report to the Department of Motor Vehicles is required.

The judgment of the district court is affirmed.

AFFIRMED.

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COUNTY OF BANNER, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. SHAW YOUNG ET AL., APPELLEES.

169 N. W. 2d 280

Filed June 27, 1969. No. 37182.

1. **Highways: Dedication.** The filing of a written consent is necessary to confer jurisdiction upon the county board to establish a consent road.
2. ———: ———. To determine the question whether or not a highway has been established the court is required to examine the proceedings had to determine if the jurisdictional requirements necessary for that purpose have been met. If they

have not been met, the right does not exist and lapse of time will not supply the defect.

3. ———: ———. Where the acts of the owner of the land are relied on to establish a dedication of land for the purpose of the public road, an acceptance of the same by the public must be proven.

4. ———: ———. To constitute a valid dedication of private property for a public highway, it must clearly appear that the owner intended to dedicate the land for a highway, and that the public by user or otherwise accepted the land for that purpose.

5. ———: ———. In a consent dedication of private property for a public highway, it is necessary to prove the acceptance of the land for highway purposes by proving that a road was opened or used. Until it is opened or used by the public, it is not finally established.

6. **Trial: Proof.** Generally, the burden of proving an issue lies on the party holding the affirmative of that issue.

Appeal from the district court for Banner County: JOHN H. KUNS, Judge. Affirmed.

Robert G. Simmons, Jr., for appellant.

William H. Heiss and Byron M. Johnson, for appellees.

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

SPENCER, J.

This is a declaratory judgment action brought by the County of Banner to determine whether a road 2 miles long legally exists. At the close of plaintiff's evidence the trial court determined the proof to be insufficient to show the existence of a valid public road, and dismissed the action.

The minutes of the meeting of the board of county commissioners of Banner County, Nebraska, for July 2, 1889, state in part as follows: "The following consent roads were established, first road commencing at the South east corner of section 36, tp. 17, R. 54, and running due north 15 miles to the north east corner of section 24, Tp. 19, R. 54. Said road being all on

range line between ranges 53 and 54 and intersecting county road as now laid out on said range line."

The county clerk, who was the custodian of the official records of Banner County, testified that he was unable to find any further record pertaining to this road. He also testified that he was unable to find any records concerning road matters other than the commissioners' minutes, prior to 1920.

On July 2, 1889, the title to all of the lands over which the alleged road passes was in the United States of America, but there was no evidence on whether it was reserved for public use or whether any of it was occupied by entrymen who later obtained patents. Other than the minutes referred to above, there is not one iota of evidence to show any road ever existed, or that a road was ever actually laid out, used, or maintained. The county clerk testified that payment of bills is shown in the commissioners' minutes, but he could find no record of payments of any nature for the alleged road.

Chapter 78, section 37, page 631, Compiled Statutes, 1887, provides as follows: "Public roads may be established without the appointment of a commissioner, provided the written consent of all the owners of the land to be used for that purpose be first filed in the county clerk's office; and if it is shown to the satisfaction of the county board that the proposed road is of sufficient public importance to be opened and worked by the public, they shall make an order establishing the same, from which time only shall it be regarded as a public road." This section, adopted in 1879, remained in our statutes unchanged until repealed in 1957, when the county road law was recodified.

Appellant county's argument herein is two fold: Either the land in 1889 was public land, or it was private land. If the land involved was public land, the county contends the road was established by virtue of the federal and state statutes; if the land was private land, the

county contends the minutes import absolute verity and establish the road as a consent road.

Appellant seeks to distinguish the instant case from Mosier v. Herman, 113 Neb. 318, 202 N. W. 875. That case is also from Banner County and involved an identical entry made the day before the one herein, for an alleged road within approximately 6 miles of the instant one. The following from that case is pertinent herein: "All that the county records show as to the proceedings of the county commissioners is stipulated as follows: 'Office of County Commissioners. * * * July 1, 1889, * * * Board met pursuant to adjournment. All members present. * * * The following consent road was established, said road commencing at the southeast corner of section fifteen, township nineteen, range fifty-three, running thence south on section line four miles.'

"This is not enough of itself to establish a road. It is true that, in establishing a road on a section line, neither a petition nor a record that the board found that the public good required the road is necessary. Howard v. Brown, 37 Neb. 902; Barry v. Deloughrey, 47 Neb. 354. But even in such a case there must be notice and proceedings with respect to damages. 'The county board may, without petition or notice, make a preliminary order establishing a section line road, by declaring that it shall be opened; but before it can be actually opened there must be proceedings upon proper notice to ascertain damages.' Barry v. Deloughrey, supra. So much appears to be jurisdictional in the absence of written consent or dedication by deed.

"In the instant case the order made can be regarded as no more than a preliminary order. The burden of proof was upon the county, and consequently upon the defendant or appellee, to prove the additional proceedings necessary to really establish and open the road in question. Henry v. Ward, 49 Neb. 392; Van Wanning v. Deeter, 78 Neb. 284; Postal v. Martin, 4 Neb. (Unof.) 534. In the first of the above cases, which contains a

valuable discussion of the effect of the act of 1879 on all previous acts with respect to roads of this character, Commissioner Irvine laid down the doctrine which has been subsequently followed in this state. He said:

" 'Under the present law (Compiled Statutes, ch. 78; Session Laws, 1879, p. 120), all section lines are declared to be public roads, but they cannot be opened as such, nor can lands be appropriated therefor, until the steps provided by statute have been taken for opening such roads and ascertaining the damages.'

"We are convinced, therefore, that the proceedings of the county commissioners were not effectual, in and of themselves, to establish the public road claimed by the appellee."

The county clerk testified he was unable to find anything pertaining to the lands in question other than receiver's receipts, patents, deeds, etc. However, he did not testify that the road records had been lost or destroyed, but merely that he was unable to find any prior to 1920. No attempt was made to determine the existence of the road plat-book which the county clerk was required to keep, or to ascertain if he had checked that record.

Chapter 78, section 28, page 630, Compiled Statutes, 1887, provided for a road record and required that any order made or action taken in the establishment of a road should be entered in that record. Chapter 78, section 29, page 630, Compiled Statutes, 1887, provided that after a road had been established, the plat and field notes must be recorded by the county clerk.

Chapter 78, section 45, page 632, Compiled Statutes, 1887, provided as follows: "If the same has not been heretofore done in any other manner, the county clerk shall, within six months after this act shall take effect, cause every road in his county, the legal existence of which is shown by the records and files in his office, to be platted in a book to be obtained and kept for that purpose, and known as the 'road plat-book.' Each town-

ship or precinct shall be platted separately, on a scale of not less than four inches to the mile; and *such clerk shall have all changes in or additions to the roads legally established immediately entered upon said plat-book,* with appropriate references to the files in which the papers relating to the same may be found." (Italics supplied.)

Since 1879 the county clerk has been required to keep a road plat or record book. The present statute is section 23-1305, R. R. S. 1943.

In Warren v. Brown, 31 Neb. 8, 47 N. W. 633, this court held the filing of a written consent was necessary to confer jurisdiction upon the county board to establish a consent road. This is a condition precedent to the establishment of such road. Without it, the proceedings are a nullity. Deloughery v. Lapsley, 110 Neb. 105, 193 N. W. 109.

We have said many times that to determine the question whether or not a highway has been established the court is required to examine the proceedings had to determine if the jurisdictional requirements necessary for that purpose have been met. If they have not been met, the right does not exist and lapse of time will not supply the defect. See Kunz v. Bornemeier, 170 Neb. 463, 102 N. W. 2d 842.

Appellant argues that the consent entry imports absolute verity because in the absence of evidence to the contrary it may be presumed that public officials faithfully performed their official duties as required by law. Ludwig v. Board of County Commissioners, 170 Neb. 600, 103 N. W. 2d 838.

The difficulty with that contention herein, even if we assume the precedent jurisdictional steps were taken, is that other than the mere entry that a consent road was established, there is no proof of any nature that action to effectuate that entry was ever taken. This entry, standing alone, is not sufficient of itself to establish a road. Mosier v. Herman, 113 Neb. 318, 202 N. W. 875.

Chapter 78, section 37, page 631, Compiled Statutes, 1887, is a little ambiguous. For the purposes of this case, we interpret the written consent required by it to mean a consent to the use of the land for the highway as well as consent to the establishment of the road, but hold that an acceptance other than the mere entry involved herein must be shown.

Chapter 78, section 29, page 630, Compiled Statutes, 1887, charged the county clerk to direct the road overseer of the district through which the road passed to have the same opened and worked. There is no evidence in this record that a road was ever laid out pursuant to the entry, and if it was laid out there still would be the question as to whether or not it had ever been used.

Chapter 78, section 4510, page 996, Compiled Statutes, 1899, provided as follows: "All roads within this state which have been laid out in pursuance of any law of this state, or of the territory of Nebraska, and which have not been vacated in pursuance of law, are hereby declared to be public roads; Provided, that all roads that have not been used within five years shall be deemed vacated."

In Warren v. Brown, 31 Neb. 8, 47 N. W. 633, this court held: "Where the acts of the owner of the land are relied on to establish a dedication of land for the purpose of the public road, an acceptance of the same by the public must be proven."

In Close v. Swanson, 64 Neb. 389, 89 N. W. 1043, it was held: "To constitute a valid dedication of private property for a public highway, it must clearly appear that the owner intended to dedicate the land for a highway, and that the public by user or otherwise accepted the land for that purpose." We apply the same criterion to a consent dedication. We determine that it was necessary for the appellant herein to prove the acceptance of the land for highway purposes by proving that a road was opened or used. Until it is opened or used by the public it is not finally established.

Appellant asserts that the lands in question in 1889 were a part of the public domain. On July 26, 1866, section 2477, United States Revised Statutes, which is now Title 43, U. S. C. A., section 932, page 265, became operative. That section reads: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." This statute was a standing offer of a free right-of-way over the public domain, and when accepted in an appropriate manner established a right-of-way. Eldridge v. Collins, 75 Neb. 65, 105 N. W. 1085.

Laws 1879, section 46, page 130, accepting the grant provided by the Act of Congress of 1866, specifically refers to the landowner's right to recover damages for the opening of public roads on section lines in this state. Scotts Bluff County v. Tri-State Land Co., 93 Neb. 805, 142 N. W. 296.

The statute of 1866, however, was only operative if the land had not been reserved for public use or entered by homestead entrymen. In Holt v. Murphy, 207 U. S. 407, 28 S. Ct. 212, 52 L. Ed. 271, we find the following: "* * * whenever an entry has been made of a tract of land that tract is segregated from the mass of public land subject to entry until the existing entry is disposed of." There is no evidence in this record as to when the certificates of entry or patents were filed or whether there were entrymen on the land in 1889.

Appellant argues that if the land was a part of the public domain, the consent entry by the board was sufficient to show an appropriate acceptance. The weakness of that position is the necessary proof that the land was available for such acceptance. In other words, that it was not reserved for public use or that there was no entryman on it. On the question of acceptance, appellant cites Streeter v. Stalnaker, 61 Neb. 205, 85 N. W. 47. That case held: "Evidence of long continued use by the public tends to show the establishment of a road by dedication over the public domain. So also does the

surveying, marking out, platting and improving of a road by the public authorities." None of these are present in this record.

The appellant in bringing this declaratory judgment action has assumed the burden of proving that the road in question legally exists. Generally, the burden of proving an issue lies on the party holding the affirmative of that issue. Henry v. Ward, 49 Neb. 392, 68 N. W. 518. Regardless of whether the land in question in 1889 was a part of the public domain or subject to individual rights, plaintiff has not met the burden of proof necessary to show the alleged road legally exists.

The judgment of the district court dismissing the proceeding is correct and is hereby affirmed.

AFFIRMED.

BOSLAUGH and NEWTON, JJ., concurring.

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DANIEL E. O'CONNER, APPELLANT, V. HOWARD W. KIENTZ, APPELLEE.
168 N. W. 2d 703

Filed June 27, 1969. No. 37186.

1. **Automobiles: Negligence.** As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision.
2. ———: ———. The foregoing rule has no application in those cases wherein reasonable minds might differ on the question of whether or not the operator exercised the care, caution, and prudence required of a reasonably careful, cautious, and prudent person under the circumstances of the particular situation.

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

Cobb, Swartz & Wieland, for appellant.

L. Raymond Frerichs, for appellee.

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

NEWTON, J.

In this action plaintiff seeks to recover for injuries alleged to have been received when the automobile in which he was a passenger was struck from the rear by defendant's truck. Verdict and judgment were entered for defendant. We reverse the judgment of the district court and remand the cause for a new trial.

At about noon on November 9, 1961, plaintiff was a passenger in an automobile owned and operated by his wife. On passing through Auburn, Nebraska, they proceeded up a hill toward a school. At an intersection on top of the hill, a large van ahead of them came to a stop and the O'Conner automobile stopped about 30 feet behind the van. Defendant Kientz was following the O'Conner car in a farm truck which he owned and was operating. He struck the rear of the O'Conner car. The impact was not severe and did not move the O'Conner car, but it did some slight damage to the bumper. The van had stopped at the intersection in obedience to a red stoplight located on the right-hand side of the street. Two hundred feet from the intersection was a sign warning of the stoplight ahead. The van concealed the stoplight from the view of plaintiff, his wife, and defendant. Apparently none of the parties observed the warning sign 200 feet from the intersection as none of them were aware of the reason for the van stopping.

On proceeding up the hill, defendant had shifted into a lower gear and was proceeding at 10 to 15 miles per hour and was 5 to 10 feet behind the O'Conner automobile when it stopped. The evidence is conflicting in regard to whether or not the O'Conner stoplights were functioning and in regard to the abruptness or suddenness with which the O'Conner automobile stopped.

Plaintiff assigns as error the failure of the trial court to direct a verdict for him on the issue of liability. Do the circumstances attendant upon this accident justify a finding that defendant was guilty of negligence as a matter of law? "As a general rule it is negligence as a

matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision." Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870. The foregoing rule has no application in those cases wherein reasonable minds might differ on the question of whether or not the operator exercised the care, caution, and prudence required of a reasonably careful, cautious, and prudent person under the circumstances of the particular situation. See Guerin v. Forburger, *supra*.

Not having seen the warning sign, neither defendant nor the driver of the automobile in which plaintiff was riding was aware that they were approaching a stoplight. Both observed the van ahead slowing down and they did likewise. Defendant was proceeding in low gear at 10 to 15 miles per hour a short distance behind the O'Conner automobile. He saw the van stop and must then have expected the O'Conner automobile to stop behind the van.

In view of the presence of the warning sign, the stoplight ahead, and the stopping of the van at the intersection, which defendant concedes he had noticed, we find that defendant had ample opportunity to avoid the accident. His failure to do so cannot reasonably be excused. He was guilty of negligence as a matter of law and plaintiff's motion for a directed verdict on that issue should have been sustained.

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

REVERSED AND REMANDED.

BLAIR COMPANY, A CORPORATION, APPELLANT, V. AMERICAN SAVINGS COMPANY, A CORPORATION, ET AL., APPELLEES.
169 N. W. 2d 292

Filed June 27, 1969. No. 37209.

1. **Constitutional Law: Statutes.** The constitutional provision that amendatory acts shall contain the section amended does not apply to an independent act which is complete in itself.
2. **Constitutional Law: Statutes: Trusts.** The Nebraska Trust Deeds Act held constitutional.
3. **Trusts: Sales: Statutes.** A trustee may sell the trust property under the conditions prescribed in the Nebraska Trust Deeds Act without a judicial proceeding.

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

Webb, Kelley, Green & Byam, for appellant.

Crosby, Pansing, Guenzel & Binning, for appellees.

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

BOSLAUGH, J.

This is an action for a declaratory judgment to determine the validity of the Nebraska Trust Deeds Act, sections 76-1001 to 76-1018, R. R. S. 1943.

The facts are not in dispute. The plaintiff Blair Company executed and delivered a note secured by trust deed to the defendant American Savings Company. A default occurred and notice of default was recorded on February 23, 1968. This action was then brought to declare the Nebraska Trust Deeds Act invalid; to determine that the trust deed was in fact a mortgage; and to enjoin the sale of the property. The parties stipulated that the property would have been sold by the trustee but for the restraining order issued by the district court.

The district court found that the Nebraska Trust Deeds Act was constitutional; that the plaintiff was not entitled to injunctive relief; and dismissed the action. The

plaintiff's motion for new trial was overruled and it has appealed.

The Nebraska Trust Deeds Act was enacted by the 1965 Legislature. Laws 1965, c. 451, p. 1423. It authorizes the use of trust deeds to secure the performance of obligations and prescribes, generally, the procedures for their execution and enforcement. The act provides that a trust deed may confer a power of sale upon the trustee. In the event of a default, the trust property may be sold by the trustee to satisfy the obligation secured. The act also provides for the substitution of trustees, reinstatement after default, and the procedure for the sale and conveyance of the trust property by the trustee.

The plaintiff contends that the act is invalid because it is amendatory and does not contain the sections amended as required by Article III, section 14, Constitution of Nebraska. The plaintiff suggests section 76-251, R. R. S. 1943, which provides as follows, as a section in conflict with the Nebraska Trust Deeds Act: "Every deed conveying real estate, which, by any other instrument in writing, shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage. The person for whose benefit such deed shall be made shall not derive any advantage from the recording thereof, unless every writing operating as a defeasance, or explaining its effect as a mortgage, or conditional deed, is also recorded therewith and at the same time."

The defendant contends that the Nebraska Trust Deeds Act is an independent act complete within itself. The constitutional provision does not apply to an independent act. Obitz v. Airport Authority of the City of Red Cloud, 181 Neb. 410, 149 N. W. 2d 105.

The Nebraska Trust Deeds Act authorizes the use of a security device which was not available prior to its enactment. The act permits the use of an instrument

which may be foreclosed by sale without the necessity of judicial proceedings. It authorizes and permits a method of financing which was not formerly available, since trust deeds have been considered to be subject to the same rules and restrictions as mortgages. See Comstock v. Michael, 17 Neb. 288, 22 N. W. 549. The act is complete in that it prescribes in detail the procedures to be followed in the execution and enforcement of trust deeds. It does not cover the entire subject of secured real estate transactions but it does cover the subject of trust deeds. We conclude that the act is an independent act, not amendatory in nature, and not in violation of Article III, section 14, Constitution of Nebraska. To the extent that section 76-251, R. R. S. 1943, may be in conflict with the Nebraska Trust Deeds Act, it is modified by implication. Chicago & N. W. Ry. Co. v. County Board of Dodge County, 148 Neb. 648, 28 N. W. 2d 396.

The plaintiff further contends that, in any event, a trust deed may not be foreclosed by a trustee's sale since an extra-judicial sale is void as between the parties in Nebraska. Cullen v. Casey, 1 Neb. (Unof.) 344, 95 N. W. 605. See, also, Kyger v. Ryley, 2 Neb. 20; Comstock v. Michael, *supra;* Wheeler v. Sexton, 34 F. 154. One purpose of the Nebraska Trust Deeds Act was to change this rule and permit a sale of the trust property by the trustee under the conditions set out in the act.

We, of course, are concerned only with the validity of the legislation and not its wisdom. If the act is not in contravention of the Constitution, it must be declared valid.

The judgment of the district court is affirmed.

AFFIRMED.

PETER MARTINEZ, APPELLANT, V. NORMAN HOVELING, APPELLEE.

169 N. W. 2d 428

Filed July 11, 1969. No. 37031.

1. **Trial: Instructions.** When a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter effectively complain of the instructions given.
2. **Negligence.** Negligence is usually defined as the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances.
3. ———. The degree of care required varies with the circumstances and increases greatly when one is dealing with a dangerous instrumentality.
4. **Weapons and Firearms: Negligence: Instructions.** The giving of a further instruction defining a gun as a dangerous instrumentality, the handling of which calls for the highest degree of care, may be regarded as surplusage.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Hal W. Bauer, for appellant.

Baylor, Evnen, Baylor, Urbom & Curtiss, Crosby, Pansing, Guenzel & Binning, and Robert T. Grimit, for appellee.

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

NEWTON, J.

Plaintiff, pleading the doctrine of res ipsa loquitur, sued to recover for personal injuries resulting from a gunshot while hunting. Defendant pleaded a general denial, contributory negligence, and assumption of risk. Verdict and judgment were entered for defendant. We affirm the judgment.

The record discloses that plaintiff, defendant, and two other men were engaged in hunting pheasants. They lined up abreast and proceeded south through a field

sown to brome grass which stood 18 to 24 inches in height. A creek bed approximately 15 feet deep meandered in a southerly direction through the field. The creek area contained heavy vegetation consisting of grass, brush, trees, and hemp and other weeds as high as a man's head. Plaintiff, on the extreme right of the line, crossed a fence and walked in the adjoining field, somewhat in advance of the line formed by the other hunters who were aware of his position. The other three hunters walked in or along the meandering creek bed and at times were out of plaintiff's view. On reaching a point where the creek bed turned sharply to the left, plaintiff crossed the fence, entered the field occupied by the others, and assumed a position about 138 feet south from the creek bank and 168 feet from the fence on the right or west. There he waited for the other three hunters who were walking toward him to work through the creek bed. As defendant neared the south bank of the creek, he stepped onto a small plateau approximately 5 feet lower than the level of the field to the south. A covey of quail flushed and defendant shot one. This is the shot, aimed to the south, which injured plaintiff. On the lip of the bank and in the area between plaintiff and defendant stood brome grass 18 to 24 inches in height, clumps of other weeds about 3 feet high, and hemp weeds. Plaintiff stated he stood watching a farmer in the field to the southwest, heard a shot, turned, and saw a quail and a hunter who shot at the quail. Plaintiff was struck by pellets from the shell fired. This is substantially the evidence introduced by plaintiff. Defendant's evidence developed conflicts relating to the positions occupied by the parties at the time the accident occurred, the distances from the fence to plaintiff's station and between plaintiff and defendant, also as to whether or not the parties were in view or sight of each other at the time the shot was fired.

Plaintiff assigns as error the failure to give a tendered instruction and the giving of certain instructions sub-

mitted by the court. In regard to the latter proposition, it is noted that the court had submitted all instructions to the respective attorneys and given them ample opportunity for examination of the instructions prior to their submission to the jury. A number of objections to the proposed instructions were made by defendant's attorney. Plaintiff's attorney objected to instruction No. 4 and insisted that in lieu of this instruction, the one he had tendered be given. No other material objections were made by plaintiff's attorney although he participated in a general discussion of the proposed instructions.

In view of this situation, it is apparent that plaintiff led the court to believe the instructions were satisfactory except for failure to give the one requested. Plaintiff cannot now complain of the instructions given. See Beveridge v. State, 183 Neb. 406, 160 N. W. 2d 229.

Plaintiff's requested instruction is as follows: "You are instructed that a loaded firearm is a dangerous instrumentality and when a person has a gun in his sole possession and control and it is discharged he is held liable for the injuries caused thereby, unless he shows that he took all reasonable precautions to guard against accidents and that the manner of firing the weapon did not involve any careless act on his part." It was refused.

The court did instruct that in handling a loaded shotgun, defendant was "charged with the highest degree of care." It is plaintiff's position that this instruction does not "place an adequate degree of duty upon defendant." Negligence is usually defined as "doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances." Edmunds v. Ripley, 172 Neb. 797, 112 N. W. 2d 385. The degree of care required varies with the circumstances and increases greatly when one is dealing with a dangerous instrumentality. The usual definition

of negligence set out in Edmunds v. Ripley, *supra,* found in the court's instruction No. 5 was sufficient. The giving of a further instruction defining a gun as a dangerous instrumentality, the handling of which calls for the highest degree of care, may be regarded as surplusage. It was given because requested and was not improper. See Naegele v. Dollen, 158 Neb. 373, 63 N. W. 2d 165. When the burden of exercising "the *highest* degree of care" is placed upon a defendant, it is difficult to understand how a more "adequate degree of duty" could be imposed.

The judgment of the district court is affirmed.

AFFIRMED.

CARTER, J., dissenting.

This court holds that when a litigant has approved instructions in the trial court by word or act, he cannot thereafter effectively complain on review of the instructions given. With this statement, I am wholly in disagreement.

It has been a fundamental rule in the state that it is the duty and responsibility of the trial court to instruct the jury on the law as to all issues of fact supported by the pleadings and the evidence whether requested to do so or not. Pursuant to statute and the rules of this court, no objection to an instruction when given need be made in the record to have it reviewed in this court. Derr v. Gunnell, 127 Neb. 708, 256 N. W. 725. This has been such a basic rule that citation of authority is hardly required.

A procedure requiring legal counsel to note exceptions to instructions at or before their giving has had its advocates particularly as a means of disposing of otherwise valid appeals. I submit, however, that it places too great a burden on the trial lawyer to make such binding decisions for his client while engaged in the pressures of jury selection, the marshaling of evidence, the examination of witnesses, the making of

oral arguments, and the numerous stresses incident to a jury trial.

While it is true that many situations arise where a litigant from necessity is bound by the judgment of his attorney, the litigant should be able to rely on the wisdom and integrity of the judge and not the hurried or impulsive action of his attorney in making a proper statement of the law to the jury as applied to the facts of his case. It is not, it seems to me, too harsh a duty to impose on the judge to require from him, and him alone, a correct determination of the applicable law. The public image of a judge is that of one who is wise in the law and the dispensing of justice. This image should be maintained in fact. The majority opinion leads one to the belief that a trial is more a game than the solemn functioning of a court of justice. It is unconscionable to deprive a litigant of a fair trial by such means.

The majority opinion relies almost completely on our opinion in Beveridge v. State, 183 Neb. 406, 160 N. W. 2d 229. While there may be doubts about the correctness of that opinion, when viewed in the light of the present opinion, it is pointed out that its facts demonstrated that appellant's counsel was instrumental in bringing about the error of which he complained on review. Such was not the case here.

The present case is a glaring example of expanding the rule beyond the limited holding in the authoritative precedent. It demonstrates the danger in not adhering strictly to previous holdings, otherwise it serves as an opening wedge, which leads to the abandonment of long-established rules that have served the best interests of litigants over the years. No evil in the previously existing rule has been pointed out, nor has any need been shown for the change, to better the administration of justice. I submit that the holdings of this court ought to be in the direction of fair and impartial trials rather

than in excusing and justifying error for the purpose of ending litigation.

SPENCER, J., joins in this dissent.

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STATE OF NEBRASKA, APPELLEE, V. VIOLET J. FIELDS, APPELLANT.

169 N. W. 2d 437

Filed July 11, 1969. No. 37078.

1. **Criminal Law: Appeal and Error.** It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence in determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution.
2. **Statutes: Words and Phrases.** The term "private person" as used in section 28-538, R. R. S. 1943, refers to a natural person as distinguished from an artificial person such as a corporation, copartnership, or joint stock company.
3. **Indictments and Informations: Criminal Law.** An information may allege the crime in the language of the statute.
4. **Attorney and Client: Criminal Law.** A person who has employed an attorney may waive his right to have the attorney present during an interview with the county attorney, and a statement made voluntarily under such circumstances is admissible in evidence.
5. **Criminal Law: Evidence.** The fact that a county attorney has brought a civil action in behalf of the county against a defendant charged with embezzlement is not admissible in evidence as showing an interest in other litigation pending against the defendant.
6. ———: ———. A ruling excluding evidence is not prejudicial if the fact is established by other evidence.

Appeal from the district court for Douglas County: ERNEST A. HUBKA, Judge. Affirmed.

Henry C. Rosenthal, Jr., Richard J. Bruckner, and Schrempp, Rosenthal, McLane & Bruckner, for appellant.

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

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

BOSLAUGH, J.

The defendant was convicted of embezzlement and sentenced to imprisonment. Her motion for new trial was overruled and she has appealed. The assignments of error relate to the sufficiency of the evidence to sustain the conviction, the admission and rejection of evidence, and the instructions to the jury.

The defendant was an employee of the clerk of the district court for Douglas County, Nebraska, from 1939 to February 27, 1967. In 1953 she became the head cashier handling filings and money paid into the office. In 1961 she took over the accounts receivable and ledger. The accounts receivable consisted of money due the clerk for filings and services for which the fees had not been paid.

The term of Sidney J. Gottneid as clerk ended on January 4, 1967. An audit of the clerk's office as of January 4, 1967, disclosed a deficiency of $85,009.22 which was assumed to be accounts receivable due the clerk. An attempt was made to verify the accounts and it was discovered that they were overstated approximately $46,000.

Marvin S. Reifschneider, whose term as clerk commenced on January 5, 1967, testified that on February 23, 1967, he received a summary for January 1967, showing cash on hand to be in excess of $37,500. After receiving the summary, Reifschneider inquired of the defendant and learned that there was $11,000 cash on hand that she had not deposited. The defendant did not explain the remaining discrepancy. A special audit was then made which disclosed that approximately $26,000 had been deposited on January 4 and 5, 1967, but had not been entered on the fee book until January 5 and 6, 1967. This had the effect of shifting liability for this amount from Gottneid to Reifschneider.

Darwin L. Severson, an employee of the clerk's office, testified that on January 5, 1967, the defendant gave him a deposit to be made to Gottneid's bank account after there had been instructions to make no further deposits to Gottneid's account. He further testified that the defendant told him not to tell Reifschneider about the deposit.

The special audit disclosed a deficit of $1,200.41 incurred between January 5 and March 1, 1967. Of this amount, $600 represented checks for alimony which had been deposited without an entry being made on the fee book. The balance of the deficit is not accounted for in the record.

There was evidence from which the jury could find that the shortage had been created by depositing checks received in payment of accounts receivable without crediting the accounts and by withdrawing an equivalent amount of cash from the office. As long as the accounts remained unverified, the shortage was not apparent.

The defendant testified in her own behalf and denied that she had taken any money from the clerk's office. There was evidence that other persons had access to the cash and handled transactions in the office.

The information contained two counts. The first count charged an embezzlement of in excess of $100 between January 1, 1966, and January 5, 1967. The second count charged a similar embezzlement between January 5, 1967, and February 24, 1967. The jury fixed the amount embezzled under Count I at $40,000 and under Count II at $600.41.

The evidence clearly established that a substantial amount of money had been embezzled from the clerk's office. The defendant was the head cashier during the time that the shortage occurred. She had charge of the cash, the bank deposits, and the records of cash received. Although partly circumstantial and in conflict, the evidence was sufficient to permit the jury to

find that the defendant had embezzled amounts in excess of $100 between the dates alleged in the information. It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence in determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution. State v. Howard, *ante* p. 461, 168 N. W. 2d 370.

The information alleged that the defendant was employed as the clerk or agent of a "private person," the clerk of the district court. The defendant contends that the information was defective because the clerk of the district court is a public official and that the conviction cannot be sustained because any money embezzled was received by the clerk in his official capacity.

Section 28-538, R. R. S. 1943, punishes embezzlement from private persons, copartnerships, incorporated companies, or joint stock companies. The term "private person" as used in the statute refers to a natural person as distinguished from an artificial person such as a corporation, copartnership, or joint stock company. Matters v. State, 120 Neb. 404, 232 N. W. 781. An information may allege the crime in the language of the statute. Buckley v. State, 131 Neb. 752, 269 N. W. 892. The defendant's contention has no merit.

On March 2, 1967, the defendant was questioned by the county attorney in his office in the presence of a court reporter. Her statement was received in evidence over objection. The defendant contends that the statement was involuntary; was not made knowingly, intelligently, and voluntarily; and that she was mentally and emotionally incompetent at the time.

The defendant testified that she had taken some medication that morning because she had a "terrible headache" and had been unable to sleep. She also testified in detail as to what happened that morning, and it is apparent from the record that she was not mentally or emotionally incompetent at that time.

The defendant was not in custody at the time the

statement was made. She went to the office of the county attorney at his request made through Gottneid. The county attorney advised the defendant that she could refuse to answer his questions; that her answers could be used against her; that she was entitled to counsel; and that an attorney would be provided if she did not have one. The defendant replied: "A. Ask anyting you want to ask me. I do have an attorney, I have Bernie Boyle; I have talked to Bernie. Q. But you are willing to, even though Mr. Boyle represents you, to attempt to answer the questions as best you can? A. I will answer them as truthfully as I can answer them."

The county attorney further testified that no threats or promises were made and that the defendant answered his questions willingly and voluntarily. Under the circumstances in this case, it was proper for the trial court to receive the defendant's statement in evidence subject to the jury's determination of its voluntariness.

During cross-examination of the county attorney, the defendant offered to prove that the witness had brought a civil action in behalf of Douglas County against the defendant. The county attorney had no personal interest in the action and the evidence had no relevancy. The objection of the State was properly sustained.

During cross-examination of Reifschneider, the defendant attempted to prove that the witness had filed a civil action against the defendant. The objection of the State to this evidence was sustained. However, on direct examination of the defendant she was allowed to testify that she had been sued by both Reifschneider and Douglas County. This evidence removed any prejudice that might have resulted from the previous ruling during the cross-examination of Reifschneider. Rakes v. State, 158 Neb. 55, 62 N. W. 2d 273.

The defendant submitted requested instructions relating to the essential elements of the offense charged and the definition of the term "a private person." The

instruction relating to "a private person" was erroneous and was properly refused. The instructions given by the trial court correctly advised the jury as to the essential elements of the offense. The trial court did not err in refusing to give the instructions requested by the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

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JIMMY JOE ROOT, BY AND THROUGH HIS FATHER AND NEXT FRIEND, LOYD ROOT, APPELLANT, V. SCHOOL DISTRICT NO. 25 OF CUSTER COUNTY ET AL., APPELLEES.

169 N. W. 2d 464

Filed July 11, 1969. No. 37185.

1. **Negligence.** An action for negligence is based on a legal duty owed by the defendant to the plaintiff which has been breached by the defendant.
2. **Negligence: Pleadings: Evidence.** A general allegation of negligence is good against a demurrer and where no motion for a more specific statement is filed, it is competent under the general allegation of negligence to offer evidence of any fact which contributed to the injury.
3. **Schools and School Districts: Torts.** A school district is immune from tort liability arising out of a physical condition, affirmatively and voluntarily created by it on its premises where the existence of the condition is not reasonably visible or apparent or where the condition constitutes an unreasonable risk of harm to persons authorized to use and reasonably using the premises, which arose prior to July 21, 1969.

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

Thomas O. David and Thomas H. Dorwart, for appellant.

William J. Ross, for appellees.

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

CARTER, J.

The plaintiff, Jimmy Joe Root, by his father and next friend, brought this action against School District No. 25 of Custer County, the members of its school board, and the superintendent and principal of the schools of the district, to recover damages for personal injuries suffered by Jimmy Joe Root through the alleged negligence of the defendants. A general demurrer was filed to the petition by the school district and the members of the school board. The demurrer was sustained and plaintiff elected to stand on his petition. The trial court thereupon dismissed the action and this appeal resulted.

On or about May 22, 1964, the plaintiff was approximately 17 years of age. On the aforesaid date he was a student attending school in School District No. 25, commonly known as the Broken Bow High School. At about noon on said day, he was walking in the hall of the school building and, as he started down a stairway to the floor below, he was struck from behind by one or more of a group of students using the hall. He fell on the stairs to the landing below, causing the injuries for which damages are sought.

The petition alleges two acts of negligence by the defendants substantially as follows: (1) In failing to provide adequate supervision in the halls of the school building when the defendants knew or should have known that without supervision the students thereof would act in an unruly manner; and (2) in failing to keep the stairway in the school building in proper condition for the safe transportation of pupils therethrough.

It is fundamental that for the purpose of determining the sufficiency of the facts alleged in the petition for damages for negligence to which a demurrer is interposed, the demurrer admits all facts well pleaded, but not those not well pleaded or conclusions of law. An action for negligence is based on a legal duty owed by the defendant to the plaintiff which has been breached by the defendant. In other words, a petition for negli-

gence must allege the facts establishing the duty of the defendant and its breach resulting in the injuries for which damages are sought. Restatement, Torts, Ch. 1, § 4, p. 9. See, also, Lownes v. Furman, 161 Neb. 57, 71 N. W. 2d 661.

But where the petition contains a general charge of negligence and the defendant does not move for a more specific allegation of the facts, the petition is not subject to demurrer for failure to allege specific acts of negligence. Bunselmeyer v. Hill, 179 Neb. 140, 137 N. W. 2d 354; Behrens v. Gottula, 160 Neb. 103, 69 N. W. 2d 384.

Defendants urge that no liability exists against the school district under the doctrine of governmental immunity. This court has prospectively abrogated the doctrine of immunity in certain types and classes of cases. In Johnson v. Municipal University of Omaha, *ante* p. 512, 169 N. W. 2d 286, this court said with respect to the abrogation of the immunity doctrine: "This court has adopted a course of reexaminatoin and gradual transition, rather than sweeping and complete abrogation. The court's processes and procedures are more effectively directed to the pattern of solution embodied in the process of inclusion and exclusion, case by case, and step by step. The legislative processes and procedures can be more effectively applied to a comprehensive solution."

The plaintiff in the case before us sustained his claimed injuries on May 22, 1964. His injuries are claimed to be due to lack of supervision of the student body and an alleged defect in a stairway in no manner described. The nature of the alleged negligence falls within the type or class of cases described in the Municipal University of Omaha case wherein it is said: "We now hold that cities, counties, and all other governmental subdivisions, and local public entities of this state, including municipal universities, are not immune from tort liability arising out of a physical condition, affirmatively

and voluntarily created by the public body on its premises, where the existence of the condition is not reasonably visible or apparent, or where the condition constitutes an unreasonable risk of harm to persons authorized to use and reasonably using the premises for the purposes intended."

This court holds that the general application of the rule of tort liability is prospective in its application. The court, in the Municipal University of Omaha case, said: "This holding applies to all causes of action arising after a date one month following the filing date of this opinion," which date is July 21, 1969. The case before us arose on May 22, 1964, more than 5 years before the effective date of the rule announced in the Municipal University of Omaha case.

We necessarily hold for the foregoing reasons that School District No. 25 was not liable for its negligence or that of its employees on May 22, 1964. The demurrer to the petition was therefore properly sustained and the judgment of the district court is affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

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DAVID J. PICKARD, APPELLANT, V. DIRECTOR OF MOTOR VEHICLES OF THE STATE OF NEBRASKA ET AL., APPELLEES.
169 N. W. 2d 460

Filed July 18, 1969. No. 37018.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. On motion for rehearing. See *ante* p. 13, 165 N. W. 2d 96, for original opinion. Motion for rehearing overruled.

Lester A. Danielson, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellees.

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

MCCOWN, J.

The original opinion in this case appears *ante* p. 13, 165 N. W. 2d 96.

The motion for rehearing asserts that there are statements in the original opinion "implying that the giving of a test pursuant to the implied consent law may be conditioned on the right to consult with an attorney." The statements in the original opinion were: "In an appropriate factual context, a request for a brief delay in making the decision to accept or refuse the chemical test in order to consult with a lawyer should be granted where the delay is short and does not jeopardize the effectiveness of the test. * * * The taking of a chemical test authorized by the Implied Consent Law is not *ordinarily* required to be delayed by a request of the arrested motorist that he be permitted to contact legal counsel." (Emphasis ours.)

The crux of the difficulty is that two separate proceedings, one civil and one criminal, may follow an arrest for driving while intoxicated, and the criminal proceeding may involve either a felony or a misdmeanor. At the time of the arrest and request for a chemical test, the arresting officer cannot be certain which proceeding may ultimately be involved, or whether both of them will be. The civil proceeding is for revocation of an operator's license under the Implied Consent Law. The criminal proceeding may be for operating a motor vehicle while under the influence of intoxicating liquor, or it may be for motor vehicle homicide. See § 39-727.01, R. R. S. 1943.

Criminal proceedings for operating a motor vehicle while under the influence of intoxicating liquor may involve either a misdemeanor or a felony, depending upon how many convictions the defendant may have had before. Motor vehicle homicide is a felony.

When the request to take a chemical test is made, a refusal to take the test leaves both procedures, civil and criminal, still open. A consent to take the test automatically cancels out any possible civil procedure under the Implied Consent Law, but the results of the test are admissible by statute in the criminal proceedings and presumptions from them are specified. Coupled with these complications is the fact that the Nebraska statute specifically provides: "If a person so arrested shall refuse to submit to the test provided for in section 39-727.03, it shall not be given, * * *." § 39-727.08, R. R. S. 1943.

Because of these involvements, the Scotts Bluff police department was regularly using mimeographed implied consent rules. According to the testimony, these rules are read "to all persons that are arrested for driving while intoxicated." They were read to the appellant in this case. The mimeographed rules consist of a full page of single-spaced material, and the first numbered sentence which was read to the appellant was: "1. You are hereby advised that you have the right to an attorney and if you desire you may call one now." Not only was the appellant advised that he had the right to call an attorney; he was given the opportunity, and made a phone call.

In the present state of the law, there is no constitutional right to counsel in any civil proceeding, including the revocation of a driver's license under the Implied Consent Law. There is also no constitutional right to counsel in minor criminal proceedings in which imprisonment of less than 6 months is all that may be imposed. There are specific constitutional rights which have been spelled out by the United States Supreme Court which apply in any "serious criminal case" where imprisonment of more than 6 months may be involved.

The Attorney General contends that Schmerber v. California, 384 U. S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908, establishes that in a criminal drunken driving con-

viction there is no constitutional right to refuse to submit to a blood test. The distinctions between that case and a "serious criminal case" in Nebraska are obvious, and the Schmerber case involved a misdemeanor. California had no statutory provision which specified that if a person refused to submit to the blood test, the test should not be given. In view of the specific provision of our statute protecting a defendant's right of refusal, it would seem obvious that if a "serious criminal case" is involved, the request to submit to a chemical test becomes a critical stage in the proceedings.

The motion for rehearing is overruled.

WHITE, C. J., dissenting.

I respectfully dissent from the order of the court overruling the motion for rehearing in this case. The State rarely files a motion for rehearing in this court. The Attorney General points out the necessity for clarification in this case because the holding of the majority opinion extending the right of counsel to implied consent cases will create confusion on the part of the law enforcement officers and materially interfere with the enforcement of the law. I agree.

The court's ruling in this case states in effect that in an appropriate situation a driver on a public highway may condition the giving of the test required under the Implied Consent Law until he has consulted his attorney. It must be kept in mind that the right to drive on a public highway is not a constitutional one, and that the State may reasonably regulate or even deny the driving of an automobile on a public highway under certain conditions. It is fundamental that an implied consent proceeding upon the refusal to submit to a chemical test to determine intoxication is a civil and administrative procedure and that the United States and state constitutional guarantees of right to counsel are not applicable. §§ 39-727.03 to 39-727.12, R. R. S. 1943; Ziemba v. Johns, 183 Neb. 644, 163 N. W. 2d 780; Sixth Amendment to the Constitution of the United States;

Art. I, § 11, Constitution of Nebraska; Finocchairo v. Kelly, 11 N. Y. 2d 58, 226 N. Y. S. 2d 403, 181 N. E. 2d 427, certiorari denied, 370 U. S. 912, 82 S. Ct. 1259, 8 L. Ed. 2d 405; Gottschalk v. Sueppel, 258 Iowa 1173, 140 N. W. 2d 866; Schmerber v. California, 384 U. S. 575, 86 S. Ct. 1826, 16 L. Ed. 2d 908.

This court recently said in Ziemba v. Johns, *supra,* that "* * * the same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. *Each section proceeds independently of the other and the outcome of one action is of no consequence to the other.*" (Emphasis supplied.)

In Finocchairo v. Kelly, *supra,* the only issue was whether the driver was entitled to the advice of counsel before deciding to submit or not to submit to a blood test for intoxication. The New York court held: "So far as the revocation of petitioner's license for his conditional refusal to take a blood test is concerned, the constitutional rights of petitioner were not invaded because of the refusal of his request for counsel."

After an extended discussion of the authorities the Iowa court in Gottschalk v. Sueppel, *supra,* held as follows: "III. There is no merit to plaintiff's contention he was deprived of due process of law by not having the opportunity to confer with his attorney before electing to consent to a chemical test or to refuse."

The Gottschalk case was cited as authority in Ziemba v. Johns, *supra,* and in turn the Gottschalk case cited the Finocchairo case, *supra.*

Valid as the distinctions are between an implied consent proceeding and a criminal prosecution, and persuasive as are the authorities cited above on the right to counsel, this case need not rest on any such distinction.

The problem of the denial of the right to counsel before the taking of a blood test was before the United States Supreme Court in the leading case of Schmerber v. California, *supra.* This case was an actual criminal prosecution in which the Supreme Court of the United States had before it a drunk driving conviction based upon the taking of a blood test of the defendant. The defendant Schmerber was arrested and was required to submit to a blood test notwithstanding the fact that he refused to take the test on the advice of counsel. The results of the blood test were admitted in evidence over objection. He asserted that he was denied due process of law, that the taking of the test violated his privilege against self-incrimination, and further since the test was taken over his objection based on advice of counsel *he was in fact denied the right to counsel guaranteed by the Sixth Amendment to the United States Constitution.*

The United States Supreme Court affirmed the conviction holding that the taking of the blood test did not involve a matter of self-incrimination, and that since due process and self-incrimination were not involved in taking the test then neither was the constitutional provision of right to counsel. The court said: "This conclusion (that due process and self-incrimination are not involved in the taking of a blood test) also answers petitioner's claim that, in compelling him to submit to the test in face of the fact that his objection was made on the advice of counsel, he was denied his Sixth Amendment right to the assistance of counsel. Since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate."

Stated in common sense terms, the above authorities hold what is so abundantly clear, namely, that defendant has no constitutional guarantee of right to counsel in

order to assist him in determining whether he will comply with the Implied Consent Law. The privilege to drive an automobile on a public highway, by the declared public policy of the State of Nebraska, is subject to the reasonable regulations and requirements of the Implied Consent Law. These requirements are manifestly enacted and designed in the pursuance of a policy of public safety on the public highways in the State of Nebraska.

If the court's ruling in this case means, as it apparently does, that in an "appropriate" situation which has yet to be defined the driver may condition the giving of a test until he has consulted his attorney, then we are faced with a situation that will result in emasculation of the enforcement of the statute. This is so because if a driver has a right to consult his attorney it follows that the consultation must be effectual and no imagination is required to foresee the amount of time involved. It will not only prevent law enforcement officers from securing constitutionally permissible incriminating evidence in drunk driving prosecutions but more important it probably will effectively prevent the disciplining and control of the borderline drinking driver. It requires the State to furnish counsel to a defendant in order to determine whether he shall comply with the law. It injects into the practical enforcement situation a requirement that a police officer determine at his peril if he may safely await the convenience of the defendant in consulting legal counsel and thereby risk the defeat of the purpose of the law.

The issue of the right to counsel was not raised in this case at any stage of the proceedings. I submit, therefore, that we should either rehear this case, or eliminate what appears to me to be unsupported obiter dictum.

CARTER and NEWTON, JJ., concur in this dissent.

CARTER, J., dissenting.

While I concur with the dissent filed by White, C. J., there is one point that needs clarification. The majority opinion states: "The crux of the difficulty is that two

separate proceedings, one civil and one criminal, may follow an arrest for driving while intoxicated, and the criminal proceeding may involve either a felony or a misdemeanor. At the time of the arrest and request for a chemical test, the arresting officer cannot be certain which proceeding may ultimately be involved, or whether both of them will be." The majority opinion places the burden on the arresting officer to prophesy at his peril the nature of the proceeding that may follow the arrest, and when and under what circumstances a lawyer request must be given effect. Consequently the arresting officer in an honest attempt to proceed lawfully and out of an abundance of caution is forced into the position of permitting the person arrested to obtain a lawyer when, in fact, he is not entitled to consult his lawyer at all on the question as to whether or not he should take the test.

The opinion in the original appeal states: "In an appropriate factual context, a request for a brief delay in making the decision to accept or refuse the chemical test in order to consult with a lawyer should be granted where the delay is short and does not jeopardize the effectiveness of the test." How does a police officer, a nonlawyer, know when "an appropriate factual context" exists when no proceeding has been filed, all the facts have not been determined, and an appropriate factual context is in no way defined. The statement induces confusion as to the law in a case where the law is clear and the action of the arresting officer entirely proper. If the case had been determined in this court solely on the facts determined by the court, there would have been no uncertainty in the law and no confusion arising in the future on similar fact situations. It demonstrates the necessity of deciding cases on the precise facts of each case and leaving to future decision any exceptions to or variances from the rule.

IN RE INTEREST OF DANNY GEIGER.
ANDREW J. MCMULLEN, APPELLEE, V. DANNY GEIGER, A CHILD UNDER THE AGE OF EIGHTEEN YEARS, APPELLANT.
169 N. W. 2d 431

Filed July 18, 1969. No. 37135.

1. **Infants: Juvenile Courts: Appeal and Error.** The review in the Supreme Court of a proceeding under the Juvenile Court Act is by trial de novo.
2. **Infants: Juvenile Courts.** A child under the age of 18 years who deports himself so as to injure or endanger seriously the morals or health of himself or others is a child in need of special supervision under the Juvenile Court Act.

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

Munro, Parker, Munro & Grossart, for appellant.

Andrew J. McMullen, pro se.

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

WHITE, C. J.

This is a juvenile court proceeding. The appellant, Danny Geiger, was adjudicated to be a child and in need of special supervision and placed on probation by the juvenile court of Buffalo County, Nebraska. The appellant's motion for new trial was overruled and he has appealed. The principal assignments of error relate to the sufficiency of the evidence to sustain the findings and order of the juvenile court, and the failure of the trial court to grant the defendant a jury trial.

A review in this court of a proceeding under the Juvenile Court Act is de novo upon the record. Doeschot v. Dahlberg, *ante* p. 303, 167 N. W. 2d 190.

The petition alleges in substance that on or about March 15, 1968, the appellant broke into and stole money from popcorn vending machines belonging to a vendor and located in three different business establishments in the city of Kearney, Nebraska.

The evidence shows that there were popcorn vending machines located at Emil's Frontier Station, Mel's Texaco Service Station, and Bob's Apco Service Station in Kearney and that Danny Geiger had gone to these places at about the time alleged in the petition. The popcorn machines take nickels and dimes. The evidence shows that these machines are operated under a franchise agreement with a vending machine company called Vendit. A 5-pound bag of popcorn is placed in the machine and will yield from 65 to 72 10-cent sacks of popcorn when either a dime or two nickels are inserted in the machine. The money trips a switch which has a counter on it and the machine then dispenses a measured amount of popcorn into a sack. The only way the popcorn can be taken from the machine other than by inserting money is to force the top or by opening the top of the machine with a key. A companion of Dannys testified that he and Danny went to Bob's Apco; that he had gone inside to get a bottle of pop, started back outside to sit down in the car, but stood at the door; and that he saw Danny "get into the machine." He testified that he saw Danny open the popcorn machine with a key and that Danny threw the key in the trash can at Bob's Apco. This same companion testified that he saw Danny around the popcorn machine at Emil's Frontier about a week before he threw the key away (at Bob's Apco). He testified that he went into Emil's Service with Danny; that there was conversation with him about whether the key would fit the machine; and that he, the companion, would go back out to the car and when Danny came back he sometimes gave him money. At Mel's Texaco the same companion testified that he sat in the car; that he did not see Danny actually get into the popcorn machine; but that he did observe him go in and see him around the popcorn machine. He testified that he saw him around the machine at Mel's Service Station about a week before Danny threw the key away. Another companion of Dannys testified that on or about

the 15th of March he went with Danny to Mel's Texaco and Emil's Frontier in Kearney. He knew that Danny had a key for a popcorn machine. He waited in the car at Mel's Texaco while Danny went into the service station and saw him get two packs of potato chips and sit down at a table and eat one pack. When Danny came out they left in the car and after they left Mel's Texaco Danny gave him 30 cents in the form of two nickels and two dimes.

The evidence shows that Danny was employed at the Landmark Cafe in Kearney, Nebraska; and that the particular key in question, No. HN 2, was reported missing to the vending machine operator by the manager of the Landmark Cafe on approximately July 15, 1967. The vending machine operator testified that on or about the 15th day of March he checked the machine at Emil's Frontier and found 40 cents in the machine and an empty storage bin. The evidence negatives any inference that the popcorn vending machines were entered by force. The vending machine operator testified that he personally put popcorn in the machines at Emil's Frontier and Mel's Texaco and then went back again and found the popcorn gone and no money except the 40 cents in the cash box at Emil's Frontier.

There is other evidence in the record which we do not deem necessary to recite in this opinion. The evidence in this case is both direct and circumstantial. The evidence is sufficient beyond a reasonable doubt to sustain the trial court's findings. The evidence shows: (1) That Danny was in possession of a key which he had taken unlawfully and two witnesses saw Danny in possession of the popcorn machine key; (2) that Danny threw the key in the trash can at Bob's Apco as stated and conceded in appellant's brief; (3) that Danny was actually seen entering one of the popcorn machines; and (4) that the popcorn and the money were both missing from the machines which in normal operation would

have had either the popcorn or the money contained within them, or both.

On appeal, we hold on trial de novo the evidence fully sustains the finding of the juvenile court that the appellant is a child in need of special supervision because he deports himself so as to injure or endanger seriously the morals or health of himself or others. § 43-201 (5) (c), R. R. S. 1943.

As we stated in Doeschot v. Dahlberg, *supra,* it is unnecessary to consider the assignment of error with respect to the standard of proof applied by the juvenile court. The review here is de novo and the evidence is sufficient to sustain the finding against the appellant beyond a reasonable doubt. See Guy v. Doeschot, 183 Neb. 557, 162 N. W. 2d 524.

The other assignments of error relate to the constitutional right to a jury trial, the right to bail, and other incidents of "due process" asserted to follow the holding of the United States Supreme Court opinion in In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527. These contentions have been discussed and answered by the controlling opinion of this court in DeBacker v. Brainard, 183 Neb. 461, 161 N. W. 2d 508. The essence of that holding, for the purposes of this decision, is that a juvenile court proceeding, under the controlling statute in the State of Nebraska, is a civil proceeding and under the doctrine of parens patriae, the constitutional guarantees of a jury trial and the incidents thereto are not applicable to a juvenile proceeding under our statute.

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

AFFIRMED.

SPENCER, J., dissenting.

For the reasons stated in the dissents in DeBacker v. Brainard, 183 Neb. 461, 161 N. W. 2d 508, I respectfully dissent herein.

It is to be noted that four judges of this court were

of the opinion in that case that the statute involved herein was unconstitutional, but because of our constitutional provision requiring the concurrence of five judges to declare an act unconstitutional the opinion of the four judges did not prevail.

BOSLAUGH, MCCOWN, and SMITH, JJ., join in this dissent.

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NOEL COVER, APPELLEE, V. RALPH K. SCOTT ET AL., APPELLANTS, SHIRLEY C. SCOTT ET AL., INTERVENERS-APPELLANTS.
169 N. W. 2d 435

Filed July 18, 1969. No. 37203.

1. **Trial: Witnesses.** Fact issues not fully explored and which may rest on the determination of the credibility of the witnesses must be resolved by trial on the merits.
2. **Judgments: Pleadings.** On motion for summary judgment a movant has the burden of proof to pierce the pleadings and show conclusively that there was no genuine issue of fact prohibiting the movant from a judgment in his favor as a matter of law.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded with directions.

Atkins, Ferguson & Nichols and LeRoy M. Hahn, for appellants.

Wright, Simmons & Hancock and Larry D. Hall, for appellee.

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

WHITE, C. J.

This case comes here on motion for summary judgment and the question involved is whether a genuine issue of fact exists requiring a trial on the merits. The

district court, based upon the pleadings and the affidavits filed, sustained plaintiff's motion for summary judgment and dismissed the action. We reverse the judgment of the district court.

Plaintiff Noel Cover recovered a personal judgment against defendant Ralph K. Scott on January 13, 1968. On February 8, 1968, plaintiff instituted this garnishment proceeding against the account of Valley Produce Company deposited in the Scottsbluff National Bank. The Valley Produce Company and Shirley C. Scott, wife of Ralph K. Scott, intervened in the garnishment proceedings, alleging ownership of the garnished account.

The pleadings and the evidence show that the Valley Produce Company, a Nebraska corporation, had become delinquent for nonpayment of occupation taxes and that sometime prior to these proceedings the corporation was dissolved by the state. See § 21-323, R. S. Supp., 1967. In an elaborate theory, the plaintiff substantially contends that upon the dissolution of the Valley Produce Company the judgment debtor Ralph K. Scott then became the owner of the assets because as an officer of the corporation he had deposited checks under his signature to the account of the Valley Produce Company.

The issue, as we see it, presented in this case turns on the question of who owned the garnished bank account deposited in the name of the Valley Produce Company which on its face, of course, demonstrates that the bank account was not the personal property of the judgment debtor Ralph K. Scott. The uncontroverted affidavit of Shirley C. Scott, wife of Ralph K. Scott, was that she was the only stockholder of the Valley Produce Company; and that personal funds of Shirley C. Scott and Ralph K. Scott were deposited in the personal account of Shirley C. Scott. In answer to interrogatories propounded to the garnishee bank, Scottsbluff National Bank, the bank stated that it had in its possession a checking account of the Valley Produce

Company. The evidence shows, from the affidavits, that the judgment debtor Ralph K. Scott withdrew or deposited funds to the account of Valley Produce Company as president of that corporation. The judgment debtor's affidavit, filed in opposition to the motion for summary judgment, states as a fact that he was the president and director of the Valley Produce Company and that his personal earnings were always deposited in the account of his wife, the intervener Shirley C. Scott. The debtor Ralph K. Scott was president and a director of the corporation, and not a stockholder. There is not any showing that he had any immediate right to the assets of the corporation. No evidence was presented by the plaintiff to controvert these facts presented by the affidavits of Shirley C. and Ralph K. Scott. An elaborate theory is presented by the plaintiff that Ralph K. Scott was the legal beneficiary of the assets of the corporation, on the assumption that the assets of the corporation had been long removed from the ownership of the corporate entity. It is unnecessary to discuss this theory or the issues presented by it. Fact issues not fully explored and which may rest on the determination of the credibility of the witnesses must be resolved by trial on the merits. It was the plaintiff's burden on motion for summary judgment, to pierce the pleadings and conclusively show that there was no genuine issue of fact prohibiting the plaintiff from a judgment as a matter of law. Rehn v. Bingaman, 157 Neb. 467, 59 N. W. 2d 614; Fidelity & Deposit Co. v. Bodenstedt, 170 Neb. 799, 104 N. W. 2d 292; Fay Smith & Associates, Inc. v. Consumers P. P. Dist., 172 Neb. 681, 111 N. W. 2d 451; Anderson v. Carlson, 171 Neb. 741, 107 N. W. 2d 535, 83 A. L. R. 2d 831; Storz Brewing Co. v. Kuester, 178 Neb. 135, 132 N. W. 2d 341, 21 A. L. R. 3d 476; Snyder v. Fort Kearney Hotel Co., Inc., 182 Neb. 859, 157 N. W. 2d 782. It may or may not be, on trial on the merits in this case, under the facts and the applicable legal theory, that the assets deposited in the garnished bank account can be

traced and be established in the personal ownership of the judgment debtor. Our opinion here cannot surmise the ultimate resolution of the facts as presented in the affidavits filed herein, or legal theories involved. There are genuine issues of facts and legal issues involved which must await a resolution on the trial on the merits.

The judgment of the district court is reversed and the cause remanded for a trial on the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

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JOSEPH L. KRAUSE, APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, APPELLEE.

169 N. W. 2d 601

Filed July 25, 1969. No. 37149.

1. **Pleadings: Trial.** 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.
2. **Insurance: Parties.** An insured's cause of action against the tort-feasor cannot be split; at all times there is one cause of action on the part of the insured against the tort-feasor.
3. **Insurance: Subrogation: Fees.** Where the holder of the subrogation right asserts his right to equitable subrogation in the avails of litigation or settlement created by the efforts of insured and his attorney, and the insurance company fails to make, or fails to offer to make, itself a party to the action against the wrong-doer, or in any manner to assist in the prosecution of the claim or contribute towards the expense thereof, although having full knowledge of its pendency and object, the insured is entitled to retain a proportionate share of the expenses, including attorney's fees, incurred in the recovery from which the insurance company will benefit to the extent of its subrogation claim.
4. **Insurance: Subrogation.** An insurer is entitled to subrogation, either by contract or in equity for the amount of the indemnity paid.
5. **Insurance: Actions: Parties.** If the property loss is greater than the amount of insurance paid the action should be in the

name of the insured, and the insured holds as much of the judgment recovered as the money paid by the insurer amounts to, in trust for the insurer.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed in part, and in part reversed and remanded with directions.

William L. Howland, for appellant.

Healey & Healey, for appellee.

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

WHITE, C. J.

This is an action on behalf of the plaintiff, Joseph L. Krause, against the defendant State Farm Mutual Automobile Insurance Company, hereinafter referred to as State Farm, for reasonable attorney's fees. The plaintiff filed a petition in Lincoln municipal court in which he alleged two causes of action against State Farm. State Farm demurred, and the plaintiff filed an amended petition. State Farm demurred to the amended petition, plaintiff elected to stand upon his amended petition, and the municipal court dismissed the plaintiff's petition. Plaintiff appealed to the district court for Lancaster County, and State Farm filed a demurrer to plaintiff's petition on appeal. Plaintiff elected to stand on his petition on appeal, whereupon the district court entered an order dismissing plaintiff's action. After plaintiff's motion to vacate or in the alternative for a new trial was overruled by the district court, he appealed.

"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, 181 Neb. 64, 147 N. W. 2d 6.

The petition of plaintiff pleads the following facts: On August 1, 1964, Mr. Lowell Roumph was involved in an automobile accident with Mr. and Mrs. Leonard

Kracman. At the time of the accident, Roumph had a $50 deductible collision policy with State Farm, his insurance carrier. The damage to the automobile was in excess of $1,400. State Farm indemnified Roumph to the extent of $1,350 and retained an equitable right of subrogation against the other parties involved.

The plaintiff was retained by Roumph as an attorney to represent him in his claim for damages to his automobile and for personal injuries sustained. After an investigation of the facts in preparation for filing an action against the Kracmans, and after substantial negotiations with Dairyland Insurance Company, the insurer of the Kracmans, settlement was made with Dairyland Insurance Company, Throughout these negotiations, State Farm was aware of the efforts of the plaintiff and acquiesced in, but did not in any way take part in, such negotiations or assist in reaching the settlement.

Apparently, the Dairyland Insurance Company made payment to State Farm for the amount of its subrogation claim. The plaintiff made demand on State Farm for the payment of reasonable compensation for his services and continued to do so for 90 days prior to the institution of this action against State Farm.

In plaintiff's petition, two causes of action were pleaded. In the first, the plaintiff contended that he was entitled to a reasonable attorney's fee for services rendered in connection with his negotiations for collecting the subrogation claim of State Farm against Dairyland Insurance Company, the tort-feasor insurance carrier. Plaintiff relies upon our holding in United Services Automobile Assn. v. Hills, 172 Neb. 128, 109 N. W. 2d 174, 2 A. L. R. 3d 1422. At the outset, we discover that this whole field of litigation is confused because of the conflicting claims between the insured and insurer with reference to the avails of the tort law cause of action against the tort-feasor. In such cases various forms of recovery, as distinguished from substantive rights, have been construed by the courts to protect the subrogation carrier

in its fundamental equitable right where it has paid the insured on a collision claim, and yet maintained the fundamental unity of the tort cause of action as against the right to split the avails. Nebraska is in harmony with the prevailing rule in most jurisdictions that the insured's cause of action against the tort-feasor cannot be split and that at all times there is one cause of action on the part of the insured against the tort-feasor. United Services Automobile Assn. v. Hills, *supra;* Shiman Bros. & Co., Inc. v. Nebraska National Hotel Co., 143 Neb. 404, 9 N. W. 2d 807; Dixon v. Coffey, 161 Neb. 487, 73 N. W. 2d 660; Hayward v. State Farm Mut. Automobile Ins. Co., 212 Minn. 500, 4 N. W. 2d 316, 140 A. L. R. 1236. United Services Automobile Assn. v. Hills, *supra,* was a declaratory judgment proceeding in which the court held that it was, in substance, an interpleader action, since the tort-feasor insurance company had paid the subrogation claim to the insured's carrier, and had paid the total amount of the attorney's fee that it owed into court. The insurance carrier refused to pay the plaintiff's attorney and refused to permit him to handle or perform any services with regard to collection of the subrogation claim. In awarding the insured's attorney an attorney's fee proportionate to the amount of services he had rendered in collecting the subrogation claim along with the personal injury claim against the tort-feasor, this court laid down the substantive principle of liability as follows: "The applicable rule is that where the holder of the subrogation right does not come into the action, whether he refuses to do so or acquiesces in the plaintiff's action, but accepts the avails of the litigation, he should be subjected to his proportionate share of the expenses thereof, including attorney's fees. In the early case of Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382, 10 Am. R. 746, the rule was stated as follows: 'Where the assured, as in case of partial insurance, sustains a loss, in excess of the reimbursement or compensation by the underwriter, he has an undoubted right to have

it satisfied by action against the wrong-doer. *But if, by such action, there comes into his hands, any sum for which, in equity and good conscience, he ought to account to the underwriter, reimbursement will, to that extent, be compelled in an action by the latter, based on his right in equity to subrogation.* But the assured will not, in the forum of conscience, be required to account for more than the surplus, which may remain in his hands, after satisfying his own excess of loss in full, and his reasonable expenses incurred in its recovery; unless the underwriter shall, on notice and opportunity given, have contributed to, and made common cause with him, in the prosecution.' See, also, Svea Assurance Co. v. Packham, 92 Md. 464, 48 A. 359, 52 L. R. A. 95; Washtenaw Mut. Fire Ins. Co. v. Budd, 208 Mich. 483, 175 N. W. 231; Shawnee Fire Ins. Co. v. Cosgrove, 85 Kan. 296, 116 P. 819, 41 L. R. A. N. S. 719; Camden Fire Ins. Co. v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.), 175 S. W. 816; Annotation, 36 A. L. R. 1267." (Emphasis supplied.) We note that since United Services Automobile Assn. v. Hills, *supra,* was filed it has become the leading case on the subject and has been followed in other jurisdictions, with perhaps one exception. See, Annotation, 2 A. L. R. 3d 1422, et seq.

The declaration in that holding, emphasized above, is in effect that the insured is compelled to hold the amount of the subrogation claim for the benefit of his insured's carrier and to account to him for this amount in the avails of the action against the tort-feasor. Translated into orthodox legal language, this is simply a declaration impressing a trust upon the fund coming into the hands of the insured and requiring him, following a fiduciary's duty, to account for the proportionate amount of the proceeds corresponding with the subrogation right. It is elementary that subrogation is in its nature equitable and the rights being litigated here are equitable rights. It therefore follows that the insurance contract setting up and declaring the rights between the parties

preserves the unity and control of the insured over his cause of action for personal injury and property damage against the tort-feasor, and yet fully protects the insurer's subrogation right. The right to an attorney's fee follows as a matter of course, since the services rendered by the attorney are beneficial to the administration of the trust and the rights of the beneficiary and as such he is entitled to a proportionate award of an attorney's fee.

The applicable rule is well stated in the case of Parker v. Hardy, 73 S. D. 247, 41 N. W. 2d 555. Therein it is said: "It is a well settled rule of law that an insurer is entitled to subrogation, either by contract or in equity for the amount of the indemnity paid. Harrington v. Central States F. Ins. Co., 169 Okl. 278, 36 P. 2d 738, 96 A. L. R. 859; Flor v. Buck, 189 Minn. 131, 248 N. W. 743; Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 143 Neb. 404, 9 N. W. 2d 807. When the indemnity paid by the insurer covers only part of the loss, as in this case, leaving a residue to be made good to the insured by the wrongdoer, the right of action remains in the insured for the entire loss. Aetna Ins. Co. v. Hannibal & St. J. R. Co., C. C., 3 Dill 1, 1 F. Case No. 96; Harrington v. Central States F. Ins. Co., supra, Anno. p. 879; City of N. Y. Ins. Co. v. Tice, 159 Kans. 176, 152 P. 2d 836, 157 A. L. R. 1233, Anno. p. 1251; Flor v. Buck, supra; Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., supra; Johanson v. Cudahy Packing Co., 107 Utah 114, 152 P. 2d 98, 103. *In these cases the insured becomes a trustee and holds the amount of recovery, equal to the indemnity for the use and benefit of the insurer.* The rule is founded on the principle that the wrongful act was single and indivisible, and gives rise to but one liability. *Upon this theory the splitting of causes of action is avoided and the wrongdoer is not subjected to a multiplicity of suits.*" (Emphasis supplied.)

In Hume v. McGinnis, 156 Kan. 300, 133 P. 2d 162, in dealing with a similar situation the Kansas court said: "If the property loss is greater than the amount of in-

surance paid the action should be in the name of the insured, and the insured holds as much of the judgment recovered as the money paid by the insurer amounts to, *in trust* for the insurer." (Emphasis supplied.)

In the quite recent case of Regent Cooperative Equity Exchange v. Johnston's Fuel Liners, Inc. (N. D.), 122 N. W. 2d 151, the Supreme Court of North Dakota said as follows: "Under the decision of this Court in the case of Farmers Insurance Exchange v. Arlt, N. D., 61 N. W. 2d 429, on page 436, this Court said '* * * By the weight of authority, however, it is held that, if the insurance paid by the insurer covers only a portion of loss, as in the case at bar, the right of action against the wrongdoer, who caused the loss, remains in the insured for the entire loss and the action should be brought in the name of the insured. 29 Am. Jur., Insurance, Secs. 1355 and 1357, pp. 1013, 1015; Annotation 96 A. L. R. pp. 865, 879-881; Annotation 157 A. L. R. pp. 1243, 1251, 1252.' * * * Since our Court in Farmers Insurance Exchange v. Arlt, supra, has in effect made the insured a *trustee* for the insurer to the extent of the insurer's interest under the circumstances involved here, vexatious suits will not lie." (Emphasis supplied.)

In McGeorge Contracting Co. v. Mizell, 216 Ark. 509, 226 S. W. 2d 566, the court held in a quite similar situation as follows: "Here, the appellee, insured, holds the proceeds of his judgment against appellant as trustee and must account to the insurance companies as their interests may appear. The Annotator in 140 A. L. R., page 1246, under 'Right of Insurer to share in recovery by insured against tort-feasor' used this language: 'The cases involving the question of the right of an insurance company which has paid a claim for property damage to an insured automobile to share, under principles of subrogation, in the proceeds of a recovery against or settlement with the tort-feasor in favor of the insured are unanimous in upholding the right of the insurer so to share.' "

With this understanding of the basic relationship between the parties, the resolution of the problem involved in this case becomes clear. The application of the substantive principle announced in United Services Automobile Assn. v. Hills, *supra,* is controlling. This action, arising out of the contractual relationship between State Farm and its insured, is essentially equitable in nature and the services of the attorney in creating and recovering the trust fund as an integral part of the prosecution of the unitary tort cause of action against the tort-feasor is compensable under customary trust principles. State Farm argues that the rule of United Services Automobile Assn. v. Hills, *supra,* should not apply because Hills involved an equitable action of interpleader. This distinction vanishes when we consider the essential nature of the action as being an equitable action to recover and account for a trust fund. Furthermore considering the basic rights involved, equity could not be served by making a distinction based upon form rather than substance. It is apparent that the rule in Hills, under such a distinction, could be easily avoided by direct payment of the tort-feasor's insurance carrier to the plaintiff's insurance carrier. Such a rule would avoid the substantive principles involved in the relationship and deny the application, in equity, of the substantive principles involved. In Hills a lawsuit was actually filed, whereas here no actual suit was filed but it is undisputed that the attorney rendered valuable services in negotiations and in settlement of the case. The recovery of the substantive right to attorney's fees for services rendered should not depend upon the fortuity of filing a lawsuit. Nor should it, in an equity action, depend upon the form of the action. It is unnecessary to discuss the argument of whether the plaintiff's action was brought in the name of the real party in interest inasmuch as our discussion of the basic nature of equitable right of subrogation disposes of any contention of that nature. It is also appar-

ent that it is unnecessary to determine what the reasonable amount of the attorney's fee should be. This follows because of the essential nature of a trust relationship and the accounting of the funds between the parties. We do not hold in this case that State Farm is bound by the contract for fees between the plaintiff's attorney and the insured in the action against the tortfeasor. The allowance depends upon consideration of all of the circumstances including the nature of the contract with the insured and the amount and the nature of the services rendered, and the other principles relating to the award of attorney's fees under the law.

In a second cause of action plaintiff contends that he is entitled to an attorney's fee for collecting the attorney's fee under section 25-1801, R. S. Supp., 1967. The trial court denied recovery of an attorney's fee for collecting for the services and we adhere to that holding. We again point out, particularly under the rationale involved in the present opinion that the plaintiff's claim for an attorney's fee is a claim against the trust fund for expenses and not a claim against State Farm for an attorney's fee which was past due and owing. It is not a claim against a person, partnership, association, or corporation within the purview of the statute.

The judgment of the district court sustaining the demurrer and dismissing the action on the first cause of action is reversed and the cause remanded for a new trial to establish the amount of attorney's fee to be allowed under the applicable principles of law. The judgment of the district court dismissing the second cause of action is correct and is affirmed.

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

SMITH and MCCOWN, JJ., dissenting.

Some cases may call for investigation of rules concerning trust relations, real parties in interest, or split causes of action. Compare Omaha & R. V. Ry. Co. v. Granite State Fair Ins. Co., 53 Neb. 514, 73 N. W. 950,

with Dixon v. Coffey, 161 Neb. 487, 73 N. W. 2d 660. The present case is not one of them. Plaintiff's client commenced no action against the alleged third-party tort-feasor. There was no legal compulsion approaching that in United Services Automobile Assn. v. Hills, 172 Neb. 128, 109 N. W. 2d 174, 2 A. L. R. 3d 1422. Yet the majority opinion holds that plaintiff's claim is actionable on the ground of legal compulsion.

The purpose of the rule against splitting causes of action is to prevent multiplicity of suits and to protect a debtor from harassment. Parties do not violate the rule when they reach a partial settlement agreement without commencing action; they may leave the controverted part for litigation. Atchison, T. & S. F. R.R. Co. v. Home Ins. Co., 59 Kan. 432, 53 P. 459, 39 Am. S. R. 504; Bliss v. New York Cent. & H. R.R. Co., 160 Mass. 447, 36 N. E. 65; Wolverine Ins. Co. v. Klomparens, 273 Mich. 493, 263 N. W. 724. We would affirm the action of the district court.

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STATE OF NEBRASKA, APPELLEE, V. WILLIAM OTTO, APPELLANT.

169 N. W. 2d 612

Filed July 25, 1969. No. 37161.

1. **Automobiles: Public Officers and Employees: Highways.** The driver of a police department vehicle on official business, sounding an audible signal by siren, shall have the right-of-way, and the drivers of other vehicles shall yield such right-of-way to such police department vehicle.
2. ———: ———: ———. A police officer conducting an activity protected under section 39-745, R. S. Supp., 1967, is entitled to exceed the speed limit.
3. **Automobiles: Words and Phrases.** The term audible signal is a signal capable of being heard, a signal which is heard, or in the exercise of ordinary care should have been heard.

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

Donald R. Hays, Jr., for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

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

WHITE, C. J.

This is a criminal action which was tried in the district court for Lancaster County, Nebraska. The defendant was found guilty of motor vehicle homicide, sentence was suspended, and he was placed on probation for 18 months. He appeals, alleging error in instructions to the jury. We affirm the judgment of the district court.

The defendant was traveling north on Twenty-seventh Street in Lincoln, Nebraska, at approximately 6:45 p.m. on February 9, 1968. He was attempting a left-hand turn at the intersection of Twenty-seventh and W Streets when he collided with a police officer on a motorcycle. The police officer, Mr. George Welter, was traveling south on Twenty-seventh Street at between 40 and 45 miles per hour. He was exceeding the speed limit of 35 miles per hour and sounding his siren in response to a dispatch informing him that: "There is a report of a man down on 25th between 'Q' and 'P'." Neither the defendant nor members of his family in the defendant's automobile heard the siren or observed the officer on the motorcycle prior to impact. The officer died of his injuries moments later at a local hospital.

The defendant contends that the police officer in exceeding the speed limit was not within the speed limit exemptions enumerated in section 39-745, R. S. Supp., 1967, and that therefore he did not have the right-of-way. He therefore contends that the following instructions, which imply that the police officer had the right-of-way, were in error. Instruction No. 6 in its relevant portion required the jury to find the defendant guilty

if it found that defendant was operating his automobile unlawfully and that the proximate cause of the death of the police officer was: "(a.) * * * the defendant while operating his motor vehicle failed to yield the right-of-way to the driver of a police vehicle on official business while said driver was sounding an audible signal by siren on said police vehicle."

Instruction No. 11 states that: "You are instructed that the driver of a police department vehicle on official business, sounding an audible signal by siren, shall have the right-of-way, and the drivers of other vehicles shall yield such right-of-way to such police department vehicle. This does not, however, relieve the driver of such vehicle from the duty to drive with due regard to the safety of all persons using the highway, nor shall it protect the driver of such vehicle from operating the same in an arbitrary manner in the use of such highway."

Instruction No. 13 states that: "You are instructed that the driver of a police department vehicle on official business, sounding an audible signal by siren, has the right to exceed the speed limitations imposed by statute. However, a duty is imposed upon such driver to operate the said police vehicle in such a manner that he will not do so in reckless disregard to the safety of others."

The speed limit exemptions are enumerated in section 39-745, R. S. Supp., 1967: "The speed limitations set forth in Chapter 39, article 7, shall not apply (1) to vehicles when operated with due regard for the safety of others under the direction of the Nebraska State Patrol, any conservation officer, sheriff, member of any police department, or any other police officer, in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, (2) to fire department or fire patrol vehicles when traveling in response to a fire alarm, (3) to public or private ambulances when traveling in emergencies, or (4) Civil Defense rescue vehicles when traveling in response to a

fire alarm or emergency; Provided, the exemption herein shall not apply to bondsmen. This exemption shall not protect the driver of any vehicle exempted herein from the consequences of a reckless disregard of the safety of others."

The obvious purpose of the speed limit exemptions for emergency vehicles is to make it possible for those agencies who are able to provide emergency services to persons in need to reach those persons as fast as is reasonably possible. The police department is one agency which provides such a service. The statute should not be read so narrowly as to emasculate the effectiveness of police officers in emergencies by limiting their speed exemptions to situations where it is clear that the law has been violated and the suspected violator remains at large. Such an interpretation would emasculate the statute because in many cases proof could only come from the lips of the dead police officer. Clearly the term "apprehension of violators of the law" was designed to protect the police officer at the very time when speed was of the essence to enforce the law and to protect the public. This statute properly assumes that a police officer on duty is in the performance of his statutory duties and is designed to give some measure of protection to the initial risks and dangers he encounters in emergency situations. It gives protection during the apprehension or discovery of law violators. It is not designed to prohibit a police officer from appropriate action when that action is necessary. It would be absurd to hold that the intent of the statute was to limit his emergency action to the period of time subsequent to the apprehension and discovery of a law violator and during only the period of time when he was possessed of proof of such criminal activity. The police officer here was responding to a legitimate command and order from his superiors. Surely a defendant, within the meaning of the statute, should not be permitted to make a judgment or to risk an opinion on the legal significance of the

police officer's proper emergency activity. It is enough, as in this case, that the police officer knew of an emergency, for which he could render effective assistance, and was operating in response to a call for assistance. We find that the police officer was conducting an activity protected under section 39-745, R. S. Supp., 1967, was entitled to exceed the speed limit, and had the right-of-way.

The defendant also contends that not only must a police emergency vehicle have a signal sounding but that such signal must be actually heard by the operator before he is required to yield. He asks that we interpret the word "audible" as used in section 39-752, R. S. Supp., 1967, as requiring an actual hearing of the signal which would thereby strike down instruction No. 12 instructing that: "The term 'audible signal' as employed in these instructions means a signal capable of being heard, a signal which is heard, or in the exercise of ordinary care should have been heard."

This is the correct instruction. In Raymond v. Haught, 102 Ohio App. 337, 143 N. E. 2d 731, the court interpreted audible signal as the instruction by the trial court interpreted it. "To hold that the above mentioned section has no application simply because De Pew testified that he did not hear a signal would render the statute nugatory. 'Audible signal,' as used in Section 4511.27, Revised Code, means an adequate signal; a signal capable of being heard; a signal which is heard, or in the exercise of ordinary care should have been heard." Werner Transp. Co. v. Zimmerman, 201 F. 2d 687 (7th Cir.), and Clark v. Sterrett (Ind. App.), 220 N. E. 2d 779, also support the trial court's instruction.

The action of the district court in entering the jury verdict of guilty, suspending further proceedings and placing defendant on probation for 18 months, and overruling the motion for new trial is correct and is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

I dissent. The degree of negligence or culpability

which is sufficient to convict an individual on a charge of motor vehicle homicide is difficult to define. "Obviously, it is not any slight breach of duty but rather a gross failure to do what is required of one." Delay v. Brainard, 182 Neb. 509 at page 514, 156 N. W. 2d 14.

The clear thrust of the majority opinion is that any unlawful operation of a motor vehicle is sufficient to convict the operator of motor vehicle homicide if the death of an individual results from it. This has not been and should not be the law. The conduct of the defendant here did not establish a reckless or careless disregard of, or indifference to, the rights and lives of other persons. He did fail to see and hear an approaching emergency vehicle which had the right-of-way. While this was a failure to yield the right-of-way, it was not motor vehicle homicide.

BOSLAUGH and SMITH, JJ., concur in this dissent.

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VIRGINIA HEISNER, APPELLEE, V. BOBBY JONES ET AL., APPELLEES, PROTECTIVE FIRE AND CASUALTY COMPANY, GARNISHEE-APPELLANT.
169 N. W. 2d 606

Filed July 25, 1969. No. 37170.

1. **Covenants: Insurance.** Covenants which require parties to arbitrate any future dispute and to be bound by the result, thus precluding them from presenting the controversy in court, will not be enforced.
2. **Insurance: Actions.** An uninsured motorist clause in an insurance policy reciting that insurer's liability is to pay the amount insured shall be legally entitled to recover as damages from the operator of an uninsured automobile implies that the amount plaintiffs may recover should be determined by processes of law and thus by a court rather than by an arbitrator.
3. ———: ———. A provision in an automobile liability insurance policy which proscribes and inhibits an insured's action and recovery for injuries sustained in an accident arising out of ownership or use of an uninsured automobile is void.
4. ———: ———. A provision in an automobile liability in-

surance policy with relation to uninsured motorist's coverage which provides that the insurer will not be bound unless the insured's action is brought with the written consent of the insurer, and which is incorporated into the policy for the purpose of enforcing a void arbitration provision is void as against public policy.

5. ———: ———. Under section 25-328, R. R. S. 1943, an uninsured motorist's insurance carrier generally has a right to intervene in litigation between its insured and an uninsured motorist tort-feasor as to the issues of liability and damages arising out of an accident between its insured and the uninsured motorist tort-feasor.

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

Blevens and Bartu, for appellant.

John P. Miller and Eisenstatt, Morrison, Higgins, Miller, Kinnamon & Morrison, for appellee Heisner.

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

WHITE, C. J.

This appeal arose out of a garnishment action brought by Virginia Heisner, wife of the insured, against Bobby Jones and Betty Barrett, and Protective Fire and Casualty Company to enforce Protective Fire and Casualty Company's contractual obligations under the uninsured motorist provision of an insurance policy issued to the insured. From a decision for the plaintiff, Virginia Heisner, Protective Fire and Casualty Company, hereinafter referred to as Protective, appeals.

The facts are stipulated. Protective is the automobile insurance carrier for Richard Heisner and his wife Virginia Heisner, the plaintiff. Included in the policy is uninsured motorist coverage. On December 24, 1966, Virginia Heisner was involved in an accident with an automobile driven by defendant Bobby Jones and owned by defendant Betty Barrett. She suffered personal injuries, requiring medical attention and treatment, and

incurred other expenses incidental to the injuries. The Barrett vehicle was subsequently found to be uninsured. Richard Heisner and Protective settled the collision loss but subsequent negotiations between the plaintiff and Protective were unsuccessful concerning payment under the policy for her physical injuries. On March 21, 1967, the plaintiff filed a petition in the district court for Douglas County praying for damages against driver Bobby Jones and owner Betty Barrett. The next day, the attorney for the plaintiff notified Protective that suit had been filed and sent a copy of the petition. Protective did not consent to be bound by judgment resulting from the lawsuit. A default judgment for $7,500 was entered against defendant Betty Barrett and request was made to Protective by the plaintiff to pay that amount under its uninsured motorist's coverage. Protective advised that it did not consider the judgment binding upon it under the terms of the policy since it did not consent, and subsequently made an offer of settlement in the amount of $1,250. Protective also indicated that it was also willing to arbitrate in accordance with another provision in its policy. After a renewed demand by plaintiff that Protective satisfy the judgment for $7,500, Protective made formal demand for arbitration. Plaintiff, instead, commenced the garnishment proceedings from which this appeal is taken.

The portion of the uninsured motorist provisions in the insurance policy with which we are concerned requires Protective: "To pay all sums which the insured * * * shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury * * * caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this coverage, determination as to whether the insured * * * is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement

between the insured * * * and the company or, if they fail to agree, by arbitration."

The arbitration clause provides that: "If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile * * * or do not agree as to the amount * * * then, upon written demand of either, the matter * * * shall be settled by arbitration * * * and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators * * *."

Protective, in another provision, declines to be bound to a judgment without its consent: "No judgment against any person * * * alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled *unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company.*" (Emphasis supplied.)

The trial court found that both the arbitration provision and the provision by which Protective, without its consent, declines to be bound in a separate action by the insured against the uninsured motorist, were invalid and ruled that Protective must pay the amount of the judgment. We affirm the judgment of the district court.

The arbitration clause in the policy compelling the parties to a contract to arbitrate and thus to oust the court of jurisdiction to settle the dispute is against public policy in Nebraska. This long-standing rule was first announced in German-American Ins. Co. v. Etherton, 25 Neb. 505, 41 N. W. 406, as follows: "Where a policy provides that the whole matter in controversy between the parties, including the right to recover at

all, shall be submitted to arbitration, the condition is void."

Later decisions which have followed this rule include: National Masonic Accident Assn. v. Burr, 44 Neb. 256, 62 N. W. 466; Schrandt v. Young, 62 Neb. 254, 86 N. W. 1085; Phoenix Ins. Co. v. Zlotky, 66 Neb. 584, 92 N. W. 736; Wilson & Co., Inc. v. Fremont Cake & Meal Co., 153 Neb. 160, 43 N. W. 2d 657.

Assaults on the doctrine of the invalidity of an arbitration clause are continually reasserted in new contexts in the development of the law. It is asserted that the novel situation present in the scheme of uninsured motorist's coverage permits an application of the doctrine without the violation of the public policy principles upon which the doctrine is founded. Perhaps the best answer to these assertions is found in the recent case of Barnhart v. Civil Service Employees Ins. Co., 16 Utah 2d 223, 398 P. 2d 873. In that case an identical provision and the same assertion was made to the Utah court. In deciding the same questions and arguments presented in the appellant's brief in this case, the court said as follows: "* * * all persons who desire to do so should also be encouraged to resort to the orderly processes of law for the purpose of settling disputes or grievances, real or imaginary, nor (and) that they should be allowed free access to the courts for that purpose. * * * It is thus to be seen that covenants which prevent a party from having access to court runs counter to both the expressed purpose and the spirit of our system of justice. This is further accented because such a provision purports to confer final judicial authority on private arbitrators and tends to divest the official courts of jurisdiction. This precludes them from fulfilling their responsibility of remaining available to adjudicate all controversies for anyone seeking justice. The reticence with which this should be done is further emphasized by realizing that such enforcement of finally binding arbitration cuts into the procedural safeguards our law provides in-

cluding the right to have a trial by jury if one so desires, and the right of review on appeal."

Noting the difference in the position of the parties and the practical reality of the execution of the insurance contract, the Utah court further said there are: "* * * many paragraphs of fine print, among which is immersed the arbitration provision. The insured is usually simply in the position of desiring to purchase some automobile liability insurance, and insofar as the policy is concerned, is not in a position to frame his own policy or to propose conditions of his own. He is obliged to take the policy that is offered with its various and sundry provisions, many of which he is quite unaware of. With respect to this arbitration, even if it were discovered, its meaning and effect are somewhat uncertain even to lawyers and judges, and presumably would be more so to laymen, most of whom are not disposed either by training or inclination to cope with the multifarious provisions of such a formidable document. The insured is not required to read, nor to understand, nor to sign anything, but only to pay his premium. The practical reality is that the lay purchaser is in an inferior bargaining position and simply accepts unilaterally the policy as prepared by the company. Under such circumstances, it would be inequitable and unjust to hold that he had given up so important a privilege as his right to seek justice in court unless it clearly appeared that he was aware of what he was doing, and that he had voluntarily made such a commitment."

The provision that the insurer is liable for the amounts that the insured may be "legally" entitled to recover from the tort-feasor is given special significance in relation to the arbitration provision by the Utah court. On this point, that court said as follows: "* * * there are others arising from the context of the contract itself which also have a bearing on the conclusion we reach. It recites that the defendant's liability is to pay the amount the insured 'shall be *legally* entitled to recover as dam-

ages' from the operator of an uninsured automobile. The reasonable import of that language would seem to be that the amount plaintiffs may recover should be determined by the *processes of law* and thus by a court rather than by an arbitrator. Even more important in that connection is the fact that it is difficult to perceive how plaintiffs and the defendant could determine by arbitration what plaintiffs might be 'legally entitled' to recover from a third party, the uninsured motorist (Welcker). The latter, not being a party to the insurance contract, could not be bound by arbitration between the plaintiffs and defendant. Whether plaintiffs are legally entitled to recover from Welcker, and if so, the amount of damages, could only be determined between the plaintiffs and Welcker."

We, therefore, come to the conclusion that the compulsory arbitration clause involved in this insurance policy and considered in the context of an uninsured motorist's coverage is void and of no force and effect because it contravenes public policy expressed in German-American Ins. Co. v. Etherton, *supra,* in that it operates "to oust the courts of their legitimate jurisdiction." The problem then becomes: Does the insurer, Protective, have an available and adequate remedy to settle the issues of liability and damages giving rise to its contractual duty? We note here also as significant the contractual provision in which Protective becomes subrogated to the insured's right against the tort-feasor. Its coverage is limited and the insured's right of action may be a very valuable one both to recover damages in excess of the coverage and as a means of enforcing the contractual subrogation obligation of the insured. It, therefore, appears that if the clause in the policy requiring consent by the insurer before it becomes bound in an action between the insured and the uninsured motorist is valid, the insured, absent consent, would be compelled to bring two lawsuits to properly protect his rights. The insured would be required to sue the uninsured motorist to obtain

a judgment which may be in excess of the limits on the uninsured motorist's coverage he possesses. This lawsuit, not complying with the consent provision, would necessitate a second suit against the insurer to litigate the issues of liability and damages due from the insurer under the uninsured motorist's clause. Such a multiplicity and confusion of issues and the attendant expense should be avoided if possible. There is no issue in this case with reference to notice or the overreaching of Protective. The evidence shows that at all times Protective had full notice of the actions of the insured, of the suit against the tort-feasor, and that it deliberately took the position that it now takes in this case. The issue then is whether the "consent to be bound" provision is valid between the insured and Protective.

It seems to us apparent that, although separately printed and stated in the policy, the consent to be bound provision and the arbitration clause provision are mutually complementary and mutually reciprocal, and inducive to each other, and therefore must be stricken as a part of an arbitration scheme which is void as against public policy.

We hold that the uninsured motorist carrier, Protective, is fully protected as to all of its rights by permitting it to intervene in the litigation, as was present here, between the insured and the tort-feasor. Our intervention statute, section 25-328, R. R. S. 1943, provides: "Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences."

It is apparent that the questions litigated and the action between the insured and the uninsured tort-feasor for liability and damages, are the identical issues which determine liability of Protective under the insurance policy and which give rise to Protective's contractual duty to pay the insured. Protective has a direct interest in the matter of litigation within the meaning of our intervention statute.

Other courts faced with this same situation have come to the same conclusion. In State ex rel. State Farm Mutual Automobile Ins. Co. v. Craig (Mo. App.), 364 S. W. 2d 343, 95 A. L. R. 2d 1321, intervention was permitted by the insurer in an action by its insured against an uninsured motorist. The court found that State Farm would be bound by the judgment on the issues of liability and damages giving rise to its contractual duty to pay sums which the insured is legally entitled to recover, and therefore concluded that the insurer may be bound by a judgment in the action within the meaning of Missouri's intervention statute.

In Dominici v. State Farm Mutual Automobile Ins. Co., 143 Mont. 406, 390 P. 2d 806, the Supreme Court of Montana struck down both an arbitration clause and a "consent to be bound" clause and suggested that intervention would protect the insurer against being required to pay under its contract based upon a judgment where liability and damages were not adequately litigated. The court said: "We must admit that this, or any other, insurance carrier is thrown upon the horns of a dilemma by this interpretation of this type of insurance contract. However, the harshness may be ameliorated through the use of intervention (See State of Missouri ex rel. State Farm Mutual Automobile Insurance Co. v. Craig, Mo. App., 364 S. W. 2d 343), or possibly a plaintiff's use of joinder. This court appreciates the problems involved in such insurance coverage and the benefits to be derived by society in general. But we cannot countenance unreasonable obstructions which restrict

the use of the courts to be placed in the path of a just recovery. So long as proper and timely notice is given an insurance carrier so their rights are not prejudiced we do not feel that they are being imposed upon."

We therefore hold that an uninsured motorist's carrier may intervene in an action between its insured and the uninsured tort-feasor in order to protect itself on the issues of liability and damages arising under the uninsured motorist's provisions of its insurance policy. It is further clear that our holding herein is conditioned upon and rests upon the compliance by the insured with the fundamentals of procedural due process. The carrier would not be bound unless given full notice and adequate opportunity to intervene and defend when the insured litigates the issues of liability and damages with the uninsured motorist tort-feasor. To give the uninsured motorist's carrier the right to intervene is to give assurance that it may litigate the issues and at the same time avoid the multiplicity of suits and the harrassment of the insured by the necessity to litigate his rights twice. The terms of his contract and the uninsured motorist's statutes imply that they need to be litigated only once. We have recently held in Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N. W. 2d 133, that the proper interpretation of our statutes on uninsured motorist's liabilities is that the uninsured motorist clause is a *substitute* liability policy. It is true that this may place the carrier in an inconvenient position with respect to the issues of negligence and contributory negligence. We see no difference between this situation and the common situation where the carrier has coverage on two insureds involved in the same accident. Beyond that the carrier receives a separate premium for a policy which on its face requires it to be placed in an ambivalent or inconsistent position and it therefore calculatedly assumes the inconveniences that may arise from that situation. In any event, balancing these considerations, the inconvenience of the insurer must give way to the over-

riding public policy expressed in our statute protecting an insured against the danger of the uninsured motorist.

The insurer is bound by the law of the State of Nebraska and the applicable statutes. It was well aware that its arbitration clause was unenforceable and it is apparent that its "consent to be bound" clause was an integral and inducing provision to enforce the requirement of arbitration. It had full notice and an opportunity to intervene but instead chose to rely upon and to test a procedure dictated in its insurance policy provisions which would oust the courts of their jurisdiction and subject their own insured to the harassment and confusion of a multiplicity of suits which is contrary to the basic public policy of the state requiring the insurer to the extent of the coverage required to provide a substitute liability policy for the uninsured motorist tortfeasor.

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

AFFIRMED.

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GROWERS CATTLE CREDIT CORPORATION OF OMAHA, A CORPORATION, APPELLANT, V. MELVIN SWANSON, APPELLEE.

169 N. W. 2d 692

Filed July 25, 1969. No. 37172.

1. **Bills and Notes: Tender.** Where a certain sum of money is tendered by a debtor to a creditor on condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the creditor must either refuse the tender or accept it as made subject to the condition. If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary.
2. **Judgments: Pleadings.** The purpose of a summary judgment proceeding is to pierce the allegations of the pleadings and to show conclusively that the controlling facts are otherwise than as alleged and that the moving party is entitled to judgment as a matter of law.

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

Allen F. Black and Maupin, Dent, Kay, Satterfield & Gatz, for appellant.

James R. Kelly and Johnson, Kelly, Evans & Spencer, for appellee.

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

WHITE, C. J.

This is an action to recover the principal balance on three promissory notes, admittedly signed and executed by the defendant. The trial court sustained a motion for a summary judgment in favor of the defendant and the plaintiff appeals. We affirm the judgment of the district court.

The defendant signed three promissory notes of varying dates in 1962 and 1963 in the sums of $170,000, $250,000, and $385,241.96.

In his original petition herein the plaintiff sought to recover from the defendant three "service charges" on the three notes in the sums of $850, $1,225, and $2,867 for a total of $4,942. In an amended petition the plaintiff sought recovery for the same amount, alleging that the amounts recited above were unpaid principal balances. The defendant in his answer to the amended petition, in substance, alleged that said notes had all been paid in full and had been discharged; that he had received the notes from the plaintiff; and that there were no balances due or owing on said notes.

The evidence in this case shows that on or about December 28, 1964, the defendant received a statement from the plaintiff setting forth the amount of $272,483.54 as the current balance owing on these notes. Included in this amount were the sums of "services charges" for which the plaintiff now is specifically seeking recovery. A misunderstanding or dispute arose between the parties

as to the payment of "service charges" in the amounts hereinbefore recited. On December 30, 1964, the counsel for the defendant, Mr. Kelly, and the plaintiff's Minnesota counsel, Mr. Joseph, engaged in a long distance telephone conversation wherein these obligations, disputes, and misunderstandings were discussed. Following this telephone conversation, the defendant, through his counsel, Mr. Kelly, wrote to the plaintiff (enclosing a check for $267,299.78) as follows. This letter is set out in full.

"December 30, 1964
Maslon, Kaplan, Edelman, Joseph & Borman
Attorneys at Law
1200 Builders Exchange Building
Minneapolis 2, Minnesota

Attention: Mr. Roger E. Joseph

RE: MELVIN SWANSON, ARCADIA, NEBRASKA. ACCOUNT WITH THE GROWERS COMPANY OF MINNEAPOLIS.

"Pursuant to our telephone conversation this morning I am enclosing herewith a check payable to The Growers Companies in the amount of $267,299.78. This is broken down as follows: Statement of the Growers Company of amount due to December 28th of $272,483.54 plus two day's interest at the rate of $47.87 per day or $95.74, for a total of $272,579.28. The fees of the Growers Company which is in contest here to date as of the statements of the Growers Company amount to $5,279.50. Deducting the fees of $5,279.50 leaves the balance due as of this date of $267,299.78, the amount of the check here enclosed.

"This check is sent to you for delivery to the Growers Companies, *conditioned* that the Growers Company release all mortgages of Melvin Swanson occassioned (sic) by this debt and return to Melvin Swanson through this office *all notes* signed by Melvin Swanson as evidence of this indebtedness.

"*When we have received these* instruments you are then

directed and authorized to present the enclosed check to the Growers Company.
"With reference to the fees and commissions charged of $5,279.50, you are hereby notified that *we refuse to pay those amounts alleging they are unlawful and arbitrarily charged* without the consent, permission or authorization of the said Melvin E. Swanson.
James R. Kelly
dnh
Enclosure 1
Certified Mail,/Return Receipt Requested." (Emphasis supplied.)

Plaintiff concedes that the check for $267,299.78 was immediately cashed by the plaintiff; the promissory notes and the chattel and real estate mortgages were satisfied; and the promissory notes sued upon were returned to the defendant. There is no contention of fraud or misrepresentation on the part of either the plaintiff or defendant. After cashing the check and in a letter of January 4, 1965, to defendant's counsel, the plaintiff attempted to reserve the dispute in connection with the service charges by reasserting his claim to these charges and stating that it was its understanding that the amount of the service charges was being held by the defendant in a separate account and subject to further litigation and compromise and settlement.

The defendant categorically denied any liability for service charges, and in his pleading and in the letter recited above, consistently refused to recognize any portion of the claim for service charges. The evidence shows that the agreement for service charges is not included in the notes and rests upon an alleged oral understanding and agreement between the parties. According to the defendant's own concession in the pleadings, in the correspondence of the parties, and in his brief, it was a disputed and unsettled account or portion of the indebtedness. Here applicable is a well-settled principle of Nebraska law that where a certain sum of

money is tendered by a debtor to a creditor on condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the creditor must either refuse the tender or accept it as made subject to the condition. If *he accepts* it, *he accepts the condition also, notwithstanding any protest he may make to the contrary.* Treat v. Price, 47 Neb. 875, 66 N. W. 834. This rule has been followed in Beckman v. Birchard, Bridge & Co., 48 Neb. 805, 67 N. W. 784; Chicago R. I. & P. Ry. Co. v. Buckstaff, 65 Neb. 334, 91 N. W. 426; Canadian Fish Co. v. McShane, 80 Neb. 551, 114 N. W. 594, 14 L. R. A. N. S. 443, 127 Am. S. R. 791; T. M. Partridge Lumber Co. v. Phelps-Burruss Lumber & Coal Co., 91 Neb. 396, 136 N. W. 65; Crilly v. Ruyle, 87 Neb. 367, 127 N. W. 241; Hileman v. Maxwell, 97 Neb. 14, 149 N. W. 44.

An interpretation of the letter of December 30, 1964, from the defendant to the plaintiff is not necessary. It could well have been drafted with the language of Treat v. Price, *supra,* in mind. The acceptance and cashing of the check, the satisfaction and discharge of the chattel and real estate mortgages, and the discharge and return of the notes released the obligation of the notes sued on. The afterthought protest and attempt to revive the dispute was ineffectual, under the exact language of the rule announced in Treat v. Price, *supra.* In plain language, it is an attempt of a party to have his cake and eat it too.

Applicable here also are the following provisions of the Uniform Negotiable Instruments Law in full force and effect at the time of the transactions in question: "A negotiable instrument is discharged * * * (3) by the intentional cancellation thereof by the holder; * * * (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right." § 62-1,119, R. R. S. 1943 (Reissue of 1958).

The defendant substantially pleaded that the notes had been paid and discharged. The pleadings in this case have been pierced to show conclusively that in the dis-

pute as to the alleged principal balance due that the plaintiff had received and cashed a check tendered on condition of full acceptance and thereafter returned and discharged the notes and chattel and real estate mortgages involved. The purpose of a summary judgment proceeding is to pierce the allegations of the pleadings and to show conclusively that the controlling facts are otherwise than as alleged and that the moving party is entitled to judgment as a matter of law. Prairie View Tel. Co. v. County of Cherry, 179 Neb. 382, 138 N. W. 2d 468.

The action of the district court in sustaining the defendant's motion for a summary judgment was in all respects correct and is affirmed.

AFFIRMED.

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MILES HOMES, INC., OF NEBRASKA, APPELLANT, V. WALTER A. MUHS, JR., ET AL., APPELLEES.
169 N. W. 2d 691

Filed July 25, 1969. No. 37199.

**Homesteads: Mortgages.** Lack of the statutory acknowledgment to an improvement mortgage on a homestead does not preclude enforcement of the mortgage.

Appeal from the district court for Stanton County: GEORGE W. DITTRICK, Judge. Reversed and remanded.

Barney, Carter & Buchholz and Brogan & Monen, for appellant.

McFadden & Kirby, for appellees.

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

SMITH, J.

Defendants gave an unacknowledged mortgage on their homestead to plaintiff, a materialman, in order to

finish their dwelling house. In this foreclosure suit the district court dismissed plaintiff's petition on the ground that the mortgage without defendants' formal acknowledgment was unenforceable. Plaintiff has appealed.

Defendants, Walter A. Muhs, Jr., and wife, had purchased an acre tract in Stanton County, Nebraska, from his parents. The price for the tract which formed a part of a quarter section owned and occupied by his parents, was $1. In October 1960 defendants established their homestead in a small trailer and lean-to on the land. In the spring of 1961 leaks in their trailer caused them to move into the parents' farmhouse, where they were to reside the next 2¾ years. In June 1961 they began to construct the basement for their dwelling house on the land.

On May 24, 1962, defendants issued their installment note for $9,288 payable to plaintiff, stating: "This note is secured by a mortgage of even date executed by the undersigned . . . and represents payment . . . for materials . . . used in the improvement . . . of the property described in said mortgage." The mortgage was signed and delivered without defendants' acknowledgment. Subsequently, but prior to recordation on February 4, 1963, it was altered by addition of a false certificate of acknowledgment. The building materials went into construction of the house. The oral agreement to sell the acre tract to defendants was performed by a conveyance dated and recorded in March 1964.

The statutory exemption, the acknowledgment requirement, and some of the exceptions read: "A homestead not exceeding in value two thousand dollars, consisting of the dwelling house . . ., its appurtenances, and the land on which the same is situated, . . . shall be exempt from . . . forced sale, except as provided in sections 40-101 to 40-117 . . .." § 40-101, R. R. S. 1943. "The homestead is subject to . . . forced sale in satisfaction of judgments obtained (1) on debts secured by mechanics', laborers', or vendors' liens upon the premises; and (2)

on debts secured by mortgages upon the premises executed and acknowledged by both husband and wife, or an unmarried claimant." § 40-103, R. R. S. 1943. "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife . . .." § 40-104, R. R. S. 1943.

The status of an unacknowledged improvement mortgage on a homestead is not settled. A related problem arose in City Savings Bank v. Thompson, 91 Neb. 628, 136 N. W. 992, 41 L. R. A. N. S. 89, a proceeding for foreclosure of a land contract that the vendee's husband had refused to sign. The wife had contracted with the intention of moving their dwelling house to the land purchased. The agreement included as purchase money the vendor's loan for the house-moving and other improvements on the land. The court on a 4-3 division decided that the improvement loan was no part of the purchase money. The majority opinion emphasized the husband's refusal to sign the agreement which related to his preexisting homestead interest in the house.

The statutory provisions for vendors' and mechanics' liens reflect a policy against acquisition or improvement of a homestead without payment. The policy limits the requirement for both spouses' acknowledgment, a requirement probably conceived to prevent coercion of the wife. See, Foster, "The Nebraska Homestead," 3 Neb. L. Bull., 353, 369; Haskins, "Homestead Exemptions," 63 Harv. L. Rev., 1289, 1305.

Lack of the statutory acknowledgment to an improvement mortgage on a homestead does not preclude enforcement of the mortgage. The City Savings Bank case to the extent of conflict is disapproved. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

WHITE, C. J., dissenting.

I respectfully dissent. The statute says: "The homestead is subject to . . . forced sale in satisfaction of judg-

ments obtained (1) on debts secured by mechanics', laborers', or vendors' liens upon the premises; and (2) *on debts secured by mortgages* upon the premises executed and *acknowledged* by both husband and wife, or an unmarried claimant." § 40-103, R. R. S. 1943. "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is *conveyed or encumbered* is executed and *acknowledged* by both husband and wife . . .." § 40-104, R. R. S. 1943. (Emphasis supplied.)

I think the statute means what it says.

CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1969

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STATE OF NEBRASKA EX REL. LOREN B. BELKER, APPELLANT, V. BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA ET AL., APPELLEES.
171 N. W. 2d 156

Filed October 3, 1969. No. 37004.

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

Ginsburg, Rosenberg, Ginsburg & Krivosha and Rodney P. Cathcart, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellees.

McGinley, Lane, Mueller & Shanahan, Maupin, Dent, Kay, Satterfield & Gatz, and Gary L. Scritsmier, for amicus curiae.

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

PER CURIAM.

This action seeks to enjoin the sale of all of the school lands held in trust for and on behalf of the common schools of Nebraska, and to declare sections 72-257 and 72-258, R. S. Supp., 1967, and 72-258.01, R. R. S. 1943 (as amended by Laws 1965, c. 435, §§ 2, 3, and 4, pp. 1386 and 1387, and Laws 1967, c. 466, §§ 10 and 11, p. 1450), void and unconstitutional.

Four judges are of the opinion that the statute is unconstitutional as challenged. Three judges are of the opinion that it is constitutional under present conditions, and refuse to consider the situation as it may appear in 1975 when approximately one-half of all school land leases will expire. Article V, section 2, Constitution of Nebraska, provides in part: "No legislative act shall be held unconstitutional except by concurrence of five judges."

The court is in agreement that the phrase "all mineral rights" in section 72-257, R. S. Supp., 1967, is declaratory of Article III, section 20, Constitution of Nebraska, and that the Legislature within constitutional limits may direct the Board but not a county treasurer to auction common school lands.

The district court dismissed the action herein. The judgment, under Article V, section 2, Constitution of Nebraska, must be affirmed.

AFFIRMED.

SPENCER, J., joined by WHITE, C. J., NEWTON, J., and COLWELL, District Judge.

The real question at issue herein is whether the words "under the direction of the Legislature" grant to the Legislature the right to deprive the Board of Educational Lands and Funds of the State of Nebraska of all discretionary rights and duties of a trustee, including the responsibility to dispose of trust property on the most advantageous terms it is possible to secure.

Plaintiff is a citizen, resident, and taxpayer of the State of Nebraska and the parent of a child of school age residing with him in Nebraska who is a beneficiary of the trust created for the benefit of children of school age, and he brings this action in his own behalf and on behalf of all others similarly situated.

The petition herein had been presented to the Attorney General prior to its filing. The Attorney General denied the request of the petitioner and refused to file said action. On December 31, 1967, there was a total

of 1,622,159.53 acres owned by the Board of Educational Lands and Funds of the State of Nebraska, hereinafter referred to as Board. Of that total, 1,621,061.58 acres were under lease. Since January 1, 1968, the Board had sold some of the lands and it was stipulated that it intends to continue selling school lands as the leases expire. In connection with the school lands sold at the expiration of their leases, the sum of $11,916.99 was expended between January 1, 1968, and March 25, 1968.

There were 294 leases which expired in 1968, and approximately 250 will expire each year until 1975, at which time approximately one-half of all the leases, with a present valuation of 75 million dollars, will expire. As of January 1965, the school lands had a value of $39,500,000. By December 1967, when a reappraisal of the school lands had commenced, the value was $70,100,000. There is 15 million dollars in the permanent school fund, representing proceeds realized from sales over the years of 1,300,000 acres of school land. That 1,300,000 acres, if still owned by the state, would have an approximate valuation of 250 million dollars.

Testimony on behalf of the plaintiff that the volume of sales required by the act would depress the market and would lower the value of the individual tracts, and that the present source of available funds could not possibly support the sales when the majority of the leases expire, stands undisputed in this record. Plaintiff's expert witness testified that it would not be a prudent or a sound investment policy to sell all the real estate and to invest the proceeds in government bonds. This testimony also stands undisputed. Plaintiff's expert further testified that his organization at the present time was actively selling government bonds and was placing more emphasis on equity investments, such as real estate.

In order to understand the questions presented herein, it is necessary to examine the historical background

of and the source of title to the school lands in Nebraska. On May 30, 1854, Congress approved an act for the purpose of organizing the territories of Nebraska and Kansas. Section 16 of that act, 10 Stat. at L., p. 283, is as follows: "And be it further enacted, That when the lands in the said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same."

Nebraska became a state by virtue of an Enabling Act of Congress approved April 19, 1864. (13 Stat. at L., p. 47.) By the terms of this act, sections 16 and 36 of each township were granted to the state for the support of the common schools except in cases where sales had been made, in which event the state was granted other lands equivalent in area. Nebraska adopted a Constitution within the territory in 1866, and was admitted into the Union on March 1, 1867. By its admission, it assumed the privileges and duties of statehood, including those imposed by the Enabling Act referred to above, which included the acceptance of the lands and funds for the common schools of the state.

The Constitution of Nebraska, 1866, contained the following provision: "The principal of all funds arising from the sale, or other disposition of lands or other property, granted or entrusted to this State for educational and religious purposes, shall forever be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations. The Legislature shall make such provisions by taxation or otherwise, as, with the income arising from the school trust funds, will secure a thorough and efficient system of common schools throughout the State; but no reli-

gious sect or sects, shall ever have any exclusive right to, or control any part of the school funds of this state."

Sections 1, 2, and 3, of Article VIII, of the Constitution of Nebraska, 1875, which amended the Constitution of 1866 with regard to school lands and funds, their use and supervision, provided as follows: "Section 1. The governor, secretary of state, treasurer, attorney-general, and commissioner of public lands and buildings shall, under the direction of the legislature, constitute a board of commissioners for the sale, leasing, and general management of all lands and funds set apart for educational purposes, and for the investment of school funds in such manner as may be prescribed by law.

"Sec. 2. All lands, money, or other property granted, or bequeathed, or in any manner conveyed to this state for educational purposes, shall be used and expended in accordance with the terms of such grant, bequest, or conveyance.

"Sec. 3. The following are hereby declared to be perpetual funds for common school purposes, of which the annual interest or income only can be appropriated, to-wit: First. Such per centum as has been, or may hereafter be granted by congress on the sale of lands in this state. Second. All moneys arising from the sale or leasing of sections number sixteen and thirty-six in each township in this state, and the lands selected, or that may be selected in lieu thereof. Third. The proceeds of all lands that have been, or may hereafter be granted to this state, where, by the terms and conditions of such grant, the same are not to be otherwise appropriated. Fourth. The net proceeds of lands and other property and effects that may come to the state, by escheat or forfeiture, or from unclaimed dividends, or distributive shares of the estates of deceased persons. Fifth. All moneys, stocks, bonds, lands, and other property, now belonging to the common school fund."

Except for the composition of the board of commis-

sioners, whose function is still the same, there has been no material change made with regard to school lands and funds since the Constitution of 1875.

Section 72-257, R. S. Supp., 1967, provides as follows: "All lands, now owned or hereafter acquired by the state for educational purposes, shall be sold at the expiration of the present leases. The Board of Educational Lands and Funds shall retain all mineral rights in the land sold. Prior to such sale, the land shall be appraised for sale purposes in the same manner as privately-owned land by a representative appointed by the Board of Educational Lands and Funds, and thereafter shall be sold at public sale at not less than the appraised value; Provided, that when two or more contiguous tracts within a section are under separate leases with different expiration dates the board may, if it is deemed to be in the best interest of the state, defer the sale of any tract of one hundred sixty acres or less having an earlier lease expiration date, and may offer the tract for lease for less than twelve years to coincide with the expiring lease of the contiguous tract, in order that the contiguous lands within a section may eventually be offered for sale on the same date."

Section 72-258, R. S. Supp., 1967, provides: "Such land shall be sold, at public auction, by a representative of the Board of Educational Lands and Funds or by the county treasurer of the county in which the land is located, to the highest bidder. The appraised value for sales purposes as provided in section 72-257 shall be the starting bid price. Notice of such sale and the time and place where the same will be held shall be given by publication three consecutive weeks in some legal newspaper published in the county where the tracts of land or the lots are located or, in case no legal newspaper is published in said county, then in some legal newspaper of general circulation therein. The proof of such publication shall be made by the affidavit of the publisher, foreman or principal clerk of such news-

paper or by some other person knowing about the same, and shall be filed in the office of the Board of Educational Lands and Funds; Provided, when the land consists of an undivided interest in realty, an action to partition may be maintained in the same manner as provided by law for the partition of real property among several joint owners. All notices of sale shall be posted in the office of the Board of Educational Lands and Funds. The board may arrange for such commercial advertising of land sales as it deems in the best interest of the state. Settlement shall be made by paying cash of not less than twenty percent of the purchase price at the time of sale and the balance shall be payable in cash within ninety days of the date of sale. If the person submitting the high bid for the land fails to pay the balance of the purchase price and complete the sale within ninety days his rights under the sale, including the twenty per cent down payment, shall be forfeited by the board and a new sale shall be authorized."

Section 72-258.01, R. R. S. 1943, provides: "If such land should not be sold according to provisions of sections 72-208, 72-257, and 72-258, then it shall be offered for lease as the Board of Educational Lands and Funds shall provide for a period of six years. No such leased land shall be subsequently offered for sale until the expiration of such lease."

It is to be noted that all the school lands except mineral rights shall be sold at the expiration of their present leases, and if the land is sold at not less than the appraised value as determined by a representative appointed by the Board, the Board has no discretion as to the approval or the disapproval of the sale.

The provision of the Enabling Act making the grant, the Constitution of 1866 setting apart and pledging the principal and income from such grant, and the subsequent act admitting the state into the Union under such Constitution, constitute a contract between the state and

the national government relating to such grants. See State v. Central Nebraska Public Power & Irr. Dist., 143 Neb. 153, 8 N. W. 2d 841.

The public school lands were received and are held in trust by the State of Nebraska solely for the benefit of the common schools of the State of Nebraska. The state as trustee of the lands and of the income therefrom is required to administer that trust estate under the rules of law applicable to trustees. The title of the lands is not vested in the state with all the ordinary incidents of other titles but the title thereto was granted to and vested in the state upon an express trust for the "support of common schools," with no right or power of the state to use, dispose of, or alienate the lands or any part thereof, except as allowed by the Enabling Act and the Constitution. Anyone dealing with the school lands must do so with knowledge of and subject to the trust obligation of the state. See Propst v. Board of Educational Lands & Funds, 156 Neb. 226, 55 N. W. 2d 653, 346 U. S. 823, 74 S. Ct. 39, 98 L. Ed. 348.

Any statute providing for the sale of school lands that does not permit the trustees to get the highest possible price is violative of the best interest of the trust and constitutionally a violation of the duties of the trustee. The statute in question forces the sale of school lands if someone bids the price at which they have previously been appraised, regardless of the fact that it could be evident that a higher price might be secured if the sale was not confirmed.

It has been suggested that the rejection and confirmation of bids can be inferred. To answer that question we need merely to refer to the legislative debate and action on the statute in question. Senators Budd and Harsh, in support of amendments to the act, argued that the Board of Educational Lands and Funds should have the right to reject bids. Senators Adamson, Paxton, Whitney, and Wylie vigorously opposed this position. Their efforts prevailed, indicating a legislative

intent that the Board be denied any right to reject or confirm bids.

It is fundamental that the intention of the Legislature may be expressed by omission as well as by inclusion. Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409; Johnson Fruit Co. v. Story, 171 Neb. 310, 106 N. W. 2d 182; Bass v. County of Saline, 171 Neb. 538, 106 N. W. 2d 860.

"It is not the province of the court to read into a statute something omitted from it by the Legislature or to discover a meaning not warranted by the legislative language. The omission of a word from an amendment of a statute must be assumed to have been intentional and for a purpose. Courts in giving effect to the amendment may not supply the omission." Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409. "To supply these defects, and others which appear in the act, requires legislation, and not judicial construction." State ex rel. Mickey v. Reneau, 75 Neb. 1, 104 N. W. 1151, 106 N. W. 451.

"I need scarcely say to the able lawyers that I am now addressing that no such power exists in the courts in cases of casus omissus. If it is true that this contingency absolutely escaped the attention of the law maker, then it is a case unprovided for, it is a casus omissus which cannot be supplied by judicial construction. I believe that is the doctrine of the law books. So that even looking at this case in the light that if we construed the law in a certain way, there would be a failure of the administration of the law, and hence considering every doubtful provision so as to make the law consistent with itself in all its parts, if that were necessary in this case, it would be impossible for any court to supply a casus omissus by giving force and effect to the language of the statutes when applied to a subject about which nothing whatever is said, and which, to all appearances, was not in the minds of the legislature at the time of the enactment of the law."

In re Contest Proceedings, 31 Neb. 262, 47 N. W. 923, 10 L. R. A. 803.

Any attempt to hold that approval of a sale is inferred or intended as justifying constitutionality is nothing less than judicial legislation. It is true that in the case of ambiguous language the court should give a construction consistent with the legislative intent, but where nothing is said at all concerning what is determined to be a defect, there can be no saving by construction because there is nothing to construe. In any event, in this case the legislative record indicates that the legislative intent was otherwise. The failure to provide for a review of the public sale price is constitutionally bad. Upset bids, fraudulent bids, the chilling of bids, etc., are all left by this act without remedy by the trustees.

This court is committed to the view that the equity jurisdiction conferred by the terms of the Constitution is beyond the power of the Legislature to limit or control. Lacey v. Zeigler, 98 Neb. 380, 152 N. W. 792. In John A. Creighton Home v. Waltman, 140 Neb. 3, 299 N. W. 261, we held that jurisdiction over the administration of trusts and supervisory jurisdiction over charitable trusts are inherent in equity courts of this state and in this court.

The constitutional directive of control over the Board by the phrase "under the direction of the Legislature" was not intended to and is not of sufficient breadth to allow the Legislature to take over the prerogatives of the Board. To hold otherwise would make the constitutional provisions for the Board meaningless.

Paraphrasing what we said in State v. Bartley, 40 Neb. 298, 58 N. W. 966, the power to sell, lease, and manage the educational lands of the state is conferred upon a distinct Board. The Constitution has placed the duty of investing the permanent school funds of the state in this Board. The authority thus conferred, the Legislature is powerless to take it away. The Legis-

lature may by statute provide the manner in which the educational lands shall be leased or sold, yet it cannot empower *anyone but the Board* to sell or lease such lands. The Legislature may prescribe the mode or manner in which permanent school funds shall be invested, but it has no power to relieve the Board of the duty of making such investments, nor can it authorize any other person or board to invest said funds.

It cannot be denied that the Board in the exercise of its sound discretion may sell some or all of the school lands when in the best interests of the trust it should be done, nor can it be denied that the Legislature may direct the Board to sell school lands within proper bounds for a fiduciary. The problem arises because the acts being questioned mandatorily direct that all of the lands *must* be sold regardless of the wisdom of the action at the particular moment. Further, section 72-258, R. S. Supp., 1967, provides: "Such lands shall be sold * * * by a representative of the Board of Educational Lands and Funds *or by the county treasurer* of the county in which the land is located, * * *." (Italics supplied.) This is an assumption of direct control over the school lands on the part of the Legislature, because the legislation manditorily decrees that the land be sold, and dictates how the sales must be conducted and who may conduct them. What discretion is left the Board in the exercise of its constitutional duty to act only in the best interests of the trust?

In State v. Central Nebraska Public Power & Irr. Dist., 143 Neb. 153, 8 N. W. 2d 841, we held: "Any act of the legislature by which the legislature seeks to assume direct control over the public school lands and remove the control of the board of educational lands and funds is unconstitutional, null and void."

We reiterate, the act requires that *all* school land *shall* be sold at the expiration of present leases. The Legislature is not directing but rather dictating that regardless of conditions the land be sold. What discre-

tion has it left the Board? How, under this mandate, can the Board carry out its fiduciary responsibility for the trust estate? The law is well established that trustees acting in a fiduciary capacity must at all times exercise such care and diligence in the management and control of a trust estate as would be exercised by a man of ordinary skill and prudence in the management of his own affairs. The designation of public school lands as a trust in the Constitution has the effect of incorporating into the constitutional provisions the rules of law regulating the administration of trusts and the conduct and duties of trustees. A breach of trust in such a situation is in effect a violation of the constitutional provision and has the effect of invalidating the legislation authorizing the breach.

In State ex rel. Ebke v. Board of Educational Lands & Funds, 159 Neb. 79, 65 N. W. 2d 392, this court said: " 'The school lands were received and are held in trust by the State of Nebraska for educational purposes. The state as trustee of the lands and of the income therefrom is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity.' " See, also, Banks v. State, 181 Neb. 106, 147 N. W. 2d 132.

The rule as to the duty of a trustee is stated in First Trust Co. v. Exchange Bank, 126 Neb. 856, 254 N. W. 569, as follows: "As a general rule, the measure of care and diligence required of a trustee is such as would be pursued by a man of ordinary prudence and skill in the managment of his own estate. 26 R. C. L. 1280, sec. 130. He must act honestly and faithfully, in what he believes to be the best interests of the cestui que trust. He must exercise sound discretion. He is bound to proceed with diligence in investigating the nature of the proposed investment, and to use such care in deciding as, in general, prudent men of intelligence and integrity in such matters would employ in their own affairs when making a permanent investment in which

the primary object is the preservation of the fund, and the secondary one that of obtaining an income therefrom."

The trial court stated in its journal entry: "The record casts serious doubt on the wisdom of the Legislature in directing the sale of *all* school lands but, upon a showing that a fair market value will accrue from said sale, the court is without power to interfere and the 'prudent man rule' is satisfied." Obviously here we cannot equate market value with the "prudent man rule." If the trial court was correct, and if the trustees obtained the best price obtainable at a particular moment, although to sell at that moment was foolhardy, the "prudent man rule" would be satisfied. This is not the law. It is the duty of a trustee to exercise due care, diligence, and skill in the sale of trust property so as to secure the most advantageous return possible. A trustee is guilty of a breach of trust in selling trust property under disadvantageous circumstances which it is in his power to avoid. 54 Am. Jur., Trusts, § 436, p. 346.

There is no requirement in the statute for sales at fair market value except by inference. Nowhere is the Board given the right to reject an appraisal, to ask for a reappraisal, or to confirm or refuse to confirm a sale, and as pointed out heretofore, the intent of the Legislature was to deny the Board this right. All that the statute requires is that some representative appraise the property "as privately-owned land" and that the appraised value, whatever it may be, shall be the starting price. To sustain the questioned acts we are required to disregard basic principles of trust law. This we cannot do. The law is void and unconstitutional.

For the reasons given, we find the questioned statutes to be void and unconstitutional. We would reverse the judgment herein.

BOSLAUGH, SMITH, and MCCOWN, JJ.

Public auction of state lands imports ". . . a sale . . . with absolute freedom for competitive bidding. Any agreement . . . to stifle competition or chill the bidding

is a fraud upon the principle upon which the sale is founded." State ex rel. Danaher v. Miller, 52 Mont. 562, 160 P. 513. The statutory requirements of appraisal and public auction assure that the trust will receive value for lands sold prior to 1975. Cf. Lassen v. Arizona Highway Dept., 385 U. S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515. Possibility of a glutted market in 1975 is too remote for consideration now.

School lands, income, and assets are held in trust and the administration of the trust estate is governed by the rules of law applicable to trustees acting in a fiduciary capacity. Anyone dealing with the school lands must do so with knowledge of, and subject to, the trust obligation of the state. Propst v. Board of Educational Lands & Funds, 156 Neb. 226, 55 N. W. 2d 653, 346 U. S. 823, 74 S. Ct. 39, 98 L. Ed. 348. The courts have jurisdiction to determine whether those rules of law have been complied with, and the power to set aside or confirm a sale. If the trustee, or persons dealing with the trust assets, desire a judicial determination as to the validity of any such sale, the courts are available. The fact that the sale statute is silent as to the procedures for such a determination does not alter the law of trusts, nor relieve the trustee of its trust obligations, nor make the statute unconstitutional. The statutes, apart from the reference to county treasurers, are not vulnerable to plaintiff's attack.

NEWTON, J.

The controlling opinion of Boslaugh, Smith and McCown, JJ., concedes the correctness of the fundamental principle enunciated in the opinion of Spencer, J. The Legislature cannot constitutionally bring about a sale of trust assets without recognition of the requirement that the trustee obtain the most advantageous possible sale of such assets. They seek to avoid application of this proposition by reading into the statute the inherent powers of the court in such cases, yet they fail to cite a single precedent sustaining this position. This is in

direct contradiction of the most basic of all rules of statutory construction.

The legislative intention, as evidenced by plain and unambiguous language, controls and a determination regarding constitutionality must be made on this basis alone. See Bachus v. Swanson, 179 Neb. 1, 136 N. W. 2d 189. The Constitution is the primary law of this state. If we are to hold, as does the controlling opinion, that any statute in derogation of a constitutional provision, when construed, shall have read into it any provision necessary to make it conform to constitutional requirements, or have read out of it provisions conflicting with the Constitution, we would effectively whitewash all legislative acts. We would then be assuming the position of a super Legislature with power to amend all such acts by judicial construction.

It is pointed out in the opinion of Spencer, J., that the Legislature, in the present case, specifically rejected language which would have permitted the trustee to conform to constitutional requirements. How then can we, in interpreting this act, say that nevertheless the Legislature intended to do that which it refused to do? We would then be supplying by implication the very thing which the Legislature pointedly rejected. Neither reason nor law can sustain such a position.

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STATE OF NEBRASKA, APPELLEE, V. KENNETH GRAHAM, APPELLANT.
171 N. W. 2d 62

Filed October 3, 1969. No. 37028.

Trial: Witnesses. Credibility is for the trier of the facts and the uncontradicted testimony of a witness does not have to be accepted.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

A. Q. Wolf and Fred J. Montag, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

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

MCCOWN, J.

The defendant, Kenneth Graham, was convicted of burglary by a jury. The sole issue on defendant's appeal is whether the State met the burden of establishing the voluntariness of a statement made by the defendant, within the ambit of the Miranda rules. We affirm the judgment and sentence.

The defendant was arrested at approximately 5 a. m. on the morning of December 27, 1967. The burglary with which he was charged had been committed July 19, 1967. At approximately 9:15 a.m. on December 27, 1967, defendant was taken to the interrogation room at the Omaha police station. After full and complete Miranda warnings and a waiver of rights, the defendant made a statement to the officer disclaiming any knowledge of the burglary. He was returned to the jailer at 9:30 a.m., and the officers continued their investigation in the field. The following afternoon, December 28, 1967, the defendant was again taken to an interrogation room. The full Miranda rights advisory warnings were again read to him. The State's testimony was that he was willing to make a statement, and affirmatively waived the services of an attorney after having been fully advised of his rights as required by Miranda. The officers then advised the defendant that they had statements from persons involved in the burglary, and that these statements implicated the defendant. The defendant, at his request, read these statements, and then made and signed his own statement and confession. There is no issue of misrepresentation as to the statements shown to the defendant, and the persons who made them testi-

fied to the essential substance of them at the defendant's trial, and prior to the hearing on voluntariness.

The police officers specifically testified that they made no promises or threats of any kind to the defendant. The officer who had interrogated the defendant on both occasions also testified that the defendant had never at any time asked him to see a lawyer or to use a telephone.

The defendant then testified that he had repeatedly requested the services of an attorney and the use of a telephone from unidentified and unnamed individuals at unspecified times, and that he had also made those requests to the officer who took his statement. He also testified that he signed the statement because the officers threatened to involve his brother, and also promised that if the statement was signed a low bond would be set.

The defendant contends that since the State did not produce rebuttal testimony directly denying the defendant's testimony of a specific promise and threat; nor his testimony of repeated requests for an attorney and the use of a telephone at unspecified times and to unidentified persons, the State did not meet the burden of proving voluntariness. The defendant's position is essentially that the testimony of a defendant on any specific point going to the issue of voluntariness is required to be accepted as true in the absence of direct controversion of that specific point. We cannot agree. It is evident that there was a direct conflict in the testimony as to some points, and the defendant's testimony might be said to be impliedly controverted on all points. Even if it were conceded that some portions of the defendant's testimony were uncontradicted, that would not require those portions to be accepted as true. Credibility is for the trier of the facts and the uncontradicted testimony of a witness does not have to be accepted. See, Wilson v. State, 150 Neb. 436, 34 N. W. 2d 880; Tyler v. Beto, 391 F. 2d 993. Miranda did not put a cloak of sanctity on the testimony of a defendant, or of a police officer, even though the testimony might be uncontradicted.

Factual issues as to voluntariness must be first determined by the court, and again by the jury if the court has first determined a statement to be voluntary.

Here the court properly found that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel, and that the confession or statement of December 28, 1967, was freely and voluntarily made.

The action of the court in admitting the confession or statement into evidence was correct and is affirmed.

AFFIRMED.

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JOSEPH L. KRAUSE, APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, APPELLEE.
170 N. W. 2d 882

Filed October 3, 1969. No. 37149.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. On motion for rehearing. See *ante* p. 588, 169 N. W. 2d 601, for original opinion. Motion for rehearing overruled.

William L. Howland, for appellant.

Healey & Healey, for appellee.

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

WHITE, C. J.

We have disposed of this case in our former opinion reported *ante* p. 588, 169 N. W. 2d 601, by reversing the judgment of the district court sustaining the demurrer and dismissing the first cause of action and remanding the cause for a new trial to establish the amount of attorney's fees to be allowed. This judgment was in error since the case is in this court on demurrer to the first cause of action and dismissal.

On motion for rehearing the judgment of the district court is reversed as to the first cause of action and the cause is remanded for further proceedings. The judgment of the district court dismissing the second cause of action is affirmed and the motion for rehearing otherwise is overruled.

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LOUIS KOSMICKI ET AL., APPELLANTS, V. P. J. KOWALSKI ET AL., APPELLEES.
171 N. W. 2d 172

Filed October 3, 1969. No. 37178.

1. **Schools and School Districts.** The Legislature has specifically authorized a school board or board of education of certain school districts to petition for a change in boundaries.
2. ———. The Legislature has plenary power 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.

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

Dean R. Armstrong and Perry, Perry, Sweet & Witthoff, for appellants.

Norman E. Stephens, Baylor, Evnen, Baylor, Urbom & Curtiss, Dier & Ross, and Robert T. Grimit, for appellees.

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

WHITE, C. J.

This is an appeal from a Sherman County district court order affirming an order of the county superintendent of schools of Sherman County, Nebraska, dissolving School District No. 16, a Class II district, and merging that territory in School District No. 1 of Sherman County, a Class III district.

On March 19, 1968, and March 21, 1968, petitions were signed by 100 percent of the members of the respective boards of education of School District No. 16 and School District No. 1 requesting the dissolution and attachment by the county superintendent. The petition by board members of School District No. 16 was signed at a special meeting on March 19, 1968, despite a vote not to merge by the majority of legal voters present at the meeting. In response to the school board petitions, the superintendent set a pubic hearing for May 17, 1968, and gave proper notice.

On April 26, 1968, a third petition was presented to the board of education of School District No. 16 requesting the board to call a special meeting on May 2, 1968, so that a vote could be taken by the legal voters present on a resolution directing the board members to withdraw their signatures from their petition requesting dissolution and attachment. No board member called the special meeting, but a meeting was held on May 2, 1968, and the above resolution was unanimously passed by the legal voters present at the meeting.

On May 17, 1968, the public hearing before the Sherman County superintendent was held upon the validity of the petitions signed by members of School Districts Nos. 16 and 1. At that time an order was entered dissolving School District No. 16 and attaching the territory to School District No. 1.

Appellants contend that the school board members of School District No. 16 had no authority to petition for merger because of the resolutions passed by a majority of legal voters present at purported special meetings against such a merger. They rely on section 79-508, R. R. S. 1943, which provides that: "The qualified voters of a district of the first or second class may also give such directions and make such provisions as they shall deem necessary in relation to the prosecution or defense of any proceeding in which the district may be a party or interested."

They argue that this statute gives the legal voters of School District No. 16 the right to prohibit the members of the school board from petitioning for merger. We do not agree.

In Languis v. De Boer, 181 Neb. 32, 146 N. W. 2d 750 (1966), the county superintendent of Lancaster County dissolved School District No. 155, a Class II district embracing the village of Panama, and merged it with School District No. 160, a Class III district. This was done in response to petitions by the school boards of the districts under section 79-402, R. S. Supp., 1965, the identical procedure followed here by the board of School District No. 16. The court stated that: "* * * in section 79-402, R. S. Supp., 1965, as we construe it, the Legislature has specifically authorized the school board or the board of education of certain school districts to petition for a change in boundaries. In this respect, we have often held that 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." The court held, in Languis, that section 79-402, R. S. Supp., 1965, permitted the dissolution and merger even over the objections of legal voters.

Section 79-508, R. R. S. 1943, cannot be construed to refute this policy permitting the board of education to petition for a change in boundaries. Section 79-508, R. R. S. 1943, is intended to apply to actions by or against the school board and does not, in any way, imply that the Legislature intended to permit legal voters in a school district to supersede action of a school board authorized under section 79-402, R. S. Supp., 1967.

The Legislature has expressly given legal voters in Class I and Class II districts the right to designate or change a school site within their district, under section 79-504, R. R. S. 1943; to direct the purchasing or leasing of any appropriate site and the building, hiring, or pur-

chasing of a teacherage or schoolhouse; to determine the amount necessary to expend for such a purpose under section 79-506, R. R. S. 1943; to authorize a tax to establish a special fund for the erection or repair of a schoolhouse under section 79-506.01, R. R. S. 1943; and to authorize and direct the sale of any school land belonging to the district under section 79-507, R. R. S. 1943. It did not give the legal voters the express right to authorize or withhold authorization to dissolve and merge with another district and that right cannot be implied from section 79-508, R. R. S. 1943.

The appellants contend that the district court for Sherman County has jurisdiction to review by proceedings in error the order of the county superintendent of schools. The issue raised by this contention is whether section 79-402, R. S. Supp., 1967, which provides that "any person adversely affected by the changes made by the county superintendent may appeal to the district court of any county in which the real estate is located," requires the district court to review an administrative order which does not rest on any adjudicative fact. We hold that this provision for direct appeal is limited to an order which required the superintendent to act in a judicial manner.

In School Dist. No. 23 v. School Dist. No. 11, 181 Neb. 307, 148 N. W. 2d 301 (1967), this court reversed a district court's review of the superintendent's order in an error proceeding. The county superintendent had dissolved and attached one school district to another under section 79-408.01, R. R. S. 1943. This court found that: "In the present case the superintendent decided no dispute of adjudicative fact, and no statute required him to act in a judicial manner. Such orders are not reviewable by error proceedings, which are limited to orders made in the exercise of judicial functions. §§ 25-1901 and 25-1903, R. R. S. 1943; Longe v. County of Wayne, 175 Neb. 245, 121 N. W. 2d 196. In such circumstances collateral attack offers an adequate remedy. See, Bier-

man v. Campbell, 175 Neb. 877, 124 N. W. 2d 918; Elliott v. City of Auburn, 172 Neb. 515, 110 N. W. 2d 218 * * *." The county superintendent of Sherman County was required to determine only whether the signatures on the petition were valid under section 79-402, R. R. S. 1943, and accordingly had no dispute of adjudicative fact before her.

Appellants finally argue that the petitions were invalid under section 79-402, R. S. Supp., 1967, because the school board members of School District No. 16 did not produce evidence that there was an incorporated village within their district as required for a Class III district. The petition of School District No. 16 states affirmatively that the village of Ashton, Sherman County, Nebraska, is an incorporated village within School District No. 16. There is no evidence in the record to the contrary.

Appellants finally argue that since the petitions were signed by the individual school board members with no indication that they were signing as a school board, they have no effect. The petitions show on their face that they were signed by the members of the school boards in their official capacity pursuant to motions duly passed by the boards to approve the petitions for merger. Each petition states: "The undersigned, each a duly elected and qualified member of the Board of Education for School District * * * do hereby petition * * *."

The order of the district court for Sherman County is affirmed.

AFFIRMED.

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JACOB SCHMIDT, SR., FATHER AND NEXT FRIEND OF JACOB SCHMIDT, JR., A MINOR, APPELLANT, V. OSCAR H. JOHNSON, APPELLEE.
171 N. W. 2d 64

Filed October 3, 1969. No. 37195.

1. **Trial: Instructions.** It is the duty of the trial court to submit

to the jury only material issues presented by the pleadings which find support in the evidence. A failure to so instruct, if objection thereto is timely made, constitutes prejudicial error.

2. **Pleadings: Evidence.** In determining if the evidence is sufficient to submit an issue supported by the pleadings and evidence, the successful party is entitled to have all conflicts in the evidence resolved in his favor including any inferences reasonably to be drawn therefrom.
3. **Trial: Instructions.** Where a jury has been otherwise properly instructed on the issues, the issue of unavoidable accident is sufficiently submitted and ordinarily it is not prejudicial error to either give or refuse an instruction on that issue.
4. **Negligence: Trial: Instructions.** Where, in an action to recover for personal injuries, the jury is properly instructed as to the burden of proving the negligence charged against defendant as a proximate cause of the injury, the defense that the negligence of a third person not a party to the action is the sole proximate cause is not an affirmative plea in avoidance of plaintiff's cause and imposes no burden of proof upon defendant with relation thereto, but is entirely consistent with and provable under the general issue where the burden of proof remains with the plaintiff to prove the alleged negligence of the defendant.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Alfred A. Fiedler and Stephen E. Sturek, Jr., for appellant.

Boland, Mullen, Walsh & Cooney, for appellee.

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

CARTER, J.

This is an action for damages for injuries sustained by Jacob Schmidt, Jr., a minor, brought by his father, Jacob Schmidt, Sr., as next friend, against Oscar H. Johnson, resulting from negligence in the operation of the latter's automobile. The claim of damages to the father was assigned to Jacob Schmidt, Jr., and is included in the action as a separate cause of action. The jury returned a verdict for the defendant and the plaintiff appeals.

The evidence shows that on June 30, 1966, Larry and Jarry Schmidt, twin brothers of the age of 16 years, were using a pickup truck belonging to their father to move furniture from a residence described as 3329 Larimore Street in Omaha. They were assisted by a younger brother, Jacob Schmidt, Jr., and a neighbor boy, David Kaiser, each of whom was 13 years of age. At about 11:30 a.m. of said day, the truck was backed over the south curb and across the lawn to the porch of the house at the above-stated address. A gas stove was loaded in the right front portion of the truck box and a water heater on the left side portion, the latter extending onto the tailgate. While Jarry was locking the house, Larry drove the truck north across the curb into Larimore Street and turned east on the south side of the street parallel with the curb. At the time of crossing the south curb or shortly thereafter, Jarry entered the cab and displaced Larry as the operator of the truck. Before reaching the curb, the two 13-year-old boys occupied the right side of the tailgate with their feet dangling within a few inches of the pavement.

Plaintiff's evidence is as follows: Jarry stated that the truck was stopped in the street when he took over the driving, that he started east, and was still moving east when defendant's station wagon struck the truck from the rear causing serious injury to the left leg of Jacob Schmidt, Jr. Kaiser testified that he saw a spark plug fall off the running board of the truck and that he shouted to Jarry to stop the truck so that he could retrieve the spark plug. Thinking that he was not heard, he attempted to crawl over the load to get the truck stopped. Before he accomplished his purpose, he felt a jolt and heard Jacob, Jr., scream. Jarry testified that he heard the shout of Kaiser and was applying his brakes when he felt the impact of the collision. Jacob, Jr., testified he saw the danger when the station wagon was within 5 feet or so of the truck and attempted to pull his legs into the truck. He got his right leg on the

tailgate or into the truck but failed to get his left leg in a place of safety to prevent the injury.

Defendant's evidence is that he approached the scene of the accident from the west, saw the truck moving into Larimore Street, braked his car and stopped completely when the change of drivers was being made on the truck. He said his car never moved from that time until after the happening of the accident. Defendant said the truck started backing toward him and that he honked his horn and attempted to reverse his car and avoid the collision. He accidentally got his car into "park" instead of "reverse" and failed to avoid the collision. After the impact, the defendant called the police and rescue squad. Two policemen testified that they interrogated both drivers. Jarry told them that the truck was moving west at the time of the impact, that the truck was rolling back at the time although slightly upgrade, and, notwithstanding, the truck backed into the station wagon. By several questions the police made it clear that Jarry understood what he said about the rolling of the truck upgrade. This evidence was manifested in the police report.

The issue of fact was for the jury. The plaintiff does not assert that the verdict is not supported by the evidence. His contention is that the evidence does not sustain the giving of instructions on certain defenses and that it was error for the court to do so. No contention is made that the instructions were erroneous if proper to be given, except as hereafter noted. It is fundamental that it is the duty of the trial court to submit to the jury only material issues presented by the pleadings which find support in the evidence if objection is timely raised. Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531, 82 A. L. R. 2d 714; Thomas v. Owens, 169 Neb. 369, 99 N. W. 2d 605. The failure to instruct a jury properly as to the theory of litigants shown by the pleadings and supported by the evidence constitutes prejudicial error. Clark v. Smith, 181 Neb. 461, 149

N. W. 2d 425; Coomes v. Drinkwalter, 181 Neb. 450, 149 N. W. 2d 60. The question is, primarily, whether or not the instructions given have support in the evidence.

In determining if the evidence is sufficient to submit an issue to the jury, the successful party is entitled to have all conflicts in the evidence resolved in his favor including any inferences that can reasonably be drawn therefrom. Flanagin v. DePriest, 182 Neb. 776, 157 N. W. 2d 389. The jury could reasonably have found in the instant case that the point of impact of the two vehicles occurred toward the west side of the residence at 3329 Larimore Street at a point west of the point of emergence of the truck into the street. Such evidence indicates that the driver of the truck backed up to pick up the spark plug on the pavement and failed to observe the defendant's car stopped west of the point the truck entered the street as the defendant testified. There is evidence that Jacob, Jr., was guilty of contributory negligence and assumption of risk, he having been many times warned by his father not to ride on the tailgate with his legs dangling because of the danger. Under this evidence, the trial court did not err in submitting to the jury the issues of contributory negligence and assumption of risk.

The jury could have found that defendant had no reason to anticipate the backing of the truck beyond the point of entry into the street until shortly before the impact, at which time he faced a sudden emergency. Defendant stated he sounded his horn and attempted to back up to avoid an accident in which he failed. Whether or not defendant failed to avoid the accident through his fault was for the jury. Under these facts there was no error by the trial court in submitting the issue of sudden emergency.

Plaintiff complains of the giving of an instruction on unavoidable accident. The giving of this instruction is sustained by the case of Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333, wherein it is said: "In Bonacci v.

Cerra, 134 Neb. 476, 279 N. W. 173, this court concluded that where in an action to recover for personal injuries the jury is properly instructed upon the burden of proving the negligence charged as a proximate cause of the injury, then the issue of unavoidable accident is sufficiently submitted, and ordinarily it is not reversible error to either give or refuse an instruction on that issue." By instruction No. 14, the court told the jury that if it found the sole proximate cause of the collision was the conduct of Jarry Schmidt, its verdict should be for the defendant. There is evidence of negligence in the record and, the court having properly required proof of negligence and contributory negligence, there was no prejudicial error in giving the instruction on unavoidable accident.

Plaintiff contends that instruction No. 10 is in error because of an inconsistency. In connection with the defense of assumption of risk, the instruction stated that defendant must prove each and all the necessary allegations to sustain the defense by a preponderance of the evidence. The instruction then stated if defendant has failed to prove any or all the necessary allegations by a preponderance of the evidence you will disregard the defense. The instruction is consistent and correct, as stated in NJI 3.31.

It is further contended that the burden of proof is on defendant to prove that the proximate cause of the collision was that of a third person not a party to the litigation, and that instruction No. 14 was in error in not so stating. This contention is correctly disposed of in the comment to NJI 2.01A, at page 27, where it is stated: "Where it is claimed that the conduct of another, not a party to the suit, was the sole proximate cause of the accident, such defense is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto but is one entirely consistent with and provable under the general issue." See Styskal v. Brickey, 158 Neb.

208, 62 N. W. 2d 854. We find instructions Nos. 10 and 14 to be free from error.

We think the instructions were correct and properly supported by the evidence. We find no prejudicial error in the record and that the issues were fairly submitted to the jury. The judgment of the district court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. HERBERT BEASLEY, APPELLANT.

171 N. W. 2d 177

Filed October 10, 1969. No. 37193.

1. **Criminal Law: Right to Counsel.** A waiver of the right to counsel must be made competently and intelligently.
2. ———: ———. An accused who is not mentally competent has no right to conduct his own defense without the assistance of counsel.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

William J. Riedmann, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of robbery and sentenced to 10 years imprisonment. The judgment was affirmed in State v. Beasley, 183 Neb. 681, 163 N. W. 2d 783.

The defendant then filed a motion for new trial alleging that newly discovered evidence disclosed that the defendant did not have sufficient mental capacity to

waive his right to counsel. The motion was overruled and the defendant has appealed.

The defendant was represented by the public defender at the preliminary hearing in municipal court. At the arraignment in district court the defendant refused to accept the appointment of counsel and insisted upon defending himself. The trial court required an assistant public defender to be present in the courtroom as an advisor to the defendant.

Upon the first appeal the defendant alleged that the trial court had erred in allowing the defendant to represent himself when the evidence indicated his lack of capacity to do so. We held that the record as a whole, at that time, did not show that the defendant was mentally incompetent to refuse the assistance of counsel.

The record now contains additional evidence consisting of the testimony of Dr. Chester Farrell, a psychiatrist appointed by the trial court to make an examination of the defendant, and records relating to the hospitalization of the defendant while he was imprisoned in the Ohio State Penitentiary.

The defendant was sentenced to the Ohio State Penitentiary for burglary in 1964. On April 29, 1965, he was admitted to the Lima State Hospital. The diagnosis made was: Schizophrenic reaction, simple type. In October he was assigned to work in the hospital television repair shop. On March 18, 1966, the defendant was discharged as without psychosis and returned to the Ohio State Penitentiary. There is no evidence that the defendant has been hospitalized since 1966.

The defendant was released from the Indiana State Penitentiary on October 9, 1967, and arrested in Omaha 2 days later for the robbery of the King Loan Company.

The defendant was examined by Dr. Farrell on August 22, 1968, approximately 8 months after the trial on the robbery charge. Dr. Farrell testified that the defendant was in a pretty good state of remission at the time of the examination and that he thought that the defend-

ant knew right from wrong in October 1967. Dr. Farrell was of the opinion that when the defendant is under stress he has a disassociation of his personality which renders him incapable of critical judgment and reasoning ability and normal functioning. When under stress the defendant becomes schizophrenic for a time and goes in and out of a psychotic state. Dr. Farrell testified that he thought the defendant was in a psychotic state at the time he refused the assistance of counsel and at the time of the trial.

If Dr. Farrell's testimony were to be accepted as controlling, it would require that the judgment be reversed and the cause remanded for a new trial. A waiver of the right to counsel must be made competently and intelligently. Westbrook v. Arizona, 384 U. S. 150, 86 S. Ct. 1320, 16 L. Ed. 2d 429. An accused who is not mentally competent has no right to conduct his own defense without the assistance of counsel.

The fundamental weakness in Dr. Farrell's testimony lies in the fact that his opinion relates to the condition of defendant 8 months previous to the examination. Except for Dr. Farrell's testimony there is no evidence that the defendant was incompetent at the time he refused counsel and at the time of the trial. Dr. Farrel assumed that the defendant must have been functioning well at the time of his release, 2 days before the Omaha robbery.

Dr. Farrell characterized the defendant's refusal of the assistance of counsel as a gross error in judgment. That is probably true, but the same can be said in most cases where the defendant insists upon representing himself. Dr. Farrell also relied upon the defendant's closing statement to the jury as evidence of psychotic behavior. The closing statement must be considered in the light of the conclusive nature of the evidence against the defendant and the absence of any substantial evidence in his favor.

The determination of the question presented in this

case must be made upon the entire record and consideration be given to these facts. The defendant when examined at the Lima State Hospital was found to be of average intelligence. He was discharged from the hospital in 1966 as without psychosis. There is no evidence that he has required hospitalization since 1966. When examined in 1968 he was in a pretty good state of remission.

The defendant has a lengthy criminal record. He has been imprisoned in Minnesota, Indiana, and Ohio. Although untrained in the law, he is no stranger to the courtroom.

The police obtained the defendant's suitcase from a storage locker. The defendant was successful in obtaining an order suppressing the suitcase as evidence. During the trial the defendant was warned that if he pursued a line of questioning he would make the suitcase admissible. He accepted the advice and was successful in keeping the suitcase out of evidence.

The defendant was apprehended in Omaha within 45 minutes of the time the robbery occurred. The stolen money was found in his possession and he was identified by three witnesses. He was faced with a nearly conclusive case against him. Apparently, he felt that there was a chance of acquittal if the trial was held just before Christmas. Under these circumstances it was not unusual for the defendant's closing statement to be very brief.

The defendant was sentenced on January 3, 1968. On January 15, 1968, he filed a notice of appeal and a motion for the appointment of counsel to prosecute the appeal.

Upon review and consideration of the entire record, including the evidence offered in support of the motion for new trial for newly discovered evidence, we conclude that the district court was not in error in permitting the defendant to defend himself.

The judgment of the district court is affirmed.

AFFIRMED.

SMITH and MCCOWN, JJ., dissenting.

Beasley's history of schizophrenia must have been known to the prosecution when Beasley rejected further assistance of counsel. At that time defense counsel advised the court, Judge O'Brien presiding, of the need for a mental examination. The advice fell on deaf ears.

There is no presumption of waiver of the constitutional right to counsel, and acceptance of such a waiver ought to be preceded by careful inquiry. Westbrook v. Arizona, 384 U. S. 150, 86 S. Ct. 1320, 16 L. Ed. 2d 429 (1966); Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A. L. R. 357 (1938); A. B. A. Standards Relating to Providing Defense Services, § 7.2, p. 62 (1958). The difficulty in a retrospective determination of capacity based on a belated mental examination was noted in Pate v. Robinson, 383 U. S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966).

The majority opinion blinks at the neglect of inquiry when inquiry would have been fruitful. The record convinces us that Beasley's constitutional right to counsel was violated.

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STATE OF NEBRASKA, APPELLEE, V. DALE LEO SCHUMACHER, APPELLANT.
171 N. W. 2d 181

Filed October 10, 1969. No. 37205.

1. **Criminal Law: Evidence.** In the absence of prejudice or a miscarriage of justice, a complaint regarding the admission of evidence is ineffective.
2. ———: ———. Testimony by a witness of similarities between tire tracks, and between such tracks and a tire, comprise statements of fact, not of opinion, and are not necessarily a subject for expert testimony.
3. **Criminal Law: Instructions.** Where a requested instruction is

substantially covered by another instruction, it is not error to refuse the request.

4. **Criminal Law: Trial: Continuance.** An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby.

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

Gordon C. Shaffer, Jr., 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.

NEWTON, J.

Defendant Dale Leo Schumacher was charged in the district court for Sioux County, Nebraska, with grand larceny. The specific theft charged was of 60 storage batteries of the value of $120, the property of M. W. Didier. Trial was had to a jury which returned a verdict of guilty and fixed the value of the batteries at $81.25, thus finding defendant guilty of petit rather than grand larceny. We affirm the judgment of the district court.

One E. A. Pinney of Scottsbluff, Nebraska, was engaged in the part-time business of dealing in scrap metal and junked storage batteries. Defendant was his partner. M. W. Didier operated an automobile service station in Harrison, Sioux County, Nebraska. On the evening of June 15, 1967, he had 60 to 65 junk batteries stacked behind his station. They were missing the following morning. Pinney and defendant were at the station on June 9, 1967, and offered Didier $1.05 per battery, but the offer was refused. On June 16, 1967, Didier, deputy sheriff Pullen, and sheriff Broderick went to the Miller Salvage Yard between Scottsbluff and Gering, Nebraska. There they found a pile of batteries

including two smeared with yellow paint and one with red paint which Didier identified as three of those taken. Four or five serial numbers were taken from some of the batteries and by checking his records, Didier identified four of the serial numbers as being on batteries which were among those taken. Pinney had loaned his Ford pickup truck to defendant on the afternoon of June 15, 1967, and did not get it back until the following day. Lawrence Lewis, another service station operator in Harrison, identified defendant as a person who had bought gasoline from him about 9 p.m., on June 15, 1967. He also identified the Pinney pickup as the one then driven by defendant.

The imprint of a rear tire was found at the Didier station where the batteries had been piled. A similar imprint was found at the Miller Salvage Yard adjacent to the pile of batteries and the Pinney truck had rear tires which made similar imprints. Pictures of one of the rear tires and the imprints found were introduced in evidence.

Henry Miller, operator of the salvage yard, testified he had no batteries there on the evening of June 15, 1967, but on going to work on the morning of June 16, he found the pile of batteries referred to. Early in the afternoon defendant appeared, said he had left the batteries, and was paid for them, receiving a check for $113.70. He also testified that the batteries had a market value of $1.30 or $1.35 in Scottsbluff and would be worth that figure, less transportation costs of about 20 cents in Harrison. Lawrence Lewis also testified that he had sold such batteries in Harrison and received money for them.

Defendant complains that there was no competent evidence of value and that it was error to receive Miller's evidence as to value. We find the evidence sufficient to establish that the batteries taken did have at least some value. Defendant, having himself offered $1.05 per battery in Harrison for the ones taken has established

this fact. This is sufficient to support the verdict of guilty of petit larceny. See § 28-512, R. R. S. 1943. Under the circumstances, no substantial miscarriage of justice having occurred and no prejudice appearing, plaintiff does not have good cause for complaint. See § 29-2308, R. R. S. 1943.

Defendant also claims error in the admission of testimony regarding the description of tires and imprints. A deputy sheriff testified to the tire imprints, described them, and identified pictures of them. He also stated he examined the tires on the Pinney pickup and that those on the rear were Firestone tires. A picture of one of them and of the imprint it made, found directly behind it, is in evidence. The witness stated that such a tire could leave an imprint similar to the one found at the Didier station. We are unable to see any error in the admission of this testimony. Any person is able to make a comparison of tires and tire imprints on viewing them, and to describe what he saw, or to state whether or not a tire with a certain type of tread would make an imprint similar to one appearing in evidence by means of casts or photographs. This is a statement of fact, not of opinion. In any event, it is a matter readily ascertainable by any person with ordinary powers of observation and is not necessarily a subject requiring expert testimony. It will be noted that the witness did not state that in his opinion the imprints found were made by the pickup truck alleged to have been operated by the defendant. See Watson v. State, 141 Neb. 23, 2 N. W. 2d 589.

It is asserted that the court erred in refusing an instruction tendered on the sufficiency of circumstantial evidence and in giving in lieu thereof the instruction set out in NJI 14.50. The refusal of the tendered instruction was without prejudice to defendant. "Where a requested instruction is substantially covered by another instruction it is not error to refuse the request." State v. Lewis, 177 Neb. 173, 128 N. W. 2d 610.

During the trial, a 1-day continuance was granted on motion of the State to enable it to secure the attendance of a duly subpoenaed material witness who appeared to be ill. Defendant has not shown, and does not contend, that he was prejudiced in any manner by the granting of the continuance. "An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby." State v. Woods, 182 Neb. 668, 156 N. W. 2d 786.

The judgment of the district court is affirmed.

AFFIRMED.

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ARNOLD MEYER ET AL., APPELLANTS, V. CITY OF GRAND ISLAND, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
171 N. W. 2d 242

Filed October 10, 1969. No. 37207.

1. **Trial: Stipulations: Motions, Rules, and Orders.** A court on timely motion may properly vacate a stipulation that is improvident and not conducive to justice.
2. **Trial: Motions, Rules, and Orders.** An order allowing a party to withdraw his rest and to adduce evidence is discretionary.
3. **Municipal Corporations: Annexation.** A city in enacting an annexation ordinance under section 16-117, R. S. Supp., 1967, exercises a legislative function.
4. ———: ———. The statute does not require the legislative body to conduct a trial-type evidentiary hearing or to make an express finding on the character of the land.

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

Gwyer Grimminger of Wagoner & Grimminger, for appellants.

Duane A. Burns, Walter Lauritsen, Robert E. Paulick, and George R. Horner, for appellees.

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

SMITH, J.

The district court rendered a declaratory judgment upholding an annexation ordinance of the City of Grand Island. Plaintiffs have appealed. Their complaints are: (1) The court relieved the city from a pretrial stipulation and submission of the cause after trial; and (2) the mayor and council had enacted the ordinance without conducting a trial-type evidentiary hearing or making an express finding on the character of the land.

Plaintiffs owned subdivision lots located approximately ½ mile west of Grand Island and ¼ mile west of the east subdivision boundary. The subdivision was adjoined by industrial property on the east, railroad right-of-way on the north, and city cemetery on the south. The three adjoining tracts extended generally eastward to the city boundary.

A pretrial stipulation states that ordinance No. 4347, passed in 1966, annexed the city cemetery. The authorizing statute, however, was held unconstitutional. Williams v. County of Buffalo, 181 Neb. 233, 147 N. W. 2d 776 (1967). Other annexation ordinances in evidence at the trial were No. 4476, describing the subdivision, and Nos. 4477, 4478, and 4479, describing the three adjacent tracts. These four ordinances had been enacted on January 8, 1968, in numerical sequence.

The district court took the case under advisement on October 10, 1968. On October 14 the city moved the court to reopen the case for the purpose of admitting ordinance No. 4439 into evidence. The motion was sustained and the ordinance received over objection. Enacted on April 20, 1967, under section 16-117, R. S. Supp., 1967, the ordinance annexed the cemetery.

The Legislature has empowered Grand Island and other first-class cities generally to annex contiguous lands that are urban and suburban in character. The

power does not reach agricultural lands that are rural in character. § 16-117, R. S. Supp., 1967. Ordinance No. 4439 which annexed the cemetery concededly supplied contiguity, but plaintiffs complain of the rulings that led to admission of the ordinance into evidence.

A court on timely motion may properly vacate a stipulation that is improvident or not conducive to justice. See, LeBarron v. City of Harvard, 129 Neb. 460, 262 N. W. 26, 100 A. L. R. 767 (1935); Butler v. Chamberlain, 66 Neb. 174, 92 N. W. 154 (1902). An order allowing a party to withdraw his rest and adduce evidence is discretionary. See, Lewelling v. McElroy, 148 Neb. 309, 27 N. W. 2d 268 (1947); Cochran v. Moriarty, 78 Neb. 669, 111 N. W. 588 (1907). Reopening the present case and admitting ordinance No. 4439 into evidence were proper.

A city in enacting an annexation ordinance under section 16-117, R. S. Supp., 1967, exercises a legislative function. The statute does not require the legislative body to conduct a trial-type evidentiary hearing or to make an express finding on the character of the land. Cf. Williams v. County of Buffalo, 181 Neb. 233, 147 N. W. 2d 776 (1967). There was no defect in enactment of ordinance No. 4476.

The judgment is affirmed.

AFFIRMED.

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OCCIDENTAL SAVINGS AND LOAN ASSOCIATION, A CORPORATION, APPELLANT, V. JOHN L. CANNON ET AL., APPELLEES, IMPLEADED WITH MCKEAN FLOOR COVERING, INC., A CORPORATION, APPELLANT.
171 N. W. 2d 166

Filed October 10, 1969. No. 37221.

1. **Mechanic's Liens.** A mechanic's lien action is tried de novo in this court.
2. ———. The burden of proof is upon one claiming a mechanic's

lien to prove that his claim was filed in time to create a lien.

3. ———. The lien of a materialman for materials furnished for the erection of a building, by virtue of an agreement with the contractor, extends to such materials only as are used in or delivered at the building for use therein.

4. ———. After a contract for material or labor is substantially completed, there should be no unreasonable delay in filing a claim for a lien if one is desired.

5. ———. The time for filing a lien cannot be delayed by performing minor labor or furnishing minor items of material.

6. ———. The purpose of the mechanic's lien statute is to protect the diligent contractor or materialman, not to provide relief for the careless or negligent one.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Reversed and remanded with directions.

Lloyd E. Atchley, Ralph E. Svoboda, C. E. Heaney, Jr., Lyman L. Larsen, Kennedy, Holland, DeLacy & Svoboda, and Fellman & Stern, for appellants.

John H. Trenerry, Jr., and James R. McGreevy, for appellee Joyce Lumber Co.

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

SPENCER, J.

This action was commenced as a foreclosure of a mortgage but has devolved into a contest between the mortgagee against as well as between two defendant mechanic's lien claimants.

John L. Cannon, hereafter referred to as Cannon, and Jane B. Cannon, the mortgagors, failed to plead herein and were defaulted. The trial court determined that Joyce Lumber Company, a corporation, hereinafter referred to as Joyce, had a mechanic's lien with a first priority; the mortgage of Occidental Savings and Loan Association, a corporation, hereinafter referred to as Occidental, was found to be second in priority; and the McKean Floor Covering, Inc., a corpo-

ration, hereinafter referred to as McKean, was third in priority. Occidental and McKean perfected an appeal to this court. The action is here for trial de novo. York Brick & Tile Co. v. Ude Motor Co., 123 Neb. 154, 242 N. W. 361.

The parties stipulated as to the validity of the Occidental mortgage and that as of September 30, 1968, there was $21,720.88 due thereon. They stipulated further that McKean furnished lumber and materials and had a valid lien in the amount of $636 plus $3.25 filing fee and interest at 6 percent from April 20, 1967. The evidence indicates that Joyce, from a blueprint provided by Cannon, furnished an estimate of materials to be used on a job at 2030 No. 104th Street, the property in question. The total of the estimate was $4,434.24.

The evidence is undisputed that Cannon was not obligated to purchase any of his material from Joyce and Joyce was not to deliver material except upon order, but any material purchased by Cannon would be furnished at the price listed in the estimate. The first material furnished Cannon was under date of November 26, 1965. This was previous to the filing of the Occidental mortgage. As of March 30, 1966, Joyce had furnished material to the value of $4,430.09 for this particular job. Subsequent to that date, items in the following amounts and dated as shown, were charged or credited to the account:

| *Date* | *Amount* |
|---|---|
| 4/ 1/66 | $ 5.46 |
| 4/ 4/66 | 46.95 |
| 4/11/66 | 39.70 |
| 6/ 9/66 | 60.55 |
| 6/ 9/66 (credit for trim returned) | 11.44 |
| 8/12/66 | 8.40 |

With the exception of the item of August 12, 1966, all of the items, which are exhibits 3 through 6, show that they were delivered to 2023 No. 104th Street, and that subsequently the address of the place of delivery was

changed to 2030 No. 104th Street. The deliveryman was not produced as a witness so there is no testimony as to where delivery was actually made on these items. Cannon was building at 2023 No. 104th Street. The item of June 9, 1966, for $60.55, exhibit 6, is for seven pair of window shutters. There is uncontradicted testimony there are no window shutters on 2030 No. 104th Street. Cannon testified they were used on 2023 No. 104th Street. The item of August 12, 1966, which is exhibit 8, reads as follows:

"Date 8/12 1966

"Sold to Jack Cannon
"Address
"Delivered to Job 2030 So. 104
"Sold by JC Delvd by Mike Charge X * * *

| "Pieces | Description * * * | Price | Amount |
|---|---|---|---|
| "1 | pr 14 x 6 8 Door Shutters | 8.40 | 8.40 |
| | * * * "Total | | $8.40 |

"Received by Mrs. Jack Cannon."

John Chambers, a Joyce employee, testified that Cannon phoned in the order shown on exhibit 8 and told him to deliver it to 2030 So. 104th Street to get the shutters primed. The order was actually receipted for by Mrs. Jack Cannon at 2036 No. 104th Street, which is the house next door to 2030 No. 104th Street.

Cannon testified that when he returned home he immediately took the shutters from the garage at 2030 No. 104th Street across the street to 2023 No. 104th Street, where they were stored in the basement, and later they were put on that property. It is his further testimony that the plans were changed after the estimate, and that door shutters could not be used on 2030 No. 104th Street. The appearance of the front of the house was so changed that door shutters were no longer appropriate. Cannon also testified that the residence at 2030 No. 104th Street was substantially completed in May 1966.

Joyce did not file its mechanic's lien until November 21, 1966. Section 52-103, R. R. S. 1943, provides that a materialman shall file his lien within 4 months of the time he furnished his material. This has been interpreted to mean 4 months from the date of the last item furnished under the contract. Nye & Schneider Co. v. Berger, 52 Neb. 758, 73 N. W. 274. The Joyce lien herein was filed within 4 months of the August 12, 1966, delivery, but more than 4 months after all of the other material had been furnished and more than 4 months after the house was substantially completed. For Joyce to have a valid lien, we must find that the material furnished on August 12, 1966, may be tacked onto the previous orders for the purpose of extending lien-filing time.

The burden of proof is upon one claiming a mechanic's lien to prove that his claim was filed in time to create a lien. Lofholm v. Stoltenberg, 178 Neb. 318, 133 N. W. 2d 387.

The first pertinent question is the nature of the contract betweee Joyce and Cannon. Was it one continuous contract for the furnishing of material during the construction of the house, or was it several different contracts? All the record indicates is that Cannon had secured a construction plan he thought he might follow in building a house, and furnished it to Joyce who prepared a material estimate for him.

On this point, the testimony of the district manager for Joyce was as follows: "Q. Who in your organization, Mr. Herrin, would have handled the matter; had there been a contract with Mr. Cannon to furnish the *matterial?* Would the estimator handle that matter? A. If I understand your question, the estimator took the plan and was charged with the responsibility of taking off quantities of materials and furnishing an estimate of quantities needed to do the job, in accordance with the plans and the instructions of the customer. Q. And that estimate was returned to Mr. Cannon for his

use? A. I can't say it was, to my knowledge. It would be common procedure. Q. Do you know, following that, whether or not there was ever any contract entered into between Joyce Lumber Company, and Mr. Cannon? A. It's common procedure when we furnish the contractor with an estimate, if he orders material on that, we assume that is a contract. Q. You furnished him with an estimate, and from that estimate, he gives an order, and you fill the order; that is customary? A. It's customary; there are deviations from time to time from the estimate. Q. You're assuming that the customary procedure was followed in the Cannon case? A. I assume it was. Q. Now, the prices shown on the estimate, do they become the prices charged them when the orders are made by the builder and delivery is made? A. That is customary. * * * Q. In other words, would it be fair to say there are changes made from the time the plans or the blueprints are prepared until the material is ordered? A. Changes are made during the process of construction. Where an estimator might anticipate that one length of material might do the job, the man building it might decide he needs something else. Quite often, actual items on sales tickets do not agree with the sales ticket. Q. Orders are placed with the recommendations of the builders rather than following the plan or estimate? A. It's common procedure for the carpenter on the job to order materials as he needs them. * * * Q. Mr. Herrin, you stated I believe, that when items are ordered pursuant to one of these estimates such as Exhibit 2, that the Joyce Lumber Company considers it then to be a contract, is that correct? A. Yes, sir. Q. Is there any obligation on the part of the contractor or the builder to order everything that's on this estimate? A. No, sir. Q. And is the price that's on here, guaranteed? A. We guarantee the price, yes, sir. Q. If the market on lumber goes up, it's still the price on the estimate? A. We guarantee the price on the completion of the job, on the

basis of the estimate. Q. Does the Joyce Lumber Company, you, or someone under your supervision, compare the orders to the estimate? A. Your question is, do we compare the tickets with the estimates? Q. Yes, sir. A. It's common procedure for the tickets to be prepared from the estimates unless there is some change or deviation of material ordered by the contractor. That quite often happens. Q. Let's talk about material ordered; does the Joyce Lumber Company make any attempt to keep track of which items on the estimate are actually ordered out? A. Well, on the estimate, if the contractor wants us to follow the estimate, we will make up our loading tickets from the estimate; some contractors prefer that. They sometimes prefer to order the material when they need it. We were delivering what was ordered. Q. So, in reality, this really wasn't a contract between Joyce Lumber and Mr. Cannon? A. Well, in reality it was a contract to buy material for that house when we started delivery. We don't care whether or not he uses a 2 by 4, 10 or 2 by 4, 20. We considered that a contract. That's common procedure in the industry. Q. Was there anything to prevent him from buying one-half of this material from Rivett? A. Well, that's been done. Q. You don't have anything to bind him, or to obligate him to buy all of this material from the Joyce Lumber Company? A. Put it this way: we never had any difficulty. Q. You didn't have anything to bind him to buy everything on this estimate from Joyce Lumber, did you? A. No, sir."

We determine there was no continuous contract herein. On the record the estimate was nothing more than an offer to furnish designated material at the price quoted. As material was ordered, a contract was implied for that particular order.

Assuming, however, that Joyce and Cannon had only one contract, the lien would still be invalid. It is undisputed that the house was substantially completed by May 1966. The lien herein was not filed until Novem-

ber 21, 1966. Assuming for the purposes of this case that the items covered by exhibits 3 through 6 were actually delivered to the property, the 4-month period would not expire until September, so Joyce on that assumption would still have been within the lien period in August 1966, when the door shutters described in exhibit 8 were delivered.

Regardless of any inference from language in some of our cases that it must be shown that the items delivered to the property were actually used thereon, we adhere to the rule enunciated in Weir & Co. v. Barnes, 38 Neb. 875, 57 N. W. 750: The lien of a materialman for materials furnished for the erection of a building by virtue of an agreement with the contractor extends to such materials only as are used in *or* delivered at the building for use therein.

It is not necessary that a materialman stay on the job to see that the material furnished by him is actually used thereon. Here, however, the evidence is uncontradicted that the door shutters could not have been used on this property, and this fact was evident from the appearance of the house itself. This would negative any inference that the door shutters were intended for 2030 No. 104th Street, which might be assumed from delivery at that address.

We also observe that after a contract for material or labor is substantially completed, there should be no unreasonable delay in filing a claim for a lien if one is desired, and the time for filing a lien cannot be delayed by performing minor labor or furnishing minor items of material. The purpose of the mechanic's lien statute is to protect the diligent contractor or materialman, not to provide relief for the careless or negligent one. To permit a contractor or a materialman to string out work on orders is to abort the statute. If the time which is restricted by the statute can be indefinitely extended by minor work or deliveries after a contract is substantially completed, the 4-month limitation period in which

to file this class of lien can and will be utterly and completely defeated, permitting the title to property to remain in an unsettled condition, and rights of diligent claimants will be subordinated to those who carelessly or unnecessarily delay to claim their rights.

For the reasons stated, we reverse the judgment of the trial court and remand the cause for the entry of a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

NEWTON, J., concurring.

I concur in the result arrived at in the opinion of Spencer, J. I note, however, that the opinion contains the following language: "We determine there was no continuous contract herein. On the record the estimate was nothing more than an offer to furnish designated material at the price quoted. *As material was ordered, a contract was implied for that particular order.*" (Emphasis supplied.) Being apprehensive that the foregoing statement indicates a separate implied contract was entered into each time materials were ordered and delivered for the construction of the house in question and that if such were construed to be the law it would then be necessary to file separate mechanic's liens on the same account at regular 4-month intervals, I am inclined to take exception to this statement.

"An 'open running' account has been defined as one which is based upon a connected series of transactions, and which has no break or interruption." 1 Am. Jur. 2d, Accounts and Accounting, § 4, p. 373.

"An open account results where the parties intend that the individual items of the account shall not be considered independently, but as a connected series of transactions, and that the account shall be kept open and subject to a shifting balance as additional related entries of debits and credits are made, until it shall suit the convenience of either party to settle and close the account, and where, pursuant to the original express or implied intention, there is but one single and indi-

visible liability arising from such series of related and reciprocal debits and credits." 1 Am. Jur. 2d, Accounts and Accounting, § 4, p. 373. "In order to establish a mutual and open current account it must appear that an account was kept, and that the parties regarded the items as constituting one account and as capable of being set off one against the other so that it is the balance only which constitutes the claim." 1 Am. Jur. 2d, Accounts and Accounting, § 6, p. 376. See, also, Annotations, 1 A. L. R. 1060, 39 A. L. R. 369, 57 A. L. R. 201.

Nebraska has consistently agreed with this interpretation and held that an open account presented but one cause of action upon which the statute of limitations commences to run only from the date of the last entry. See, Heineman v. Thimgan, 136 Neb. 357, 285 N. W. 920; Lewis v. Hiskey, 166 Neb. 402, 89 N. W. 2d 132.

WHITE, C. J., joins in this concurrence.

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OSCAR W. FIENE, APPELLEE, V. MAURICE ROBERTSON, APPELLANT.
171 N. W. 2d 179

Filed October 10, 1969. No. 37235.

1. **Animals: Trespass: Damages.** At common law, the owner of livestock was liable for any damage done by it while trespassing upon the lands of others, whether such lands were cultivated or uncultivated.
2. ———: ———: ———. Under existing statutes such liability is limited to trespass upon cultivated lands. To render the owner liable for a trespass upon uncultivated lands, a willful trespass must be alleged and proven.
3. **Animals: Fences: Damages.** Failure of the damaged party to maintain a division fence does not relieve the owner of domestic animals from liability for damage resulting from a trespass by such animals upon cultivated lands.

Appeal from the district court for Cass County: WALTER H. SMITH, Judge. Affirmed.

Fancis M. Casey, for appellant.

Beynon, Hecht & Fahrnbruch, for appellee.

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

NEWTON, J.

This is an action to recover for hay stacked on plaintiff's premises and consumed by defendant's cattle. Trial was had to the court and plaintiff recovered judgment. We affirm the judgment of the district court.

Plaintiff and defendant owned adjoining farms separated by division fences. Plaintiff had baled hay stacked or piled adjacent to the division fence. Defendant, in accordance with custom, rebuilt the right or east half of the fence, offered to assist plaintiff's tenant in rebuilding the remainder, and nothing being done, made some repairs thereon himself. Notwithstanding such repairs, the west half of the fence was not in condition to prevent defendant's cattle from trespassing upon plaintiff's land and damaging plaintiff's hay.

It appears to be defendant's theory that he is not responsible for the damage inflicted by his cattle because plaintiff negligently or willfully refused to repair his portion of the division fence. This theory is not convincing.

At common law the owner of livestock was liable for any damage done by it, while trespassing upon the lands of others, whether such lands were cultivated or uncultivated. See Lorance v. Hillyer, 57 Neb. 266, 77 N. W. 755.

Under existing statutes such liability is limited to trespass upon cultivated lands. See § 54-401, R. R. S. 1943. To render the owner liable for a trespass upon uncultivated lands, a willful trespass must be alleged and proven. See Meyers v. Menter, 63 Neb. 427, 88 N. W. 662.

In the present instance, the trespass was upon

cultivated lands and it is immaterial whether it was willful or not. Whether or not plaintiff was negligent in maintenance of the division fence is also immaterial. Section 54-401, R. R. S. 1943, provides: "The owners of cattle * * * shall hereafter be liable for all damages done by such stock upon the cultivated lands in this state as provided by section 54-402." Section 54-402, R. R. S. 1943, provides: "All damages to property so committed by such stock running at large shall be paid by the owners of such stock; * * *." Under the statutes, as under the common law, the burden of restraining domestic animals is placed squarely upon the owner, and ordinarily no excuse for failure to restrain them is recognized.

It appears from the record that defendant may have had a just grievance occasioned by plaintiff's failure to maintain a just proportion of the division fence as contemplated by section 34-102, R. R. S. 1943. Nevertheless, this did not justify or excuse the trespass by defendant's cattle. On the contrary, defendant's remedy was to compel plaintiff to maintain the fence in the manner provided by Chapter 34, article 1, R. R. S. 1943.

The judgment of the district court is affirmed.

AFFIRMED.

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BITUMINOUS CASUALTY CORPORATION, A CORPORATION, APPELLEE, V. DARLENE L. ANDERSEN ET AL., APPELLEES, IMPLEADED WITH FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION, APPELLANT.

171 N. W. 2d 175

Filed October 10, 1969. No. 37249.

**Insurance: Automobiles.** Where an excess insurance clause in an automobile driver's liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

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

Kennedy, Holland, DeLacy & Svoboda, Joseph P. Cashen, and Lyman L. Larsen, for appellee Bituminous Cas. Corp.

Abrahams, Kaslow & Cassman, for appellees Andersen et al.

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

SMITH, J.

Rosen-Novak Auto Co. furnished Isidoro Bortolotti its Cadillac sedan for use while it repaired his automobile. With Bortolotti at the wheel the Cadillac struck Darlene L. Andersen, who lodged a damage claim against him. Bortolotti was an insured nonowner under a policy with bodily injury liability coverage and an excess insurance clause issued by plaintiff in this declaratory judgment action. Rosen-Novak held a policy issued by Fireman's Fund Insurance Company with bodily injury liability coverage and a no-liability clause. The district court adjudged that Bortolotti had been an insured under the owner's policy and that insurance afforded by plaintiff was excess. Fireman's Fund has appealed.

The excess clause in the policy issued by plaintiff reads: ". . . the insurance under this policy with respect to loss arising out of . . . the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance."

The no-liability clause annexed to the owner's policy stated a consideration of a reduced rate of premium. Part of the definition of an insured class is more fully set out in Federal Insurance Co. v. Prestemon, 278 Minn. 218, 153 N. W. 2d 429 (1967), where the clause limits

the class to: " '(b) any other person, but only if no other valid and collectible automobile liability insurance, either primary or excess, with limits of liability at least equal to the minimum limits specified by the financial responsibility law of the state in which the automobile is principally garaged, is available to such person; . . . .' "

Judicial treatment of excess clause vis-a-vis no-liability clause has not been uniform. In many cases the phrase "either primary or excess" was not present in the no-liability clause. Most courts read the text to enforce excess clauses but not such no-liability clauses. Presence of the phrase "either primary or excess" at times has been important in enforcement of no-liability clauses. Indiana Lumbermens Mutual Ins. Co. v. Mitchell, 409 F. 2d 392 (7th Cir., 1969); Continental Cas. Co. v. Weekes, 74 So. 2d 367, 46 A. L. R. 2d 1159 (Fla., 1954); New Amsterdam Cas. Co. v. Certain Underwriters, 34 Ill. 2d 424, 216 N. E. 2d 665 (1966); Government Employees Ins. Co. v. Globe Indemnity Co., 415 S. W. 2d 581 (Ky. App., 1967); Allstate Insurance Co. v. Shelby Mutual Ins. Co., 269 N. C. 341, 152 S. E. 2d 436 (1967); Faltersack v. Vanden Boogaard, 39 Wis. 2d 64, 158 N. W. 2d 322 (1968); 8 Appleman, Insurance Law and Practice, § 4914, p. 400 (1962); 16 Couch on Insurance 2d, §§ 62.75 and 62.76, p. 521 (1966).

Some opinions have approved judicial estimates of risks, policy functions, and premium bases, pointing out that an excess clause in the driver's policy ordinarily should prevail over a no-liability clause in the owner's policy. See, State Farm Mutual Auto Ins. Co. v. Travelers Ins. Co., 184 So. 2d 750 (La. App., 1966) (concurring opinion of Tate, J.); Federal Insurance Co. v. Prestemon, 278 Minn. 218, 153 N. W. 2d 429 (1967).

There is apparent conflict in excess clause vis-a-vis no-liability clause without the phrase "either primary or excess." Addition of the phrase does not logically resolve the conflict.

Need exists for certainty, simplicity, and inexpensive administration in connection with these business relations among insurers. See Russ "The Double Insurance Problem—A Proposal," 13 Hastings L.J. 183 (1961). We hesitatingly reject proration in favor of this rule: Where an excess insurance clause in a driver's automobile liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess.

AFFIRMED.

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HELEN BERNSTEIN, APPELLEE, V. NATHAN SEGLIN, APPELLANT.
171 N. W. 2d 247

Filed October 17, 1969. No. 37216.

1. **Landlord and Tenant: Damages.** A landlord may not unreasonably refuse to accept a qualified and suitable substitute tenant for the purpose of mitigating the damages recoverable from a tenant who has abandoned the leased premises prior to the expiration of the term.
2. ———: ———. In an action by the landlord to recover rental from a tenant who has abandoned the leased premises prior to the expiration of the term, the burden is on the tenant to prove that the landlord unreasonably failed to relet the premises and mitigate damages.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Marks, Clare, Hopkins & Rauth, for appellant.

Kartman & Fike, for appellee.

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

MCCOWN, J.

This is an action for the recovery of rental on a lease. The trial court sustained a motion for a directed verdict

and entered judgment for the plaintiff. The defendant has appealed.

The plaintiff, Helen Bernstein, as lessor, and the defendant, Nathan Seglin, as lessee, entered into a written lease of a business building in Omaha, Nebraska, in June 1961. The lease was for a term of 7 years commencing July 1, 1961, and terminating June 30, 1968. The lease provided for a basic rental of $200 per month plus 2 percent of gross sales exceeding $144,000 per year. No percentage rental was ever due and the percentage clause was inoperative at all times.

The lease prohibited assignment and subletting without the previous written consent of the landlord. The concluding portion of the assignment paragraph provided: "Landlord agrees not to withhold his consent arbitrarily where the proposed assignee is a financially responsible and experienced retail grocer." It was stipulated that the limitation of the type of business to a retail grocer was waived.

The defendant took possession under the lease July 1, 1961, and operated his business on the premises through January 1964. On January 31, 1964, the defendant Seglin sold his business to Bernard W. Sharon, and assigned the lease to Sharon. The assignment executed by the defendant and the consent to the assignment executed by the plaintiff both provided that the defendant Seglin would "remain primarily liable to the lessor, jointly and severally with the assignee, for the payment of the rent payable by lessee for a period of 30 months from and after February 1, 1964 * * *."

Sharon took possession of the premises February 1, 1964, and paid the rent during his 5-month occupancy. On June 30, 1964, without notice to anyone, Sharon moved out and abandoned the premises. There was no surrender of the premises nor acceptance of surrender. It is undisputed that the plaintiff was holding the defendant responsible for the rent after Sharon's departure, and that the defendant understood that fact.

Following Sharon's departure, both the plaintiff and the defendant advertised in newspapers, posted signs, and made other efforts to rerent the premises. Defendant's efforts to find a new tenant netted several contacts and interviews but only one definite prospect developed. This was a Mrs. Hubbell. The defendant then referred Mrs. Hubbell to the plaintiff. Defendant's wife testified: "She (Mrs. Hubbell) was a prospect. She wanted to negotiate and was ready to sign a lease." There was no testimony as to what kind of a lease or for what term or on what conditions Mrs. Hubbell was prepared to negotiate. The defendant and his wife both conceded that they did not know anything about Mrs. Hubbell's financial condition. It was conceded that Mrs. Hubbell was contemplating renting the premises for use by her son for a nursery business, but neither the plaintiff or defendant ever discussed the matter with the son or knew anything about his financial condition or business experience. The interview between the plaintiff and Mrs. Hubbell did not produce any offer or proposal from Mrs. Hubbell. After the interview, the plaintiff advised the defendant's wife by telephone that the plaintiff definitely wanted more rent and that she would just sit and wait until she got the right tenant. The defendant and his wife thereupon ceased their efforts to rerent the property.

Plaintiff conceded that she wanted a rental of $300 per month, which was the amount she had received prior to the defendant's lease. She also testified that she would have negotiated a lower rent for the right person or someone who had a good credit rating and was a successful merchant. Plaintiff continued her efforts to re-rent the premises. Some of her advertisements carried an asking price in excess of $200 a month. She ultimately leased the premises effective January 1, 1966. The rental was $200 per month for the first 3 years and $240 per month thereafter, plus a provision requiring the tenant to expend a substantial amount in leasehold improvements.

Thereafter the plaintiff brought this action for the recovery of rental due prior to rerenting the premises.

The defendant's theory is that plaintiff's statement that she wanted more rent than the lease called for, and occasionally advertising a higher asking price, constituted constructive breach of her agreement not to withhold consent to an assignment of the lease. The defendant argues that plaintiff's actions in connection with the Hubbell negotiation, coupled with her announced desire to obtain more rent, released the defendant from any further obligation to pay rental under the lease.

The plaintiff's contention is that upon abandonment of the premises by a tenant, the landlord may either relet the premises or permit them to remain vacant and recover his rent in accordance with the terms of the lease. It is argued that there is no duty on the landlord to accept or procure a new tenant for the purpose of mitigating damages recoverable from the original tenant. Plaintiff relies upon the case of Merrill v. Willis, 51 Neb. 162, 70 N. W. 914, cited and approved in Johnston v. Jackson, 129 Neb. 545, 262 N. W. 19.

While there was no refusal to consent to assignment of the lease here, the problem with respect to the duty of the landlord to mitigate damages upon abandonment of premises by the tenant is not so clear. There is a direct split of authority on the issue. Some courts hold that there is no duty to relet after abandonment by the tenant, while others hold that a landlord is required to mitigate damages by reletting. See Annotation "Landlord's Duty, on Tenant's Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages by Accepting or Procuring Another Tenant." 21 A. L. R. 3d 534 to 594. Nebraska has followed the rule imposing no duty of mitigation. Merrill v. Willis, *supra* (1897).

The traditional view is that a lease creates an interest or estate in land and, therefore, the lessor need not concern himself with a lessee's abandonment of his own property. A modern lease of a business building ordi-

narily involves multiple and mutual running covenants between lessor and lessee. It is difficult to find logical reasons sufficient to justify placing such leases in a category separate and distinct from other fields of the law which have forbidden a recovery for damages which the plaintiff by reasonable efforts could have avoided. See Wright v. Baumann, 239 Ore. 410, 398 P. 2d 119. The perpetuation of the distinction between such a lease and a contract, in the application of the principle of mitigation of damages, is no longer supportable. We, therefore, hold that a landlord may not unreasonably refuse to accept a qualified and suitable substitute tenant for the purpose of mitigating the damages recoverable from a tenant who has abandoned the leased premises prior to the expiration of the term. Merrill v. Willis, 51 Neb. 162, 70 N. W. 914, is overruled as to this issue.

Where a tenant who has abandoned premises pleads a failure to mitigate damages as a defense to relieve himself of the results of his own default, the burden of proof ought to be on the tenant. Steinman v. John Hall Tailoring Co., 99 Kan. 699, 163 P. 452; Home Owners' Loan Corp. v. Baldwin, 265 App. Div. 864, 37 N. Y. S. 2d 822. In an action by the landlord to recover rental from a tenant who has abandoned the leased premises prior to the expiration of the term, the burden is on the tenant to prove that the landlord unreasonably failed to relet the premises and mitigate damages.

Gauged against these principles, the defendant here failed to prove any arbitrary or unreasonable refusal to accept any tenant. The only prospect revealed by the evidence was a Mrs. Hubbell. There was no evidence that either she or her son were financially responsible or that she ever offered to rent the premises for any specific term or offered any definite amount of rent. There was no evidence that the exercise of reasonable diligence on the part of the plaintiff would have resulted in securing another suitable tenant at an earlier date, nor was there any evidence as to the amount of rent that

could have thus been obtained. The plaintiff's efforts ultimately resulted in a new tenant at the same rental provided in the lease.

The district court correctly found that there was no arbitrary or unreasonable refusal to consent to an assignment of the lease. It is also clear that there was no unreasonable refusal to accept a qualified and suitable substitute tenant. The action of the trial court in granting plaintiff's motion to withdraw the case from the jury and enter judgment for the plaintiff was correct and is sustained.

AFFIRMED.

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CITY OF BELLEVUE, A MUNICIPAL CORPORATION, SARPY COUNTY, NEBRASKA, APPELLEE, V. WESTERN SURETY COMPANY, A CORPORATION, APPELLANT.
171 N. W. 2d 772

Filed October 17, 1969. No. 37223.

1. **Public Officers and Employees: Bonds.** The surety upon the bond of a county treasurer is liable for funds received by the treasurer and not accounted for by him.
2. ———: ———. Interest on funds received by a county treasurer but not accounted for by him runs from the date of receipt.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

William L. Walker and Earl Ludlam, for appellant.

John E. Rice, for appellee.

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

BOSLAUGH, J.

This is an action by the City of Bellevue, Nebraska, to recover upon the official bond of Robert M. Eby, the former county treasurer of Sarpy County, Nebraska. The

defendant, Western Surety Company, was the surety upon the treasurer's bond.

A jury was waived and the action tried to the court. The trial court found generally for the plaintiff. The defendant's motion for new trial was overruled and it has appealed.

The evidence shows that the city delivered its check dated September 15, 1958, in the amount of $2,000 to the county treasurer for credit to its Water Revenue Bond Fund. The treasurer endorsed and deposited the check in his bank account but failed to credit the Water Revenue Bond Fund of the city.

The evidence further shows that the city delivered its warrant dated September 9, 1964, in the amount of $20,000 to the county treasurer for credit to its Water Revenue Bond Fund. The treasurer endorsed and deposited the warrant in his bank account but only credited the Water Revenue Bond Fund of the city in the amount of $16,000.

The $6,000 shortage was discovered after the death of Eby. In September 1966, auditors for the city found that the beginning balance in the ledger account for the Water Revenue Bond Fund did not correspond with the ending balance as shown in the audit report for the previous year. Investigation disclosed that ledger sheets had been substituted since the previous audit. In this manner the shortage had been concealed from the auditors for the city and the Auditor of Public Accounts. The duplicate ledger sheets were found in the office of the county treasurer and are in evidence.

The defendant contends that the evidence is not sufficient to permit a recovery on the bond since there is no evidence as to what happened to the $6,000 that should have been credited to the Water Revenue Bond Fund. The contention is without merit. The bond requires that the treasurer "faithfully discharge all the duties of his said office as required by law." The evidence shows that the treasurer failed to account for $6,000 received by

him. This was a breach of his duties for which the defendant surety is liable. The evidence sustains the finding of the trial court against the defendant.

The action was commenced October 13, 1967, which was well within the time permitted by statute. § 25-209, R. R. S. 1943; Alexander v. Overton, 22 Neb. 227, 34 N. W. 629.

The trial court received in evidence, over objection, ledger sheets pertaining to the Water Revenue Bond Fund account in the office of the county treasurer. These exhibits were identified as records in the office of the county treasurer made in the handwriting of Robert M. Eby, the former treasurer. The exhibits were properly received in evidence.

The trial court excluded from evidence copies of the county treasurer's reports from July 1, 1957, through December 31, 1965. These reports were not material to the issues in the case and were properly excluded. The trial court also excluded from evidence a release executed by the county pursuant to a settlement with the defendant for a shortage in money received from distress warrants. The settlement and release related to a transaction between the defendant and Sarpy County and was not relevant to any of the issues in this case.

It is unnecessary to consider the other assignments of error.

The trial court allowed interest from the date that the checks and warrants involved were deposited in the treasurer's bank account. This was proper since the money was withheld from the plaintiff from that date. § 45-104, R. R. S. 1943; Thomssen v. Hall County, 63 Neb. 777, 89 N. W. 389.

The trial court allowed the plaintiff an attorney's fee of $900. The plaintiff is allowed the sum of $500 for the services of its attorney in this court.

The judgment of the district court is affirmed.

AFFIRMED.

SANITARY AND IMPROVEMENT DISTRICT NO. 14 OF SARPY COUNTY, NEBRASKA, APPELLEE, V. WESTERN SURETY COMPANY, A CORPORATION, APPELLANT.
171 N. W. 2d 774

Filed October 17, 1969. No. 37224.

1. **Public Officers and Employees: Bonds.** The surety upon the bond of a county treasurer is liable for funds received by the treasurer and not accounted for by him.
2. ———: ———. Interest on funds received by a county treasurer but not accounted for by him runs from the date of receipt.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

William L. Walker and Earl Ludlam, for appellant.

Dixon G. Adams, for appellee.

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

BOSLAUGH, J.

This is an action by Sanitary and Improvement District No. 14 of Sarpy County, Nebraska, upon the official bond of Robert M. Eby, the former county treasurer of Sarpy County, Nebraska. The defendant, Western Surety Company, was the surety upon the treasurer's bond.

A jury was waived and the action tried to the court. The trial court found generally for the plaintiff. The defendant's motion for new trial was overruled and it has appealed.

The evidence shows that the county treasurer received a check dated August 15, 1962, in the amount of $1,412.96 which should have been credited to the account of the plaintiff. The check was endorsed and deposited in the treasurer's bank account on October 3, 1962, but the plaintiff never received credit for the amount of the check.

The shortage was discovered in 1965 by auditors employed by the plaintiff. Apparently, the treasurer had

credited the $1,412.96 check to Sanitary and Improvement District No. 4 in October 1965, but this entry was later erased and no credit was ever given to the plaintiff. The evidence sustains the finding of the trial court against the defendant.

The other assignments of error are discussed and disposed of in City of Bellevue v. Western Surety Co., *ante* p. 678, 171 N. W. 2d 772.

The trial court allowed the plaintiff an attorney's fee of $350. The plaintiff is allowed the sum of $500 for services of its attorney in this court.

The judgment of the district court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. C. RAY CURRY, APPELLANT.
171 N. W. 2d 163

Filed October 17, 1969. No. 37226.

1. **Criminal Law: Courts.** When a sentence has been imposed by the district court within statutory limits it will not be disturbed on appeal in the absence of an abuse of discretion.
2. ———: ———. In reviewing a criminal sentence in this court, the burden of proof is on the defendant to show by the record an abuse of discretion by the trial court. If such an abuse of discretion is established, and the sentence imposed is found to be excessive, this court may reduce the sentence of the accused as in its opinion may be warranted by the evidence.
3. **Criminal Law: Statutes.** A provision in a sentence in effect directing that a jail sentence authorized by section 28-512, R. R. S. 1943, shall be served in the Nebraska Penal and Correctional Complex is unauthorized and void. The transfer of prisoners sentenced to the county jail is governed by section 29-1001, R. R. S. 1943.

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

Thomas L. Anderson, 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.

CARTER, J.

The defendant was charged in the district court for Hall County with two counts of petit larceny. Defendant entered a plea of guilty to each count. On the first count, defendant was sentenced to 6 months in jail and a fine of $500. On the second count, defendant was sentenced to 6 months in jail to be served consecutively with the jail term imposed on the first count. The defendant has appealed.

The evidence shows that on the evening of December 12, 1968, and the morning of December 13, 1968, the defendant, Cynthia Thompson, and Cindy McConnell arranged to cooperate in stealing merchandise from Skagway Department Stores, Inc. The evidence is that of the three participants and defendant's employer given to the trial court immediately preceding the sentencing of the defendant. This evidence may be summarized as follows:

Cynthia was 18 years of age, married, and the mother of a small child. She was employed by Skagway in its Grand Island store and, at the time of the thefts, was working as a checkout girl at a cash register. Cindy was 18 years of age, single, and had formerly been employed by Skagway. She lived with her parents in North Platte and at the time here involved was visiting at the home of Cynthia. She met the defendant for the first time through her boyfriend the day before the thefts. Defendant asked her if she knew of a way to get some Christmas presents for his children at reduced prices and she said she would see what she could do. She talked to Cynthia who stated she would do it for the defendant. Defendant was 27 years of age, divorced, the father of three children whose custody was with the

mother, and employed by Cornhusker Homes as a finishing carpenter.

On December 13, 1968, defendant and Cindy went to Skagway after Cynthia reported for work, selected two dolls priced at $10 or $11 each, a stuffed animal of unknown value, and two tape recordings priced at $6.95 each and was permitted by Cynthia to carry them out for a charge of $8. An hour or two later, the time-lapse being in dispute, defendant and Cindy came into the store, selected a large amount of merchandise for Cynthia, defendant, and others. Cynthia turned back some of the merchandise, but accepted $33 for merchandise priced at $185 found in sacks in the possession of Cindy and defendant as they were leaving the store. It was admitted by the three participants that the two larcenies occurred pursuant to a scheme previously agreed upon.

Cynthia and Cindy had no previous criminal record but admitted that the same offense had been committed a few times by them at Skagway and another store without any participation by the defendant. Within a year prior to the commission of the present offense, defendant was convicted of assault and battery in which firearms were involved and sentenced to 3 months in jail. After serving 20 days in the county jail, he was transferred to the Nebraska Penal and Correctional Complex because of his incorrigible conduct while in jail. Prior thereto, defendant was convicted for obstructing justice and was fined $100. He was never previously involved in any larceny or anything similar to the present case.

The defendant contends that the sentences were excessive under the foregoing fact situation. It has long been the rule of this court that the imposing of criminal sentences by the district court is a discretionary matter with which this court will not interfere in the absence of an abuse of such discretion if the sentence is within the limits prescribed by the applicable statute. State v.

Paul, 177 Neb. 668, 131 N. W. 2d 129. See, also, § 29-2308, R. R. S. 1943.

It is argued here that uniformity of sentences on the same factual situations is to be desired. The alleged excessiveness of the sentences is based on the fact that Cynthia and Cindy were each sentenced to 90 days in jail for their part in the offenses. As a general proposition, the argument is a valid one. The determination as to when a pattern exists and should be applied in reviewing a sentence in this court creates many problems because of the intangible considerations involved. The trial court having conducted the trial and observed the defendant is in a much better position to determine the sentence to be imposed after considering questions of punishment, rehabilitation, and the deterrence of future violations. Local history and statistics might be of importance in imposing a sentence. Large increases in particular offenses in the locality could well require more severe sentences than otherwise to obtain adequate law enforcement. It is shown in the brief of the State that in the city of Grand Island in 1967, there were 209 larceny offenses in excess of $50 and 418 such offenses of less than $50 known to the police. Hoover, Crime in the United States, Uniform Crime Reports—1967, p. 187. This suggests the public need for discouraging the commission of these offenses by more severe sentences to deter potential thieves. Subject to some exceptions, similar persons found guilty of similar crimes should be punished substantially the same. But, on the other hand, persons found guilty of crime must accept the natural hazards that inhere in the sentencing process. In addition to the foregoing, we point out that the evidence of defendant alone would sustain a conviction for grand larceny and a sentence equal to or in excess of those imposed in the case at bar.

We point out here that the sentencing of convicted criminal defendants is the primary function of the district courts and the right of review in this court is limited

to finding an abuse of discretion by such courts in imposing sentences. The nature of the offense committed and its relation to the need for the protection of society, its effectiveness as punishment of the defendant, the evaluation of the possibilities of rehabilitation of the wrongdoer, its effect in deterring future offenses by defendant and potential offenders, and its consistency with the sense of justice of the local community are important considerations in a proper exercise of the judicial discretion lodged in the sentencing court. The foregoing standard guidelines for imposing a just sentence appear to have been followed and a just sentence imposed upon the defendant. We find nothing in the record indicating an abuse of discretion by the trial court in imposing the sentences that it did.

The journal entry reciting the imposition of the sentences states: "The Court further finds, from the evidence, that the Defendant, Ray Curry, is incorrigible, and cannot be contained in the Hall County Jail and that for this reason, he should be removed to the Nebraska Penal Complex for safe keeping." The quoted provision exceeds the powers of the district court and is void. The sentence authorized by the trial court must be in accordance with section 28-512, R. R. S. 1943. The provision of the sentence above quoted is hereby stricken as void and the sentences imposed are otherwise affirmed. The transfer of a convicted defendant sentenced to the county jail is governed by section 29-1001, R. R. S. 1943.

We find no prejudicial error in the record before us and the judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

MARYRUTH PARKHURST, APPELLEE, V. GARNETT S. PARKHURST, APPELLANT.
171 N. W. 2d 243

Filed October 17, 1969. No. 37240.

1. **Divorce: Appeal and Error.** Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed.
2. ———: ———. A rule by which to measure the exact amount or degree of corroboration required in a divorce case has not been formulated. The sufficiency or insufficiency of corroboration must be determined from the facts and circumstances of each case.
3. **Divorce: Appeal and Error: Evidence.** Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

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

Henry E. Stevens, for appellant.

Yost & Yost and Nicholas J. Lamme, for appellee.

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

SPENCER, J.

This is an action for divorce brought by Maryruth Parkhurst against Garnett S. Parkhurst on the grounds of extreme cruelty. The trial court granted plaintiff an absolute divorce and divided the property of the parties, subject to encumbrances. Defendant perfected this appeal.

The parties were married May 18, 1943, and have one son who has attained his majority. The marital home of the parties was in Fremont, Nebraska. Plaintiff has been

gainfully employed during the entire marriage except for the period of her pregnancy. For the last several years she has been employed at the Hormel Packing Company. Defendant has been employed or in business during the marriage except for a period of less than a year. For the last 5 years he has been operating a laundromat and dry cleaning business in Wahoo, Nebraska. The downpayment for the purchase of the business was made with plaintiff's inheritance from her mother.

We limit our consideration to the assignments of error covering sufficiency of the evidence, corroboration, and condonation. Defendant also attacked the division of the property in his brief, but neglected to include it in his assignments of error. It will not be considered herein in accordance with Rule 8 a 2 (3), Revised Rules of the Supreme Court, 1967, which so far as material herein is as follows: "Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed."

Plaintiff testified that defendant had a violent temper and continually struck her, the last occasion being when he broke some furniture and dishes during the evening meal about a week before the separation. She also testified that she went to Columbus, Nebraska, the last Friday in April to check on defendant's alleged girl friend, and found defendant's car parked in front of the house. She testified defendant was in the house approximately 2½ hours. While defendant insisted it was a business call and denied any impropriety on this occasion, there is a modicum of corroboration of plaintiff's testimony in the defendant's version of the event. Plaintiff returned to Fremont, picked up some clothes, and left the home of the parties. She remained away for 3 weeks and when she returned she refused to live with the defendant.

After the divorce action was filed, defendant called her on the telephone. Her sister, who was listening on an extension telephone, testified to the conversation. The sister testified defendant wanted to know on what grounds plaintiff was seeking a divorce. Plaintiff told him that her main objection was his striking her, his violent temper, and, of course, his running around with other women. The sister testified that defendant, relative to striking plaintiff, said: "'How are you going to prove that. No one saw it.'"

Plaintiff had a restraining order issued against the defendant, but the testimony is undisputed that he followed her in his car wherever she went, and on one occasion the Omaha police had to escort her to her sister's-in-law home in Omaha.

After the filing of the petition, plaintiff's home was entered and the title to the defendant's car was taken, along with some letters to the defendant from other women which plaintiff had found. There was some money in the house on this occasion but only one-half of it was gone. Plaintiff parked her car during the day on the Hormel parking lot. On one occasion while it was parked there, sugar was put in the motor. Defendant had been seen in the vicinity of the car on the day of this occurrence.

The evidence in this case, although somewhat marginal, is sufficiently corroborated to sustain a finding of extreme cruelty on the part of the defendant. In Sewell v. Sewell, 160 Neb. 173, 69 N. W. 2d 549, we held: "A rule by which to measure the exact amount or degree of corroboration required in a divorce case has not been formulated. The sufficiency or insufficiency of corroboration must be determined from the facts and circumstances of each case."

On the issue of condonation after the filing of the petition herein, defendant's evidence strains credulity. The parties were living apart and defendant admits plaintiff refused to listen to his pleas for reconciliation. De-

fendant testified to cohabitation on several occasions subsequent to the filing of the petition. Plaintiff vehemently denied any cohabitation after the Columbus event. The trial court in its determination accepted plaintiff's version of the evidence and granted the divorce.

Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Schalk v. Schalk, 168 Neb. 229, 95 N. W. 2d 545.

The judgment of the district court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. EDWARD STRONG, ALSO KNOWN AS EDDIE THOMPSON, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. JAMES RONALD STEVENSON, APPELLANT.
171 N. W. 2d 246

Filed October 17, 1969. Nos. 37297, 37298.

1. **Criminal Law: Courts.** When a sentence has been imposed by the district court within statutory limits, it will not be disturbed on appeal in the absence of an abuse of discretion.
2. ———: ———. The moral turpitude involved in the commission of a criminal offense is a proper element to be considered by the trial court in fixing the sentence to be imposed.

Appeals from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

A. Q. Wolf and Lynn R. Carey, Jr., for appellants.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

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

CARTER, J.

The defendants in these two cases were each convicted of the crime of burglary and each sentenced to a term of 10 years in the Nebraska Penal and Correctional Complex. Each of the defendants has appealed. These are separate actions, but involve identical issues arising out of the same transaction. They will, therefore, be discussed together.

The defendants were charged in separate informations on two counts with burglary and robbery on January 14, 1969, of a dwelling located at 4110 North Forty-third Street in Omaha, Douglas County, Nebraska, occupied by George P. Barker. Each defendant entered his plea of guilty to the charge of burglary after which the county attorney, with the consent of the court, dismissed the charge of robbery against each defendant. It is the contention of each defendant that he was given the maximum sentence of 10 years for burglary because of the trial court's consideration of the unproven charge of robbery in fixing the sentence.

It is clear that the dismissal of the robbery charges after defendants pleaded guilty to burglary was the result of a deal between the State and the defendants. The trial court knew of the arrangement and questioned each defendant and his counsel about it. Each defendant stated that he desired to plead guilty to burglary solely because he was guilty of that offense and that the agreed-upon dismissal of the robbery charge played no part in his decision to enter a guilty plea. Only after being convinced that each defendant understood thoroughly his rights and options, and the effect of the guilty plea, did the court accept the plea of guilty.

By securing the dismissal of the robbery charge by the deal made, referred to by the sophisticated name of a "plea bargain," each defendant was subject to one felony

sentence instead of two. There is no evidence that the sentence was to be any less than that imposed. The record is completely void of any evidence that the dismissed robbery charge played any part in the assessment of the sentence. The defendants are not in a position to assert their contention under these circumstances in the absence of affirmative evidence to the contrary.

The apparent reason for the imposition of the maximum sentences does appear in the record. After the arraignment and before sentences were imposed, the trial court became possessed of information concerning the conduct of the two defendants in perpetrating the offense which affected the extent of the moral turpitude involved. This is a duty imposed by statute. § 29-2217, R. R. S. 1943. The trial court discovered and so informed the defendants that in burglarizing the subject dwelling they had terrorized two crippled people by tying their arms to their wheelchairs, pushing them around, and threatening to kill them. They took out or cut the telephone wires, searched and ransacked the dwelling, and robbed the occupants of the dwelling. This information was not denied by the defendants and affords a proper basis for more severe sentences. This conclusion is supported by State v. Escamilla, 182 Neb. 466, 155 N. W. 2d 344; State v. Williams, 183 Neb. 395, 160 N. W. 2d 201; State v. Stock, *ante* p. 29, 165 N. W. 2d 111; and State v. Hake, *ante* p. 381, 168 N. W. 2d 270.

We find that there is no error in the record and the judgments of the district court are affirmed.

AFFIRMED.

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E. C. WELLER, APPELLEE, V. L. D. PUTNAM, APPELLANT.
171 N. W. 2d 767

Filed October 24, 1969. No. 37119.

1. **Pleadings: Set-Off and Counterclaim.** The proper manner in which to challenge the appropriateness of a counterclaim or

cross-petition is by motion to strike rather than a demurrer.

2. ———: ———. A defendant in an action is not restricted to the counterclaim provided for in sections 25-812 and 25-813, R. R. S. 1943, but, in a proper case, may seek affirmative relief, either against the plaintiff or against co-defendants, by cross-petition.

3. ———: ———. The new issues which a defendant may introduce by cross-petition or cross-bill are to be limited to such as it is necessary for the court to have before it in deciding the questions raised in the original suit in order to do complete justice to all parties with respect to the cause of action on which the plaintiff bases his claim to relief.

4. **Actions: Set-Off and Counterclaim.** New and distinct matter not maintainable under the provisions of the code as a counterclaim and not involved in a proper determination of the subject matter of the original suit must be litigated in a separate action.

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

Dudley Herman and Milton C. Murphy, for appellant.

Farman & Cassell and Jewell, Otte & Pollock, for appellee.

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

WHITE, C. J.

Plaintiff brought an action to collect the balance remaining on a demand promissory note less an amount credited to defendant involving a split of real estate loan fees. The original note, executed October 14, 1963, was for $60,000, defendant had repaid $10,000 on November 13, 1963, and $15,000 on December 3, 1963. Defendant cross-petitioned praying for an accounting. The district court sustained demurrers to the first and second causes of action of defendant's cross-petition. Defendant has appealed to this court.

Defendant's answer admitted that the note had been executed, consideration received, partial payment made, and a demand for full payment made all as plaintiff had

alleged. Defendant however alleged that at the time of the execution of said note plaintiff was indebted to defendant for a large amount of money; that plaintiff was in very poor health; that defendant was advised and counseled not to disturb plaintiff by demanding the full amount due defendant at that time; and that it was in the best interests of both parties for the defendant to execute the note; and that an accounting would be had later when the plaintiff's health had improved; and further that defendant orally agreed at that time to a later adjustment of the amounts due in an accounting between them.

Defendant's cross-petition contained three causes of action, the first two of which are before this court.

Defendant in his first cause of action alleged that defendant at plaintiff's request agreed to and did operate plaintiff's businesses which were in financial difficulty on the agreement that once the businesses were financially successful the defendant would be paid a fee of 20 percent of plaintiff's remaining assets. This occurred commencing in December 1951 and ending in December 1952. Defendant alleged that shortly before plaintiff filed this cause of action plaintiff acknowledged the value of defendant's services and agreed to an accounting of all debts between the parties. In addition defendant's first cause of action alleged that at about the time the above transaction was drawing to a close plaintiff took defendant to the business of a third party, which third party was interested in securing a loan from plaintiff. Plaintiff felt the loan was a poor security risk and asked defendant to guarantee the loan which defendant alleges that he did. Further in 1959 this third party was in default, the loan was foreclosed, and the property leased back to the third party. Then in 1960 the plaintiff became ill and asked the defendant again to carry on for him under the arrangements existing in the 1951-1952 undertaking. Of particular concern to the plaintiff at this time was the loan to the third party.

Defendant assisted the third party in making the third party's interests go to such a point that the indebtedness of the third party to the plaintiff could be entirely repaid. Whereupon defendant alleges that he was to receive 1 percent for making and guaranteeing said loan and 1 percent upon all interest paid and collected all to be due upon the full payment of the loan which defendant alleges was fully repaid in December of 1966 and that plaintiff was indebted to defendant pursuant to this agreement.

Defendant's second cause of action is that plaintiff in 1964 after numerous unsuccessful attempts to procure sufficient irrigation water on 3 quarter sections of land, "* * * knowing the defendant to be an accomplished and recognized well witcher, came to the defendant and asked him to locate a well upon each quarter section of land * * *." Defendant alleges that he undertook to find the water on a contingent basis, that he was to receive $15,000 for each irrigation well located, that he did locate an irrigation well on each quarter section of land, and that plaintiff was therefore indebted to defendant for these services in the amount of $45,000.

The issue presented to this court is whether or not the cross-petition of the defendant is properly pleaded in this action. This issue apparently was presented to the trial court by plaintiff's demurrers. A party may demur to a pleading only upon such grounds as are specified in the statute. Central Nebraska Public Power & Irr. Dist. v. Walston, 140 Neb. 190, 299 N. W. 609; § 25-806, R. R. S. 1943. It is our opinion that the proper manner in which to challenge the appropriateness of a counterclaim or cross-petition is by motion to strike rather than a demurrer. Standing alone a counterclaim or cross-petition might well state facts sufficient to constitute a cause of action but at the same time not be proper as a counterclaim or cross-petition. Brugman v. Burr, 30 Neb. 406, 46 N. W. 644. See, also, O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540; McGerr v.

Marsh, 148 Neb. 50, 26 N. W. 2d 374; Rogers v. Western Electric Co., 179 Neb. 359, 138 N. W. 2d 423.

Both of the parties have joined issue in this court on the sole issue of whether the cross-petition pleaded herein may be properly filed and tried in this case. That being true, we will consider the case as if presented properly by motions to strike.

The issue presented is a procedural one. The full ambit of the defendant's attack upon the lower court's ruling sustaining the demurrers in this case is contained in his proposition of law No. II which is stated as follows: "A defendant in an action is not restricted to the counter-claim provided for in Secs. 25-812 and 25-813, R. R. S. 1943, but may in a proper case seek affirmative relief against the plaintiff, based upon mutual existing obligations." Again, the issue in this case is narrowed further by apparent agreement that this general proposition of law is accurate. Both parties cite and rely upon the following cases: Rogers v. Western Electric Co., *supra;* Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N. W. 2d 298; Louis Hoffman Co. v. Western Smelt. & Refin. Co., 150 Neb. 524, 34 N. W. 2d 889; Indiana Harbor Belt R.R. Co. v Alpirn, 139 Neb. 14, 296 N. W. 158.

An analysis of the argument in this case reveals that the argument is further narrowed to a question of the interpretations of our holdings in the recent case of Rogers v. Western Electric Co., *supra,* and the basic case of Armstrong v. Mayer, 69 Neb. 187, 95 N. W. 51. The defendant does not contend that his cross-petition or cross-bill filed herein is authorized by the appropriate statutory sections 25-812 and 25-813, R. R. S. 1943. He contends, first, as is stated verbatim in his proposition of law, that our case holdings have expanded the restrictions of the statutes; and second, therefore, his cross-petition or cross-bill herein is authorized by the holdings of the authorities cited. With the first contention we agree. In Armstrong v. Mayer, *supra,* this court held:

"A defendant in an action is not restricted to the counterclaim provided for in sections 100 and 101 of the code (now sections 25-812 and 25-813, R. R. S. 1943), but, in a proper case, may seek affirmative relief, either against the plaintiff or against codefendants, by cross-petition." The rationale of this holding will not be recited herein. Suffice it to say that this court has long held that outside the statute, in either law or equitable actions, in a proper case, a defendant may seek affirmative relief against a plaintiff by cross-petition.

These decisions and the text authorities extensively cited by appellant clearly support the general proposition that he contends for, that the court, outside of the range of the statute, may permissibly grant the right to file a cross-petition seeking affirmative relief beyond the scope of the precise issues presented by plaintiff's petition. Applying these general principles of the purposes and reasons for the permission of the filing of a cross-petition outside the ambit of the statute, the defendant argues as an original matter that his cross-petition should be permitted under the particular equities and the circumstances of this case. We are not required, however, to originally determine whether there are any boundaries to a defendant's right to file a cross-petition or a cross-bill, as distinguished from a statutory counterclaim. The limitations on the right to file a cross-petition or a cross-bill, either in a law or equity action, have been definitively established and followed in this state since the case of Armstrong v. Mayer, *supra*. In the recent case of Rogers v. Western Electric Co., *supra*, the interpretation of which the parties join issue here, this court exhaustively reviewed our holdings on this precise procedural issue, reaffirmed the holding and rationale of Armstrong v. Mayer, *supra*, and precisely and accurately stated the controlling rules and principles upon which they are based. The court said: "If we are to accept the true spirit of the reformed procedure intended by the code, then it is the substance of

the action rather than the form of it which will determine the availability of relief. The criterion to be applied is that the issues raised by the cross-bill must be so closely connected with the cause of action in the original suit that a cross-claim is a mere auxiliary or dependency upon the original action. The new issues which a defendant may introduce by cross-claim are to be limited to such as it is necessary for the court to have before it in deciding the questions raised in the original suit in order to do complete justice to all parties with respect to the cause of action on which the plaintiff bases his claim to relief. If a defendant in filing a cross-bill attempts to go beyond this and to introduce new and distinct matter not essential to the proper determination of the issue put in litigation by the original bill, although he may show a perfect case against either the plaintiff or one or more of his co-defendants, his pleading will not be permitted as a cross-bill. New and distinct matter not maintainable under the provisions of the code as a counterclaim and not involved in a proper determination of the subject matter of the original suit must be litigated in a separate action. * * *

"Even under the chancery practice, it was held that the cross-suit must be germane to the original suit and the new issues which a defendant could introduce by a cross-bill were limited to such as it was necessary for the court to have before it in deciding the question raised in the original suit.

"As we said in Armstrong v. Mayer, 69 Neb. 187, 95 N. W. 51: 'We see no reason to doubt that the matters set up in the cross petition must be germane to the original suit under the code, quite as much as under the chancery practice.' We can see no reason to deviate from this rule."

Applying these principles, it is apparent that the alleged well-witching contract set out in cause of action No. 2 is not remotely connected with the subject matter of the original action, which is a suit for the balance on

a promissory note. As to the first cause of action, it is clear that the original cross-petition of the defendant filed herein alleged a cause of action on which the statute of limitations had long since run. On attack, the defendant filed an amendment to this first cause of action, seeking to remedy this defect, by alleging that in 1952 the plaintiff made a loan to James Corkle, secured by a real estate mortgage; that the defendant guaranteed to the plaintiff the payment in full of the loan; that in consideration thereof plaintiff agreed to pay defendant one percent of all principal and interest paid on the Corkle loan; and that said compensation was "not to become due and payable until all of the principal and interest was paid by Corkle to the plaintiff." The defendant in his cross-petition further alleges that the final payment thereof under this allegation was made in December 1966. The defendant's delemma is obvious. Giving maximum reach to the allegations of his petition, he has alleged two demands in his first cause of action, the first of which the statute of limitations has destroyed its life, and the second in which he seeks recovery of a $527.50 balance which did not accrue, by the allegations of the cross-petition, until December 1966, approximately 10 or 11 months after the filing of the plaintiff's action. We have long followed the rule in Nebraska that a counterclaim, set-off, or cross-petition, to be available as a matter of affirmative defense or affirmative relief, must be a claim upon which the defendant could, at the date of the commencement of the plaintiff's suit, have maintained in an action on his part against the plaintiff. Simpson v. Jennings, 15 Neb. 671, 19 N. W. 473; Bank of Crab Orchard v. Myers, 120 Neb. 84, 231 N. W. 513; Gurske v. Kelpin, 61 Neb. 517, 85 N. W. 557; American Gas Construction Co. v. Lisco, 122 Neb. 607, 241 N. W. 89.

The assignments of error as supported by the contentions of the defendant cannot be sustained, and for

that reason the judgment of the district court is affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.
BOSLAUGH, J., concurs in the result.

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STATE OF NEBRASKA, APPELLEE, V. WILLIAM EDWARD AGNEW, APPELLANT.

171 N. W. 2d 542

Filed October 24, 1969. No. 37204.

**Criminal Law: Searches and Seizures: Arrest.** A search without a warrant is valid if made incident to a lawful arrest.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Fred J. Montag and Henry F. Pedersen, Jr., for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

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

MCCOWN, J.

The defendant, William Edward Agnew, was found guilty of burglary by a jury and sentenced to a term of 3 to 5 years in the Nebraska Penal and Correctional Complex.

Early on the morning of August 8, 1968, Frank Barna was awakened by the sound of breaking glass. He looked out the window of his residence and saw two men breaking out the heavy glass in the door of a service station across the street, some 40 yards away. He saw the two men enter the service station; pick up the cash register; carry it out; and put it in the trunk of their car. They left the trunk lid open. The two white men were accompanied by a girl wearing shorts or pedal pushers.

One man wore a solid-colored shirt. The three people got into the car and drove away. He described the car as a green Triumph convertible with three windows in the back. Barna called the police as the car was pulling away.

The call to police units went out at about 3:27 a.m. The police arrived in 5 or 10 minutes. Barna went across to the service station and gave the description of the car and its occupants to the police. Officer Price was the first police officer to arrive at the service station. He talked to Barna and left immediately in search of the automobile described.

From the service station, which was located at 84th and Blondo Streets in Omaha, he proceeded to 96th and Dodge Streets, and turned north on 96th Street. Shortly thereafter he saw a small dark-colored Triumph convertible going south. He had seen only a few other moving automobiles during his search. Price turned around, followed the car, and radioed for help. The car turned west on Dodge Street and was stopped at 120th and Dodge Streets by Price and two other police cruisers. The car was occupied by two white men and a girl. The car was stopped at about 3:50 or 3:55 a.m. It was raining at the time.

The police got the occupants out of the car, searched the men, and arrested all three. One officer briefly inspected the interior of the car by shining a flashlight into it. The three individuals and the car were taken to the police station. Officers Price and John stayed in the station long enough to take the individuals up to the detective bureau, and then went down and searched the car. The search was made 15 or 20 minutes after arriving at the police station. In the trunk of the car, the officers found a receipt made out to the service station which had been burglarized.

At about 11 a.m., on the same morning, a search warrant was obtained for the car. Photographs were taken and the lid of the trunk was removed and subsequently

received in evidence. On the inside of the trunk lid were two marks, scratches or dents about 17⅛ inches or 17¼ inches apart. The stolen cash register was later recovered a few blocks away from the place where officer Price first saw the car. The top of the cash register measured 17⅛ inches in width.

The primary contention of the defendant on appeal is that the search of the automobile at the police station was not incident to the arrest and was unreasonable.

In this case, the determinative facts going to the issue of probable cause to make the arrest are undisputed. The officers knew that a burglary had been committed. Within a few minutes they discovered, in the vicinity of the burglary, a car meeting the description given by the eyewitness and occupied by persons meeting the descriptions given. The car itself was of an unusual and distinctive appearance. Very few cars were on the streets in that area at that hour of the morning. Under such circumstances, the officers clearly had probable cause to make the arrest and the arrest was lawful. See State v. O'Kelly, 175 Neb. 798, 124 N. W. 2d 211.

It is well established that a search without a warrant is valid if made incident to a lawful arrest. United States v. Rabinowitz, 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 2d 653.

A search made at the time and place of the arrest here would unquestionably have been lawful and reasonable. Nevertheless, the case of Preston v. United States, 376 U. S. 364, 84 S. Ct. 881, 11 L. Ed 2d 777, left some uncertainty as to when a search of a car is unreasonable, if the search is separated from the arrest in time or place. In that case, the defendant and two companions sitting in a parked automobile in the early hours of the morning were unable to give satisfactory explanations for their presence at that time and place. They were arrested for vagrancy, searched for weapons, and taken to police headquarters. The car, which had not been searched at the time of the arrest, was driven by an officer to

the station, from which it was towed to a garage. Soon after the men had been booked at the police station, some of the police officers went to the garage. They searched the car and found revolvers in the glove compartment, but were unable to get into the trunk. They went back again later, got into the trunk, and found evidence which was used to convict the defendant of conspiracy to rob a federally insured bank. Under those circumstances the search was found unreasonable, and the evidence inadmissible.

We believe the present case to be clearly distinguishable from Preston. There the "crime" for which the defendant was arrested was vagrancy, and the relationship and relevancy of the search to that "crime" was nonexistent. In this case, the crime was a burglary committed a very short time before, in which both the car and the evidence being searched for were directly connected with the crime for which the arrest was made. In Preston, the search was held to be too remote in time or place to have been made incidental to the arrest, under the test of reasonableness. Here the search was substantially contemporaneous with the arrest. (The entire arrest and search procedure was apparently completed in 30 to 40 minutes.)

There is no direct testimony as to the reasons for moving the car and postponing the search. Several reasonable justifications for such action may be inferred from the evidence. There were three police cruisers and the defendant's car standing on the highway at night and in the rain. Traffic safety is an obvious justification for changing the place of search. The lack of effective light at the scene and the possibility that the weather conditions might damage or alter the evidence are likewise reasonable motivations. Under the facts here, the action taken by the officers should not transform a constitutionally reasonable search into an uncontstitutional and unreasonable one. The removal of the car to the police station for search and the resultant

minimal delay did not make the search unreasonable. Neither was the search too remote in time or place to have been made as incidental to the arrest. For related cases, see, United States v. Dento, 382 F. 2d 361 (3d Cir., 1967) cert. denied 389 U. S. 944, 88 S. Ct. 307, 19 L. Ed. 2d 299; United States v. Powell, 407 F. 2d 582 (4th Cir., 1969); United States v. Rundle, 389 F. 2d 54 (3d Cir., 1968). On the facts before us, Preston v. United States, *supra,* does not control and we are satisfied that the search here was reasonable.

The defendant's remaining assignments of error are without merit. The judgment of the district court was correct and is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. GERRY FIEGL, APPELLANT.
171 N. W. 2d 643

Filed October 24, 1969. No. 37208.

1. **Criminal Law: Pleadings: Trial.** All defects that may be excepted to by a motion to quash an information are taken to be waived by defendant pleading the general issue.
2. **Criminal Law: Trial: Juries.** A party in the selection of a jury ordinarily has no right to examine a juror out of the presence of all other jurors.
3. **Criminal Law: Searches and Seizures.** A warrantless search of defendant's automobile and seizure of materials found therein are reasonable when defendant has consented freely and intelligently.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

James R. Welsh and Schrempp, Rosenthal, McLane & Bruckner, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

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

SMITH, J.

A jury found defendant guilty of unlawful possession of a depressant and stimulant drug. Defendant has appealed. He assigns for error the overruling of his motions (1) to quash the information, (2) to exclude all jurors, except the one under examination, from the courtroom during defendant's preliminary examination of jurors, and (3) to suppress the drugs from evidence.

The motion to quash the information came more than two months after defendant had pleaded not guilty. All defects that may be excepted to by a motion to quash are taken to be waived by defendant pleading the general issue. § 29-1812, R. R. S. 1943. The ruling was correct.

The motion concerning voir dire examination rested on publicity about importation of drugs from California and drug abuse in Omaha. No item mentioned defendant. A party in the selection of a jury ordinarily has no right to examine a juror out of the presence of all other jurors. The district court ruled correctly.

Defendant contends that the drugs which police seized in a warrantless search of defendant's automobile were within the exclusionary rule. The main question is whether defendant consented, the evidence disclosing the following: The Omaha police department received information from employees of Todd's Drive-In about illicit sales of drugs there. The informants, otherwise unidentified, described the seller as the owner of a green 1967 GTO Pontiac with black vinyl top and California license places. The information was relayed to officers Brigham and Dalgliesh of the vice control section. At 8 or 8:30 p.m., August 28, 1968, they saw at least five persons near a Pontiac of that description in a parked position at the drive-in. Investigating, they found defendant, who owned the Pontiac.

When defendant asked the officers why they were

investigating him, Brigham said he had reliable information about possession and sale of drugs by defendant. Brigham testified: "Q. . . . did you tell him you wanted to search the car? A. Yes, sir. Q. Did you tell him you would have to have the car taken down to the Station to do this? A. Yes, sir. Q. And that certain forms would have to be filled out first? A. Yes. . . . Q. Did he go to the Station voluntarily with you for the purpose of filling out certain consent and search warrants? A. Yes, sir." At the station the officers advised defendant of his constitutional rights, and defendant consented orally and in writing to the search. Inside the Pontiac trunk an unlocked suitcase opened by defendant was found to contain a sock in which the drugs were hidden.

A warrantless search of defendant's automobile and seizure of materials found there are reasonable when defendant has consented freely and intelligently. See, State v. Baker, 183 Neb. 499, 161 N. W. 2d 864 (1968); State v. Forney, 182 Neb. 802, 157 N. W. 2d 403 (1968). The district court correctly denied defendant's motion to supress the drugs from evidence.

Other assignments of error are not well taken. The judgment of the district court is affirmed.

AFFIRMED.

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CHARLOTTE M. BALKA, APPELLANT, V. SCHOOL DISTRICT NO. 53-J OF LISCO, IN THE COUNTY OF GARDEN, NEBRASKA, APPELLEE.

171 N. W. 2d 646

Filed October 24, 1969. No. 37236.

1. **Statutes: Words and Phrases.** 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.
2. **Schools and School Districts: Contracts.** A teacher whose con-

tract is automatically renewed under the provisions of section 79-1254, R. R. S. 1943, must file a written notice of acceptance with the secretary of the board within 15 days after April 15.

Appeal from the district court for Garden County: JOHN H. KUNS, Judge. Affirmed.

Lovell & Raymond, for appellant.

McGinley, Lane, Mueller, Shanahan & McQuillan, for appellee.

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

BOSLAUGH, J.

This is an action to determine the validity of a teacher's contract. The plaintiff was employed by the defendant, a Class I school district, under a written contract for the school year commencing in September 1967.

The petition alleges that on or about March 1, 1968, the defendant's principal advised the plaintiff orally that her contract for the next year would not be renewed. The plaintiff received no written notice of termination from the secretary of the school board and the plaintiff filed no written notice of acceptance of automatic renewal of the contract.

The plaintiff claims that her contract was automatically renewed by operation of law. The defendant has refused to honor the contract or permit the plaintiff to teach in its schools.

The trial court sustained a general demurrer to the petition. The plaintiff elected to stand on the petition and the action was dismissed. The plaintiff has appealed.

The question presented is whether the plaintiff was required to file a written notice of acceptance of automatic renewal in order to claim the benefit of the statute. Section 79-1254, R. R. S. 1943, provides in part as follows: "Any contract of employment between a

teacher who holds a certificate which is valid for a term of more than one year and a Class I, II, III, or VI district shall be deemed renewed and shall remain in full force and effect until a majority of the members of the board vote on or before April 1 to amend or to terminate the contract at the close of the contract period; Provided, that the secretary of the board shall, not later than April 15, notify each teacher in writing of any amendments to his contract or the termination of his contract; and provided further, that a teacher whose contract is terminated shall have the right to file a written request with the board of education for a hearing before the board. Such request shall be filed within fifteen days after receipt of the notice of termination and such request shall be granted by the school board or board of education. After such hearing a written statement as to the termination shall be given if requested by the teacher. Any superintendent or teacher whose contract is amended or automatically renewed according to the provisions of this section shall file written notice with the secretary of the board within fifteen days after receiving such notice of his acceptance of the amendments to or renewal of such contract, and failure to file such notice shall be regarded as conclusive evidence of his nonacceptance of the amendments to or renewal of his contract."

The automatic renewal provision originated in 1937 when the statute was amended to provide, in part: "The original contract of employment with a superintendent or a teacher shall require the sanction of a majority of the members of the board, but thereafter said contract shall be deemed renewed and shall remain in full force and effect until a majority of the members of the board vote on or before April first to terminate the contract at the close of the contract period, or until the contract is superseded by a new contract mutually agreed to by the board and the superintendent or teacher: Provided, that any superintendent or teacher whose contract is automatically renewed according to the aforesaid pro-

visions shall file written notice with the secretary of the board within fifteen days thereafter of his or her acceptance of said contract and failure to file such notice shall be regarded as conclusive evidence of his or her non-acceptance of the contract; * * *." Laws 1937, c. 182, § 4, p. 716.

In 1959, the statute was amended to require that the secretary of the board "not later than April 15, notify each teacher in writing of his election or failure of election." The notice of acceptance requirement was changed to read "within fifteen days after receiving such notice of election." Laws 1959, c. 411, § 1, p. 1377.

In 1965, the statute was changed to its present form. The notice of election requirement was eliminated but the notice of acceptance of automatic renewal was still required within 15 days "after receiving such notice." Laws 1965, c. 528, § 1, p. 1660.

The plaintiff contends that written notice of acceptance is no longer required because there is now no provision for the notice of election to start the 15-day period for giving notice of acceptance. The defendant contends that notice of acceptance must be given within 15 days after April 15, which is the last day upon which notice of amendment or termination may be given by the secretary of the board.

In construing a statute, effect must be given if possible to all it several parts. No sentence, clause, or word shall be rejected as meaningless or superfluous if it can be avoided. Heywood v. Brainard, 181 Neb. 294, 147 N. W. 2d 772.

The requirement of notice of acceptance has been in the statute since 1937. Although it is not clear as to when the Legislature intended that the notice be given, it is clear that notice of acceptance of automatic renewal is still required.

The notice of acceptance is important to each of the parties because it fixes their relationship for the following year. The teacher is not required to accept the

benefit of the automatic renewal statute; but if the teacher intends to claim the benefit of the statute, it is important that the school district know of that intention.

The construction urged by the plaintiff would eliminate the requirement of notice of acceptance. The construction urged by the defendant would result, in practical effect, in a procedure similar to that under the 1937 amendment.

We conclude that unless written notice of acceptance of automatic renewal is given to the secretary of the board within 15 days after April 15, the contract is not renewed under the statute. Since there was no notice of acceptance given in this case, the contract was not renewed.

The judgment of the district court is affirmed.

AFFIRMED.

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SIDNEY A. MIDDLE, APPELLEE, V. DAVID A. MOUNT, APPELLANT.

171 N. W. 2d 641

Filed October 24, 1969. No. 37237.

**Automobiles.** Former section 39-751 (2), R. R. S. 1943, provided: "The driver of any vehicle traveling at an unlawful speed shall forfeit any right-of-way which he might otherwise have hereunder." The provision was inapplicable to a motorist who met an oncoming vehicle which was being turned left between intersections.

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

Baylor, Evnen, Baylor, Urbom & Curtiss, for appellant.

Cobb, Swartz & Wieland, for appellee.

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

SMITH, J.

A motorcycle that plaintiff was driving north collided with an automobile that defendant was turning from south to east toward defendant's residential driveway. In this personal injury and property damage action the district court granted a new trial after verdict for defendant, and defendant has appealed. In question is a jury instruction on a statutory rule prescribing forfeiture of right-of-way because of speed.

Jury instruction No. 7 which defined the standard of conduct of a reasonable man in recognizing risk, concluded: "The driver of any vehicle traveling at an unlawful rate of speed shall forfeit any right of way which he may otherwise have." It was based on former section 39-751, R. R. S. 1943, which, from 1931 to 1969 with an exception inapplicable here, provided in part: "(1) When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right . . . (2) The driver of any vehicle traveling at an unlawful speed shall forfeit any right-of-way which he might otherwise have hereunder."

Jury issues were related to lookout and control by each party and to speed of plaintiff. The court also submitted the issue whether defendant had failed to yield the right-of-way but no issue whether plaintiff had failed to do so.

A jury weighing the evidence might reasonably find these facts: The collision occurred at 5 p.m., June 12, 1967, in front of defendant's home at 2440 South Thirty-seventh Street in Lincoln. Defendant had commenced to turn his 1963 Ford station wagon at a speed of 5 miles an hour. He stopped the Ford at a 45° angle 5 feet from the east curb when plaintiff's motorcycle was located some distance away. Speed of the motorcycle before deceleration was at least 35 miles an hour in a zone with a specific maximum limit of 25 miles an hour. The motorcycle left a solid tire mark 39 7/12

feet long and from the north end of the tire mark, gouge marks 12 11/12 feet long. It struck the right front door of the Ford. Damage to the motorcycle totaled $350.54, of which $238.35 represented charges for parts.

The scope of the statutory subsection on forfeiture was considered on motion for rehearing in Doan v. Hoppe, 133 Neb. 767, 277 N. W. 64 (1938). There defendant motorist had struck plaintiff pedestrian in a Lincoln street between intersections. A jury instruction defining the standard of reasonable conduct set out the forfeiture provision. We reversed the judgment for plaintiff, saying: "But this statute can have no application where the accident occurred in the middle of a block as in the case at bar." See, also, § 39-741 (5), (6), and (7), R. R. S. 1943; Hermansen v. Anderson Equipment Co., 174 Neb. 325, 117 N. W. 2d 791 (1962); Nygaard v. Stull, 146 Neb. 736, 21 N. W. 2d 595 (1946); generally, N J I 7.14.

The effect of the error in instruction No. 7 was indirect in view of the issues. The jury probably understood "right of way" to be the privilege of the immediate use of the east traffic lane at the collision scene. The indirect effect was substantial enough to justify the order for a new trial.

AFFIRMED.

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DAVID R. COLGROVE, APPELLANT, V. CITY OF WYMORE, A CORPORATION, ET AL., APPELLEES.

171 N. W. 2d 639

Filed October 24, 1969. No. 37242.

1. **Workmen's Compensation.** For partial disability, workmen's compensation shall be 66⅔ percent of the difference between the wages received at the time of the injury and the earning power thereafter, not to exceed $45 per week or to continue beyond 300 weeks.
2. ———. Disability under subdivisions (1) and (2) of section

48-121, R. R. S. 1943, refers to loss of earning power rather than loss of bodily function. Losses in bodily function, so far as these subdivisions of the statute are concerned, are important only as they relate to earning capacity.

3. ———. One of the determinative factors in reaching a conclusion on impairment of earning ability is the capacity of a workman to earn wages in the employment in which he was previously engaged or for which he is fitted.

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

Cobb, Swartz & Wieland, for appellant.

Cline, Williams, Wright, Johnson, Oldfather & Thompson, for appellees.

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

WHITE, C. J.

This is an action to recover benefits under the Nebraska Workmen's Compensation Law.

David R. Colgrove, plaintiff and appellant, was employed by the City of Wymore as an apprentice lineman. On May 6, 1966, he was injured as the result of a fall due to the mechanical failure of a boom basket in which he had been working. Although other injuries were sustained and compensation paid, the sole issue before this court is whether the plaintiff suffered a permanent partial disability, from the surgical removal of one kidney, within the meaning of section 48-121 (2), R. R. S. 1943, and is now entitled to compensation therefor.

The Nebraska Workmen's Compensation Court disallowed compensation for permanent disability. The district court for Lancaster County dismissed plaintiff's appeal. Plaintiff has appealed to this court. We affirm the judgment.

Medical testimony established that, upon the loss of one kidney, the other kidney makes an effort to achieve the total weight, size, and function of the original two kidneys. Creatinine is one of the breakdown products

that is excreted in urine and is used to determine kidney function. A person with two normal kidneys has a creatinine clearance of 130,000,000 grams per minute while a person with a single kidney will normally have a clearance of 70,000,000 to 90,000,000 grams per minute.

It was testified that this has little medical significance on the bodily function on a day-to-day living basis as one kidney is sufficient to maintain the internal environment of the body. The significance of the kidney loss is that all reserve is gone. Thus, if plaintiff were to have any future kidney ailments, his life could be endangered.

One of the medical experts also testified that, in his opinion, there was a 10 percent loss of total bodily function to a person with only one kidney. This 10 percent loss was then linked to the fact that a person with only one kidney might be more susceptible to, or have a more difficult time with, kidney ailments in the future. It was not related to the plaintiff's ability to *presently* perform his job.

Plaintiff's remaining kidney was stated to be healthy and also to be adequately performing the job of compensating for the kidney which was surgically removed.

As to ability to perform his job, plaintiff testified that he did, when twisting or stretching a certain way, get muscle cramps at the site of the incision. It appears that after returning to his job plaintiff completed his apprenticeship requirements and is now earning more wages than before.

Section 48-121 (2), R. R. S. 1943, provides that for partial disability compensation shall be 66⅔ percent of the difference between the wages received at the time of the injury and the earning power thereafter, not to exceed $45 per week or to continue beyond 300 weeks.

In Thinnes v. Kearney Packing Co., 173 Neb. 123, 112 N. W. 2d 732 (1962), it was stated that: "Disability under subdivisions (1) and (2) of section 48-121, R. S. Supp., 1957, refers to loss of earning power rather than loss of bodily function. Losses in bodily function,

so far as these subdivisions of the statute are concerned, are important only as they relate to earning capacity."

The fact that plaintiff is now earning more than before his injury is not conclusive of whether his earning power has been impaired. One of the determinative factors in reaching a conclusion on impairment of earning ability is the capacity of a workman to earn wages in the employment in which he was previously engaged or for which he is fitted. Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51 (1954).

In the present case, plaintiff has, since returning to work, completed his apprenticeship requirements and received a promotion and pay raise in the *same* employment in which previously engaged.

Even if the speculative medical testimony that plaintiff has incurred a 10 percent loss of total bodily function were accepted as true, this would be important only as it would relate to earning capacity, which relationship has not been shown by the testimony.

Directly on point is Frederick v. Cargill, Inc., 165 Neb. 589, 86 N. W. 2d 575 (1957). There plaintiff had a 10 percent permanent disability of the body as a whole due to a lung operation and partial removal of a rib. The plaintiff returned to the same type of work and at time of trial was receiving a higher wage. Even though he testified he was weaker and sometimes short of breath, this court found nothing upon which to base any reasonable calculation of impaired earning ability.

The theory behind workmen's compensation laws is that industry should bear the cost of economic disability which arises out of and in the course of employment. Plaintiff, here, has shown no compensable economic disability within the meaning of section 48-121 (2), R. R. S. 1943.

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

AFFIRMED.

WILLIAM H. PICK, JR., ET AL., CONSERVATORS OF LOUIS PICK, APPELLANTS, V. GEORGE PICK ET AL., APPELLEES.
171 N. W. 2d 766

Filed October 24, 1969. No. 37273.

1. **Bills and Notes: Limitations of Actions.** A voluntary payment of any part of the principal or interest upon a promissory note tolls the statute of limitations and a new right of action accrues after each payment.
2. ———: ———. The statute is not tolled as to a joint maker unless the payment was made with his authority or consent.
3. **Trial.** A party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence.

Appeal from the district court for Cedar County: JOSEPH E. MARSH, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Addison & Addison, for appellants.

Ryan & Scoville, for appellees George Pick and Marilyn Pick.

McFadden & Kirby, for appellee Herbert Pick.

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

BOSLAUGH, J.

This is an action against the makers of a promissory note. The plaintiffs are the conservators of Louis Pick, the payee of the note.

The note evidenced a loan of $3,000 to the defendants. They admit the execution and delivery of the note but contend that the action is barred by the statute of limitations. At the close of all the evidence the trial court found that the action was barred and directed a verdict for the defendants. The plaintiffs' motion for new trial was overruled and they have appealed.

An action upon a promissory note must be brought within 5 years. § 25-205, R. R. S. 1943. The note was

due February 6, 1963. The action was commenced April 12, 1968. The plaintiffs contend that the action is not barred because the defendants had paid interest on the note up to and including February 6, 1964.

A voluntary payment of any part of the principal or interest upon a promissory note tolls the statute of limitations and a new right of action accrues after each payment. Kienke v. Hudson, 126 Neb. 551, 253 N. W. 687. The statute is not tolled as to a joint maker unless the payment was made with his authority or consent. Kuhse v. Luther, 130 Neb. 623, 266 N. W. 66.

Raymond R. Pick, one of the plaintiffs, testified that in a conversation with the defendant George Pick in August 1964, George Pick stated that he had paid the interest on the note up to date. William H. Pick, Jr., the other plaintiff, testified that he was present at the time of the conversation in August 1964, and that George Pick said that interest on the note had been paid up to date at that time.

The note bore interest at the rate of 4 percent before maturity, payable semi-annually, and at the rate of 9 percent after maturity. The plaintiffs produced a copy of a check, exhibit 2, in the amount of $60, dated February 29, 1964, signed by George Pick, and payable to Louis Pick; and a copy of the deposit slip, exhibit 3, showing the deposit of the check to the account of Louis Pick. A duplicate copy of the deposit slip had been received in evidence as exhibit 8. Exhibits 2 and 3 were identified as copies of the records of the bank and should have been received in evidence.

George Pick, on direct examination, denied that the conversation in August of 1964 took place. On cross-examination he testified that he did not remember what the February 29, 1964, payment to Louis Pick was for, but that it was not for interest on the note. The evidence is in sharp conflict, but in determining the sufficiency of the evidence the plaintiffs are entitled to have every controverted fact resolved in their favor and

to have the benefit of every inference that can reasonably be drawn from the evidence. Reed v. Reed, 182 Neb. 136, 153 N. W. 2d 356.

The testimony of the plaintiffs in this action, if believed, established that George Pick had paid interest on the note up to August 1964. Exhibit 2 fixed the date of the payment from which the statutory period would run. The evidence presented a question for the jury, and the motion for a directed verdict as to the defendant George Pick should have been overruled.

It is unnecessary to consider the other assignments of error.

The judgment of the district court dismissing the action as to Marilyn Pick is affirmed. The judgment dismissing the action as to George Pick is reversed and the cause remanded for a new trial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

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DONNA HUBER, APPELLANT, V. E. JAY TIMMONS ET AL., APPELLEES.

171 N. W. 2d 794

Filed November 7, 1969. No. 37159.

1. **Animals: Negligence.** One who lets a horse for hire warrants the horse to be suitable for the purpose for which it is let and is liable for injuries resulting from the viciousness or dangerous propensities of the horse if he had knowledge, or, in the exercise of reasonable care, should have had knowledge, of such viciousness or dangerous propensities.
2. ———: ———. Ordinarily the existence of vicious or dangerous propensities in a domestic animal and knowledge of such propensities are indispensable to liability on the part of the owner.
3. ———: ———. There are many characteristics common to all horses, even the most gentle. One such characteristic is their propensity to rear or bolt when frightened. It is one of the situations that one riding a horse must expect to encounter

and one riding a hired horse must take the risks incident to such pursuit.

4. ———: ———. Where ponies remain at all times under the supervision of a concessionaire, the fact that the patrons of the concession are children is a factor to be considered in determining if reasonable care is exercised.

5. ———: ———. Even in the absence of any known viciousness in a domestic animal, its owner is obliged to exercise over it a certain degree of care depending upon the kind and character of the particular animal concerned, the circumstances in which it is placed, and the purposes for which it is employed or kept. The owner is charged with knowledge of the natural propensities of animals, and, if these propensities are of the kind that might cause injury he must exercise the care necessary to prevent such injuries as may be anticipated.

6. Negligence. A person who attempts to rescue another placed in imminent peril does not assume the risk incident thereto and is not guilty of contributory negligence unless he acts in a rash, imprudent, or negligent manner.

7. ———. Where the negligence of the defendants and the contributory negligence of the plaintiff stem from the same identical situation, the negligence of neither can be greater nor lesser than that of the other and under the rule of comparative negligence there can be no recovery.

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

Paul H. Harmon and Edward J. McCarthy, for appellant.

Gross, Welch, Vinardi, Kauffman, Schatz & Day, Kennedy, Holland, DeLacy & Svoboda, Joseph P. Cashen, William J. Reidmann, and Lyman L. Larsen, for appellees.

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

NEWTON, J.

This is a personal injury action. Plaintiff attended a concession providing Shetland pony rides for children in a small arena. She purchased a ride for her daughter and walked alongside as the pony was led around the

arena. The pony reared and bolted. Plaintiff seized the saddle, was dragged along, and injured.

At the conclusion of plaintiff's evidence in the trial court, her petition was dismissed on motion of defendants and judgment entered for defendants. We affirm the judgment of the district court.

Plaintiff was a member of St. Joan of Arc Catholic Church. The church, or certain groups connected with the church, conducted an annual carnival for fund-raising purposes. Numerous booths, concessions, and rides were available to the public, including the Shetland pony and other concessions owned and operated by defendant Pony Rides, Inc. Plaintiff, a member of the church, accompanied by her 5-year-old daughter, attended the carnival in the evening. Plaintiff purchased a ticket entitling her daughter to a pony ride. The ponies were led around the arena by young boys who supplied such services gratuitously at the solicitation of members of the church. Tickets were sold by church members but were taken up by the concessionaire and all operations connected with the concession were under the control of, and conducted by, the concessionaire.

As her daughter was placed on a pony, plaintiff observed that it was to be led by Mark Donnelly, a 9-year-old boy with whom plaintiff was well acquainted. After a man placed plaintiff's daughter on the pony, he asked plaintiff if she wanted to let her daughter ride alone. Plaintiff replied that she wanted to walk beside her daughter and proceeded to do so. As they proceeded around the arena, the pony suddenly reared and bolted. Plaintiff sought to protect her daughter, was unable to seize the bridle reins, but did take hold of the saddle and was dragged for a short distance until the pony was stopped by an attendant. She was kicked or stepped on by the pony and sustained a severed Achilles tendon of the right heel.

Mark Donnelly attributed the pony's action to fright caused by a panel truck, with its lights on, driving

rapidly into a parking area a short distance from the pony and coming to a sudden stop. Mark became frightened and stepped back when the pony bolted. He did not know whether the pony jerked away from him or he let go.

Plaintiff stated that her brother had at one time had a pony, that she and her husband owned a Shetland pony they had purchased for their daughter, that the children were not permitted to ride it except in the presence of their father or grandfather, and that she was somewhat familiar with ponies.

Plaintiff charges negligence in that the pony was not properly controlled and was placed in charge of an immature and inexperienced handler. Defendants pleaded a general denial, contributory negligence, and assumption of risk.

One who lets a horse for hire warrants the horse to be suitable for the purpose for which it is let and is liable for injuries resulting from the viciousness or dangerous propensities of the horse if he had knowledge, or, in the exercise of reasonable care, should have had knowledge, of such viciousness or dangerous propensities. See Baty v. Wolff, 162 Neb. 1, 74 N. W. 2d 913. Ordinarily the existence of vicious or dangerous propensities in a domestic animal and knowledge of such propensities are indispensable to liability on the part of the owner. See, Durrell v. Johnson, 31 Neb. 796, 48 N. W. 890; 4 Am. Jur. 2d, Animals, § 89, p. 336. There are many characteristics common to all horses, even the most gentle. One such characteristic is their propensity to rear or bolt when frightened. It is one of the situations that one riding a horse must expect to encounter and one riding a hired horse must take the risks incident to such pursuit. See, Clifton v. Holliday, 85 Ohio App. 229, 88 N. E. 2d 304; 4 Am. Jur. 2d, Animals, § 86, p. 332.

The foregoing rules deal primarily with instances in which a horse when hired is ridden off and fails to remain under the supervision of the owner who cannot

ensure that the horse may not shy and unseat its rider when frightened. The present case is not one in which a horse is let to an experienced horseman. On the contrary, the concession was one primarily designed to cater to children of all ages, including plaintiff's 5-year-old daughter. The ponies remained at all times under the supervision of the concessionaire and the fact that the patrons of the concession were children is a factor to be considered in determining if reasonable care was exercised. See, Dee v. Parish, 160 Tex. 171, 327 S. W. 2d 449; Pullen v. Novak, 169 Neb. 211, 99 N. W. 2d 16. "Even in the absence of any known viciousness in a domestic animal, its owner is obliged to exercise over it a certain degree of care depending upon the kind and character of the particular animal concerned, the circumstances in which it is placed, and the purposes for which it is employed or kept. The owner * * * is charged with knowledge of the natural propensities of animals * * *, and, if these propensities are of the kind that might cause injury he must exercise the care necessary to prevent such injuries as may be anticipated." 4 Am. Jur. 2d, Animals, § 89, p. 337. See, also, 3 C. J. S., Animals, § 145, p. 1247; Fox v. Koehnig, 190 Wis. 528, 209 N. W. 708, 49 A. L. R. 903.

Considering the youthfulness of defendants' patrons, the natural propensities of horses, and the youth and inexperience of Mark Donnelly, we find a jury question would normally have been presented regarding whether or not defendants were negligent in entrusting the pony to his care.

It is true that it was the mother, and not the child who rode the horse, who has been injured. This is not material as she was as much entitled to rely upon the use of reasonable care by defendants in accordance with existing circumstances as was her daughter.

The defenses of contributory negligence and assumption of risk are not here available insofar as they pertain to plaintiff's actions while attempting to protect her child from injury. A person who attempts to rescue another

placed in imminent peril does not assume the risk incident thereto and is not guilty of contributory negligence unless he acts in a rash, imprudent, or negligent manner. See 65A C. J. S., Negligence, §§ 124 and 174 (5), pp. 84 and 301; 38 Am. Jur., Negligence, § 228, p. 912; Wolfinger v. Shaw, 138 Neb. 229, 292 N. W. 731. The preceding rule would not be applicable to plaintiff's action in proceeding with the ride after becoming aware of the fact that Mark Donnelly was to lead the pony.

According to plaintiff's testimony, she was familiar with ponies and their natural propensities. She was well acquainted with Mark Donnelly who was about the same age as, and a playmate of, her son. She and her husband had sufficient knowledge of the hazards to be encountered when dealing with ponies so that they refused to let their 5-year-old daughter or their son, who was about Mark Donnelly's age, ride the pony they owned except in the presence of their father or grandfather. Notwithstanding this knowledge and her observation that Mark Donnelly was to be in charge of the pony ridden by her daughter, plaintiff elected to proceed. She had as much, or more, knowledge of Mark Donnelly's previous experience and ability to handle horses as the defendants. Under these circumstances she alleges that defendants were negligent in entrusting the pony to Mark Donnelly's care; yet, she denies, despite her own knowledge and experience, that she was guilty of contributory negligence or assumed the risk of injury. Her position is, at best, extremely contradictory. If defendants were negligent, she was necessarily guilty of contributory negligence. Since any negligence of the defendants, and any contributory negligence of the plaintiff, stem from the same identical situation, the one cannot be lesser or greater than the other. A case for submission under the rules of comparative negligence is not presented and we are necessarily obliged to find that plaintiff was guilty of contributory negligence sufficient to bar her recovery as a matter of law.

The judgment of the district court is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I do not agree that the plaintiff was guilty of contributory negligence as a matter of law. If there was contributory negligence, it would be a question of fact which should have been submitted to the jury under proper instructions.

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STATE OF NEBRASKA, APPELLEE, V. HIRAM RAY BAKER, APPELLANT.
171 N. W. 2d 798

Filed November 7, 1969. No. 37181.

1. **Intoxicating Liquors: Automobiles.** For the implied consent of a person to be effective, as provided in section 39-727.03, R. R. S. 1943, the person must have been arrested or taken into custody before the test is given.
2. ———: ———. A statute providing that a presumption of intoxication arises under a determination that the amount of alcohol in the subject's body fluid at the time in question is 0.15 percent or more by weight, as shown by chemical analysis, is in derogation of the common law and subject to strict construction.

Appeal from the district court for Gage County: ERNEST A. HUBKA, Judge. Reversed and remanded with directions.

John McArthur and A. James McArthur, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

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

SPENCER, J.

Defendant, Hiram Ray Baker, perfected an appeal to this court from a conviction for driving an automobile while under the influence of intoxicating liquor. He set out four assignments of error. We consider only the

second, that: "The Court erred in admitting into evidence over objection the results of the blood test allegedly made."

This prosecution grew out of a collision which occurred on U. S. Highway No. 77, approximately 1¾ miles north of Beatrice, at approximately 12:30 a.m., December 2, 1967. The evidence would indicate that the other car was across the centerline and struck defendant's car. After the accident defendant was pinned behind the steering wheel and his feet were caught in the car so that he could not be removed. He also sustained a severe cut on his forehead. No attempt was made to remove him until sometime after an ambulance arrived. He was then taken to the Mennonite Hospital in Beatrice.

A deputy sheriff who investigated the collision saw the defendant in the emergency room of the hospital approximately 2 hours after the accident but did not interview him until he was taken to his room. This interview lasted only 3 or 4 minutes. The sheriff of Gage County also saw the defendant in the emergency room, explained the implied consent law to him, and asked for a blood test which the defendant refused to give. The sheriff at no time advised the defendant that he was in custody or under arrest. The sheriff asked the doctor rendering emergency treatment to obtain a blood sample, but the doctor refused to take one unless the defendant gave his consent. Subsequently the doctor withdrew some blood which was given to the authorities. There is a dispute as to whether the defendant ever gave his consent but this point is immaterial herein. There is no dispute that the defendant was not arrested until December 4, 1967, or 2 days after the blood was withdrawn.

The only question presented is whether a reasonable inference can be drawn that the defendant was in custody at the time the blood sample was secured. The record would indicate he was not. Defendant was a patient in the hospital. His condition was such that he could not leave. There is nothing in the record

which even would permit an inference that he could not have left the next day if he had been able to. There is no indication of any nature that the defendant was in custody until he was actually placed under arrest 2 days after the blood was withdrawn and after the result of the blood test was known.

In Otte v. State, 172 Neb. 110, 108 N. W. 2d 737, we said that section 39-727.03, R. R. S. 1943, read in connection with section 39-727.04, R. R. S. 1943, requires an arrest or the taking into custody on a driving offense before the test is administered. We held in that case: "For the implied consent of a person to be effective, as provided in section 39-727.03, R. S. Supp., 1959, the person must have been arrested or taken into custody before the test is given.

"A statute providing that a presumption of intoxication arises under a determination that the amount of alcohol in the subject's body fluid at the time in question is 0.15 percent or more by weight, as shown by chemical analysis, is in derogation of the common law and subject to strict construction."

For the reasons given, defendant's objection to the admission in evidence of the blood test should have been sustained. The judgment herein is reversed and the cause is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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READY SAND AND GRAVEL COMPANY, A NEBRASKA CORPORATION, NOW KNOWN AS ALL-MIX CONCRETE AND GRAVEL CO., A NEBRASKA CORPORATION, APPELLANT, V. L. S. CORNETT, APPELLEE.

171 N. W. 2d 775

Filed November 7, 1969. No. 37229.

1. **Contracts: Reformation of Instruments.** In order to obtain reformation of a written instrument on the ground of mistake,

the mistake must be mutual. To grant such relief, equity insists that the reformation must be consistent with a complete mutual understanding of the essential terms of their bargain.

2. **Contracts: Reformation of Instruments: Evidence.** In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory; and, until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties.
3. **Equity: Courts.** Where it appears in an equity suit that a party is entitled to equitable relief, a court of equity once having properly acquired jurisdiction will make a complete adjudication of all matters properly presented and involved in the case.
4. **Contracts: Abatement.** Where in a purchaser's suit the purchaser demands compliance with a contract of sale of real estate where there is a failure of title as to a portion of the land or quantity of the estate, the court may require a vendor to give the best title he can and order an amount abated from the purchase price for the deficiency of title or quantity of the estate.
5. ———: ———. The measure of abatement should be such portion of the price as the relative value of the land lost bears to the purchase price of the whole tract.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded for further proceedings.

Keith I. Frederick and Schmid, Ford, Snow, Green & Mooney, for appellant.

Alfred A. Fiedler, for appellee.

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

CARTER, J.

This is a suit in equity to reform a real estate sales agreement and to reduce the price to the number of acres represented as being sold. Claim is also made for attorneys' fees and expenses incurred in unsuccessful litigation with a third party claiming by adverse possession a part of the land conveyed. The trial court found for the defendant and plaintiff has appealed.

On March 31, 1960, Arthur H. Schultz and wife en-

tered into an agreement with Kenneth J. Weiman, Verna L. Cornett, and John R. Atkins in which the Schultzes agreed to sell to Weiman, Cornett, and Atkins the following described real estate: "The North One half (N½) of the Southeast One Fourth (SE¼) of Section Eighteen (18), and Government Lot 3 in Section 18, all in Township 15 North, Range 10 East of the 6th P.M. And the accreation (sic) thereto," for the sum of $37,000. Subsequently L. S. Cornett acquired the interest of the purchasers, Cornett thereby becoming the sole owner of the interest in the real estate by virtue of the sale contract. The record further discloses that Cornett was the sole owner of all the stock amounting to 500 shares of Ready Sand and Gravel Company, now All-Mix Concrete and Gravel Company, which Cornett sold to William C. Patterson and Gus Graske by an agreement executed on December 31, 1965. The stock transaction appears to be of little importance here although the agreement recites that it is an integral part of the land transaction. On December 23, 1965, Cornett assigned to Ready Sand and Gravel Company all his right, title, and interest in and to the land contract of March 31, 1960, and the real estate described therein which was described the same as in the contract of sale of March 31, 1960. The closing date for completing the sale from Cornett to Patterson and Graske was December 31, 1965. Cornett refused to extend the date for closing the sale. On December 22, 1965, Patterson and Graske, with their counsel, met in the law office of defendant's counsel, with defendant and his counsel present, and the latter prepared a sales agreement covering the sale of stock and indemnities, protecting against existing liabilities of the corporation, and covering the terms of the land contract as well. Patterson insisted that it be made clear as to the number of acres they were getting. Graske also insisted that the number of acres being sold be specified. One of plaintiff's counsel, Dwyer, testified that the words, "Containing 125 acres plus accretion ground," were added

by mutual agreement to the tentative contract for the very purpose of fixing the acreage sold to mean that there were 125 acres plus the accretion ground. Another attorney representing the plaintiff corroborated this testimony. On the other hand, Cornett testified that he intended to sell only his interest in the Schultz-Cornett sale contract and, knowing that there was in excess of 125 acres with the accretion lands included, he agreed to the amendment of the sale contract by inserting, "Containing 125 acres plus accretion ground." Defendant's attorney did not testify. It appears clear to us that the sales agreement after the amendment was added meant that Cornett contracted to sell 125 acres and any and all accretions thereto. While the evidence was in conflict as to the intention of the parties in making the amendment, the intention of the parties as manifested by the amended contract was clear and unequivocal that defendant agreed to sell and Patterson and Graske agreed to purchase 125 acres of land and, in addition thereto, all accretion ground. The change thus made was carried into the final closing agreement of December 31, 1965.

Subsequent to the execution of the sales agreement Graske caused a survey of the land to be made. The survey showed that the north half of the southeast quarter and government Lot 3, all in Section 18, contained 119.15 acres. In a subsequent and separate suit, it was decreed that one Fred L. Lydick, by adverse possession, was the owner of 5.92 acres lying along the south side of the north half of the southeast quarter and government Lot 3.

In the sales agreement for the sale of stock, dated December 31, 1965, it was provided in part as follows: "The Seller hereby guarantees payment of and will save the Buyers, * * * free and harmless of and from all demands, claims, actions or causes of action, assessments, losses, damages and attorneys fees by reason of any claims obligations, debts, demands or liabilities existing as against the Corporation or the real estate de-

scribed in paragraph 6 above, except the interests described therein, prior to and including the date of this agreement, or thereafter coming into being by reason of any state of facts existing prior to and including the date of this agreement or arising or growing out of this transaction, * * *." Plaintiff asserts that Ready Sand and Gravel Company brought a suit to quiet the title to the 5.92 acres south of the south fence line against Lydick with an unsuccessful result. It is contended that attorneys' fees of $750 and surveying fees of $584, in addition to costs amounting to $46, are within the contract of guaranty. Cornett contends that these items are not within the guaranty for the reason that the suit was brought by Ready Sand and Gravel Company and was not within the guaranty for the reason that it was affirmative and not defensive. This defense was highly technical. The quiet title action was necessary to determine the right of ownership and use, and is within the intent of the guaranty.

On May 2, 1966, and before the quiet title action was determined, Graske caused the survey of the lands involved to be made, as above stated. The survey showed that the north half of the southeast quarter and government Lot 3, according to the surveyor's legal descriptions, contained 119.15 acres. The area lost by adverse possession south of the south fence line was 5.92 acres, leaving 113.23 acres exclusive of accretion lands. The accretion lands lying between the dike on the west line of Lot 3 and the Platte River amounted to 19.78 acres. The total number of acres including the accretion lands and excluding the 5.92 acres lost by adverse possession is 133.01 acres. It is clear from the undisputed facts that the issues of this case must be determined from the contract of the parties as gleaned from the numerous documents offered in evidence in the case.

The evidence shows that the Schultz-Cornett sale contract made no mention of the number of acres. Nor did the assignment of this contract by Cornett to Ready

Sand and Gravel Company specify the number of acres being assigned. On December 22, 1965, a contract prepared by Cornett's attorney, covering the sale of stock and the real estate, contained the legal description of the real estate as follows: "No. ½ of the S.E. ¼ of Section 18 and the Governments (sic) Lot 3 in Section 18, all in Township 15 N., Range 10 East of the 6th P.M. and the accreation (sic) thereto, Douglas County, Nebraska." After the question of the number of acres being conveyed was raised and discussed, as hereinbefore related, the parties by agreement added the following to the legal description: "Containing 125 acres plus accreation (sic) ground." In a document designated "AGREEMENT FOR SALE OF STOCK," bearing date of December 31, 1965, the real estate was described as follows: "The North ½ of the Southeast ¼ of Section 18 and the Government Lot 3 in Section 18, all in Township 15 North, Range 10 East of the 6th P.M. and the accretion thereto in Douglas County, Nebraska, containing at least 125 acres, plus accretion ground." The last-mentioned contract is the final closing contract and expresses the meeting of the minds of the parties in completing the stock and land transaction.

It seems clear to us that the foregoing description means that Cornett contracted to sell the north half of the southeast quarter and government Lot 3, plus the accretion ground. Cornett's testimony that the words, "plus the accretion ground," were intended to convey future accretions is rather specious in view of Cornett's long experience as a real estate dealer and the fact that future accretions attach as a matter of law. We conclude that the amended descriptions were a representation that the north half of the southeast quarter and government Lot 3 contained 125 acres.

Defendant asserts as a defense that where a mistake of the parties in conveying real estate relates to the identity of the property itself, reformation cannot be had. As a general proposition of law this is true. See

45 Am. Jur., Reformation of Instruments, § 38, p. 604. The rule is stated in Lippire v. Eckel, 178 Neb. 643, 134 N. W. 2d 802, as follows: "Where a mistake of the parties relates to the identity of the property itself, reformation may not be had. However, where there is no mistake as to the identity of the land intended to be conveyed, but there is a mistake in the description of it, equity may reform the instrument to conform to the true intention of the parties."

There is no mistake asserted here as to the legal description of the land intended to be conveyed. The mistake, if there be one, is as to the meaning of the representation of the number of acres warranted or represented to be within the legal description of the north half of the southeast quarter and government Lot 3, all in Section 18. It appears that $17,000 of the purchase price had not been paid to the Schultzes after the payment of which amount a warranty deed was to be furnished by the Schultzes. The sale contract provided that Ready Sand and Gravel Company would assume the $17,000 and receive the warranty deed from the Schultzes upon its payment. It was also agreed that Cornett would deliver a quitclaim deed to the real estate to the purchasers. The giving of the quitclaim deed by Cornett under these circumstances and the acceptance of a quitclaim deed by the purchasers from Cornett does not play any part in the determination of the liability for contractual representations and warranties of Cornett, or his liability under the indemnifying provisions of the closing contract of sale. It is our conclusion that the trial court was in error in denying relief to the plaintiff and dismissing its action.

Under the findings as herein made, we have determined that the description of the lands sold after the amendment mutually agreed upon is plain and clear that Cornett agreed to convey the north half of the southeast quarter and government Lot 3 containing at least 125 acres plus the accretion ground. There is no evi-

dence in this record of a mutual mistake. This precise issue does not appear to have been directly raised and certainly it was not assigned as error. Mistake as a ground for reformation of an instrument must be mutual, otherwise a reformation of the instrument reformed would be the equivalent of making a new contract for the parties which the courts may not do. The petition filed in the instant case resembles a suit for specific performance by the purchasers with abatement of the purchase price. "In actions by a vendee for the specific performance of a contract for the sale of real estate, where it appears that the vendor is unable to make a complete or perfect title, or that there is a deficiency in the quantity of land contracted to be sold, the general rule is that the vendee, if he so elects, it not only entitled to have the contract specifically performed to the extent of the vendor's ability to comply therewith by requiring him to give the best title he can or convey what he has, but he may compel the vendor to convey his defective title or deficient estate, and at the same time have a just abatement out of the purchase price for the deficiency of title, quantity, or quality of the estate to compensate for the vendor's failure to perform the contract in full. The vendee, in other words, may waive full performance and accept such title as the vendor is able to give, and if he chooses to do so, he has a right to that and to an abatement, and the court will not hear the objection, by the vendor, that the purchaser cannot have the whole. * * * The measure of abatement should be such portion of the purchase price as the relative value of the land lost bears to the purchase price of the whole tract. At any event, abatement should be made upon the basis of the contract price." 49 Am. Jur., Specific Performance, § 105, p. 123. See, also, Melin v. Woolley, 103 Minn. 498, 115 N. W. 654, 22 L. R. A. N. S. 595; McFarlane v. Dixon, 176 Wis. 652, 187 N. W. 671, 48 A. L. R. 1. Whether or not an action for the reformation of the contract for the sale of real estate is established by the

evidence, the petition states a cause of action for equitable relief. Pursuant to the principle that a court of equity once having properly acquired jurisdiction in a suit for equitable relief will make a complete adjudication of all matters properly presented and involved in the case, the court ordinarily will grant such relief, legal or equitable, as justice and equity may require.

There is no evidence in this record as to the per acre value of the lands sold. It cannot be assumed in view of the evidence that the accretion lands west of the dike are of the same value as the lands east thereof. We can find no way to assess damages or abate the deficiency against any unpaid part of the purchase price. It is the opinion of this court that the costs and attorneys' fees incurred in the case of Ready Sand and Gravel Company v. Cornett, Schultz, and Lydick, docket 589, No. 137, of the records of the district court for Douglas County, are subject to the indemnity provisions of the contract bearing date of December 31, 1965, if the procedural provisions of that contract have been complied with, a matter that we do not here decide.

The judgment of the district court is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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STATE OF NEBRASKA, APPELLEE, V. PAUL CHANEY, APPELLANT.
171 N. W. 2d 787

Filed November 7, 1969. No. 37234.

1. **Criminal Law: Trial.** The order in which proof is introduced is to a large extent within the discretion of the trial court and its ruling in that regard is no cause for reversal where the rights of the defendant are not shown to have been prejudiced.
2. **Rape: Evidence.** The slightest penetration of the sexual organ of the female is sufficient, if established beyond a reasonable

doubt, to constitute the necessary element of penetration in a prosecution for rape, and such element may be proved by either direct or circumstantial evidence.

3. **Criminal Law: Evidence.** It is only where 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.
4. **Rape: Evidence.** In a prosecution for rape, after the prosecutrix has testified to the commission of the offense, it is competent to prove in corroboration of her testimony as to the main fact that within a reasonable time after the alleged outrage she made complaint to a person to whom a statement of such an occurrence would naturally be made.
5. ———: ———. The testimony concerning such complaint should, on direct examination, be confined to the fact that complaint was made, and the details of the event, including the identity of the person accused, are not proper subjects of inquiry unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae.
6. **Trial.** The practice of reading law to the jury is in conflict with and totally inimical to the fundamental concept inherent in the jury system of this state.
7. **Trial: Juries: Instructions.** It is the duty of the trial judge to instruct on the law of the case, and the law so given to the jury in the instructions must apply even though the jury may decide that the law be otherwise.
8. **Criminal Law: Sentences.** Where a sentence has been imposed by the district court within statutory limits, it ordinarily will not be disturbed in the absence of an abuse of discretion.

Appeal from the district court for Otoe County: WALTER H. SMITH, Judge. Affirmed.

Otto H. Wellensiek, 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.

SPENCER, J.

This is an action for forcible rape. Defendant was

convicted by a jury in Otoe County and sentenced to a term of 5 years in the Nebraska Penal and Correctional Complex. He has perfected an appeal to this court.

There is evidence in the record from which the jury could have found that the prosecutrix, who was a married woman and temporarily separated from her husband, was picked up by the defendant after she had been called and advised that her husband wanted to see her. She met the defendant outside the home of her parents sometime between 10:30 and 11 p.m., May 9, 1968. Defendant drove his truck to a point in the immediate vicinity of the Missouri River and near a park at the north end of Nebraska City. Defendant stopped the truck, walked around it, threw the door open, and told the prosecutrix he was going to rape her. He then pulled her from the truck, threw her to the ground, started beating her, and tearing her clothes. She screamed and did her best to resist his advances. Defendant kept hitting and choking her, and tearing on her clothes until she lost consciousness. Her pants, shirt, slacks, and windbreaker were received in evidence. The shirt had grass stains, dirt, and blood on it. The other items were torn and exhibited evidences of a struggle. At the time of a doctor's examination in the early morning hours of May 10, 1968, she was crying and quite agitated. The doctor testified to abrasions and bruises about her face; to tears in the external genitalia; and to sperm in the vaginal walls, in the upper part of the vagina.

Defendant's version of the affair is that prosecutrix invited him to call. He met her at a prearranged location, and after driving up and down main street they drove along the river road to a spot near the old boat dock. Because some springs in the car cushion were sticking prosecutrix, they left the truck. They had sexual relations. Prosecutrix offered no resistance, but was a willing and cooperative participant.

Defendant, questioning the sufficiency of the evidence to sustain the verdict and the judgment, quotes at length from Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897. In that case, we said: "This court has always recognized the age-old admonition of Sir Mathew Hale that 'It is true rape is a most detestable crime, and therefore ought severly and impartially to be punished * * * but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent,' and that courts should 'be the more cautious upon trials of offenses of this nature.' In the light thereof, courts have generally exercised great care and vigilance to insure that a verdict of conviction was supported by sufficient competent evidence and not the result of passion and prejudice, inspired by the wiles of a malicious contriver or the very heinousness of the offense charged. See 1 Hale, P. C., p. 634; Mathews v. State, 19 Neb. 330, 27 N. W. 234; Whomble v. State, 143 Neb. 667, 10 N. W. 2d 627."

Defendant complains because the prosecution was permitted to call as its first witness the medical examiner who saw the prosecutrix at the hospital soon after the event. He argues this testimony was incompetent since it was taken before the admission of any preliminary foundational proof as to the occurrence of the alleged act. It is true no evidence had yet been received as to the alleged act or the identity of the participants, but we fail to see how the defendant could have been prejudiced. The order in which proof is introduced is to a large extent within the discretion of the trial court, and its ruling in that regard is no cause for reversal where the rights of the defendant are not shown to have been prejudiced. See Horney v. McKay, 138 Neb. 309, 293 N. W. 98.

Defendant contends his motion to dismiss at the close of the prosecution's case should have been sustained for lack of sufficient evidence with respect to force, resistance, and penetration. Accepting defendant's testi-

mony that prosecutrix invited him to call and willingly accompanied him to the scene of the act, it still would have been permissible for her to change her mind before the inception of the act. The exhibits in evidence and the condition of the prosecutrix when she was seen by the medical examiner sufficiently indicate the use of force and a high degree of resistance. The evidence was sufficient to permit the jury to find carnal knowledge by force on the part of the defendant, and nonconsent thereto and resistance to the extent of her ability on the part of the prosecutrix. Without reciting further of the gory details than already set out herein, suffice it to say we have carefully reviewed the evidence, and there cannot be the slightest doubt there was sufficient evidence to go to the jury on these issues.

On the issue of penetration, we quote the following: "The slightest penetration of the sexual organ of the female is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for rape, and such element may be proved by either direct or circumstantial evidence." Lovings v. State, 158 Neb. 134, 62 N. W. 2d 672.

The following is also pertinent herein: "It is only where 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." Lovings v. State, *supra*.

Defendant, relying on Peery v. State, 163 Neb. 628, 80 N. W. 2d 699, complains that two witnesses were permitted to testify that prosecutrix told them she had been raped by the defendant when they asked her what had happened. Defendant urges it was error to permit the witnesses to testify who prosecutrix stated committed the rape. In Peery v. State, *supra*, we said: "In a prosecution for rape, after the prosecutrix has testi-

fied to the commission of the offense, it is competent to prove in corroboration of her testimony as to the main fact that within a reasonable time after the alleged outrage she made complaint to a person to whom a statement of such an occurrence would naturally be made.

"The testimony concerning such complaint should, on direct examination, be confined to the fact that complaint was made, and the details of the event, including the identity of the person accused, are not proper subjects of inquiry unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the res gestae."

The two witnesses saw the prosecutrix a short distance from the scene. She was crying and appeared hysterical. The time elapsed was short. The circumstance of the statement evidenced sufficient spontaneity and was so closely connected with the act as to be a part of the res gestae. In any event, the identity of the defendant was in no way dependent upon the testimony of these witnesses and he could not have been prejudiced by this facet of their testimony.

Defendant's counsel, during the final argument to the jury, attempted to read extracts from Selvage v. State, 148 Neb. 409, 27 N. W. 2d 636. The prosecutor objected to this method of argument, and the court advised the jury that it would be advised as to the law of the case at a later time. Defendant's attorney ceased the reading, and now argues that he was prevented from fairly presenting the argument to the jury. There is no merit to defendant's complaint. In Stratton v. Dole, 45 Neb. 472, 63 N. W. 875, we said: "Although the practice of reading to the jury from reported decisions should not be encouraged, the subject is one within the discretion of the trial court and presents no grounds for interference by this court in the absence of an abuse of discretion." We now hold that the practice of reading law to the jury not only should not be encouraged, but should

be condemned. The practice is in conflict with and totally inimical to the fundamental concept inherent in the jury system of this state; it is the duty of the trial judge to instruct on the law of the case and the law so given to the jury in the instructions must apply even though the jury may decide that the law should be otherwise.

Defendant also assigns as error certain alleged misconduct on the part of the county attorney and the overruling of his motions for mistrial during the course of the trial. We have closely examined the four instances cited by the defendant. Only one of them could be even remotely prejudicial. However, in this instance, the objection was adequately handled by the trial judge and the defendant could not have been prejudiced herein.

Finally, defendant argues the sentence was excessive. The 5-year sentence imposed upon the defendant is well within the limits prescribed by statute. Section 28-408, R. R. S. 1943, provides a penalty of not more than 20 nor less than 3 years. Where a sentence has been imposed by the district court within statutory limits, it ordinarily will not be disturbed in the absence of an abuse of discretion. State v. Rose, 183 Neb. 809, 164 N. W. 2d 646. There was no abuse of discretion herein. In fact, the statement made by the trial judge to the defendant after explaining how he arrived at the sentence well sums up the situation. He said: "I feel that I have been reasonably considerate in this matter, under all the facts and circumstances, * * *."

For the reasons given, the judgment herein should be and hereby is affirmed.

AFFIRMED.

ORVILLE H. MONROE, APPELLANT, V. ST. MARKS LUTHERAN CHURCH OF LINCOLN, NEBRASKA, ET AL., APPELLEES.
171 N. W. 2d 644

Filed November 7, 1969. No. 37243.

**Workmen's Compensation.** Ordinarily an injury sustained by an employee while going to and from his work does not arise out of and in the course of his employment.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Alfred A. Feidler and Kripke, Hoffman, Carrigan & Dufty, for appellant.

Cobb, Swartz & Wieland, for appellees.

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

NEWTON, J.

This is an action under the Workmen's Compensation Act. Plaintiff served as organist in each of the two defendant churches and was severely injured in an automobile accident while enroute to Milford, Nebraska, to perform his duties as organist in Grace Lutheran Church of Milford. He was denied recovery in both the compensation court and the district court. We affirm the judgment of the lower courts.

The defendant churches are separate entities. St. Marks Lutheran Church is located in Lincoln, Nebraska, and Grace Lutheran Church in Milford. Both are members of the same synod. Each is separately governed by a local board of trustees. Each employs its own pastor, organist, janitor, etc., and fixes terms of employment completely independent of the other. Each, acting separately, had employed the same pastor and the same organist. The pastor and the plaintiff organist resided in Lincoln. On Sunday mornings the pastor drove in his automobile to Milford, taking the plaintiff with him, although there were times when plaintiff drove to Mil-

ford in his own automobile. They would return after services at Milford to hold services at Lincoln. Neither church controlled the method of transportation between churches nor in any manner provided for such transportation. No one was reimbursed for mileage or automobile expenses incurred. Plaintiff received $2 each Sunday for his services at St. Marks Lutheran Church and $1 each Sunday for his services at Grace Lutheran Church. Compensation was made by each church independently of the other.

It is apparent that the two churches were not engaged in a joint venture and that at the time of his accident, plaintiff could not conceivably have been acting within the scope of his employment by St. Marks Lutheran Church. As to this defendant, the action must fail on that ground.

In regard to the remaining defendant, Grace Lutheran Church, it conclusively appears that the church did not, as part of plaintiff's employment, supply him with transportation to and from Milford. Was he then acting within the scope of his employment at the time he was injured while enroute to Milford? Ordinarily an injury sustained by an employee while going to and from his work does not arise out of and in the course of his employment. See, Acton v. Wymore School Dist. No. 114, 172 Neb. 609, 111 N. W. 2d 368; Henry v. Village of Coleridge, 147 Neb. 686, 24 N. W. 2d 922.

Plaintiff has no valid ground upon which he may recover. The judgment of the district court is affirmed.

AFFIRMED.

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PATSY R. WITTE, APPELLEE, V. ROBERT L. LISLE ET AL., APPELLANTS.
171 N. W. 2d 781

Filed November 7, 1969. No. 37248.

1. **Automobiles: Witnesses: Evidence.** A hypothetical question as

to the rate of speed of a vehicle must include all factors necessary for a reasonably accurate opinion, and all such factors must be supported by the evidence.

2. **Trial: Evidence.** The admission of testimony wrongfully received in a case tried to a jury is prejudicial error where it may have influenced the verdict.

Appeal from the district court for Otoe County: WALTER H. SMITH, Judge. Affirmed.

John E. Finnigan and Wellensiek, Morrissey & Davis, for appellants.

Spencer & Hoch and Boland, Mullin, Walsh & Cooney, for appellee.

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

McCOWN, J.

This is an action for damages arising out of a head-on collision near the crest of a hill and substantially in the middle of a gravel and crushed rock county road west of Nebraska City, Nebraska. The petition of the plaintiff, Patsy R. Witte, and the cross-petition of the defendant, Robert L. Lisle, each alleged negligence on the part of the other. The State of Nebraska was joined as a defendant by virtue of workmen's compensation payments to the defendant Lisle, and filed its cross-petition against the plaintiff for property damage to the automobile owned by it and driven by Lisle. The jury returned its verdict against the plaintiff on her petition, and in favor of the defendants, Robert L. Lisle and the State of Nebraska, on their cross-petitions. The district court set aside the verdict and judgment and granted plaintiff's motion for a new trial. The defendants have appealed.

The trial court assigned no specific reasons for its action. The rules applicable to such a case on appeal are set out in Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

The first issue involves the admission into evidence of the opinion of an expert witness, Professor W. F. Weiland, as to the rate of speed of the plaintiff's car. In answer to a hypothetical question, Weiland testified over objection that the plaintiff's automobile was traveling at no less than 61 miles per hour. The objection to the question included in its grounds that the question failed to assume facts necessary to the conclusion or opinion thereon; assumed facts not in evidence; failed to assume necessary facts which were in evidence; and that there was no proper and sufficient foundation.

Weiland testified that in the method he used to determine the speed of plaintiff's car by including the impact, it was necessary to know the weight of each vehicle within 200 pounds; that it was also necessary to consider the damage to each of the vehicles and loss of energy in that damage; that when a thicker metal is crushed, it uses up more energy than a thinner metal; and that he likes to know the damage to the heavier frame members of the automobile rather than the "tomato can" construction of fenders, etc.

There was no evidence whatever in the record as to the weight of either vehicle, loaded or unloaded. Standard unloaded weight tables for specific cars would apparently be inadequate by themselves in view of the substantial weight difference involved in various accessories which might be attached to the same model of a modern automobile. The evidence also did not disclose load weight information for either vehicle. Weiland had not examined either of the vehicles, but only photographs. The photographs did not show the thickness or weight of frame construction nor the damage to it.

The hypothetical question did not ask Weiland to make any assumptions as to these factors which he himself had testified were essential in reaching a reasonably accurate opinion under the method he used, and there was no evidence in the record to support any spe-

cific assumption on these factors.

In Brugh v. Peterson, 183 Neb. 190, 159 N. W. 2d 321, this court expressed its view that it was error to permit the expert witness there to state his opinion as to the speed of the automobile, including the impact, and that his testimony should have been confined to speed based upon skid marks only. Even if it be assumed that the head-on collision here does not fit the facts of the Brugh case, the result is not changed. It is clear, on Weiland's own testimony, that the foundation for the expert opinion here was inadequate; that the hypothetical question failed to assume facts necessary to the opinion expressed; and that such facts were not in evidence. A hypothetical question as to the rate of speed of a vehicle must include all factors necessary for a reasonably accurate opinion, and all such factors must be supported by the evidence. Brugh v. Peterson, *supra*.

The plaintiff also contends that the trial court erred in admitting testimony of a city police officer of Nebraska City as to a conversation he had with the plaintiff sometime before the accident on the morning of January 23, 1967. Over an objection that the conversation was hearsay, and was incompetent, irrelevant, and immaterial, the officer was permitted to testify that plaintiff inquired about the legality of driving an automobile to Otoe on an in-transit license. The officer told her that if the in-transit plates had expired, it would be unlawful to drive it, and she would be subject to arrest. The officer then testified that the plaintiff "said something about—she wondered if they'd be patroling the back roads or the country roads, or something to that effect."

The evidence was undisputed that plaintiff's automobile which was involved in the accident was properly licensed. There are clear inferences that a different automobile driven by her son might have had in-transit plates. That automobile was a separate automobile. Although her son was driving it some distance ahead

of her on the road, it had nothing to do with this accident. It is difficult to find any purpose in this testimony except to prejudice the plaintiff before the jury. The evidence was apparently irrelevant and immaterial. It had nothing to do with her automobile or with the issue of her negligence in this accident.

Proof in the trial of a jury case should be confined to the issues made by the pleadings, and the admission of testimony wrongfully received in a case tried to a jury is prejudicial error where it may have influenced the verdict. Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141. The trial court may well have determined that this evidence may have influenced the result, and that its reception was prejudicial error.

The district court's action in setting aside the verdict and judgment and granting a new trial was correct and is affirmed.

AFFIRMED.

NEWTON, J., concurring in part and dissenting in part.

I am in accord with the result arrived at in this case and agree that the hypothetical evidence pertaining to speed was erroneously admitted and was prejudicial.

I also agree that the evidence regarding plaintiff's statements about driving an improperly licensed automobile should not have been admitted. I do not agree, however, that this evidence was prejudicial.

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CITY OF LYONS, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. ROBERT C. BETTS ET AL., APPELLANTS.
171 N. W. 2d 792

Filed November 7, 1969. No. 37268.

1. **Nuisances.** Section 28-1016, R. R. S. 1943, defines nuisances in part as follows: "The erecting, continuing, using or maintaining of any building, structure or other place for the exercise of any trade, employment, manufacture or other business which, by occasioning noxious exhalations, noisome or offensive smells,

becomes injurious and dangerous to the health, comfort or property of individuals or the public; * * * shall be deemed nuisances."

2. **Municipal Corporations: Nuisances.** A municipal corporation may maintain an action in equity to enjoin the maintenance of a nuisance.
3. ———: ———. This power extends to a nuisance maintained outside the corporate limits of the municipality.
4. **Nuisances.** Ordinarily a property owner does not have and cannot acquire a vested right, or a constitutional privilege, to maintain or continue a nuisance.

Appeal from the district court for Burt County: GEORGE W. DITTRICK, Judge. Affirmed.

Yost & Yost, for appellants.

John A. Young and Moodie & Moodie, for appellee.

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

NEWTON, J.

This is an action instituted for the purpose of enjoining the operation of a hog raising and feeding setup alleged to constitute a nuisance and to be operated contrary to city ordinances. The cause was tried to the court and decree entered for plaintiff. We affirm the judgment of the district court.

On January 14, 1954, defendants entered into the business of selling Purina livestock feeds in the city of Lyons, Nebraska, a city of the second class. At that time they owned property which contains 2 acres and is now described as Lots 12 and 13 in Highway Addition to the city of Lyons, but which was then outside the city limits. On this property, defendants farrowed, raised, and fed out hogs, apparently as an activity ancillary to and partially connected with their feed business. The feed business was handled at a different location in the downtown area. In July 1963, defendants installed a 36 x 18 foot building over one corner of a lagoon. The lagoon was approximately 5 feet deep, 56 feet wide, and

90 feet long. It was filled with water and although the water level varies, it has never been less than 3 feet deep, is supplied by rains, and occasionally overflows. It is generally conceded that there is a more or less disagreeable odor resulting from this operation. Defendants' evidence indicates the odor is present only following rains or atmospheric changes and can only be detected for a distance of 1 to 2 city blocks. Plaintiff's evidence is to the effect that the odor is constant, can be detected up to ½ mile away, is at times more noticeable than on other occasions, and is offensive to all who live in or pass through the neighborhood.

Highway Addition lies between the original city and U. S. Highway No. 77 to the east. The principal highway into the city runs on the north edge of the addition and of defendants' property. There are, in the addition, several residences, a filling station, a cafe, and a commercial trucking firm. To the north is another tract in the process of being annexed to the city. Across the highway to the east is a John Deere Implement business, an enclosed chicken-raising establishment, a motel, an open hog yard, and a residence. To the south is an area containing an elevator and several homes at two or three of which locations livestock is raised or fed. Still further south is a new nursing home and a tract being subdivided. Highway Addition was annexed by ordinance No. 300, passed and approved on November 3, 1964. Another ordinance forbids the keeping of livestock within the city limits.

Section 28-1016, R. R. S. 1943, defines nuisances in part as follows: "The erecting, continuing, using or maintaining of any building, structure or other place for the exercise of any trade, employment, manufacture or other business which, by occasioning noxious exhalations, noisome or offensive smells, becomes injurious and dangerous to the health, comfort or property of individuals or the public; * * * shall be deemed nuisances." A city of the second class may maintain an action in equity to

enjoin the maintenance of a nuisance. See, § 17-123, R. R. S. 1943; Village of Kenesaw v. Chicago, B. & Q. R.R. Co., 91 Neb. 619, 136 N. W. 990. This power extends to a nuisance maintained outside the corporate limits of the municipality. See City of Syracuse v. Farmers Elevator, Inc., 182 Neb. 783, 157 N. W. 2d 394. In this regard it may be pointed out that section 17-121, R. R. S. 1943, provides that a city of the second class may: "* * * suppress, and prevent the occurrence of nuisances and enforce all laws of the state * * * relating to the same or to matters of sanitation of such city." Section 28-1016, R. R. S. 1943, is a general statute defining and forbidding the maintenance of nuisances, including those occasioned by offensive smells, whether in or out of municipal limits. This is one of the laws which the preceding statute specifically authorizes a city of the second class to enforce.

In view of the foregoing, it is apparent that plaintiff was acting within the powers conferred upon it and whether or not the ordinance annexing Highway Addition was constitutional is immaterial.

Defendants contend that they have what is sometimes referred to as a "grandfather right" to continue to operate their livestock business at its present location. It may be pointed out that the city of Lyons was in existence long before defendants commenced operations and the evidence shows that many of the homes and businesses were in the area prior to the institution of defendants' confinement feeding system. Were "grandfather rights" to be recognized under such circumstances, the orderly growth of all municipal corporations would be jeopardized. Defendants are not being deprived of their property. Its use is simply being restricted to prevent the maintenance of a nuisance. Ordinarily a property owner does not have and cannot acquire a vested right, or a constitutional privilege, to maintain or continue a nuisance. See Sarraillon v. Stevenson, 153 Neb. 182, 43 N. W. 2d 509.

No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

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SAMUEL SCHLOTHAUER, APPELLEE, V. HELEN SCHLOTHAUER, APPELLANT.
171 N. W. 2d 786

Filed November 7, 1969. No. 37279.

1. **Divorce: Parent and Child: Judgments.** Modification of a child support judgment because of change in the parties' circumstances ordinarily should rest only upon facts which have occurred since rendition of the judgment; res judicata applies.
2. ———: ———: ———. A proceeding to modify a judgment for child support is not a retrial of the original case or a review of the equities of the original decree.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded with directions.

Robert L. Gilbert, for appellant.

No appearance for appellee.

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

SMITH, J.

The district court decreased the amount of plaintiff's monthly obligation to support each of two children from $150 to $112.50. Defendant has appealed.

Appearing personally with counsel in open court, the parties had stipulated for property settlement and for support of each child at $150 a month. The court approved the stipulation on May 29, 1968. Plaintiff on November 8, 1968, petitioned to modify the judgment on grounds of changed circumstances which included his loss of income and defendant's gainful employment. The modification order was rendered in January 1969.

A cooperative association had employed plaintiff to sell bulk petroleum products on commission, plaintiff to furnish the truck. His commissions less business expenses totaled $12,269 in 1965 and $12,481 in 1966. Approximate totals, apart from a truck repair item, were $10,889 in 1967 and $10,500 in 1968.

The truck, a 1963 model with mileage of 500,000 in January 1969, had been repaired in 1967 and 1968 at a cost of $1,345.08. On June 14, 1968, plaintiff paid the repair bill which we excluded from the above statement of earnings.

Defendant, not gainfuly employed in May 1968, subsequently obtained a part-time job which paid $15 a week.

A child support judgment in respect to unaccrued installments may be modified in the children's best interest or upon change in the parties' circumstances. § 42-312, R. R. S. 1943. Modification because of changed circumstances of the parties ordinarily should rest only upon facts which have occurred since rendition of the judgment; res judicata applies. A proceeding to modify a judgment for child support is not a retrial of the original case or a review of the equities of the original decree. Walters v. Walters, 177 Neb. 731, 131 N. W. 2d 166 (1964).

The order decreasing the amount of child support is reversed and the cause remanded with directions that plaintiff's petition for modification be dismissed. Defendant is allowed $250 for services of her attorney in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

LOUIS WEINER, DOING BUSINESS AS LOUIS WEINER REAL ESTATE CO., ET AL., APPELLANTS, V. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLEE.
171 N. W. 2d 783

Filed November 7, 1969. No. 37330.

1. **Administrative Law: Attorneys at Law.** An attorney retained by the Nebraska State Real Estate Commission is not an employee within the ambit of section 81-864, R. R. S. 1943.
2. **Administrative Law: Statutes.** The Nebraska State Real Estate Commission is not required by the Administrative Procedures Act to set out statutory provisions in its rules and regulations.
3. ———: ———. Section 84-909, R. R. S. 1943, is only applicable to those procedures which have not been specifically covered by statute.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Lyle B. Gill, for appellants.

Clarence A. H. Meyer, Attorney General, Robert A. Nelson, and Robert H. Petersen, for appellee.

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

SPENCER, J.

This is an appeal from the district court for Douglas County, Nebraska, which after a trial de novo entered a judgment affirming the order of the Nebraska State Real Estate Commission revoking the real estate broker's license and the real estate salesman's license of Louis Weiner and Robert L. Solomon respectively.

Appellants predicated error on the contention that the proceedings were void because of alleged violations of sections 81-864, 81-884, and 84-909, R. R. S. 1943. The investigation herein was made by one Robert H. Petersen who is the local Omaha counsel for the Nebraska State Real Estate Commission, hereinafter referred to as commission. He is also legal counsel for the Omaha Real Estate Board.

Section 81-864, R. R. S. 1943, so far as material herein, provides in part: "The commission shall employ a director who shall keep a record of all the proceedings, * * *. Neither the director nor any employee of the commission may be an officer or paid employee of any real estate association or group of real estate dealers or brokers." Appellants contend Mr. Petersen was an employee of both groups and the proceedings based upon his activities are void. Mr. Petersen was not an employee or officer of either group. He was retained as counsel for both and served as an independent contractor rather than as an employee. He maintains a private law practice in Douglas County and the only control exercised over him by either group is the normal one in an attorney-client relationship. While we fail to see the relevance herein, we hold that Mr. Petersen is not an employee within the ambit of section 81-864, R. R. S. 1943.

Appellants further urge that the director of the commission violated section 81-864, R. R. S. 1943, because the action taken to revoke appellants' licenses was not recorded in the commission's minutes. There is no requirement that it be so included. The proceedings were all a part of the commission's records. The hearing was recorded by an official court reporter and the transcript is a part of the record herein. The certified copy of the commission proceedings, received as an exhibit herein, includes the order of revocation which recites in detail portions of the evidence and the findings thereon subscribed by the members of the commission. This is a sufficient record of the official acts of the commission.

Appellants further complain that the commission made no findings of fact as required by section 81-884, R. R. S. 1943, after its hearing on the revocation. We determine that the commission made detailed findings as recited above.

Appellants further contend the proceedings are a nullity because of the failure of the commission to comply with section 84-909, R. R. S. 1943, providing for

the adoption of rules and regulations governing all formal and informal procedures of the commission's hearings. The commission has filed rules and regulations, but they did not specifically detail the procedure to be followed in the determination of contested cases. However, sections 81-882 through 81-884.01, R. R. S. 1943, set out in detail the notice, hearing, and trial provisions in contested cases, and section 84-914, R. S. Supp., 1967, details evidentiary and trial procedures for all administrative agencies. The commission is not required to set out statutory provisions in its rules and regulations. There can be no question but that any due process of law requirements have been fully satisfied herein. Section 84-909, R. R. S. 1943, is only applicable to those procedures which have not been specifically covered by statute.

Appellants' final assignment of error is premised on their contention that their conduct was not detrimental to any person and they were not given an opportunity to rectify it after discovery. We find it difficult to understand appellants' argument. We do understand the suggested inference that by overcharging they might have been doing their clients a favor by keeping their assets within the maximum limit for public housing. Clearly, their clients did not receive the amount they should have received under the signed sales contract. Admittedly, appellants made charges for expense which was not incurred. Admittedly, they did not give credit for a $100 cash payment made by the purchasers. Obviously, they charged a larger commission than that called for in the listing agreement. Definitely, their dealings in this transaction clearly violate the provisions of section 81-881, R. R. S. 1943, and their licenses should have been and were properly revoked.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN CARL EUTZY, APPELLANT.
172 N. W. 2d 94

Filed November 14, 1969. No. 37222.

**Criminal Law: Guilty Plea.** A plea of guilty or nolo contendere, made with full knowledge of the charge and the consequences of the plea, will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

A. Q. Wolf and Thomas D. Carey, 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.

CARTER, J.

On June 29, 1967, defendant was charged with issuing a "no-account" check with intent to defraud. On arraignment in the district court, defendant entered a plea of nolo contendere and was found guilty on February 26, 1968. On October 16, 1968, the defendant, having appeared for sentence, requested leave to withdraw his plea of nolo contendere and enter a plea of not guilty. The trial court denied the defendant leave to change his plea and from this ruling defendant appeals.

On February 26, 1968, defendant was arraigned and entered a plea of nolo contendere. Before accepting this plea, the trial court ascertained that defendant had employed legal counsel who was with him at the hearing. The trial court advised defendant of the nature, elements of the crime charged, and the minimum and maximum penalties to which a plea of guilty or nolo contendere would subject him. He was fully advised of his right to trial, degree of evidence, right of cross-examination,

confrontation of witnesses, presumption of innocence, and his right not to testify, all of which he said he understood. He stated that no force, threats, coercion or inducements had been applied or extended to him. He stated further that he had discussed the matter at length with his attorney, understood the effect of his plea, and was ready to enter it at that time. The trial court thereupon accepted his plea and entered a finding of guilt. Sentence was deferred pending a presentence investigation.

The record shows that defendant furnished bail and was out on bond until September 13, 1968, after which time his bond was forfeited for his failure to appear in accordance with its terms. Defendant failed to appear for sentence primarily because he was confined from July 11, 1968, to October 10, 1968, in the Lancaster County jail in Lincoln on a conviction and sentence for petit larceny. When brought before the court for sentence on October 16, 1968, he requested leave to withdraw his previous plea and enter one of not guilty. He asserted that he did not understand his previous plea and that he had the impression gained from inferences that he would not receive a sentence of more than 6 months. The questions by the trial court and defendant's answers thereto at the arraignment completely destroy the credibility of defendant on this point. The close questioning by the court and the clarity of defendant's answers in the presence of his counsel dispel the validity of his claim that he did not understand the effect of his plea.

Before sentence was imposed, defendant requested that he be examined by a psychiatrist for the benefit of the court. The court granted his request and defendant was examined by two psychiatrists. Dr. John L. Blodig filed a report substantially as follows: Defendant's I.Q. was clinically estimated to be above the range of normal. There was no evidence of disturbance in thought production or progression. He was well ori-

ented to time, person, and place. He was described as a psychopathic personality. A trial psychotherapy and drug therapy was recommended. We find nothing in the foregoing report to indicate any mental disability sufficient to relieve defendant from a sentence for the crime charged. Dr. C. H. Farrell likewise found a history of marked instability and emotional immaturity without indication of a frank psychosis. Defendant was described as a psychopathic personality and that he could aid in his own defense. After a consideration of this evidence, and on December 4, 1968, defendant was sentenced to the Nebraska Penal and Correctional Complex.

We find that defendant knowingly, voluntarily, and understandingly entered his plea of nolo contendere and that no basis exists for withdrawing such plea and the finding of guilt based thereon. A mere change of mind after the completion of a presentence investigation does not warrant a change of procedure and a new trial at the whim of a defendant who acted with full knowledge of the import and consequences of his plea, particularly when it was done with the assistance of competent legal counsel.

AFFIRMED.

SMITH and MCCOWN, JJ., concurring in the result.

We would affirm on authority of section 2.1, A.B.A., Standards Relating to Pleas of Guilty (Approved Draft, 1968).

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EDWIN SEEMAN, ADMINISTRATOR OF THE ESTATE OF JOHN E. SEEMAN, DECEASED, APPELLANT, V. ELIZABETH PAGELS, APPELLEE.

172 N. W. 2d 100

Filed November 14, 1969. No. 37256.

1. **Automobiles: Negligence: Statutes.** The violation of statutes

regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence, which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.

2. **Automobiles: Statutes.** Under former section 39-751, R. R. S. 1943, the operator of a motor vehicle on a highway who would otherwise have the right-of-way at an intersection forfeits that right-of-way if he operates it at an unlawful rate of speed.
3. **Negligence: Trial.** Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury.
4. **Pleadings: Motions, Rules, and Orders.** When a motion has been made to amend a pleading to include a material allegation upon which some evidence has been received, such amendment should be allowed.
5. **Trial: Instructions.** The charge of a trial court to the jury should be confined to the issues presented by the pleadings and supported by the evidence.

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

Homer E. Hurt, Jr., for appellant.

Thomas E. Brogan and Monen, Seidler & Ryan, for appellee.

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

NEWTON, J.

This action results from an automobile accident which occurred at the intersection of two graveled county highways. On trial to a jury, verdict was rendered for defendant. Judgment was entered on the verdict and we affirm the judgment of the district court.

Plaintiff is the administrator of the estate of John E. Seeman who was killed in the accident. For convenience, the deceased will be referred to as Seeman. The accident occurred just at dusk on October 1, 1966, at a county road intersection ½ mile east and 3 miles north of West Point, Nebraska. Both roads were graveled,

but the east-west road contained a considerably heavier coating of gravel. There was a very slight decline from the west and a slight incline from the north. Apparently neither grade exceeded 5 percent. There were no warning or stop signs on either approach, but the east-west road was the more heavily traveled of the two. All corners of the intersection were open so that oncoming traffic could be observed with the exception of the northwest corner of the intersection. Here, on the north edge of the east-west road, there were tall weeds and shrubbery, then going west was an opening, a small bushy tree, another small opening, and a heavy growth of trees. Both Seeman and defendant were residents of the neighborhood where the accident occurred.

Seeman approached from the west. His automobile left skid marks for a distance of 92 feet 8 inches and following the collision traveled in a southeasterly direction a distance of 59 feet 7 inches where it came to rest upside down. This was a two-door Dodge hardtop. It was completely demolished, with the left side caved in, the trunk lid torn off, and the top flattened. Defendant's automobile left skid marks for a distance of 30 feet and following the collision traveled in a southeasterly direction a distance of 39 feet where it came to rest in an upright position. The right front of this car sustained considerable damage and the right front wheel was damaged. Defendant had approached the intersection from the north.

Defendant had traveled almost in the center of the 18-foot 6-inch north-south road and Seeman, though partially in the center, was largely to the right of the center of the 21-foot wide east-west road. The accident occurred in the northwest corner of the southeast quadrant of the intersection.

Defendant testified that she was driving at about 45 miles per hour until within about ¼ of a mile of the intersection where she started to slow down and approached the intersection at a speed of about 30 miles

per hour; and that she looked to the west, then to the east, then back to the west. At this time she was about 1½ car lengths from the intersection. She saw the Seeman car about 2 car lengths to the west of the intersection and applied her brakes. There is no direct evidence relating to the speed of the Seeman car.

Plaintiff contends that defendant was guilty of negligence as a matter of law in that she failed to comply with the provisions of section 39-7,108, R. R. S. 1943, and reduce her speed. Defendant testified that she did reduce her speed, but in any event, we have long held that: "The violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence, which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby." Guerin v. Forburger, 161 Neb. 824, 74 N. W. 2d 870. Plaintiff also insists that in view of the provisions of section 39-728, R. R. S. 1943, Seeman had the directional right-of-way. The two vehicles having collided, it is apparent that they did reach the intersection at approximately the same time and Seeman was on the right. Nevertheless, there are factors present which indicate that Seeman was traveling at a higher rate of speed than the defendant. The jury may have concluded that his speed was unlawful and that he thereby forfeited his directional right-of-way. "The operator of a motor vehicle on a highway who would otherwise have the right-of-way under statutory regulations if he operates it at a lawful rate of speed forfeits that right-of-way if he operates it at an unlawful rate." Thomas v. Owens, 169 Neb. 369, 99 N. W. 2d 605. "Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury." Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571.

Plaintiff insists that the issue of contributory negli-

gence should not have been submitted to the jury. Although Seeman approached the intersection from defendant's right, as heretofore pointed out, the evidence presents questions as to the speed of both vehicles, particularly in regard to the lawfulness of such speed as the vehicles approached a partially blind intersection. It is plaintiff's position that defendant was negligent in this respect or that at least a jury question was presented on the issue. The same identical reasoning is applicable to Seeman and we agree that this point was one for the jury to determine. This is also true regarding other grounds of negligence and contributory negligence alleged. Plaintiff claimed Seeman had the right-of-way by virtue of being first in the intersection. Plaintiff charged defendant and defendant charged Seeman with a failure to maintain a proper lookout, failure to maintain reasonable control of their vehicles, and failure to stop or turn aside to avoid the accident. Under the circumstances attendant upon the accident, it was for the jury to determine the truth or falsity of these charges and countercharges and it was as much a jury question as to one as to the other. The circumstances were similar in this respect as to both parties.

Plaintiff argues that the trial court erred in permitting defendant to amend her answer after the parties had rested. The amendment charged contributory negligence of Seeman in failing to stop or turn aside to avoid the accident. The facts show that Seeman did neither. "When a motion has been made to amend a pleading to include a material allegation upon which some evidence has been received, such amendment should be allowed." Curren v. Certain Parcel of Land, 149 Neb. 477, 31 N. W. 2d 405.

Finally, plaintiff objects to the refusal of the court to instruct that although either or both of the parties may have had liability protection that should not be considered by the jury nor should any weight be given to the fact that the subject had not been mentioned dur-

ing the trial. No issues regarding liability insurance, its ownership or lack of ownership, arose during the trial. "The charge of a trial court to the jury should be confined to the issues presented by the pleadings and supported by the evidence." Newkirk v. Kovanda, *ante* p. 127, 165 N. W. 2d 576.

No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

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CHAUNCEY B. HALL ET AL., APPELLANTS, V. ALICE B. SIMPSON, COUNTY SUPERINTENDENT OF LINCOLN COUNTY, NEBRASKA, ET AL., APPELLEES.
171 N. W. 2d 805

Filed November 14, 1969. No. 37260.

1. **Schools and School Districts: Constitutional Law: Statutes.** The legislative function in transfer of land among school districts is unaffected by constitutional guarantees of procedural due process.
2. **Schools and School Districts: Statutes.** The initial decision concerning change of school district boundaries does not resolve disputes of adjudicative fact unless the Legislature has provided otherwise.
3. **Constitutional Law: Administrative Law.** One element of a full hearing under due process clauses is ample opportunity for all parties to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken.

Appeal from the district court for Frontier County: VICTOR WESTERMARK, Judge. Affirmed.

Baylor, Evnen, Baylor, Urbom & Curtiss and Robert T. Grimit, for appellants.

W. R. Mullikin, Fred J. Schroeder, and Beatty, Morgan & Vyhnalek, for appellees.

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

SMITH, J.

Plaintiffs asserted that orders made by county superintendents for dissolution of four school districts and attachment of the territories to another district were ineffective. Their contentions were: The orders rested on a statute that was not applicable; the title to the statute did not clearly express the subject; and the statute violated federal and state guarantees of due process of law. The district court found against plaintiffs, dismissing the petition. Plaintiffs have appealed.

Prior to the superintendents' orders six school districts were classified as follows: Nos. 23 and 70 of Lincoln County and Nos. 9 and 77 of Frontier County were Class I, maintaining only elementary grades; No. 46 of Frontier County was Class II, maintaining both elementary and high school grades; No. 120 of Lincoln and Frontier Counties was Class VI, maintaining only a high school; and the Class I districts lay entirely within district No. 120.

The superintendents ordered dissolution of the Class I districts and attachment of the territories to district No. 46 between April 25, and July 1, 1967. The orders concluded proceedings taken under L.B. 892, Laws 1965, c. 510, p. 1629, then sections 79-426.23 to 79-426.26, R. R. S. 1943. L. B. 892 provided for the following: (1) Initiation of the proposal on petitions signed by 25 percent of the Class I district's voters; (2) approval by the other district's board and a reorganization committee; and (3) approval by a majority of voters at a special election in the Class I district. Upon notification of voter approval the county superintendents were to advertise a hearing in regard to the proposal. After the hearing and upon a determination of compliance with all statutory requirements they were to order the changes.

The superintendents' orders did not satisfy L.B. 261, Laws 1963, c. 472, p. 1514, then section 79-402, R. R. S. 1943, which provided in part: "The county superintendent shall . . . change the boundaries of any district

upon petitions signed by sixty per cent of the legal voters of each district affected; Provided, . . . that . . . when a Class I school district, which is entirely within a school district of the sixth class, is taken from a Class VI school district, it will be deemed to be an affected district . . . . The county superintendent shall . . . advertise and hold a hearing to determine the validity and sufficiency of the petitions. Upon determination, as a result of the hearing, that valid signatures of at least sixty per cent of the . . . voters of each district are contained in the . . . petitions, or at least sixty-five per cent if the proposal has been disapproved by both the state and county committees, the county superintendent shall . . . effect the changes . . . ."

L.B. 261 and L.B. 892 differed in provisions for petition, election, and nature and scope of the hearing before the county superintendent. The statutes were independent of each other so that L.B. 892 was applicable to district No. 120 without reference to L.B. 261.

The Constitution of Nebraska, Article III, section 14, requires the title to express clearly the subject of a legislative bill. L.B. 892 was enacted with this title: "AN ACT relating to schools; to provide additional procedures, as prescribed, for the dissolution of an existing Class I or II school district and the attachment thereof to an existing Class II, III, IV, or V district . . . ." Plaintiffs contend the title was defective for lack of reference to Class VI districts. The purpose of the title, however, was to describe the subject, not to synopsize the contents or every conceivable consequence. Chaloupka v. Area Vocational Tech. School No. 2, *ante* p. 196, 165 N. W. 2d 719 (1969). The title to L.B. 892 was sufficient.

L.B. 892 did not provide for a hearing at the preelection stage. It required a hearing at the postelection stage, but the requirement precluded disputes over sufficiency of petitions to initate proposals. Plaintiffs contend that lack of a hearing on such disputes violated procedural due process.

The legislative function in transfer of land among school districts is unaffected by constitutional guarantees of procedural due process. The initial decision concerning change of school district boundaries does not resolve disputes of adjudicative fact unless the Legislature has provided otherwise. Chaloupka v. Area Vocational Tech. School No. 2, *supra;* Frye v. Haas, 182 Neb. 73, 152 N. W. 2d 121 (1967); School Dist. No. 23 v. School Dist. No. 11, 181 Neb. 305, 148 N. W. 2d 301 (1967).

If the Legislature authorizes a public hearing, due process may demand that the hearing be full. One element of a full hearing is "ample opportunity . . . (for) all parties . . . to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken." The New England Divisions Case, 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605 (1923).

Fairness to plaintiffs did not necessitate provision for a preelection hearing or for a postelection inquiry into the sufficiency of the petitions. "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Missouri, Kansas & Texas Ry. Co. v. May, 194 U. S. 267, 24 S. Ct. 638, 48 L. Ed 971 (1904).

The judgment is affirmed.

AFFIRMED.

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MARGARET F. HANSEN, APPELLEE, V. FLORENCE GOINS, APPELLANT.

172 N. W. 2d 98

Filed November 14, 1969. No. 37262.

1. **Deeds: Contracts.** Where a grantor conveys land in consideration of the agreement of the grantee to support, maintain, and

care for the grantor during his lifetime and the grantee neglects or refuses to comply with the contract, the deed may be set aside and the title quieted in the grantor.

2. **Deeds: Contracts: Evidence.** To come within the ambit of this rule, the plaintiff has the burden of proof to establish her case by a preponderance of the evidence.

3. ———: ———: ———. This burden of proof involves two essential issues: Has plaintiff proved such contract; and, if so, has there been a failure or refusal of the grantee to perform the condition subsequent?

Appeal from the district court for Dakota County: JOSEPH E. MARSH, Judge. Reversed and remanded with directions.

Leamer & Galvin, for appellant.

Ryan & Scoville, for appellee.

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

SPENCER, J.

This action seeks to set aside a deed for failure of consideration. The trial court entered judgment for plaintiff, setting aside the deed. Defendant perfected an appeal to this court.

Plaintiff, a childless widow 84 years of age, executed the deed in question May 4, 1967, conveying her home to the defendant, subject to a life estate. The deed was drawn by her own attorney, pursuant to her direction. Shortly before May 4, plaintiff asked the defendant to take her to see the attorney. Plaintiff advised him she wanted to deed her home to the defendant, telling him the defendant was going to take care of her and she wanted to deed the property to her. The attorney advised plaintiff not to convey her home, but recommended that she handle the matter by will. On this point, the attorney testified: "This she didn't want to do and reiterated the fact she wanted to deed the house to Mrs. Goins. I then prepared the deed and on May 4 they came back and Mrs. Hansen signed it and I also explained to her

that there was a reservation in there for her lifetime reserving the lifetime use in Mrs. Hansen. The deed was recorded then through our office with the County Clerk." The attorney, who notarized the deed, testified the signing was the voluntary act and deed of plaintiff and that she was mentally competent at the time. Defendant was present on both occasions, but took no part in the conversation.

Approximately 3 months after the conveyance, plaintiff, who was then living in the home of the defendant, moved out, saying she didn't like it. Some time later she demanded the return of her home. The evidence would indicate this was after other friends moved into the house with her.

Plaintiff's attorney wrote defendant under date of December 26, 1967, as follows: "Dear Florence:

"We have been having quite a time with Margaret Hansen and she is very, very disturbed about the fact that she deeded the house to you. *I realize that she did this without you asking her to do it and over my objections.* However, this is water under the bridge and I feel sure that everything can be solved if you could simply deed it back to her.

"Would you please contact me as soon as possible so that we can discuss this matter." (Emphasis supplied.)

The parties had been close friends for more than 30 years. They had taken trips and vacations together on several occasions. Plaintiff had helped the defendant with the care of her children and in later years with her parents. In the later years defendant visited plaintiff in her home several times a week, helped her with her errands, and took her shopping and to church on Sundays. The evidence would indicate defendant had been providing plaintiff with companionship and some degree of care.

Plaintiff alleged in her petition that defendant in consideration of the execution and delivery of the deed agreed to care for her, to supply her needs, and be a com-

forter and companion to her. No attempt was made in the record to define what was meant by care. Plaintiff at all times bought her own food and paid her own bills, so clearly it did not include support.

Defendant testified the conveyance was plaintiff's sole idea. Plaintiff had previously made provision in her will, leaving the property in question to defendant. Plaintiff had experienced some trouble in probate proceedings and the purpose of the conveyance was to avoid probate to eliminate any trouble after plaintiff was gone. Defendant further testified she continued her previous activities on behalf of the plaintiff until plaintiff made it impossible to continue,

Plaintiff predicates her action on our repeated holding that where a grantor conveys land in consideration of the agreement of the grantee to support, maintain, and care for the grantor during his lifetime, and the grantee neglects or refuses to comply with the contract, the deed may be set aside and the title quieted in the grantor. Lewelling v. McElroy, 148 Neb. 309, 27 N. W. 2d 268.

To come within the ambit of this rule, the plaintiff has the burden of proof to establish her case by a preponderance of the evidence. Plaintiff's burden of proof involved two essential issues: Has the plaintiff proved such contract? If so, has there been a failure or refusal of the grantee to perform the condition subsequent? The answer to the first question is sufficient herein. Not only has there been a failure to prove an agreement, even if we could infer one was made, its exact nature is not apparent from the record.

We conclude that plaintiff has failed to sustain her burden of proof. The deed in question was drawn by and executed before her own attorney, who made an attempt to dissuade her. When he failed to do so, he provided for the reservation of a life estate for plaintiff in the property. At the time of the conveyance, plaintiff was fully competent and must be presumed to

have understood the nature of her act. If, as she now contends, the conveyance was premised on a definite agreement of future care, we find it hard to believe her attorney would not have advised her to have the agreement with its definite terms reduced to writing. The letter of December 26, 1967, to defendant from plaintiff's attorney, would certainly tend to negative any suggestion of an agreement.

The judgment of the trial court is reversed and the cause is remanded with directions that the plaintiff's petition be dismissed.

REVERSED AND REMANDED WITH DIRECTIONS.

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SHIRLEY PACKETT, APPELLANT AND CROSS-APPELLEE, V. BERNARD PACKETT, APPELLEE AND CROSS-APPELLANT.
172 N. W. 2d 86

Filed November 14, 1969. No. 37263.

**Divorce: Parent and Child.** An original decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action.

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

John McArthur, for appellant.

Wilson, Barlow & Watson, for appellee.

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

NEWTON, J.

Plaintiff Shirley Packett and defendant Bernard Packett were divorced by decree of the separate juvenile court of Lancaster County, Nebraska, on April 5, 1966. They had as the issue of the marriage one son Brad Lee

Packett. Plaintiff was awarded custody of the minor son subject to a provision that: "The defendant should have the right to visit with his minor son at reasonable times and places, such as on weekends, holidays, birthdays, and a thirty day visit during the summer school vacation, the exact time of the summer visitation to be selected by the defendant at least thirty days prior to the commencement of said visit." Defendant now seeks custody of his son and both parties indicate that a clarification of the original decree is desirable. The trial court entered a supplemental decree providing: "* * * that the decree entered in this case on the 5th day of April, 1966 is modified to provide that until such time as the plaintiff is willing and does communicate with the defendant in order that reasonable visitation rights can be agreed upon by the parties, reasonable times and places of visitation of Brad Lee Packett with the defendant shall be selected and fixed by the defendant." We find that the decree of the trial court requires modification.

Ordinarily litigants come into court because they are unable to settle their differences themselves and desire the court to fix their respective responsibilities. Such was the case here. It will be observed that the trial court in its most recent decree has failed to perform this duty but has, in effect, said to the parties: "Go home and settle your own differences." This is not an approved procedure.

At the time of the divorce, plaintiff was residing in the State of Iowa and defendant was residing in Lincoln, Nebraska. The only material changes in circumstances that have occurred are that the plaintiff now also resides in Lincoln, Nebraska, the defendant has remarried, and the son will very soon have attained the age of 14 years. It is not contended that either party is unfit to have the custody of the boy, but on the contrary, both appear to be much interested in his welfare. The defendant father, contrary to circumstances so often

found following divorce actions in which children are involved, very commendably takes a great interest in his son and this action has apparently resulted due to the fact that defendant has steadfastly sought to increase opportunities for association with his son. As mentioned, this is a commendable trait in the father, but there is another factor that cannot be overlooked. First, the son is now at an age where he quite likely has commitments of his own which may well be interfered with by his father's demands upon his company. Second, the persistent request of the defendant for the company of his son, oftentimes made on short notice, can have a disrupting influence upon the plans of the boy's mother. If the father is at liberty to gain the boy's company and to take him at his, the father's, pleasure, it makes it virtually impossible for the mother to make any plans either for the boy or for herself and the boy. This presents, at best, an unsatisfactory situation.

The original decree did not provide that the defendant could take his son into his home any time other than the 30-day vacation period. It did provide that he might visit the son at other reasonable times and places such as weekends, holidays, and birthdays. The defendant has apparently construed this provision to give him a blanket invitation to seek the company of his son whenever he desired to do so and since the plaintiff moved her residence to Lincoln, Nebraska, the defendant has increasingly sought to take advantage of the rights he deemed himself to have under the original decree. This led to considerable dissension between the parties. Both parties concede that they had agreed that the defendant might, in addition to the summer vacation period, take his son with him on 1 weekend each month, and might also take him to church each Sunday, and elsewhere on 2 evenings in each month. This agreement was adhered to for a time but proved to be unsatisfactory to the defendant.

An original decree fixing custody of minor children will not be modified unless there has been a change in

circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action. See, Anderson v. Wilcox, 163 Neb. 883, 81 N. W. 2d 314; Jones v. Jones, 183 Neb. 223, 159 N. W. 2d 544. In the present case, no such change of circumstances has occurred; yet, it would appear in the best interests of the minor child, due to the constant bickering which has been occurring between his parents, that there be some modification of the custody provisions. Such conduct cannot fail to be painful and detrimental to Brad Lee Packett. We, therefore, believe that some revision and clarification of the decrees entered in this case would be proper and in the best interests of the minor son.

The custody of Brad Lee Packett shall remain vested in his mother, the plaintiff herein. Defendant may have custody for a 6-week period during summer school vacation, but shall give 3 weeks notice to plaintiff and to his son of the period he selects and shall return his son to plaintiff's custody at least 1 week before school commences. Defendant shall also be privileged to take his son into his home or elsewhere 1 weekend each month upon giving 3-days notice of the time selected to plaintiff and to Brad. Defendant shall also be privileged to take his son to church and to noon lunch each Sunday and to have his company 2 evenings out of each month. Plaintiff and Brad shall be given 24 hours notice of the evenings selected and Brad shall be returned to plaintiff's home at a reasonable time each evening. The costs of this action, including trial court costs, are taxed to the defendant and plaintiff is allowed an attorney's fee in the sum of $500.

The judgment of the trial court is modified as above set forth and the cause is remanded with directions to enter a decree in accord with this opinion.

AFFIRMED AS MODIFIED.

CARTER, J., dissenting.

The appeal in this case was from an order of the trial

court modifying the visitation rights of the husband. The trial court gave the husband the authority to fix the times and places for exercising visitation rights, taxed the costs to the wife, and denied the wife an attorney's fee, all of which is assigned as error. This court holds, in effect, that the court was in error in not fixing specifically the visitation rights of the husband. With this portion of the opinion, I agree.

The costs of this appeal should be taxed against the husband including a reasonable attorney's fee for services rendered in this court. Considering the issues involved on appeal, I submit that a reasonable attorney's fee does not exceed the amount of $250 and I respectfully dissent from the allowance of $500 for services rendered in this court.

The wife assigns as error the taxing of costs to the wife in the trial court and the failure to allow the wife an attorney's fee in that court. I point out that the issues in the trial court are more detailed and extensive than they are on this appeal. The taxing of an attorney's fee for services rendered in the trial court is, in the first instance, in that court and not here. If the trial court erred in not fixing an attorney's fee for the wife, the case should be reversed and remanded to the trial court to have such attorney's fee taxed as costs in that court. It is the trial court and not this court that has the facts and means of determining a reasonable attorney's fee for services rendered in that court. It is true that this court has in the past, improvidently I think, allowed attorney's fees in the trial court for services in that court without the benefit of that court's judgment as to the allowance to be made. The taking of the allowance out of the hands of the trial court and substituting our judgment for that of the trial court on a record which may or may not be adequate as to all that has occurred in the trial court, including previous allowances made, can well result in a hit or miss allowance that is unfair and unreasonable. I submit that an

excessive attorney's fee should not be allowed in this court on the theory that we are making an allowance for services rendered in both the trial court and in this court.

For the foregoing reasons, I do not concur with the allowance of a $500 attorney's fee for services rendered in this court.

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DANIEL J. EDERER, FATHER AND NEXT FRIEND OF MARY ELLEN EDERER, A MINOR, APPELLANT, V. BERNARD J. VAN SANT ET AL., APPELLEES.

172 N. W. 2d 96

Filed November 21, 1969. No. 37166.

1. **Automobiles: Negligence: Infants.** The driver of an automobile is not an insurer against injuries to children from the operation of a car. He is bound to exercise ordinary or reasonable care towards children as well as towards adults. The age, maturity, and intelligence of the child is a circumstance to be considered in determining whether or not the driver has exercised such care.
2. **Trial: Witnesses.** The manner in which a witness may be examined is within the sound discretion of the court.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Martin A. Cannon of Matthews, Kelley, Cannon & Carpenter, for appellant.

Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellees.

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

BOSLAUGH, J.

This is an action by Daniel J. Ederer as father and next friend of Mary Ellen Ederer to recover damages for injuries she sustained in an accident on November

8, 1967. Mary Ellen, who will be referred to as the plaintiff, was born on February 23, 1965.

The accident happened on November 8, 1967, at about 4 p.m., in Omaha, Nebraska. Paula Marie Van Sant, who will be referred to as the defendant, was driving a 1963 Ford automobile owned by her father, Bernard J. Van Sant, in a northerly direction on Westgate Road. It was a clear day and the pavement was dry. When the defendant reached the intersection at Frederick Street she was traveling 15 to 20 miles per hour.

Westgate Road is 30 feet wide. The Ederer home is the second house north of Frederick Street on the east side of Westgate Road. There is a driveway leading east from Westgate Road which is north of the Ederer home and approximately 144 feet north of Frederick Street.

The defendant testified that when she had just passed Frederick Street, or as her automobile was leaving the intersection, she saw a child standing in the driveway north of the Ederer house. The child, who was the plaintiff, was then 4 or 5 feet east of the east curbline of Westgate Road.

As Westgate Road proceeds to the north it curves to the east. There was a truck parked on the east side of Westgate Road on the curve. The defendant was driving with the left side of her automobile near the centerline of Westgate Road and as she proceeded north she began to "swing out" as she approached the bend or curve in Westgate Road.

The defendant testified that as she proceeded north on Westgate Road from the Frederick Street intersection, the plaintiff was in her view and was standing still in the driveway. The defendant did not see the plaintiff move, but as she passed the driveway north of the Ederer house she heard a "thump." The defendant stopped the automobile and found the plaintiff lying in the driveway. The right front door handle on the de-

fendant's automobile had struck the plaintiff's forehead injuring her.

At the close of the evidence the plaintiff moved for a directed verdict on the issue of liability. This motion was overruled, and the jury returned a verdict for the defendants. The plaintiff's motion for new trial was overruled and she has appealed.

The principal assignment of error relates to the overruling of the motion for a directed verdict on the issue of liability. The plaintiff contends that the evidence established that the defendant was guilty of negligence as a matter of law which was the proximate cause of the accident.

The driver of an automobile is not an insurer against injuries to children from the operation of a car. He is bound to exercise ordinary or reasonable care towards children as well as towards adults. The age, maturity, and intelligence of the child is a circumstance to be considered in determining whether or not the driver has exercised such care. Pullen v. Novak, 169 Neb. 211, 99 N. W. 2d 16.

The plaintiff argues that the defendant, after seeing the plaintiff in the driveway, never looked at her again; and that the defendant turned her attention to a remote truck and never saw or noticed the plaintiff again before the impact occurred. The defendant's testimony was that the plaintiff was in her view and standing still in the driveway as the defendant proceeded north on Westgate Road.

The defendant was required to maintain a lookout for other pedestrians and vehicles that might be using the street. The defendant was not required to devote her entire attention to the plaintiff who was standing in the driveway beside the street as the defendant approached. Under the facts and circumstances in this case it was a question for the jury whether the defendant exercised reasonable care toward the plaintiff.

The plaintiff also complains of a number of rulings

by the trial court on objections to questions asked by her counsel during his examination of the defendant. We have examined each of these rulings and find no prejudicial error in any of them.

The manner in which a witness may be examined is within the sound discretion of the court. State v. Adams, 181 Neb. 75, 147 N. W. 2d 144. The record in this case does not show an abuse of discretion by the trial court.

The judgment of the district court is affirmed.

AFFIRMED.

CARTER, J., concurs in the result.

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BERNADETTE BAUER, APPELLEE, V. RICHARD BAUER, APPELLANT.
172 N. W. 2d 231

Filed November 21, 1969. No. 37171.

1. **Divorce.** The sufficiency of the corroboration in a divorce case must be tested upon the particular facts and circumstances in each case.
2. ———. Misconduct on the part of a plaintiff in an action for divorce, not amounting to a statutory ground for divorce, will not sustain a denial of the divorce on grounds of recrimination.
3. **Divorce: Parent and Child.** Ordinarily the custody of children of tender years should be awarded to the mother unless it is affirmatively demonstrated that she is unsuitable, unfit, or unable to provide a good home.
4. ———: ———. Ordinarily the custody of children of tender years in a divorce case should be kept within the jurisdiction of the court having control over them, unless the best interests of the children demand otherwise.
5. ———: ———. A child's preferential statement as to custody, while deserving to be considered, should be closely scrutinized, is not controlling in the determination of custody.

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

Littrell & Patz, for appellant.

Wilson, Barlow & Watson, for appellee.

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

WHITE, C. J.

In this divorce action, the defendant husband appeals from a decree granting the custody of two minor children, ages 8 and 12, to the plaintiff wife, and awarding child support and fixing a division of the property. On appeal, the defendant challenges the granting of the divorce to the plaintiff, asks that he be given custody of the two minor children, and attacks the division of property as being inequitable. We affirm the judgment of the trial court.

The parties were married in 1955. The two children, Richard and Deborah, were born in 1956 and 1960, respectively. The record reveals a personal incompatibility from almost the beginning of the marriage. The marriage spanned the defendant's Air Force career and the record supports a finding of unjust accusations by the defendant about plaintiff's behavior and physical struggles ensuing therefrom. On at least one occasion, when defendant was on a temporary overseas duty, the plaintiff took the children and moved to Texas, finally returning after approximately 6 months, at the defendant's request. During 3 or 4 months of such period of time defendant failed to support plaintiff and the children. It appears that the parties became reconciled after these disputes and difficulties and in the summer of 1963 the defendant was transferred from his station at Knob Noster, Missouri, to the Lincoln Air Force Base. Plaintiff and the children stayed in Missouri and in the summer of 1963 the plaintiff filed for a divorce. However, in December of 1963 the plaintiff joined the defendant in Lincoln and it appears that this reconciliation was motivated by the defendant's desire to have his family with him in order to get a promotion. This reconciliation resulted in a dismissal of the divorce action. The defendant during this period of time had been

sending $200 a month to plaintiff, in addition to paying her rent and utilities while she remained in Missouri with the children.

The record supports the finding that during the stay in Lincoln the defendant's attitude and temper became uncontrollable and abusive toward his family and the plaintiff. However, they remained together, and in January 1966 the defendant was transferred to Tennessee to attend an Air Force school. During his absence the defendant had agreed to send the plaintiff and the children $500 a month for support. About 3 or 4 months later he began sending her $525 a month. In June 1967 defendant decided he was going to leave the service and return to school. During this period of time the defendant received a $400 income tax refund and also received in excess of $14,000 in severance pay from the service, which latter amount plaintiff was unaware of until much later.

Defendant was separated from the Air Force in June 1967, and thereupon returned to Lincoln and advised the plaintiff that he was going to go to Milwaukee to attend school, that she and the children were coming with him, and that plaintiff was going to support him while he attended school. He also advised the plaintiff that if she did not come he would send her no more support money.

The defendant left Lincoln and after the incident recited above sent no more support money. Consequently in July 1967, plaintiff filed for a divorce on the grounds of extreme cruelty. In February 1968, plaintiff filed an amended petition alleging as an additional ground for divorce that defendant was able to provide suitable maintenance but that he had grossly, wantonly, and cruelly refused to do so. In May 1968 plaintiff made application for, and received, temporary child support. The plaintiff had received no support money from the defendant from June 1967 until May 1968. As a result thereof, she was forced to resort to full-time employment which was inadequate to pay the necessary bills for

food, clothing, rent, utilities, and the other necessary incidents of the standard of living the defendant had maintained for the family.

It is apparent that the evidence amply sustains, and we find that it does by a preponderance of the evidence, a finding of nonsupport on the part of the defendant. See § 42-302, R. R. S. 1943.

On the issue of extreme cruelty, the evidence was sharply conflicting and we shall neither encumber the record or embarrass the parties by a detailed recital of the conflicting versions given by the parties. The defendant asserts a lack of corroboration of the plaintiff's testimony under section 42-335, R. R. S. 1943, and also asserts a defense upon the technical ground of recrimination. Much of the background testimony is uncorroborated. But the sufficiency of the corroboration in a divorce case must be tested upon the particular facts and circumstances in each case. Humann v. Humann, 180 Neb. 719, 144 N. W. 2d 723. The trial court found for the plaintiff upon the issue of extreme cruelty and impliedly found there was adequate corroboration of her testimony. This finding is amply sustained by the testimony of the plaintiff's witness who stayed with the family in Lincoln for a considerable period of time and corroborated the fact that the defendant was a moody man and given to excessive outbursts of temper which were usually directed, in her presence, at the plaintiff or the children. Of vital importance in testing this issue on appeal, is the fact that the trial court, in weighing this type of evidence, had the opportunity to observe the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other. Schalk v. Schalk, 168 Neb. 229, 95 N. W. 2d 545. There is ample evidence to sustain the trial court's finding of extreme cruelty and corroboration and we adopt it as our own on trial de novo in this court.

On the issue of recrimination, in substance, defendant asserts that there were utterances and conduct of the

plaintiff sufficient to bar her right to a divorce. Misconduct on the part of a plaintiff in an action for divorce, not amounting to a statutory ground for divorce, will not sustain a denial of the divorce on grounds of recrimination. § 42-304, R. R. S. 1943; Schalk v. Schalk, *supra;* Stephens v. Stephens, 143 Neb. 711, 10 N. W. 2d 620. Again, on this issue, the trial court's evaluation of the oral testimony has considerable weight on this court's determination on judicial review of the district court's decree and judgment. It is quite apparent from the record in this case that the alleged outbursts of temper on the part of the plaintiff were largely of a defensive nature and provoked by or occurred during the defendant's numerous outbursts of temper. The holding of the trial court that the plaintiff was entitled to an absolute decree of divorce on the grounds of extreme cruelty is sustained.

The trial court granted the custody of the children to the plaintiff mother. In determining the question of who should have the care and custody of the children, this court has repeatedly said that as between the parties the paramount consideration is the best interest and welfare of the children. Where the trial court has observed the witnesses and heard the testimony, and has made an independent investigation of the circumstances, if the decree in this respect is justified by the evidence, its discretion will ordinarily not be disturbed. Ross v. Ross, 174 Neb. 795, 119 N. W. 2d 495. In this case, the defendant himself requested an investigation of the custody situation by the juvenile probation office of Lancaster County. After hearing all of the evidence, including the report of investigation, the trial court concluded that the best interests of the children would be served by giving custody to the plaintiff with the defendant having reasonable visitation rights. The trial court also found that both parents were fit and proper to have the custody of the children. Ordinarily the custody of children of tender years should be awarded to

the mother unless it is affirmatively demonstrated that she is unsuitable, unfit, or unable to provide a good home. Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361; Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509; Hausman v. Shields, *ante* p. 88, 165 N. W. 2d 581. We also note that the defendant's residence is in Milwaukee. This court has held that ordinarily the custody of children of tender years in a divorce case should be kept within the jurisdiction of the court having control over them, unless the best interests of the children demand otherwise. Koch v. Koch, 175 Neb. 737, 123 N. W. 2d 642. Defendant argues that the two children expressed a preference to live with the defendant. Particularly with reference to children of tender years, this court has said that a child's statement, while deserving to be considered, should be closely scrutinized, is not controlling in the determination of custody. Bath v. Bath, *supra*. The testimony in this respect, on close examination, is equivocal. The children did not express any hostility or lack of love for their mother. The evidence reveals, if custody is placed with the father, that prospectively the actual care and detailed supervision of these children in the future will be placed with relatives of the defendant in Milwaukee, and this would follow a wrenching of the children from their school situation, their friends, and the continuing care and attention of their mother since their birth. The decree of the trial court awarding the custody of the children to the mother is correct and is affirmed.

The defendant asks us to review the determination of allowances for child support and division of property. The general principles to be followed in this determination are well settled and will not be repeated here. Jablonski v. Jablonski, 173 Neb. 544, 114 N. W. 2d 1.

We observe that the plaintiff is and has been gainfully employed and has contributed substantially, and especially during the periods when there has been a failure in support on the part of the defendant, to the

support of the children. Without reviewing the general background and status of the parties as heretofore recited in this opinion, it is apparent that the trial court's decree is eminently fair to both parties. The trial court awarded the sum of $75 per month for each child commencing September 1, 1968, as child support; awarded the plaintiff her personal property and effects; the household furniture and furnishings of the parties; the home and real estate located at 8145 Sanborn Drive, Lincoln, Nebraska, subject to any mortgage against the same; her insurance policy; her savings account in her own name containing approximately $1,950; an investment account in the plaintiff's name valued at approximately $2,200; a judgment in the amount of $750 representing child support from July 1, 1967, to June 1, 1968, during the period of time the defendant failed to support the family, at the rate of $150 per month, less a credit of $900 received by the plaintiff from the sale of defendant's one-half interest in a Piper airplane; and also awarded her the 1961 Chevrolet automobile that she has been using.

The defendant was awarded his personal property and effects; his 1966 Chevrolet automobile; 200 shares of Delta Airlines stock; 25 shares of Outboard Marine stock; United States savings bonds in the approximate amount of $3,550; his savings account in his name; his insurance policies; and all other property in the sole name of the defendant. We can find nothing in the evidence in this record or in the argument of the defendant that would justify an enlargement of the award to the defendant in this case. This is especially true in light of the fact that the plaintiff is required to support and maintain an adequate and suitable home for the care of her minor children, a requirement that will entail expenditures of substantial amounts of money in addition to the $150 per month specifically awarded for the care of the children.

The decree of the trial court granting an absolute

divorce to the plaintiff, the custody of the minor children, subject to reasonable visitation rights by the defendant, and the division of the property rights of the parties is in all respects correct and is affirmed. The costs of this action, including a reasonable attorney's fee for the plaintiff's attorney in the amount of $600, are taxed to the defendant.

The judgment of the separate juvenile court of Lancaster County is in all respects correct and is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. RAYMOND LEE SABIN, APPELLANT.

172 N. W. 2d 89

Filed November 21, 1969. No. 37219.

1. **Statutes.** Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning, and this court cannot read a meaning into a statute which is unrelated by legislative language, nor can it read plain, direct, and unambiguous language out of a statute.
2. ———. If a statute is unambiguous, this court will not usurp the function of a lawmaking body to give meaning to a statute not intended by the Legislature.

Appeal from the district court for Dawson County: HUGH STUART, Judge. Affirmed.

Padley & Dudden, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

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

WHITE, C. J.

The question involved in this case requires an interpretation of the over-width provisions of the Nebraska motor vehicle law contained in section 39-719, R. R.

S. 1943. The district court decided that the "unbaled livestock forage" exception, section 39-719(5), R. R. S. 1943, to the 8-foot statutory vehicle width limit applied to the load only and not to the vehicle. We affirm the judgment of the district court.

The facts are not in dispute. On January 5, 1968, appellant was arrested for operating a motor vehicle on the public highways in violation of the over-width provisions of section 39-719, R. R. S. 1943. Appellant was approximately 1 mile south of Gothenburg, Dawson County, Nebraska, and was enroute from G. & M. Mann Hay Company to a farm 5 miles south and ¾ of a mile east of Gothenburg. He was to pick up a load of hay at this location and return to his place of employment. The vehicle the appellant was driving had been modified by its owner, the G. & M. Mann Hay Company, for the purpose of hauling loose hay. The truck bed protruded beyond both sides of the cab of the truck and measured 13 feet 9 inches between the extreme outside edges. It is clear that there was no intent at the time of the arrest to use the vehicle for any purpose other than the hauling of hay.

The statute says that: "No vehicle shall exceed a total outside width, *including any load thereon,* of eight feet except that such prohibition shall not apply to * * * (5) unbaled livestock forage within the county or adjacent counties not to exceed twenty feet in total width; * * *." (Emphasis supplied.) § 39-719, R. R. S. 1943.

The precise issue here is whether any vehicle used to haul a load of "unbaled livestock forage" 20 feet in width can exceed 8 feet in width while the vehicle is being moved empty to a point of loading. In other words, does the exception apply only to the load or does it include the width of the vehicle also? Appellant argues that the exception applies to the vehicle and that a reasonable interpretation authorizes the use of a vehicle of such width as will carry a maximum allowable load limit; and asks

us to answer the proposition that a load of loose hay 20 feet in width cannot be hauled on a vehicle which is merely 8 feet in width.

As authority for our judicial exploration of the wisdom and reasonableness of his argument he invokes a standard tool or rule of statutory construction that this court should give effect to the intent or purpose of the Legislature, and in so doing, this court should look to the object to be accomplished and the evils and mischief sought to be remedied, and place upon the statute a construction that will best effectuate its purpose. State v. Simants, 182 Neb. 491, 155 N. W. 2d 788 (1968); State ex rel. Retchless v. Cook, 181 Neb. 863, 152 N. W. 2d 23 (1967); Johnson v. School Dist. of Wakefield, 181 Neb. 372, 148 N. W. 2d 592 (1967); 82 C. J. S., Statutes, § 323, p. 593. But the limitations on the use of this tool of statutory construction are well settled. It is not an imperative demand authorizing at all times judicial exploration of the wisdom or policy considerations motivating the enactment of a statute. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning, and this court cannot read a meaning into a statute which is unrelated by legislative language, nor can it read plain, direct, and unambiguous language out of a statute. State v. Levell, 181 Neb. 401, 149 N. W. 2d 46 (1967); Schmeckpeper v. Panhandle Coop. Assn., 180 Neb. 352, 143 N. W. 2d 113 (1966); Rehkoph v. Board of Equalization, 180 Neb. 90, 141 N. W. 2d 462 (1966); Chicago & N. W. Ry. Co. v. City of Seward, 166 Neb. 123, 88 N. W. 2d 175 (1958), rehearing denied, 166 Neb. 662, 90 N. W. 2d 282 (1958). If a statute is unambiguous, this court will not usurp the function of a lawmaking body to give meaning to a statute not intended or expressed by the Legislature. Ludwig v. Board of County Commissioners, 170 Neb. 600, 103 N. W. 2d 838 (1960); Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240 (1958); Cavalry Baptist Church v. Coonrad, 163 Neb. 25, 77 N. W. 2d 821 (1956).

The statute involved in the case at bar is totally devoid of ambiguity. It does ont apply the width limitation to any *vehicle* used for hauling livestock forage. It merely provides that the prohibition, that any vehicle *including any load thereon* cannot exceed 8 feet in width, shall not apply when that load is unbaled livestock forage. Appellant's interpretation of the statute would require us to totally ignore this unequivocal language.

Nor may we permit an ingenious process of semantical word construction to create an ambiguity. The respective statutory classifications of "a vehicle" and *"a vehicle including any load thereon"* seem to us to be clear, and the finding of an ambiguity is not required simply because hindsight examination of the grammar of the statute could lead us to a more apt statement. If appellant's interpretation of section 39-719 (5), R. R. S. 1943, were correct then the hay or forage moving vehicular equipment could be 20 feet wide, taking up the traveled portion of most of our state highways. This in turn would require the courts to judicially explore and determine factually whether such a vehicle was being used in moving to or from a hay-loading operation. Certainly it is not the intent of the statute that a truck bed would have to be reconstructed to 8 feet in width when not hauling unbaled forage or hay. Nor are we required or authorized to judicially speculate as to the proportionate width between truck beds and overhanging hay loads. It may be, as appellant suggests, that a 20-foot-wide hay load may not be placed upon an 8-foot-wide truck bed. The point is that the statute expressly authorizes such a load width if it can be accomplished. Further discussion is unnecessary. The statute clearly says that the maximum width limit of a vehicle shall be 8 feet. It permits unbaled forage or hay to be carried as a load thereon up to a limit of 20 feet in width.

The judgment of the district court is correct in its interpretation of the statute and is affirmed.

AFFIRMED.

SPENCER and BOSLAUGH, JJ., dissenting.

Defendant was arrested when he was proceeding to a farm for the purpose of loading a stack of loose alfalfa hay. We are unable to agree with the majority opinion that the words of the statute are plain, direct, and unambiguous, and that no interpretation is needed to ascertain their meaning.

Actually, when the attention of the Senator who proposed the legislation was called to a possibility of conflict in interpretation, he wrote the Attorney General with reference to such interpretation. We quote the following reply to him dated February 28, 1966: "We have your letter of February 25, 1966, with reference to the legality of certain hay moving equipment owned by a Mr. Jim Harmon of Loup City. As we understand the situation, based upon the contents of your letter, Mr. Harmon states that he was advised by officers of the scale section of the Highway Department to the effect that although the law did permit him to transport unbaled hay by means of a vehicle the total outside width of which, including the load thereon, does not exceed twenty feet, that when such vehicle was empty the same could not be operated over public roads if the width thereof exceeded the basic eight foot maximum. That statement does not represent a correct interpretation of the law; and either Mr. Harmon misunderstood the officers, or the officers are misapplying the provisions of Section 39-719, as amended by L.B. 713."

We quote the above merely to suggest that the statute is not as plain and unambiguous as the majority opinion suggests. This being a penal statute, it should be strictly construed. It seems obvious to us that a truck 8 feet in width could not conceivably haul unbaled livestock forage 20 feet in width. The only reasonable construction which can be put upon the statute is that in the excepted instance the truck is not restricted to the 8-foot maximum. The truck herein was 13 feet 9 inches. Legislative Bill 857, which will become effective December 25,

1969, will permit the use of unloaded vehicles 14 feet in width.

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IN RE COMPLAINTS OF CORNHUSKER PUBLIC POWER DISTRICT.
CORNHUSKER PUBLIC POWER DISTRICT, APPELLANT AND CROSS-APPELLEE, V. LOUP RIVER PUBLIC POWER DISTRICT ET AL., APPELLEES AND CROSS-APPELLANTS.
172 N. W. 2d 235

Filed November 21, 1969. No. 37261.

1. **Public Utilities: Electricity.** It is the public policy of the state by the enactment of sections 70-1001 to 70-1020, R. R. S. 1943, to provide for adequate electric service at the lowest possible overall cost, to eliminate conflict and competition between public power districts, to avoid and eliminate the duplication of facilities and resources which result therefrom, and to facilitate the settlement of rate disputes between suppliers of electricity.
2. **Public Utilities: Electricity: Administrative Law.** In approving a service area agreement, the Nebraska Power Review Board is required by section 70-1007, R. R. S. 1943, to consider (1) the supplier best able to supply the load required, (2) the most logical future supplier of the area, (3) the desires of the supplier with respect to loads and service areas it wishes to serve, (4) the ability to provide service at costs comparable to other suppliers in the service area, and (5) the ability of the supplier to cope with the problems of expanding loads and increased costs. In the absence of agreement or a failure to meet the requirements of the foregoing guidelines, a service area supplier is protected against encroachments and invasions of his service rights.
3. ———: ———: ———. A supplier of electricity except by agreement may not offer electric service to additional ultimate users outside its service area without applying to the Nebraska Power Review Board and receiving its approval after notice and hearing. Such approval cannot be validly granted unless it is shown that the supplier in whose service area the customer is located cannot or will not furnish adequate electric service or that its provision by such supplier of the service area would involve wasteful and unwarranted duplication of facilities, as provided by section 70-1011, R. R. S. 1943.

4. ———: ———: ———. Where there is no evidence sufficient to sustain a finding that a supplier in his service area has failed or is unable to comply with the duties and responsibilities imposed on such a supplier, an order of the Nebraska Power Review Board permitting others to supply customers in such service area is arbitrary and unreasonable, and therefore void.
5. ———: ———: ———. Where it appears that the Nebraska Power Review Board has complied with controlling statutes in exercising its powers, and the evidence is sufficient to sustain its findings of fact, this court is without authority to substitute its judgment for that of the board, and the action of the board will be sustained. But where the evidence on controlling facts does not support the action of the board, its order is arbitrary and unreasonable.

Appeal from the Nebraska Power Review Board. Reversed.

Healey & Healey and Dennis D. Burchard, for appellant.

Schmid, Ford, Snow, Green & Mooney and Wilson, Barlow & Watson, for appellees.

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

CARTER, J.

This is a proceeding before the Nebraska Power Review Board brought by the Cornhusker Public Power District against the Loup River Public Power District and Consumers Public Power District under sections 70-1001 to 70-1020, R. R. S. 1943, alleging that the latter were violating the service area agreement made by the parties and unlawfully serving two industrial customers of the Cornhusker Public Power District. The basis of the two complaints was denied by the defendants. Defendants also filed a cross-application seeking a modification of Consumers Public Power District's service area agreement by adding thereto a strip of land referred to in the record as the corridor. Cornhusker by answer denied any right to modify the service areas of the parties. The complaints were consolidated for trial and a

hearing had before the Power Review Board. The board by a divided vote dismissed the complaints and sustained in part the application for the service area modification. The complainant has appealed.

For convenience we shall refer to the Cornhusker Public Power District as Cornhusker; Consumers Public Power District as Consumers; Loup River Public Power District as Loup; the Nebraska Power Review Board as the board; the Butler County Rural Public Power District as Butler; the Douglas-Lomason Company as Douglas-Lomason; the Kosch Manufacturing Company as Kosch; the Behlen Manufacturing Company as Behlen; the Champlin Oil Company as Champlin; and the Moorman Manufacturing Company as Moorman.

On May 10, 1965, pursuant to the provisions of section 70-1002, R. R. S. 1943, Cornhusker and Consumers entered into a service area agreement fixing Consumers' service area in the immediate territory as the territory within the corporate limits of the cities of Columbus and Richland, and the customers being served by it outside of such territory. The service area of Cornhusker, so far as it is here involved, included the territory outside of Columbus and Richland excepting customers already being served by Consumers in the area. Such service areas were subject to modification by mutual agreement with the approval of the board or by the board after notice and hearing. It was further provided that neither party, except as mutually agreed, should offer or provide electric service to additional ultimate users in the other party's service area or construct or extend any new line into the service area of another supplier for the purpose of furnishing service to ultimate users therein without first applying for and receiving the approval of the board. In order to eliminate conflicts, duplications, and competition between the parties, it was agreed, so far as applicable here, that where electric lines and facilities crossed or were located in the Cornhusker service area electrical service should not

be extended by Consumers without first obtaining the consent of Cornhusker and the approval of the board or on order of the board after application, notice, and hearing by the board. It was further provided that in the event a load or customer should develop which was closer to an existing electric line of Consumers in Cornhusker's service area, neither Consumers nor Cornhusker should offer electrical service to supply the same without first obtaining the consent of the other party and the approval of the board or by an application to the board approved after notice and hearing. This agreement was approved by the board on May 26, 1965.

On April 11, 1967, Consumers and Loup entered into a realignment agreement by which Loup became entitled to the service area rights of Consumers in the controversial area in consideration for the transfer of utility properties outside the involved service area. This agreement was never approved by the board as required by section 70-1002, R. R. S. 1943. Whether or not the claimed rights of defendants were those of Consumers or Loup seem of little consequence here since both are parties to the action and the claimed rights of Loup cannot exceed those obtained by Consumers.

Material to the issues in this case is an area referred to as the corridor. The corridor is approximately 4½ miles long from east to west and about 1½ miles wide from north to south. The east boundary is the west city limits of Richland and the west boundary is the east city limits of Columbus. The corridor is within the service area of Cornhusker, but Consumers has electric lines and customers in the area specifically shown on the map attached to the service area agreement. Approximately 2 miles east of Columbus, a tail race from Lake Babcock to the Platte River crosses the corridor from north to south. Paralleling the tail race is a 34.5 kv electric line formerly belonging to Butler but now belonging to Cornhusker. Adjoining the tail race on the west is a 400-acre tract of land known as Loup's indus-

trial site. This site is within the Cornhusker service area and gives rise to the service loads in controversy here.

The evidence shows that in the spring of 1965, Douglas-Lomason, a national auto parts manufacturer, was looking for a new plant location. This company was encouraged by the chamber of commerce of Columbus, with the assistance of Consumers and Loup who had personnel on the chamber's negotiating committee, to locate its plant in Columbus. Douglas-Lomason acquired a plant site in the Loup industrial site and negotiated with Consumers for electrical power service. The evidence is that the negotiations for the plant location were necessarily kept secret to protect Douglas-Lomason during the initial stages of its new operation. Cornhusker had no information of the plant location until it became publicly known. Cornhusker began furnishing temporary construction power to the building contractor on May 12, 1965, and was soon informed that arrangements for permanent power supply had been made with Consumers. On or about May 10, 1965, Consumers sought a waiver of Cornhusker's service area rights. It was explained that it was essential that prompt service be provided in view of Douglas-Lomason's contractual commitments. Cornhusker refused to waive its rights but agreed, in view of the circumstances and the civic interest of both Consumers and Cornhusker, to permit Consumers to supply the power until the board could decide the disputed rights of the parties. Consumers proceeded to furnish the power and the present proceeding is an appeal from the board's decision on the issue reserved by the agreement of the parties.

It is the contention of Consumers that Cornhusker did not have the equipment, particularly transformers, to build the line to Douglas-Lomason in May of 1965. This Cornhusker admits. Consumers, on the other hand, had such transformers. Consumers points out that it served one industrial plant, Champlin, east of the tail race by

2 miles of 34.5 kv electric line. This electric line tapped the Butler 34.5 kv electric line. It also served the Behlen plant by likewise tapping the Butler line. Both of these plants are loads properly served by Consumers under its area service agreement with Cornhusker. Other than the Butler 34.5 kv electric line, Consumers had the closest lines to the Douglas-Lomason plant. But it must be borne in mind that all of these industrial plants were served by the Butler line which Cornhusker could use by an arrangement with Butler and which it subsequently purchased. In the fall of 1966, the Moorman Feed Company constructed a plant a short distance north of Consumers' 34.5 kv electric line serving Champlin. Cornhusker had no such line close by and it waived its area service rights and permitted Consumers to serve this load. We fail to see the materiality of this to the issue before us.

In June 1967, Kosch sought and purchased a new site in Loup's industrial site for the purpose of constructing a new building. The selected location was close to U.S. Highway No. 30 and to railroad facilities. Loup apparently conditioned the sale of the ground for the plant on the use of electrical power to be furnished by Loup although it was within Cornhusker's service area. The site was a short distance north of the Douglas-Lomason plant, both being west of the Butler line. Loup was operating all Consumers' properties in the area under its realignment agreement with Consumers. No waiver agreement being reached with Cornhusker, Loup proceeded to provide electric power to Kosch pending a decision by the board.

Much was said in the evidence concerning the ability of the parties to provide adequate service, not only under existing conditions, but in the area of growth and expansion as well. Consumers and Loup argue that the larger facility with a greater inventory of equipment is an element of great import in determining this question. But we have found no evidence that Cornhusker

could not serve Douglas-Lomason and Kosch as well as Consumers or Loup. The power came from the same source and over the same powerlines, and we fail to see where size alone is a controlling factor. It is not claimed that Cornhusker is not adequately staffed or that its operations would be any less efficient than those of Consumers or Loup. It is true, of course, that a larger inventory of equipment might be timesaving in some instances, but in situations such as we have here where one party has notice and an opportunity to obtain necessary equipment during a period which is not available to the other, a distinct advantage exists in favor of the one having advance knowledge of the power requirements of the customer.

Consumers-Loup contend that Douglas-Lomason was their customer before the service area agreement was entered into. If it was, it should have been shown as such a customer when the service area agreement was entered into which it was not. As to Kosch, it is contended that Loup's plan to serve Kosch by tapping the Behlen substation and building a line west across the tail race to Kosch at an estimated expense of $4,600 is more economical than the proposal of Cornhusker to tap the Douglas-Lomason substation and go north to the Kosch plant at an expense of $13,000. There is evidence in the record that in the long run the construction of the line from the Douglas-Lomason plant to Kosch is the more economical for the supplier but not the user since the evidence also shows the Cornhusker user-rate charged is identical with that of Consumers-Loup.

It is fundamental that where it appears that the Nebraska Power Review Board has complied with the requirements of the controlling statutes in exercising the powers granted to it by legislative authority, and the evidence is sufficient to support its findings of fact, this court may not substitute its judgment for that of the board, and the action of the board will be sustained. City of Auburn v. Eastern Nebraska Public Power Dist.,

179 Neb. 439, 138 N. W. 2d 629; City of Schuyler v. Cornhusker P. P. Dist., 181 Neb. 704, 150 N. W. 2d 588.

The public policy of the state in enacting sections 70-1001 to 70-1020, R. R. S. 1943, is stated in the first section of the act to be as follows: "In order to provide the citizens of the state with adequate electric service at as low overall cost as possible, consistent with sound business practices, it is the policy of this state to avoid and eliminate conflict and competition between public power districts, * * * to avoid and eliminate the duplication of facilities and resources which result therefrom, and to facilitate the settlement of rate disputes between suppliers of electricity." By section 70-1011, R. R. S. 1943, it is provided in part: "Except by agreement of the suppliers involved, no supplier shall offer electric service to additional ultimate users outside its service area * * * without first applying to the board and receiving approval thereof, after due notice and hearing under rules and regulations of the board. Such approval shall be granted only if the board finds that the customer or customers proposed to be served cannot or will not be furnished adequate electric service by the supplier in whose service area the customer is located, or that the provision thereof by such supplier would involve wasteful and unwarranted duplication of facilities." In approving the service area agreement entered into by the parties, the board was obliged to follow the guidelines set out in section 70-1007, R. R. S. 1943. The board at that time found in effect that (1) Cornhusker was the supplier best able to supply the load required; (2) it was the most logical future supplier of the area; (3) determined the desires of Cornhusker with respect to loads and service areas it wished to serve; (4) determined that Cornhusker had the ability to provide service at costs comparable to other suppliers in the service area; and (5) that Cornhusker had the ability to cope with the problems of expanding loads and increased costs. In examining the evidence we find nothing to in-

dicate that these findings are not as valid now as they were at the time the service area agreement was entered into. We have not overlooked the fact that if the material evidence is in conflict we will not substitute our judgment for that of the board. But where there is no competent evidence to sustain the elements necessary to warrant an invasion of the area service rights of a supplier, an order of the board permitting it is arbitrary and in conflict with the public policy of the applicable statutes.

Consumers-Loup filed an application with the board for a modification of its existing retail service area by adding thereto the area heretofore referred to as the corridor. The board sustained the application as to the 400-acre tract described as the Loup industrial site and denied it as to the remainder of the territory described as the corridor. Cornhusker appealed from the grant of the application as it applied to the 400-acre tract and Consumers-Loup cross-appealed from the denial of the application as it applied to the balance of the territory in the corridor. The evidence sustains the decision of the board insofar as it denied the application of Consumers-Loup. As to the 400 acres which the board attached to the retail service area of Consumers-Loup, the correctness of the order of the board is controlled by the evidence, or want thereof, applicable to Cornhusker's right to serve Douglas-Lomason and Kosch. We can see no more reason for Consumers-Loup to be permitted to serve loads on the 400-acre tract than to serve Douglas-Lomason and Kosch. The evidence will not sustain a finding that Consumers-Loup is better qualified to serve the 400 acres than Cornhusker because of its larger inventory of equipment, or that it is the logical future supplier of the area, or that the cost of service would be greater, or that it is better able to cope with expanding loads and increased costs.

If Consumers-Loup can, under such circumstances, encroach on the service rights of Cornhusker and take the

most desirable loads or customers, the area service agreement becomes a shambles and the public policy of the statute is defeated. Area service contracts must be respected in the furtherance of the intent of the statute unless and until the supplier is unable to provide the service in accordance with the guidelines set out in section 70-1007, R. R. S. 1943, which affords the basis for the grant of a service area in the first instance.

We conclude that the board's order dismissing the complaints against Consumers-Loup is not supported by the evidence. We hold further that the order of the board sustaining the application for a modification of the area service agreement as to any part of the corridor is not sustained by evidence and that such order is arbitrary and unreasonable. For the foregoing reasons, the orders of the board complained of are reversed.

REVERSED.

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RICHARD I. SNOOK ET AL., APPELLEES, V. LEONARD N. SNOOK ET AL., APPELLEES, CHARLES F. FISHER, REFEREE-APPELLANT.

172 N. W. 2d 85

Filed November 21, 1969. No. 37267.

**Partition: Fees.** The determination of the amount of a reasonable referee's fee in a partition action rests in the sound judicial discretion of the trial court. It will not be disturbed on appeal in the absence of an abuse of discretion.

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

Fisher & Fisher, for appellant.

Bevin B. Bump, for appellees Richard I. Snook et al.

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

McCOWN, J.

Charles F. Fisher, the court-appointed referee in a partition action has appealed from the order of the district court setting the amount of the referee's fee.

The referee was appointed June 25, 1968, and filed his report recommending a sale of the property on July 22, 1968. The land was sold September 10, 1968, and the sale confirmed September 23, 1968. The total sale price was $148,814.21. On November 1, 1968, the court entered an order and decree of distribution fixing and allowing costs and fees. The attorney's fees were set at $10,200 and the referee's fee was set at $2,500. The referee objected to his fee allowance as insufficient. The objections were overruled.

The essence of the contention here is that a referee's fee which is not set at a fixed percentage of the sale price of the property, and is not determined in a set ratio to the attorney's fee, is therefore unreasonable.

No case authority is cited, and there is no opposing brief. A referee's duties in a partition case are distinct and different from the attorney's duties. The statutes do not require the referee to be an attorney. The fact that an attorney may be acting as referee does not per se convert the referee's duties and fees to attorney's duties and fees, nor does it require that both fees be combined for division in a fixed percentage ratio.

While attorney's fees and referee's fees are considered in the same section of the statute, they are distinctly and separately treated. The last sentence of section 25-21,108, R. R. S. 1943, provides: "The court shall also determine and tax as costs a reasonable fee for the referee." The common denominator is that each fee shall be reasonable.

Many factors enter into a determination of what constitutes a reasonable fee in a given case. The nature and amount of the services performed, the time required, and the value of the property are all factors to be considered. A fixed percentage of the sale price of property sold in

a partition action is not the sole conclusive gauge by which to measure the reasonableness of a referee's fee. The reasonableness of a fee must be determined in each individual case and it is impossible to lay down a rule that would apply in all cases.

The determination of the amount of a reasonable referee's fee in a partition action rests in the sound judicial discretion of the trial court. It will not be disturbed on appeal in the absence of an abuse of discretion.

The district court did not abuse its discretion, and the judgment is affirmed.

AFFIRMED.

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ALICE ISHAM, ADMINISTRATRIX OF THE ESTATE OF CYNTHIA ISHAM, DECEASED, APPELLANT, V. PATRICK W. BIRKEL ET AL., APPELLEES.

172 N. W. 2d 92

Filed November 21, 1969. No. 37269.

**Trial: Evidence.** Excluding testimony during oral examination at a trial on the sole ground of nonresponsiveness raised by counsel who is not interrogating the witness is error.

Appeal from the district court for Butler County: H. EMERSON KOKJER, Judge. Reversed and remanded.

John McArthur, for appellant.

Wilson, Barlow & Watson and Ted L. Schafer, for appellees.

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

SMITH, J.

This action for wrongful death of Cynthia Isham was brought for the benefit of her parents, Donald and Alice Isham. On issues that included contributory negligence

of Alice in having failed to supervise Cynthia reasonably, a jury returned a general verdict for defendant. Plaintiff administratrix has appealed. In question is a ruling excluding testimony by Alice to her supervision of Cynthia, age 4, and three other children, ages 3 to 9.

The Ishams lived in a farmhouse that fronted on a graveled road. On August 11, 1967, about 11 a.m., Alice and the four children returned by automobile to their home. Approximately 15 minutes later the children were playing in the road near the Isham driveway when an automobile driven by defendant Patrick W. Birkel struck Cynthia. The impact caused her death.

The disputed ruling was made during direct examination of Alice as follows: "Q What did you do then when you got into the driveway? A We got out of the car and one of the — the second boy started to the road and I stopped him and told him that I didn't want them going out there; that I was going in the house to fix them lunch so we could go pick up their father.

"Mr. Barlow: Your Honor, I move to strike the statement made by the witness as to what she said as not responsive and hearsay. (Question . . . and Answer . . . read aloud by the reporter.)

"The Court: Do you mean the part about what she told him? Is that what you are objecting to?

"Mr. Barlow: Yes.

"The Court: Sustained.

"Mr. McArthur: Q Well, without repeating anything that the children said or that you said to them, did you admonish them not to go in the road? A Yes. Q Were all four of the children there in the yard at that time? A Yes. Q What did you do then? A I went into the house."

Now abandoning the hearsay ground, defendant argues that (1) the stricken testimony was not responsive and (2) any error was harmless in view of the subsequent answer that Alice had admonished the children.

Excluding testimony during oral examination at a

trial on the sole ground of nonresponsiveness raised by counsel who is not interrogating the witness is error. Cardenas v. Peterson Bean Co., 180 Neb. 605, 144 N. W. 2d 154 (1966). "This topic of responsiveness has somehow become in modern times beset with crude misunderstandings, that tend to suppress truth and turn the inquiry into a logomachy: (1) Sometimes it is said that the *party questioning* may object on this ground, but not the opposing party. But there should be no such distinction; if the answer gives an admissible fact, it is receivable, whether the question covered it or not . . . (3) That an opponent is entitled to the *striking out* of an answer which is non-responsive *and inadmissible* . . . is merely a rule excusing him from not having objected before the answer." III Wigmore on Evidence (3d Ed., 1940), § 785, p. 160. We are not deciding whether or not a motion by the interrogator to strike such testimony for nonresponsiveness is good.

Plaintiff's counsel fairly interpreted the ruling to exclude testimony to what Alice or a child at the time specifically said. The prejudicial error in the ruling remained in spite of the fleeting inquiry that escaped objection.

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

REVERSED AND REMANDED.

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MINNIE JENSEN, A WIDOW, ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.
172 N. W. 2d 607

Filed November 28, 1969. No. 37115.

1. **Eminent Domain: Evidence: Witnesses.** Expert opinion evidence in a condemnation case, as in all other cases, is to be considered and weighed by the triers of fact like any other testimony. It is only advisory in nature and is not binding upon the jury or the court.

2. ———: ———: ———. The weight and credibility of the testimony of either lay or expert witnesses in an eminent domain action is for the jury.
3. **Eminent Domain: Damages.** The amount of damages sustained in an eminent domain action is peculiarly of a local nature and ordinarily is to be determined by the jury, and this court will not ordinarily interfere with the verdict if it is based upon admissible testimony.
4. **Eminent Domain: Evidence: Damages.** A verdict of the jury will not be set aside unless it is shown to be clearly wrong and in determining this issue in a condemnation case a verdict may not be set aside as excessive except where it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or the controlling rules of law.
5. **Eminent Domain: Witnesses.** It is not necessary that a qualified witness in a condemnation case be familiar with every possible element that goes into the determination of market values.
6. **Trial: Evidence.** The admission or rejection of photographs in evidence is largely within the discretion of the trial court and, in the absence of a showing of abuse of discretion, error may not be predicated upon such ruling.
7. **Attorneys at Law: Fees.** In the determination of a reasonable attorney's fee there should be considered the importance of and the result of the case, the difficulties thereof, the degree of professional skill demonstrated, the diligence and ability required and exercised, the experience and professional training of the attorney, the difficulty of the questions of fact and law that are raised, and the time and labor necessarily required in the performance of those duties.
8. ———: ———. The allowance of a reasonable attorney's fee for necessary services performed by an attorney will not be reversed on appeal in the absence of a showing of an abuse of discretion by the trial court in making the allowance.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., Ted L. Schafer, and Gary R. Welch, for appellant.

Lyle E. Strom, William T. Caniglia, C. L. Robinson,

and Fitzgerald, Brown, Leahy, McGill & Strom, for appellees.

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

WHITE, C. J.

In this condemnation action the State appeals from a jury verdict and judgment of $101,056.50 for damage to the plaintiffs' 73.86-acre tract of land, occasioned by the taking of a diagonal (northwest-southeast) strip of 16.86 acres for the construction of a State highway. We affirm the judgment of the district court.

The first contention of the State is that the verdict is not supported by the evidence. There is ample competent evidence admitted without objection by the State, and cumulatively corroborated by witnesses as to whose foundation for testifying was not objected to, to sustain the following facts: The plaintiffs are the owners of a 73.86-acre rectangular tract of land on the northwest side of Omaha, Nebraska. The property is located on the west side of Ninetieth Street, adjacent to the south side of the City of Irvington, Nebraska. The Jensen family has occupied and lived on the property continuously since 1925. The taking of the 16.86-acre diagonal tract across the property was September 23, 1966. The whole tract was undeveloped at the time but areas to the east, north, and south of the plaintiffs' property had been developed and were variously zoned as residential and commercial. The evidence of all of the witnesses shows that the installation of the highway which gave rise to this condemnation action not only cuts diagonally through the Jensen tract of land but has made drastic changes in the topography of the land. Deep cuts and fills have been made to maintain a level highway. As a result, portions of the property are below the grade level of the highway and other parts above it. It appears that the primary potential use of the property is residential with some areas to be developed commercially. There is also

a small triangular portion of the tract that has been made inaccessible by the taking because of the installation by the State of a concrete drainageway. This area is between ¼ to ½ acre in extent.

There is ample evidence to sustain a finding that the highest and best use of the property on September 23, 1966, was for residential and commercial development as a unit. A detailed plan for such development of the property was prepared, introduced in evidence, and testified to by the expert witnesses in the case. The evidence shows that this plan was in harmony with the developing use of the property in the whole area. The evidence is that this plan for the development of the property which was feasible at the time of the taking in September 1966 has now been destroyed because of the diagonal fragmentation of the property and also because of the lack of access due to the installation of the highway. Persuasive competent evidence is to the effect that the remainder would now have to be developed in two separate tracts, because of the diagonal fragmentation of the whole tract by the installation of the highway.

Detailed expert testimony shows that the taking would require substantial additional expenditures in three different areas, namely sanitary sewer construction, the moving of utility and gas pipe lines, and grading.

Prior to the taking by the State the sanitary sewers would generally have flowed and followed the streets in a downhill direction over the northeast corner of this property. In the development of this property after the taking it will be necessary to carry these sewers under the new highway and it will be necessary to install a lift or pump station to carry the sanitary sewers up the hills. Extra sanitary sewers will have to be constructed under the highway, of more expensive material, and will need to be installed by tunneling rather than in an open ditch. There is competent evidence that the additional cost of the sanitary sewer construction will be in the neighborhood of $15,000, and in addition

the cost of grading allocable to the remaining acres is greater per acre than the cost of grading would have been before the taking.

The gas pipe lines will have to be adjusted on both sides of the highway. The pipe lines will have to go directly under entrances permitted by the State and it will be necessary to grade over them. Four hundred feet of pipe lines will have to be raised on the north side of the highway in the remainder tract. Pipe lines on the south side of the highway will have to be adjusted to grade by excavating down and lowering the pipes 10 to 12 feet. The State objected to a question soliciting the cost for this pipe line adjustment, but as the objection was sustained, we are without the benefit of the exact cost of this necessary adjustment.

Changes in grading due to State dictated access requirements, and other changes necessary because of the extensive cut and fill activity in the construction of the highway, will result in the taking and removal of an additional 55,000 cubic yards of dirt if the property is developed separately. It is also clear that street alignment in the development of the property into two tracts will be substantially changed because the State in its taking dictates the entryways into the State right-of-way.

Summarizing, there is competent and persuasive testimony in this record establishing the following definite factors which a willing buyer would take into consideration and which would create a diminished value for the remainder: (1) The nature of the severance which is to diagonally partition the property and require the development into two entirely separate and relatively irregular tracts; (2) due to the creation of the deep fills and cuts in the establishment of the highway the relative topography of the whole tract is adversely affected and impaired; (3) extensive additional grading will be required to bring the property into a useable and saleable harmonious relationship for residential and commercial purposes, especially in light of the neces-

sity to correlate this with the extensive cuts and fills in the installation of the highway and the necessity to meet the State dictated requirements of access; and (4) the undisputed additional cost of the development of the utilities, the sanitary sewer system, and the removal of 55,000 cubic yards of dirt.

The valuation testimony of the plaintiffs' witnesses, Howard Jensen (one of the owners) and the expert appraiser, Mr. H. J. Grove, was admitted without objection either as to foundation or amount. The testimony of Jensen as to the value of the 16.86-acre tract taken was in the sum of $67,440 and the damage to the remainder was $85,395 or a total of $152,835. Grove testified as to a total damage of $142,660. This was based on a valuation of the 16.86 acres taken in the sum of $55,638 and a damage to the remainder in the sum of $87,022 or a total of $142,660. This witness included in his foundation testimony a consideration of 25 to 30 sales dating from 1960 to 1967 and particularly 6 sales that appropriately cross-sectioned the neighborhood, all of which took place subsequent to 1963. The State's expert testified that the total damage was in the sum of $42,993, *and testified there was no damage at all to the remainder.*

It is apparent from the detailed recital of the evidence herein given that there is ample evidence to support the finding of the jury and the judgment of the court. The contention of the State in this case, especially in light of the undisputed foundation testimony and the evidence, to which no objection was made, as to valuation on the part of the plaintiffs' witnesses amounts to a request that this court enter its de novo determination of the amount of damages independent of the jury's determination. This, of course, we may not do. As many times happens in condemnation cases the jury verdict fell in between the valuations of the different expert witnesses.

Expert opinion evidence in a condemation case, as in

all other cases, is to be considered and weighed by the triers of fact like any other testimony. It is only advisory in nature and is not binding upon the jury or the court. The weight and credibility of the testimony of either lay or expert witnesses is for the jury. The amount of damages sustained in an eminent domain action is peculiarly of a local nature and ordinarily is to be determined by the jury, and this court will not ordinarily interfere with the verdict if it is based upon admissible testimony. Evans v. State, 176 Neb. 156, 125 N. W. 2d 541; Schmailzl v. State, 176 Neb. 617, 126 N. W. 2d 821; Connor v. State, 175 Neb. 140, 120 N. W. 2d 916; Iske v. Metropolitan Utilities Dist., 183 Neb. 34, 157 N. W. 2d 887; Schimonitz v. Midwest Electric Membership Corp., 182 Neb. 810, 157 N. W. 2d 548.

The evidence in this case is conflicting as to valuation. Under well-known principles of law in eminent domain cases a verdict of the jury will not be set aside unless it is shown to be clearly wrong. In determining this issue in a condemnation case we have said that a verdict may not be set aside as excessive except where it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or the controlling rules of law. Schimonitz v. Midwest Electric Membership Corp., 182 Neb. 810, 157 N. W. 2d 548; Garska v. Harris, 172 Neb. 339, 109 N. W. 2d 529.

The State did not object to the admission of the testimony as to valuation of the expert witnesses in this case and is in no position now to impeach the foundation for it. Its position now, in effect, is to ask this court to impeach the foundation testimony and destroy the admissibility of this evidence in order to reach the conclusion that the evidence does not support the verdict. Otherwise its position must be taken as a flat request that this court evaluate the property independently and determine the credibility of the witnesses. This, of course, we cannot do.

An examination of the foundation testimony under the applicable rules as to admissibility of evidence in an eminent domain case reveals that the testimony had ample foundation under all of the accepted and required tests. The argument is made that the professional appraiser who testified in this case for the plaintiffs did not testify as to all of the possible factors which might influence buyers and purchasers of real estate. As we said in Evans v. State, 176 Neb. 156, 125 N. W. 2d 541, it is not necessary that a qualified witness in a condemnation case be familiar with every possible element that goes into the determination of market value. The market value of real estate is almost always a matter of opinion. In determining market value the experts themselves may vary as to the different factors that they consider compelling or dominant in reaching their final conclusion as to valuation. Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328; Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168; 1 Orgel on Valuation under Eminent Domain (2d Ed.), §§ 132, 135, pp. 564, 580.

We come to the conclusion that the verdict was amply supported by the evidence and may not be overturned under any of the applicable rules relevant thereto and that this assignment of error and contention that the verdict is not supported by the evidence is untenable and without merit.

The State assigns as error the admission of exhibits 7 through 19, being color slides of the premises. Actually exhibits 7, 8, 12, 14, 15, 16, and 19 were the only ones admitted over the objections of the defendant and our discussion of this assignment of error will be confined to these exhibits. These exhibits generally showed the cuts and fills made during construction of a portion of the highway over the premises. At the time of the trial, the highway had not been completed. No paving had been done and some grading remained to be done. Therefore the only way the plaintiffs could present any

tangible or demonstrative evidence of the cuts and fills and other changes in the topography of the land, in order to support their theory of the case as to its detraction from the value of the remainder, was by the evidence of the condition of the land and of the highway in its uncompleted state. The State argues that the ditches showing the presence of machinery and the confusion and debris incident to the construction activity is a temporary inconvenience or damage, is not compensable, and it was therefore prejudicial to admit such exhibits or pictures in evidence. Lybarger v. State, 177 Neb. 35, 128 N. W. 2d 132. The difficulty is presented by the necessity of the trial court permitting the plaintiffs to introduce competent evidence to support their theory of the case and at the same time protect the State from the possibility of an unwarranted allowance of damages for an unrecoverable element in an eminent domain case. The answer to this challenge to these exhibits lies in the trial court's statement that they were received in evidence "only for the purpose of showing or illustrating any cuts or fills in the construction of the highway over the premises involved herein of plaintiff or formerly owned by plaintiff and only as such pictures may relate to the before and after value of the remainder other than the right of way of the road itself. They shall in no event be considered by the jury as evidence of any construction damage as construction damage such as nuisance (etc.), during construction is not claimed or an issue in this lawsuit." When the court submitted the case to the jury it also reiterated this admonition in instruction No. 26 in which it again suitably warned the jury of the limited purpose and application of these exhibits. The admission or rejection of photographs in evidence is largely within the discretion of the trial court and, in the absence of a showing of abuse of discretion, error may not be predicated upon such ruling. Peterson v. Skiles, 173 Neb. 470, 113 N. W. 2d 628; Markey v. Hunter, 170 Neb. 472, 103 N. W. 2d 221.

The trial court properly balanced the conflicting necessities of the situation, and since no abuse of discretion appears, this contention of the inadmissibility of the exhibits is without merit.

The State next challenges the allowance by the trial court of a $15,000 attorney's fee under section 76-720, R. R. S. 1943. Plaintiffs' attorney, Mr Strom, testified that the fee arrangement which the firm had with the Jensen family was substantially in conformity with the statute. Much of the argument and the discussion of the evidence contained in the briefs deals with a dispute as to the amount of and the necessity for the number of hours that plaintiffs' attorneys spent on the case, and the necessity of having two lawyers participate in the trial of the case. *The State had two also.* We feel it unnecessary to detail the testimony in this respect. These are only two of the factors involved in determining a reasonable attorney's fee under the applicable statute. The testimony as to the value of these services being in the sum of $15,000 was supported by other expert testimony that the services were worth between $15,000 and $20,000.

We have said many times that in the determination of a reasonable attorney's fee there should be considered the importance of and the result of the case, the difficulties thereof, the degree of professional skill demonstrated, the diligence and ability required and exercised, the experience and professional training of the attorney, the difficulty of the questions of fact and law that are raised, and the time and labor necessarily required in the performance of those duties. Darnell v. City of Broken Bow, 139 Neb. 844, 299 N. W. 274, 136 A. L. R. 101; Stephens v. Allied Mutual Ins. Co., 182 Neb. 562, 156 N. W. 2d 133. We have also said that the allowance of a reasonable attorney's fee for necessary services performed by an attorney will not be reversed on appeal in the absence of a showing of an abuse of discretion by the trial court in making the allowance. State ex

rel. Sorensen v. Bliss, 123 Neb. 620, 243 N. W. 877. Testimony was received in the hearing regarding this issue in the district court as to each one of the elements above recited as being pertinent to the determination of a reasonable attorney's fee. The State introduced no adverse testimony. The evidence amply supports the allowance of $15,000 as a reasonable attorney's fee in this case, when all of the circumstances and the applicable rules of law involved are considered, and we can find no abuse of discretion in the allowance made herein. This contention is without merit.

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

AFFIRMED.

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BLANCHE F. PECK, APPELLANT, V. JAMES E. DUNLEVEY, DIRECTOR OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, ET AL., APPELLEES.
172 N. W. 2d 613

Filed November 28, 1969. No. 37133.

1. **Statutes: Words and Phrases.** Where a statute is plain, direct, and unambiguous the words therein must be given their ordinary meaning and courts have no right to read a different meaning into or out of the words of such a statute.
2. **Statutes: Appeal and Error.** The right of appeal in this state is clearly statutory and, unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist.
3. ———: ———. If the mode and manner of appeal is provided in a statute, appellate jurisdiction under such statute can only be conferred in the mode and manner provided by the statute.

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

Paul E. Galter, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellees.

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

WHITE, C. J.

This is an appeal from an order entered by the Department of Motor Vehicles of the State of Nebraska on February 2, 1966, revoking the operator's license and operating privileges of plaintiff because of the failure to comply with the provisions of the Nebraska Implied Consent Law. The plaintiff was arrested in Fillmore County, Nebraska, for operating or being in actual physical control of a motor vehicle on a public highway while under the influence of alcoholic liquor. An affidavit was filed by the arresting officer and a hearing was held by the Department of Motor Vehicles. Thereafter an order was entered revoking the operator's license and operating privileges of plaintiff. Plaintiff then filed a petition on appeal in the district court for Lancaster County, Nebraska, and attached the transcript of proceedings provided under section 60-420, R. R. S. 1943. The district court for Lancaster County, Nebraska, dismissed the appeal on the ground that the applicable statute authorized appeal by the plaintiff to the district court for Fillmore County alone. Plaintiff has appealed this decision. We affirm the judgment of the district court dismissing the purported appeal filed in the district court for Lancaster County, Nebraska.

The plaintiff's contention that her petition on appeal is properly venued and that the district court for Lancaster County has jurisdiction of the matter is predicated upon the contention that the applicable statute is open to construction as to where the appeal may be filed, and that a proper analysis of our statutes pertaining to venue, contained in Chapter 25, article 4, R. R. S. 1943, leads to a conclusion that the statute should be interpreted to permit this appeal in the district court for Lancaster County, Nebraska.

This argument would appear to be somewhat of an

afterthought. Plaintiff in paragraph 1 of her petition on appeal states that: "* * * she prosecutes this action in equity under and by virtue of the provisions of Section 60-420, Revised Statutes of Nebraska, 1943, Re-issue 1960, *and related statutes*, all as amended; * * *." (Emphasis supplied.) We first observe that the general statutes that are the foundation of the plaintiff's argument all relate to the venue of an original action. It cannot be challenged that the case before us is an appeal proceeding governed by the special statutes contained in the motor vehicle code and relating to the procedure on appeal from the revocation or suspension of a motor vehicle operator's license. Section 39-727.11, R. R. S. 1943, states unequivocally where the appeal from the revocation or suspension of an operator's license is to be taken. It provides in part: "Any person who feels himself aggrieved because of such revocation may appeal therefrom to the district court of the county where the alleged events occurred for which he was arrested in the manner prescribed in section 60-420." This is the *related statute* referred to by the plaintiff herself in invoking the jurisdiction of the court. The pertinent portion of section 60-420, R. R. S. 1943, referred to by the plaintiff, is as follows: "Applicant or licensee shall file his petition in *such* district court within thirty days from the date of filing of the director's final order in the matter, * * *." (Emphasis supplied.)

All of the events foundational for the plaintiff's arrest occurred in Fillmore County, Nebraska. The statute is clear and unequivocal, and the procedure outlined was specifically enacted by the Legislature to govern appeals from the revocation or suspension of a motor vehicle operator's license. There is no contrary or inconsistent statute. The right of appeal in this state is clearly statutory and, unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist. And if these statutes create such a right, the mode and manner of appeal is statu-

tory and such jurisdiction can only be conferred in the manner provided by statute. From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441; Watkins v. Dodson, 159 Neb. 745, 68 N. W. 2d 508; Anania v. City of Omaha, 170 Neb. 160, 102 N. W. 2d 49; McDonald v. Rentfrow, 171 Neb. 479, 106 N. W. 2d 682; Languis v. DeBoer, 181 Neb. 32, 146 N. W. 2d 750.

Underlying the plaintiff's contention in this case is the assumption that the statute herein is open to construction and that we should reasonably interpret it to permit venue other than that provided in the statute. In turn, this argument leads to the inference that this court, in the determination of such venue may invoke its independent procedural rule-making power to create an additional permissible venue on appeal.

The first answer to this contention lies in the fundamental proposition that where a statute is plain, direct, and unambiguous the words therein must be given their ordinary meaning and courts have no right to read a different meaning into or out of the words of such a statute. In Bachus v. Swanson, 179 Neb. 1, 136 N. W. 2d 189, this court said: "The position seems to be that any statute passed by the Legislature should be open to construction as a matter of course, and that we should not only judicially construe it, but judicially rewrite it. A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. Franzen v. Blakley, 155 Neb. 621, 52 N. W. 2d 833; Todd v. County of Box Butte, 169 Neb. 311, 99 N. W. 2d 245."

Second, a use of the procedural rule-making power of

this court is impermissible to accomplish the creation of additional venue.

The nature and limits of judicial power of this court under the Constitution are contained in Article V of the Constitution of the State of Nebraska. Article V, section 25, provides in part as follows: "For the effectual administration of justice and the prompt disposition of judicial proceedings, the supreme court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, *and not in conflict with laws governing such matters.*" (Emphasis supplied.) The proceedings of the Constitutional Convention of 1920 reveal an attempt to give to the court unrestricted procedural rule-making power which, in effect, the plaintiff contends for in this case. A portion of the history of this argument may be found in Volume II, Proceedings of the Constitutional Convention, pp. 2316 to 2323. The proposal was rejected and the restrictive provision was adopted and is now part of the organic law of the state. It therefore appears that the rule-making power of this court may not be invoked either expressly or by inference to accomplish, either by interpretation or addition, venue of this appeal in the district court for Lancaster County, Nebraska.

The judgment of the district court for Lancaster County dismissing the purported appeal in this case is correct and is affirmed.

AFFIRMED.

SMITH and MCCOWN, JJ., dissenting.

Applicable statutes read: "The district courts shall have . . . appellate jurisdiction in all matters . . . , except where otherwise provided." § 24-302, R. R. S. 1943. "Any person . . . aggrieved . . . may appeal . . . to the district court of the county where the alleged events occurred for which he was arrested . . . ." § 39-727.11, R. R. S. 1943. The language may mean that venue is jurisdictional or that an appeal is only subject to a timely motion to transfer venue. Our choice should

depend not only on degree of statutory ambiguity but also on historical background and present utility of jurisdictional venue.

In the second half of the 12th century the Curia Regis, an itinerant English court, caused great inconvenience. To attend trial, parties and witnesses often traveled long distances under adverse conditions. In 1215, the Magna Charta required trials concerning three real property writs to be local. It also declared: "Common pleas shall not follow our court,, but shall be held in some fixed place." Blume, "Place of Trial in Civil Cases," 48 Mich. L. Rev. 1 (1949); 1 Holdsworth, A History of English Law, 34 (3d Ed., 1922).

In the United States early courts were organized along colonial lines modified by demands for decentralization. "In a country of long distances in a time of slow communication and expensive travel, central courts . . . of first instance involved an intolerable expense. There was an understandable tendency to set up a local court of general jurisdiction at every man's door." Pound, Organization of Courts, 91 (1940).

In Nebraska venue-process provisions for original actions in district court generally have fallen under the rubric "jurisdictional venue." See Coffman, "Jurisdiction or Venue?", 20 Minn. L. Rev. 617 (1936). A Nebraska decision concerning justices of the peace led former Commissioner Pound in 1906 to compose "The Causes of Popular Dissatisfaction with the Administration of Justice." Pound, *supra,* at p. 273. He spoke of problems nationwide: ". . . in two civil cases the question was whether the Circuit Court of Appeals was the proper tribunal . . . . All of this is sheer waste, which a modern judicial organization would obviate." 29 A.B.A. Rep. 395 at 411 (1906).

He later wrote: ". . . the controlling reason for a systematic and scientific adjective law must be to insure precision, uniformity and certainty in the judicial application of substantive law . . . . No appeal should be

dismissed . . . solely because . . . taken to the wrong court or wrong venue, but if there is one where it may be . . . prosecuted, it should be transferred . . . , all prior proceedings being saved." Pound, "Some Principles of Procedural Reform," 4 Ill. L. Rev. 388 and 491 at 497 (1910).

The statutes regulating plaintiff's appeal are ambiguous enough to be free of this antiquated burden. We would reverse the judgment.

The court may "certify to the Legislature, its conclusions as to desirable amendments or changes in the general laws governing such practice and proceedings." Art. V, § 25, Constitution of Nebraska. The majority opinion affirms the judgment without acknowledging the utter worthlessness of jurisdictional venue in practice. We hope that the lack of acknowledgment is not approval.

BOSLAUGH, J., dissenting.

The action should not be dismissed for lack of jurisdiction where the plaintiff has satisfied the requirements for a proceeding in error. See From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441.

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ALVIN A. CHRISTIANSEN, APPELLANT, V. DENNIS MOORE, APPELLEE, DAIRYLAND MUTUAL INSURANCE COMPANY, GARNISHEE-APPELLEE.

ELSIE CHRISTIANSEN, APPELLANT, V. DENNIS MOORE, APPELLEE, DAIRYLAND MUTUAL INSURANCE COMPANY, GAHNISHEE-APPELLEE.

172 N. W. 2d 620

Filed November 28, 1969. Nos. 37238, 37239.

1. **Automobiles: Insurance.** Under the "automatic insurance" provision before us, coverage extends to a replacement automobile as defined in the policy for 30 days following the delivery, in all events, irrespective of notice; but where notice is not given prior to the accident, there is no coverage with respect to

accidents occurring after the 30-day period has elapsed.

2. **Pleadings: Trial: Garnishment.** Under section 25-1030.02, R. R. S. 1943, where material issues of fact are presented in a contested garnishment proceeding, they are triable by a jury unless waived.

Appeals from the district court for Douglas County: JOHN E. MURPHY, Judge. Reversed and remanded for further proceedings.

Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellants.

Cobb, Swartz & Wieland and William A. Ahlstrand, for garnishee-appellee.

Francis McLane, for appellee Moore.

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

MCCOWN, J.

This is a garnishment action by plaintiffs Alvin A. Christiansen and Elsie Christiansen, individual judgment creditors of Dennis Moore, against the garnishee, Dairyland Mutual Insurance Company, the insurer on an automobile liability insurance policy issued to Dennis Moore. The garnishee filed answers denying indebtedness and denying that Moore had insurance coverage with the garnishee. Applications were filed praying for a determination of the liability of the garnishee. Answers to the applications specifically denied insurance coverage. A jury trial was requested by plaintiffs and denied, and the cases were tried by the court. The district court found for the garnishee and released and discharged it, and the plaintiffs have appealed.

On September 15, 1965, Dennis Moore obtained liability insurance on a 1955 Chevrolet through the N. P. Dodge Company. The policy covered liability only, and the garnishee, Dairyland Mutual Insurance Company, was the insurer. Moore was a substandard risk and so classified. The premium was charged on that basis.

The policy contained what is referred to as an "automatic insurance" clause which provided that the word "automobile" meant: (1) the described automobile, (2) trailer, (3) temporary substitute automobile, and "(4) Newly Acquired Automobile—an automobile, ownership of which is acquired by the named Insured or his spouse if a resident of the same household, if (i) it replaces an automobile owned by either and covered by this policy, or the company insures all automobiles owned by the named Insured and such spouse on the date of its delivery, and (ii) the named Insured or such spouse notifies the company within thirty days following such delivery date. The insurance with respect to the newly acquired automobile does not apply to any loss against which the named Insured or such spouse has other valid and collectible insurance. The named Insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile."

In the fall of 1965, Dennis Moore was involved in an accident and the 1955 Chevrolet was "totaled," and was later sold for junk. In early November 1965, Moore purchased a 1957 Mercury, which he traded for a 1962 Ford in April 1966. On July 4, 1966, Moore was involved in the accident out of which the plaintiffs' judgments against him arose. He was driving the 1962 Ford. The 1962 Ford was totally destroyed in the accident. On August 5, 1966, Moore purchased a 1957 Ford. He drove the 1957 Ford until January of 1967. On the 21st of January 1967, he purchased a 1956 Chevrolet.

Premiums were paid on the insurance policy for the period from September 15, 1965, to February 15, 1967, as reflected by renewal certificates of Dairyland Mutual Insurance Company. The renewal certificates show the car year as 1955 on all renewal certificates except for the renewal certificate for the period of November 15, 1966, to February 15, 1967, which shows the car year as 1957. The records of N. P. Dodge Company show a

change of automobile endorsement from a 1955 Chevrolet to a 1957 Ford effective August 26, 1966, and an endorsement changing the 1957 Ford to a 1956 Chevrolet on January 28, 1967. They do not show any endorsement or change of automobile between the original date of the policy and the endorsement of August 26, 1966.

Dennis Moore testified that he did not himself report the accident to the 1955 Chevrolet in October of 1965, but thought that his father handled it. Exhibit 11 shows that the garnishee knew of the accident by October 29, 1965, but not from Dennis. Dennis Moore had not himself notified the insurance agency of any change of automobiles until July 25, 1966.

Clarence Moore, the father of Dennis Moore, testified that he had notified N. P. Dodge Company by telephone that his son, Dennis, had acquired the Mercury within 30 days after its acquisition in November of 1965, and gave them all the information that they asked for. He also testified that within 3 or 4 days after the purchase of the 1962 Ford in April 1966, he called the N. P. Dodge Company about the purchase, and gave them the information they asked for. He also testified that he notified the N. P. Dodge Company within 10 days after the acquisition of the 1957 Ford in August 1966, but did not recall having notified anyone in connection with the purchase of the 1956 Chevrolet in January 1967.

The writing agent testified that he did not remember receiving any phone calls from Clarence Moore about the 1962 Ford. The office supervisor of N. P. Dodge Company testified that she had never received a call from Dennis Moore or Clarence Moore, his father, between September 1965, and July 1966, advising of a change of vehicle; that there were no notes on any change of cars in the file; and that she was unaware of any notice on change of cars being lost or misplaced. It was also stipulated that two witnesses employed in the insurance department of N. P. Dodge Company from June 1965, through September 1966, would testify that

they did not receive any notice of change of cars from Dennis or Clarence Moore relating to vehicles owned and operated by Dennis Moore.

The district court made specific fact findings including a finding that: "At no time prior to July 4, 1966 was any notice given by Dennis Moore, or anyone acting for him or on his behalf, to either Dairyland Mutual Insurance Company or N. P. Dodge Insurance Agency or any of their officers, agents or employees, of his purchase of either the 1957 Mercury or 1962 Ford automobiles, or of the October, 1965 accident."

The district court also determined that the effect of the "newly acquired automobile" clause in the policy is to extend its coverage to benefit the insured, and that before the insured may have that benefit, it is necessary that he comply with the notice requirements or, at least, that they be substantially complied with. The district court's judgment released and discharged the garnishee.

The plaintiffs' first major contention is that even in the absence of any notice of the change of automobiles, the insurer may not avoid liability on the policy unless the breach of the notice requirement contributed to the loss. They rely on section 44-358, R. R. S. 1943, the concluding sentence of which provides: "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 testimony of underwriters was essentially that the primary concern in underwriting automobile liability insurance, particularly for substandard risks, was the insured driver, but that a very high-powered car or a "souped-up" car would also be material to the risk. The particular cars involved here did not fall in that category. We believe the evidence established that the

change of vehicles involved here did not affect the risk.

Nevertheless, we are unable to find any authority to support plaintiffs' position that where no notice is ever given, and the accident occurred more than 30 days following delivery of the replacement car to the insured, the insured is still entitled to recover if the insurance company was not prejudiced. Courts have been unanimous in denying recovery under such circumstances. Various grounds have been relied on, although no one of them is entirely satisfactory. Thompson v. Dairyland Mutual Ins. Co., 30 Wis. 2d 187, 140 N. W. 2d 200 (1966), is illustrative of the position of many courts. In response to a contention that the insurance company must show some prejudice before it could be relieved from liability on the policy, the court said: "But this is not a case of a claimed breach of a policy provision perpetrated by the insured. Rather, it is the failure of the insured to perform a requirement of a provision of the policy, i.e., to give notice of a change of vehicle, in order to gain coverage of a different vehicle under the policy. It is not a question of discontinuing coverage because of some act by the insured that breaches his contract; rather, it is the insured's failure to do some act that is required to bring about coverage. By his failure to give proper notice, Levy was not insured by the subject policy at the date of the accident. Thus, the breach cases are not in point at all."

In any event, the authorities unanimously agree that where no notice is given, there is no coverage of the replacement automobile with respect to accidents occurring after the prescribed period has elapsed. See, 7 Blashfield, Automobile Law and Practice, Insurance, § 316.6, p. 672; 7 Am. Jur. 2d, Automobile Insurance, § 100, p. 408; Annotation, Automobile Insurance—Substituted Cars, 34 A. L. R. 2d 936, § 7, p. 943; 7 Appleman, Insurance Law and Practice, § 4293, p. 84.

Under the "automatic insurance" provision before us, coverage extends to a replacement automobile as defined

in the policy for 30 days following the delivery, in all events, irrespective of notice; but where notice is not given prior to the accident, there is no coverage with respect to accidents occurring after the 30-day period has elapsed.

The plaintiffs also assign as error the action of the trial court in denying the plaintiffs' requests for a jury trial on the factual issues in the garnishment proceedings. At the conclusion of the evidence, the garnishee specifically requested the court to make special findings of fact as to the issue of whether or not notice was given. The amended answer of the garnishee specifically denied that any notice was given. The court did make findings of fact. There can, therefore, be no doubt that a factual issue was presented, at least on the issue of notice.

Section 25-1030.02, R. R. S. 1943, provides in part: "The trial of the determination of the liability of the garnishee shall be conducted the same as in a civil action."

Article I, section 6, of the Constitution of Nebraska, provides in part: "The right of trial by jury shall remain inviolate . . .."

The applicable rule is stated in an annotation, 19 A. L. R. 3d, Issues in Garnishment as Triable to Court or to Jury, 1393, at page 1398, as follows: "Certain garnishment statutes, instead of specifically stating that the jury shall determine issues of fact, broadly provide that issues in garnishment, or certain specific issues in garnishment, shall be tried in the same manner as similar issues are tried in any other civil action. Accordingly, under such statutes, where the issue is one which is proper for jury determination, it has been held or recognized that there must be a jury trial if demanded."

In Clark v. Foxworthy, 14 Neb. 241, 15 N. W. 342, this court stated: "If the garnishee make any legal or equitable claim to the amount in his hands, or if he insists upon his right to retain it for any lawful purpose

. . . the controversy must be determined by action, as in garnishment before judgment, so that the constitutional right of a jury trial, secured by sec. 6 of the Bill of Rights, may be availed of."

This conclusion is further reinforced by section 25-1030.03, R. R. S. 1943, which provides for intervention in the garnishment proceedings and requires: "If issue on such intervention or on such pleading by the defendant in the original action is joined by the plaintiff, it shall be tried with the issues as to the garnishee's liability." This would reinforce the conclusion that the trial of an issue of fact should be treated as a trial between a plaintiff and defendant. While the statute was somewhat different, the Oregon court stated in Argonaut Ins. Co. v. Ketchen, 243 Ore. 376, 413 P. 2d 613, 19 A. L. R. 3d 1386: "While a garnishment is a statutory proceeding, it is legal and not equitable in nature, and if tried as any normal issue between a plaintiff and a defendant, as required by the statute, all fact issues must be tried as in an action at law . . .. This necessarily means such issues are tried with a jury unless the parties waive a jury trial." See, also, Ruble v. Saretzke, 63 N. D. 631, 249 N. W. 716, 88 A. L. R. 1148, where the court said: "If the issue had arisen between the principal defendant and the garnishee, it would have been one triable to a jury. Hence it was likewise triable to a jury in the garnishment action."

Section 25-1104, R. R. S. 1943, dealing with civil procedure in the district courts provides: "Issues of law must be tried by the court, unless referred as provided in section 25-1129. Issues of fact arising in actions for the recovery of money or of specific real or personal property, shall be tried by a jury unless a jury trial is waived or a reference be ordered as hereinafter provided."

Under section 25-1030.02, R. R. S. 1943, where material issues of fact are presented in a contested garnish-

ment proceeding, they are triable by a jury unless waived.

The garnishee contends that where the evidence is undisputed or but one reasonable inference or conclusion can be drawn therefrom, the question is one of law for the court and prejudicial error was not committed if a jury trial has not been granted. In the absence of the testimony of Clarence Moore, we might well conclude that the case was one for a directed verdict and that no prejudicial error was committed. His testimony, however, created a direct conflict in the evidence, and we cannot say that his testimony was discredited as a matter of law.

The judgment of the district court is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SPENCER, J., concurs in the result.

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DOROTHY RACHEL BAYER, APPELLANT, V. LUTHERAN MUTUAL LIFE INSURANCE COMPANY, WAVERLY, IOWA, A CORPORATION, APPELLEE.
172 N. W. 2d 400

Filed November 28, 1969. No. 37329.

1. **Insurance: Principal and Agent.** Section 44-362, R. R. S. 1943, prohibits an agent of an insurance company from issuing any estimate, statement, or circular misrepresenting benefits promised under any policy issued by the company.
2. ———: ———. An insured has no right to rely on an agent's patently absurd interpretation of his policy.
3. ———: ———. An insured ordinarily may rightfully rely on an agent's interpretation that is plausible and not in patent conflict with the printed policy although legally untenable.
4. ———: ———. An insurer treating general agents' correspondence as its records is ordinarily charged with knowledge of the general agents' letters that promise policyholders future dividends.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Reversed and remanded with directions.

Ray C. Simmons, for appellant.

F. W. Carstens, for appellee.

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

SMITH, J.

Plaintiff claimed accumulated dividends, interest, and other benefits of $1,867.38 under a 30-year endowment insurance policy on completion of the 30-year term. A general agent of defendant insurer had misrepresented the amount of benefits in a letter to plaintiff's mother during plaintiff's minority and shortly after issuance of the policy. Defendant's tender of $1,415.69 due without reference to the letter was refused. After a hearing on motion of each party for summary judgment the district court rendered summary judgment for defendant, and plaintiff has appealed. Defendant denies (1) any agreement by the agent respecting benefits of $1,867.38, (2) any right of the policyholders to rely on the letter, and (3) any vicarious liability on the transaction.

Defendant, a mutual company, had issued the policy on July 14, 1938, on the life of plaintiff, age 17. The face amount, $1,000, was based on an annual premium of $32.60. On the front fold and at the top of the first page of the policy appear the words "Dividends Payable Annually." Other headings are "THIRTY YEAR SAVINGS REFUND," "THIRTY Year Endowment," "Face Amount Payable at Maturity Date," and "Increased Death Benefit Payable Prior to Maturity Date." Inside the policy a table of nonforfeiture options lists values at completion of the 16th and 30th years respectively as follows: Death benefits, $1,289, $1,702; cash values,

$411.99, $1,000; and paid-up life insurance and cash, $1,000 and $6.41, $1,000 and $475.77.

Respecting dividends, the printed policy reads: "At the end of the second policy year and annually thereafter, this policy while in full force, except as extended insurance, shall participate annually in the divisible surplus as apportioned by the Board of Directors of the Company. Dividends . . . may be . . . D. Left to accumulate to the credit of the policy with compound interest at such rate as may be determined by the Company, but never less than three per cent per annum . . . ."

On August 19, 1938, plaintiff's mother sent a letter inquiring about the policy to Paul B. Hellbusch, solicitor of the application and general agent of defendant. The letter was not preserved. On August 22 Hellbusch in reply wrote on his letterhead disclosing his general agency for defendant: "I will see you within . . . ten days and we can examine your daughter's policy at that time and also discuss other forms issued by our company . . . However, I want to say that the figures shown on the policy do not include any dividends and that the $6.41 shown after the 16th year is cash in addition to a $1000 paid-up participating policy. The cash value at that time is $418.40 or $528.21 if the dividends have not been drawn . . . . After 30 years Dorothy can take a $1,000.00 paid-up policy and receive . . . $867.61 in cash if the dividends have been left with the company. If she does not want . . . the protection after 30 years, she can draw $1867.38 in cash providing she has left the dividends with the company each year. If the dividends are not left . . . , she will still have $1457.77 at the end of 30 years . . . ."

Defendant's rate book (1938) respecting the printed policy contains this information:

| "End of Year | Death Benefit | Cash or Loan | Paid Up Ins. | Net Amount Invested | Dividend Accumulated |
|---|---|---|---|---|---|
| 15 | $1265 | $ 378.43 | $949.00 | $406.25 | $ 97.75 |
| 16 | 1289 | 411.99 | 6.41* | 429.72 | 109.81 |
| 30 | 1702 | 1000.00 | 475.77 | 697.09 | 391.61 |

"Settlement Options at Maturity:
First: $1,000 in cash.
Second: $1,000 Paid-Up Policy and $475.77 in cash.
Third: $1,908 Paid-Up Policy . . . .

"Dividend figures and accumulations used in these illustrations are not guaranteed. Based on present dividend schedule.

"*Values from here are cash payable immediately in addition to $1,000 Paid-Up whole life insurance."

Defendant had conferred express authority on Hellbusch to appoint agents and to collect premiums, but not to prescribe form or character of policies. Anti-rebate and records provisions of his general agency agreement read in part: "He shall not . . . agree to . . . allow . . . any special . . . advantage in the dividends . . . to accrue, or any valuable consideration . . . whatever not specified in the policy . . . . He shall . . . preserve as the property of the Company all . . . correspondence and records of all kinds which at any time shall come into his possession . . . relating to transactions by or for the Company . . . ."

The printed policy contains language limiting authority of agents: "No agent of the Company . . . , except the President, a Vice President, the Secretary or Assistant Secretary, has power to make, modify, or discharge this or any contract of insurance . . . , or to bind the Company by making any promise respecting any benefits hereunder . . . ."

Defendant admitted the fact of reliance by plaintiff and her mother on Hellbusch's representation. It contends, however, that the policyholders had no right to

rely on the letter which simply illustrated without promising future dividends or interest. Defendant cites Kaley v. Northwestern Mutual Life Ins. Co., 102 Neb. 135, 166 N. W. 256 (1918), which applied Wisconsin law to an agent's statement headed "A Conservative Estimate of a Semitontine Policy . . . ," a 20-year endowment policy issued in 1899. The case is not controlling.

Section 44-362, R. R. S. 1943, which originated in Laws 1913, c. 154, § 141, p. 467, provides: "No insurance company, or any . . . agent . . . thereof . . . shall issue . . . any estimate, statement or circular misrepresenting . . . any policy issued or to be issued by such company, or misrepresenting the benefits . . . promised under any such policy . . . ."

The letter is to be interpreted according to this standard: An insured has no right to rely upon an agent's patently absurd interpretation of a policy. He ordinarily may rightfully rely, however, upon an agent's interpretation that is plausible and not in patent conflict with the printed policy although legally untenable. Mutual Ben. Life Ins. Co. of Newark, N. J. v. Bailey, 55 Del. 215, 190 A. 2d 757 (1963). The statement of benefits in Hellbusch's letter was promissory, not illustrative, and plaintiff and her mother had a right to rely on it. See, generally, Belth, "Life Insurance Price Measurement," 57 Ky. L. J. 687 (1969); Comment, 6 Houston L. Rev. 810 (1969).

On the question of vicarious liability the title "general agent" without more has no fixed meaning in the business world. The general agent of an insurance company is ordinarily one who himself employs agents to carry out the business of the company. Restatement, Agency 2d, § 3, Comment e, p. 17. An agent with authority to solicit insurance applications and to countersign and issue policies entrusted to him for that purpose is a general agent. He may possess the authority

of a corporate officer. Bleicher v. Heeter, 141 Neb. 787, 4 N. W. 2d 897 (1942).

An insurer treating general agents' correspondence as its records is ordinarily charged with knowledge of the general agents' letters that promise policyholders future dividends. Keeping silent and receiving premiums sometimes bars the insurer from avoiding liability on the promise notwithstanding an exculpatory clause of the printed policy. See Manhattan Life Ins. Co. v. Stubbs, 234 S. W. 1099 (Tex. Com. App., 1921).

The present case is one of liability. The district court erred in rendering summary judgment for defendant and in failing to render summary judgment for plaintiff in accordance with plaintiff's motion. The judgment is reversed and the cause remanded with directions that judgment be rendered accordingly. Plaintiff is allowed $750 for services of her attorney in this court. See § 44-359, R. R. S. 1943.

REVERSED AND REMANDED WITH DIRECTIONS.

NEWTON, J., dissenting.

I respectfully disagree with the result arrived at in the majority opinion. In this case the plaintiff acquired a life insurance policy, maturing in 30 years, at which time certain elections became available to her, one being the right to cash it in for a sum of money to be determined as specified in the policy. After receipt of the policy and the payment of premium, a letter was written to the policyholder by a general agent of the defendant in regard to the options available at the end of the 30-year period. In this letter the agent erroneously stated that a larger cash sum would be available to the policyholder at the end of the 30-year period than the policy provided for. Plaintiff says that she relied upon this statement and no doubt after receiving the agent's interpretation, she did expect to collect the larger sum. It may be pointed out that it is not contended nor do the pleadings allege that there was any fraud or deceit connected with this transaction and the plaintiff was not

wrongfully induced to change her position in any manner. In essence, plaintiff is contending that the letter of the general agent effected a change in or modification of the policy which she already held. The courts uniformly hold that in the absence of facts showing an estoppel, a consideration is necessary for the valid modification of the coverage provisions of an insurance policy, whether the effect of the modification is to extend or limit the risks against which the insurance affords protection. See, 43 Am. Jur. 2d, Insurance, § 354, p. 403; Annotation, 52 A. L. R. 2d 826. In line with this principle, it was held in Mutual Benefit Health & Accident Assn. v. Cohen, 194 F. 2d 232 (1952), that an insurance company, in regard to a policy maturing in 20 years, could not limit its liability for benefits unless it also reduced its premium. The present case is not one where a representation was wrongfully made to induce plaintiff to buy or reinstate a policy. It falls within the purview of the proposition announced in Hagelin v. Commonwealth Life Ins. Co., 106 Neb. 187, 183 N. W. 103: "Where there is no specific provision in a policy of life insurance for forfeiture, either whole or partial, on a breach of a condition by the assured, the court will not write one in; nor can the insurer afterwards impose new conditions creating a forfeiture without the consent of the assured, and without a new consideration."

In this case the plaintiff acquired a policy of insurance maturing in 30 years under the terms of which she agreed to pay a certain annual premium. Her responsibilities and liabilities under this policy have never changed from the date of its inception. She was never called upon to pay any sum other than that required under the original policy and she has never changed her position in any respect since she first acquired the policy. The premium was not increased after she received the agent's letter which she now claims increases the benefits she is entitled to. Clearly, there was no consideration and the agent's letter cannot be deemed a valid

revision or modification of the original policy. Were we to adopt such a theory, then the insurance company could unilaterally cut down the coverage in any policy, at any time, without decreasing the premium or giving other valid consideration therefor.

In my judgment, this case should be affirmed.

CARTER, J., joins in this dissent.

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CHARLES O. RICKUS, APPELLEE, V. RENA IRENE RICKUS, APPELLANT.
172 N. W. 2d 628

Filed December 5, 1969. No. 37197.

1. **Divorce: Appeal and Error.** During the pendency of an appeal in the Supreme Court, the district court has power to enter orders for temporary alimony and support.
2. ———: ———. In a divorce action the district court has the power to modify or terminate temporary support or alimony orders during the pendency of the action.
3. **Judgments: Payment.** As a general rule money paid by a judgment debtor into the registry of the court in satisfaction of a judgment may be applied by the court in such a manner, in view of all of the circumstances, as is most in accord with justice and equity and will best protect and maintain the rights of both the debtor and the creditor.
4. **Payment: Mistake.** Generally the rule on nonrecoverability of voluntary payments made under a mistake of law does not apply to, but recovery may be had of, payments made to an officer of the court under a misapprehension as to legal rights.

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

Wright, Simmons & Hancock, for appellant.

Lovell & Raymond, for appellee.

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

WHITE, C. J.

This is a supplementary proceeding in garnishment

in aid of execution of a final judgment in a divorce case between the same parties rendered in the case of Rickus v. Rickus, 183 Neb. 140, 158 N. W. 2d 540. In our previous opinion this court stated its decision as follows: "The trial court was overly generous with the defendant. She had a $50 per week temporary alimony allowance from July 14, 1965, to the date of trial, or $5,050. Plaintiff was additionally required to keep up the payments on the house in which the defendant was living. Defendant also was allowed $50 temporary attorneys' fees, and $333.50 for court costs and expenses. In the final decree, defendant was awarded $7,500 permanent alimony, $700 attorneys' fees, and plaintiff was required to pay $1,140.63 in obligations incurred by her subsequent to the separation of the parties. * * * *On the record, $2,000 is a very generous permanent alimony allowance for defendant to be paid as directed by the trial court,* and the judgment of the trial court is modified to that extent. In all other respects the judgment is affirmed as modified." (Emphasis supplied.)

A mandate was issued from this court on June 24, 1968, and on August 8, 1968, the defendant wife herein initated these proceedings to collect the $2,000 permanent alimony and other costs not material to the issues herein.

The issue involved in this case is the disposition or application of some $2,350 paid in by the plaintiff husband in the original divorce action between the time of the rendition of the decree in the district court on June 12, 1967, and the entry of the mandate from the Supreme Court in the original divorce action on August 8, 1968. The district court, on motion, dissolved the garnishment and dismissed the garnishment proceedings. We affirm the judgment of the district court.

It appears that in the original action initiated on June 29, 1965, the district court entered an order requiring the plaintiff to pay $50 per week temporary alimony to the defendant during the pendency of the action. The trial of the divorce case occurred on De-

cember 19, 20, 21, and 22, 1966, almost 1½ years after the original action was commenced. During this time the plaintiff had paid approximately $5,050 in temporary alimony into court. On June 12, 1967, the district court entered its final decree of divorce. The pertinent portions of the decree for purposes of this appeal provided: "IT IS FURTHER ORDERED that Plaintiff shall pay to Defendant, as alimony and property settlement, the sum of Seven Thousand Five Hundred Dollars ($7,500.00), payable Fifty Dollars ($50.00) per week, commencing with entry of this Decree, without interest, except legal interest on delinquent payments, *and that the Order for Temporary Support shall terminate upon entry of this Decree.*" (Emphasis supplied.)

The defendant first contends that the original order for temporary alimony in the amount of $50 per week continues during the pendency of the action in this court and that pursuant to section 42-340, R. R. S. 1943, when an appeal has been instituted from a decree of divorce in a district court within 1 month such decree cannot become final until such proceedings are finally determined here. It is therefore urged that the payments of temporary alimony during the pendency of the action in this court were payments on temporary alimony and the final mandate of this court awarding *permanent* alimony in the sum of $2,000 was enforceable in these garnishment proceedings. There are two answers to this contention. First, temporary orders in the district court allowing alimony, child support, etc., terminate with the rendition of a final decree of divorce or the overruling of a motion for new trial if one be filed. Hall v. Hall, 176 Neb. 555, 126 N. W. 2d 839; Wolfe v. Wolfe, 144 Neb. 55, 12 N. W. 2d 368. Second, fatal to this contention is the order of the court entered on June 12, 1967, at the time of the entry of the decree of divorce in the district court, that specifically orders "that the Order for Temporary Support shall terminate upon entry of this Decree." It is not argued nor could

it be contended that the district court does not possess complete power to modify or terminate temporary orders for support, alimony, and court costs, and the record reveals that there was neither application for, nor an order for, temporary alimony or support money during the pendency of the action in this court. The authority for the district court to enter such an order for temporary alimony and support money, costs, and attorneys' fees during the pendency of an action in this court is well established under the statute and the decisions of this court. It therefore becomes apparent that the defendant's argument is, in effect, an argument that the district court has no power to modify or terminate a support or alimony award once it has been entered. This position is untenable and the contention made herein is without merit.

The payments in dispute of some $2,350 were made by the plaintiff into the registry of the clerk of the district court of Scotts Bluff County, Nebraska. The defendant contends that since they were voluntary payments made under a mistake of law they are not recoverable and cannot be applied to the extinguishment of the judgment for permanent alimony. The district court, in its order dissolving the garnishment herein, in effect applied the subsequent payments of $50 per week towards the satisfaction of the judgment for permanent alimony. This was correct.

The court exercises a judicial discretion in the situation present here in the application of the money paid into the registry of the clerk of the district court in the satisfaction of the various aspects of the judgment. Here we have continuing payments paid into the registry of the court after the termination of a temporary support order, and during a period of time that a decree for permanent alimony and support, held to be valid to the extent of $2,000, was in full force and effect, not having been superseded. As recited in the final decree entered by this court, there were other payments for costs and

expenses besides the one for permanent alimony. The general rule on the power of a court to order the application of payments in this situation is well stated in 70 C. J. S., Payment, § 70, p. 272, where it is stated: "Where a payment is not applied by the debtor or the creditor, the general rule is that the court will apply it in such manner, in view of all of the circumstances, as is most in accord with justice and equity and will best protect and maintain the rights of both the debtor and the creditor. * * * This rule applies to involuntary, as well as to voluntary, payments." The mandate of this court required the $2,000 permanent alimony, *"to be paid as directed by the trial court."* This language in itself invited and required the district court to make an equitable and proper application of any amount of money that was paid into the court on the judgment during the pendency of the action in the Supreme Court.

Our former opinion in this case was clear and unequivocal, and required no interpretation. It called attention to the large amount of temporary support money paid in until the time of the rendition of the decree in district court on June 12, 1967. It then proceeded to reduce the amount of *permanent* alimony from $7,500 to $2,000. The decree of the district court terminating the temporary support money was before this court in the decision on the original case. This court in the original opinion noted the long pendency of the action and the large amount of money paid in for temporary support and it decreed a reduction to $2,000 of permanent alimony. The opinion and mandate were clear in their direction and meaning and the district court correctly implemented the opinion and mandate in its decree in this garnishment proceeding.

Although the general rule with respect to the nonrecoverability of voluntary payments is not applicable to this situation because it is a matter of the court properly applying payments into court to the satisfaction of the different aspects of a divorce judgment, we

note that the general rule with reference to voluntary payments does not apply to, but recovery may be had of, payments made to an officer of the court under a misapprehension as to legal rights. Leonard v. Gage, 94 F. 2d 19; Hillmer v. Bishop, 316 Ill. App. 411, 45 N. E. 2d 188; Morgan v. Jasper County, 223 Iowa 1044, 274 N. W. 310. See, also 70 C. J. S., Payment, § 138, p. 346.

For the reasons given the judgment of the district court dissolving the garnishment herein and dismissing the garnishment proceedings is correct and is affirmed.

AFFIRMED.

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STEPHEN F. KRANTZ, APPELLANT, V. MARGE'S MUFFLERS, INC., APPELLEE.
172 N. W. 2d 624

Filed December 5, 1969. No. 37214.

1. **Negligence.** The duty to maintain a proper lookout is a part of the duty to use due care.
2. **Trial: Instructions.** 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.
3. **Negligence.** The doctrine of sudden emergency is not applicable where the emergency is caused in part by the negligence of the party claiming its benefit.
4. **Trial: Witnesses.** Although a witness may be impeached by proof of previous inconsistent statements, counsel should not be permitted to read at length from pre-trial depositions during cross-examination where there is no substantial variance in the testimony.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

Young, Holm, McEachen & Hamann, for appellant.

Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellee.

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

BOSLAUGH, J.

This is an action by Stephen F. Krantz to recover damages for personal injuries sustained by him in an accident at the defendant's automobile repair shop in Omaha, Nebraska.

On January 4, 1965, the plaintiff, who is a used car dealer, brought an automobile to the defendant's shop to have its exhaust system repaired. The automobile was placed on a lift or hoist and raised so that the exhaust system could be inspected. Later, while the automobile was being lowered the plaintiff's foot was caught underneath the hoist and injured.

The jury returned a verdict for the defendant. The plaintiff's motion for new trial was overruled and he has appealed. The assignments of error relate to the overruling of the plaintiff's motions for a directed verdict, the instructions to the jury, and rulings on objections during the plaintiff's cross-examination of the defendant's employee.

The work area of the defendant's shop contained four hoists arranged in two rows so that automobiles could enter from the north and south sides of the building and be placed on the hoists. Each hoist consisted of a platform supported by four posts located at the corners. The platform was raised and lowered by a winch and cable system operated by an electric motor. It required 48 seconds for the hoist to be lowered. There was an aisle 6½ feet wide between the hoists on the north and south sides of the shop. When the platform was lowered, a bar or cross-member at the front of the hoist rested on the concrete floor of the shop.

The plaintiff was familiar with the defendant's shop and the way cars were lifted. On the day of the accident the plaintiff's automobile entered the shop from the south and was placed on a hoist. The plaintiff then went into the office or waiting room while the automobile was inspected to determine what repairs were needed.

Terry Hinze, an employee of the defendant, testified

that he examined the muffler, exhaust pipe, and tailpipe on the automobile and found no defects in them. Hinze then asked the plaintiff to come to the shop area, and the plaintiff and Hinze went underneath the automobile and inspected it. Hinze climbed up on the hoist, started the engine, and had another employee plug up the tailpipe. This procedure disclosed that the defect was in the center head or intake manifold area.

Hinze climbed down from the hoist and told the plaintiff that the defect was in the engine area and not in the exhaust system. Hinze said that if the plaintiff would step out from underneath the car, he would lower the hoist and the plaintiff could see where the defect was located.

The switch which controlled the hoist was located at the northwest corner of the hoist near the left front corner of the automobile. Hinze testified that the plaintiff was clear of the hoist before he began to lower the automobile. The plaintiff was standing north of or in front of the hoist and to the left of Hinze as the automobile was being lowered. Hinze was watching the hoist as the automobile was being lowered and the plaintiff was not in the vision of Hinze. There was some evidence that the plaintiff was looking at the engine when the hoist came down on his right foot.

The plaintiff testified that the engine had been started with the car on the hoist before he was asked to come to the shop area to see where the defect was located. The plaintiff said that he was underneath the hoist looking at the automobile when he felt the hoist coming down. The plaintiff was backing out from under the hoist and had "almost made it" when he felt himself lunging backwards, caught hold of the top of the radiator of the car, and pulled himself back. The plaintiff said that he straightened himself out, but as the hoist went on down, "my foot was just in the wrong place" and the bar caught his foot. The plaintiff's right big toe and part of the second toe were crushed in the accident.

The evidence was in conflict as to how the accident happened and presented questions for the jury as to negligence and contributory negligence. The plaintiff's motions for a directed verdict were properly overruled.

The plaintiff contends that the trial court erred in failing to give two requested instructions concerning the duty of the operator of a car lift. The first requested instruction stated that it is the duty of the operator of a car lift to keep a proper lookout and to see what is plainly before him. The second requested instruction stated that a car lift is a dangerous instrumentality and that a slight deviation from the standards of care will constitute negligence.

The trial court instructed generally with respect to negligence and contributory negligence but gave no specific instruction as to the duty of lookout with respect to either party. However, the trial court did instruct that the defendant was required "to exercise that degree of care, precaution and vigilance in its actions and operations on the premises which the circumstances justified and reasonably demanded." The trial court further instructed that the defendant was not required to "warn of an open and obvious danger" and the plaintiff was "not entitled to anticipate that he would be warned of a risk that should have been open or obvious to him in the exercise of ordinary care."

The duty to maintain a proper lookout was a part of the duty to use due care and was applicable to both parties. It was not limited to the defendant alone as suggested in the first requested instruction. Under the circumstances in this case the trial court was not required to give the requested instruction.

Although a car lift might be considered to be a dangerous instrumentality in one sense of the term, the duty upon the defendant was to exercise reasonable care under the circumstances while operating the lift. The trial court was not required to instruct the jury that even a "slight deviation from the standards of

care" would constitute negligence. 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. Frazier v. Anderson, 143 Neb. 905, 11 N. W. 2d 764.

The plaintiff contends that the trial court should have instructed the jury in regard to the doctrine of sudden emergency even though such an instruction was not requested. The doctrine is not applicable where, as in this case, the emergency is caused in part by the negligence of the party claiming its benefit. Schwartz v Hibdon, 174 Neb. 129, 116 N. W. 2d 187.

During the cross-examination of Hinze, plaintiff's counsel inquired at length concerning a pre-trial deposition. As to many of the questions asked there was no variance between the testimony at the trial and the testimony in the deposition. On two occasions the trial court sustained objections to the questions asked because the previous answers did not tend to impeach the witness.

The plaintiff now complains that he was prevented from proving that the witness had stated, in his deposition, that he asked the plaintiff to come to the shop area to observe the source of the noise. Hinze had testified on direct examination that he asked the plaintiff to come to the shop area "and we went underneath the car."

There was no prejudice in the ruling. Although the objection was sustained, no motion was made to strike the testimany and no admonition was given to the jury. There was an offer of proof but no ruling made. The cross-examination continued and the plaintiff's counsel made further inquiry concerning the pre-trial deposition.

Although a witness may be impeached by proof of previous inconsistent statements, counsel should not be permitted to read at length from pre-trial depositions during cross-examination where there is no substantial variance in the testimony. The trial court in this case

did not abuse its discretion in attempting to keep the cross-examination within proper bounds.

The judgment of the district court is affirmed.

AFFIRMED.

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THE OVERLAND NATIONAL BANK OF GRAND ISLAND, A CORPORATION, APPELLEE, V. AURORA COOPERATIVE ELEVATOR CO., A CORPORATION, APPELLANT.

172 N. W. 2d 786

Filed December 5, 1969. No. 37233.

1. **Statutes: Contracts: Crops.** Under the Uniform Commercial Code, an after-acquired property clause in a security agreement creates a valid security interest in crops which are planted and become such within one year after the security agreement is executed, where the rights in the crops are acquired by the debtor in the ordinary course of his business.
2. **Contracts.** A provision in a security agreement granting a security interest in proceeds of the collateral, as well as in the collateral, should be interpreted to mean only that should a sale, exchange, or other disposition occur, the proceeds resulting also would be covered by the security agreement.

Appeal from the district court for Hamilton County: H. EMERSON KOKJER, Judge. Affirmed.

Crosby, Pansing, Guenzel & Binning and William D. Kuester, for appellant.

Luebs, Tracy & Huebner, Vincent L. Dowding, and Morsman, Fike, Sawtell & Davis, for appellee.

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

MCCOWN, J.

This action was brought by the Overland National Bank of Grand Island, Nebraska, a corporation, against the defendant, Aurora Cooperative Elevator Company, for conversion of milo in which the plaintiff claimed a security interest. The milo was purchased by defendant

from Clyde C. Carnes. The district court entered judgment for $3,728.51 against the defendant. The defendant has appealed.

The facts are stipulated. The plaintiff is a bank doing business in Grand Island, Hall County, Nebraska, and the defendant operates two elevators, both located in Hamilton County, Nebraska. On February 21, 1966, plaintiff loaned Clyde C. Carnes $33,000 and since that date loaned Carnes additional money. On the same date, Carnes executed and delivered to the plaintiff a security agreement as security for said loan and additional advances. The security agreement covered all farm products including livestock and crops "now owned or hereafter acquired." The agreement granted the bank a security interest in all proceeds of the collateral, and contained a covenant that the borrower would not sell or otherwise dispose of the collateral. The security agreement was perfected by filing a financing statement with the county clerk of Hamilton County, Nebraska, on March 18, 1966.

In the fall of 1966, Clyde C. Carnes, without the consent or permission of the plaintiff delivered and sold to the defendant 225,980 pounds of milo. The milo was planted, grown, and harvested in 1966, on land in Hamilton County specifically described in the security agreement and financing statement. Clyde C. Carnes was a person engaged in farming operations and produced and acquired the above described milo in the ordinary course of his farming operations and business.

The defendant elevator took possession of the milo delivered to it by Carnes and paid Carnes the sum of $3,728.51 by delivering to Carnes a check drawn by defendant in the sum of $3,459.57 and by crediting Carnes' account with the defendant in the amount of $268.94. Carnes then deposited the check for $3,459.57 in his checking account in the plaintiff bank. The money paid to Carnes for the milo was never paid to the plaintiff by Carnes.

The district court found that the plaintiff had a valid security interest in the milo and a right to recover for conversion. The court also found that the plaintiff, without notice of the wrongful sale, had no duty to the defendant to exercise a right of set-off against the milo proceeds deposited in Carnes' account.

The defendant's first contention is that plaintiff did not have a valid security interest in the milo sold because it was not planted or growing on February 21, 1966; was thus after-acquired property; and the security interest did not attach unless new value was advanced.

Section 9-204, U. C. C., provides in part: "(1) A security interest cannot attach until there is agreement that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.

"(2) For the purposes of this section the debtor has no rights

"(a) in crops until they are planted or otherwise become growing crops, . . ."

Subsection (4) provides: "No security interest attaches under an after-acquired property clause

"(a) to crops which become such more than one year after the security agreement is executed . . . ."

Section 9-108, U. C. C., establishes that such a security interest in after-acquired collateral is deemed to be taken for new value if the debtor acquired his right in the collateral in the ordinary course of his business.

Under the facts stipulated here, the milo involved was planted, grown, and harvested within less than one year from the date of the security agreement and was acquired by Carnes in the ordinary course of his farming operations and business. Under the Uniform Commercial Code, an after-acquired property clause in a security agreement creates a valid security interest in crops which are planted and become such within one year after the security agreement is executed, where the rights in the

crops are acquired by the debtor in the ordinary course of his business.

The defendant also contends that it was entitled to take the milo free of the security interest here for a combination of reasons. One reason urged is that under the provisions of the Uniform Commercial Code, a buyer in the ordinary course of business generally takes free of a security interest created by the seller, and the reasons justifying that general rule ought to apply equally to a farming business.

The answer to this is that the code makes a specific exception in cases such as this. Section 9-307, U. C. C., provides: "(1) A buyer in ordinary course of business *other than a person buying farm products from a person engaged in farming operations* takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence." (Emphasis ours.)

This case is directly within the exception. The reasons for the legislative action may not be apparent, but the legislative intent is apparent, and the language is definite and unambiguous.

Defendant also urges that an implied authorization or permission to sell the milo may be found from the course of dealing and usage between the plaintiff and Carnes. Reliance rests on section 9-306 (2), U. C. C. The only evidence in this case was the fact stipulation, the security agreement, the financing statement, and two ledger sheets of Carnes' bank account with the plaintiff bank. These ledger sheets show only amounts and dates of deposits and checks for the months of October and November 1966. The account is titled "Clyde Carnes & Son, Auctioneers." There is no evidence that any deposit came from Carnes' farming operation except the milo proceeds referred to in the stipulation, and even that deposit cannot be identified on the ledger sheets. Such evidence is insufficient to establish implied authorization or permission to sell farm products.

Clovis National Bank v. Thomas, 77 N. M. 554, 425 P. 2d 726, is not in point. In any event, the parties here specifically stipulated that the sale of the milo to the defendant was "without the consent or permission of the plaintiff." It requires interpretive ingenuity to argue that the stipulation referred only to an express consent or permission. Giving the defendant the benefit of the doubt, however, there is still no evidence that the sale of the milo by Carnes was impliedly authorized by any course of dealing or conduct of the plaintiff.

The defendant also asserts that the provision in the security agreement granting a security interest in all "proceeds" of the collateral, as well as in the collateral itself, indicates an implied authorization for sale.

A provision in a security agreement granting a security interest in proceeds of the collateral, as well as in the collateral, should be interpreted to mean only that should a sale, exchange, or other disposition occur, the proceeds resulting also would be covered by the security agreement. It is a clause inserted to protect a security holder as to third parties, not one of permission or consent to the borrower. See Vermillion County Production Credit Assn. v. Izzard, 111 Ill. App. 2d 190, 249 N. E. 2d 352.

The defendant's final contention is that plaintiff's failure to exercise a right of set-off against the proceeds terminated its security interest in the milo. Ordinarily the right of set-off is a privilege which the bank has, not a duty owing to the depositor or one primarily liable on the debt. See 10 Am. Jur. 2d, Banks, § 678, p. 651. The district court specifically found that the plaintiff had no notice of the wrongful sale and had no duty to the defendant to set-off the milo proceeds, which were deposited in the account of Clyde C. Carnes, against his obligation to the plaintiff. The evidence fully supports the finding and it is unnecessary to decide whether or not any such duty would have arisen had there been such notice.

The judgment of the district court was correct in all respects and is affirmed.

AFFIRMED.

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STATE EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL, APPELLEE, V. MICHAEL J. EYEN, APPELLANT.
172 N. W. 2d 617

Filed December 5, 1969. No. 37285.

1. **Licenses and Permits: Appeal and Error.** An order of revocation of a license to practice a profession will not ordinarily be disturbed in the absence of an abuse of discretion.
2. **Licenses and Permits: Administrative Law.** The conviction of a felony cannot be collaterally attacked in a proceeding before the Director of Health for revocation of a license to practice a profession.

Appeal from the district court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Shrout, Linquist, Caporale, Brodkey & Nestle, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

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

SPENCER, J.

This action for the revocation of the license of defendant, Michael J. Eyen, to practice dentistry in Nebraska originated before the Director of the Department of Health of the State of Nebraska. On appeal, the district court found the evidence sufficient to sustain the order of revocation of the Director of Health.

In accordance with Rule 8 a 2 (3), Revised Rules of the Supreme Court, 1967, we consider only the assignments of error specifically set out in defendant's brief. They are as follows: "I. The Court erred as follows:

in sustaining the Order of Revocation, by the Director of Health of the State of Nebraska, of License No. 2536 to practice Dentistry.

"II. The Court erred in not admitting into evidence Exhibits 9, 10 and 11.

"III. The Court erred in not admitting the testimony of Josephine Eyen and that of Anne Eyen."

Defendant pled nolo contendere to an information charging the felony offense of assault with intent to inflict great bodily harm. The offense involved the throwing of acid on the victim. On May 24, 1962, defendant was sentenced to confinement in the Nebraska State Penitentiary for a period of 4 years. On May 29, 1962, the present action for revocation was filed before the Director of Health. Defendant was served with notice at the penitentiary. He did not personally appear at hearings held June 15, 1962, and August 30, 1962, but was represented by counsel. The order of revocation was entered September 5, 1962. The appeal to the district court was heard in November 1968.

Section 71-147, R. R. S. 1943, provides, so far as material herein: "A license to practice a profession may be revoked or suspended when the licensee is guilty of any of the following acts or offenses: * * * (2) immoral, unprofessional or dishonorable conduct; * * * (4) conviction of a felony; * * *."

The defendant does not challenge the jurisdiction of the Director of Health, nor does he contend that the evidence adduced was insufficient under the circumstances to sustain a revocation. He does, however, urge that the wording of the statute provides permissive rather than mandatory revocation or suspension, and that in his case revocation is too severe. We agree the use of the word "may" makes the statute permissive or discretionary in this instance, but we do not accept defendant's conclusion.

An order of revocation of a license to practice a profession will not ordinarily be disturbed in the absence

of an abuse of discretion. There has been no abuse of discretion herein. Defendant was convicted of a serious criminal act. To hold that the order of revocation was an abuse of discretion would be to emasculate the statute.

Defendant attempts to impeach his conviction by now denying his guilt and by producing affidavits of an accomplice that he testified falsely in the criminal prosecution, and of the victim that he wished to retract the statement that there was any sexual relationship between him and the defendant. The accomplice at the time of the execution of the affidavit was a fellow inmate. These affidavits were properly excluded. It is not possible to reverse a criminal conviction in an administrative proceeding. The conviction of a felony cannot be collaterally attacked in a proceeding before the Director of Health for revocation of a license to practice a profession.

Defendant concedes that he understood the effect of a nolo contendere plea. To use his words: "I understood what a no contest charge would involve." He now contends that his attorney, who is deceased, assured him that the worst he would get was a "bench parole." Defendant's attorney was a very able and reputable lawyer, and it strains the bounds of credulity to believe that he would have given defendant such assurance in view of the nature of the case, but assuming it was so, it could have no effect herein. We are more inclined to believe that the reason for the nolo contendere plea is to be inferred from the affidavit of the victim, offered by the defendant and excluded by the trial court.

Assignment of error No. 3 refers to exclusion of certain testimony of defendant's mother and sister. The offer of proof is substantially that if they had been permitted to testify they would have said that immediately after the sentencing defendant's attorney said he was surprised, and that he thought it would be a "bench parole." This testimony was immaterial and was properly excluded.

The record on defendant's plea is in evidence. The following is pertinent: "MR. DOUGLAS: Has it been explained to you in the event you enter a plea of Guilty, Mr. Eyen, to the Information as charged, you will be admitting the facts contained therein and you will not be entitled to a trial by jury and it will merely be up to this Court to determine the disposition of this case; do you understand that? THE DEFENDANT: Yes. * * * MR. DOUGLAS: I would like to ask the defendant a few questions: Have there been any threats by anyone to have you enter this plea of Nolo Contendere? THE DEFENDANT: No, sir. MR. DOUGLAS: Have there been any promises by anyone in law enforcement to have you enter this plea of Nolo Contendere? THE DEFENDANT: No, sir. MR. DOUGLAS: Are you pleading Nolo Contendere after you have had an opportunity to discuss this matter with your attorney Mr. Devoe? THE DEFENDANT: Yes. MR. DOUGLAS: And are you pleading Nolo Contendere freely and voluntarily? THE DEFENDANT: Yes, sir."

Defendant's testimony on cross-examination herein is also revealing. It is as follows: "Q. That isn't what I am asking. I am asking you if you understood that you could be sentenced to the Penitentiary if you were found guilty of this charge against you? A. Yes, I believe I understood that. Q. And there was certainly no guarantee you would get probation, is that true? A. No, there was no guarantee."

While defendant did not assign violation of due process as error herein, he does suggest that issue in his argument. In passing, we observe that he concedes he had personal notice of the revocation hearing and that he was represented by counsel at the hearing. He also concedes he was told arrangements could be made for his appearance at the hearing, but that he never got there.

We find no merit in any of defendant's assignments of error. The judgment is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. JERRY SHELDON, APPELLANT.
172 N. W. 2d 631

Filed December 5, 1969. No. 37292.

**Criminal Law: Post Conviction. Post conviction relief should be denied where the record does not show an infringement of constitutional rights sufficient to invalidate the judgment.**

Appeal from the district court for Butler County: H. EMERSON KOKJER, Judge. Affirmed.

Jerry Sheldon pro se.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of burglary and possession of burglar's tools. State v. Sheldon, 179 Neb. 377, 138 N. W. 2d 428. He was denied post conviction relief in State v. Sheldon, 181 Neb. 360, 148 N. W. 2d 301. He now appeals from the overruling of a second motion. He contends that his arrest was unlawful; that the tools should not have been received in evidence; and that he was denied effective assistance of counsel.

The legality of the arrest was not and is not legally important in this proceeding. The foundation evidence for the admission of the tools in evidence was considered and discussed in the direct appeal. The foundation was adequate and the tools were properly received in evidence. An objection to the offer would have served no purpose.

The record shows no basis for post conviction relief. The judgment of the district court is affirmed.

AFFIRMED.

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M. G. KELLER, FIRST AND REAL NAME UNKNOWN, ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

172 N. W. 2d 782

Filed December 5, 1969. No. 37295.

1. **Attorneys at Law: Fees.** The claims of a lessee and an absentee landlord are not sufficiently related to warrant the tacking together of their awards to justify the allowance of attorneys' fees.
2. **Constitutional Law: Property.** The property of no person shall be taken or damaged for public use without just compensation therefor.
3. **Eminent Domain: Appeal and Error: Costs.** Section 76-720, R. R. S. 1943, as amended, is designed to permit a condemnee to recover his expenses of litigation in the event of a nonmeritorious appeal by the condemner to the end that he may be fully compensated for the loss of his property, and to discourage nonmeritorious appeals.
4. **Attorneys at Law: Fees: Costs.** Attorneys' fees are allowed and taxed as costs. Costs as a general rule are given to the prevailing party.
5. **Statutes.** In determining the legislative intent, all statutes relating to the same subject should be construed and considered together.
6. **Judgments.** A judgment is the final determination of the rights of the parties in an action.
7. **Eminent Domain: Judgments: Damages.** In view of the history of section 76-720, R. R. S. 1943, and the apparent legislative intention, we find that the term "final judgment" refers only to the final amount recovered as damages, exclusive of interest.
8. **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.
9. ———. The intention of the Legislature when ascertained will prevail over the literal sense of the words used and this is

especially true when the strict letter of the law would lead to injustice or absurdity. In interpreting a statute the legislative intent may be found from the reason of the enactment.

10. ———. When the intent of the Legislature is clear, it is the duty of the courts to construe it in accordance with such intent. A sensible construction will be placed upon it to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.

Appeal from the district court for Deuel County: JOHN H. KUNS, Judge. Affirmed.

Firmin Q. Feltz and William S. Padley, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., and John P. Regan, for appellee.

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

NEWTON, J.

This is an action in eminent domain. The appeal to this court raises only the question of allowance of attorneys' fees. We affirm the judgment of the district court.

M. G. Keller and Margaret O. Keller, husband and wife, were joint owners of certain farmland, a portion of which the defendant, State of Nebraska, Department of Roads, sought to acquire for road purposes. The plaintiff Omer Parker was the tenant in possession of the Keller property. The county court appraisers made an award of $26,285.10 to the Kellers and $330 to Parker. The plaintiffs and the defendant all appealed. On trial in the district court, the jury made an award of $25,367.60 to the Kellers and of $2,983.74 to Parker. The court added interest, abstracting expenses, etc., to these items and entered judgments of $27,717.96 and $3,179.42. Costs, including attorneys' fees allowed Omer Parker in the sum of $750, were taxed to defendant. The court found that the verdict for Kellers was for a lesser amount than had been awarded them by the appraisers and refused to allow any attorney's fees for these plaintiffs. Plain-

tiffs assign the refusal to allow attorneys' fees as error.

Section 76-720, R. R. S. 1943, provides: "* * * if appeal is taken by both parties and the final judgment is greater in any amount than the award, the court may in its discretion award to the condemnee a reasonable sum for the fees of his attorney * * *." Plaintiffs maintain that the term "final judgment" permits the inclusion of interest and entitles them to an allowance of attorneys' fees; and that since the jury verdict on the combined claims of Parker and the Kellers was greater than the combined appraisers' award, they are entitled to such fees.

The matter could be simply and readily determined on the basis that the statute specifically makes the allowance of such fees discretionary with the court. Under the circumstances present, there was not an abuse of discretion. We feel, however, that for the benefit of future litigants, the contentions of plaintiffs should be more fully considered.

The interests of the landowners and their lessee in an eminent domain action are entirely different. A landowner is entitled to recover the value of land taken and damages sustained by reason of the depreciation in value of the remainder. A lessee or tenant is entitled to recover for his interest in growing crops destroyed and any depreciation in the value of his leasehold. The right of recovery of a lessee has an entirely different and separate basis from that of the nonoccupying owner. Both the parties and the claims are different. Either may arrive at a settlement with the condemner, accept the award of the appraisers, or appeal, independently of the other. Each receives a separate award or judgment. Under such circumstances, it is clear that the claims of a lessee and an absentee landlord are not sufficiently related to warrant the tacking together of their awards to justify the allowance of attorneys' fees.

Article I, section 21, Constitution of Nebraska, provides: "The property of no person shall be taken or

damaged for public use without just compensation therefor." Eminent domain proceedings are designed with a view to complying with this constitutional provision and this fundamental precept must be kept in mind in construing statutes dealing with the process of eminent domain. The purpose is to ensure "just compensation" for property taken for public use and that is the maximum for which recovery may be had. It may be readily observed that if a property owner is obliged to undergo expensive litigation to recover "just compensation" and can obtain a judgment or award only for his actual loss, his net recovery will be materially less than the amount of his loss if he is obliged to pay the expense of litigation out of the amount recovered. Section 76-720, R. R. S. 1943, as amended at the 1963 session of the Legislature, was designed to correct this situation. At the time of its passage, the Legislature also included certain provisions designed to prevent an abuse of the more liberal amendment regarding the allowance of attorneys' fees. It was provided that when a condemnee appealed, the final recovery must be greater by 15 percent than the original award, or if both parties appealed and the recovery did not equal the award, the allowance of attorneys' fees was not authorized. It also provided that if the condemner only appealed, the allowance of fees was authorized unless the final recovery was 15 percent less than the original award. These provisions are in a sense penalties designed to discourage nonmeritorious appeals. If the condemner unsuccessfully appeals from a fair award, it can be saddled with attorneys' fees. The same is true with an unsuccessful appeal by the condemnee in that he will then be obliged to pay his own expenses of litigation.

Attorneys' fees are allowed and taxed as costs. Costs as a general rule are given to the prevailing party. See 20 C. J. S., Costs, § 8, p. 266, § 9, p. 269. This common law precept is recognized by statute in Nebraska. See §§ 25-1708 and 25-1710, R. R. S. 1943. "In determining the legislative intent, all statutes relating to the same

subject should be construed and considered together." City of Grand Island v. Ehlers, 180 Neb. 331, 142 N. W. 2d 770. When a condemnee appeals from an award made by appraisers in the county court and recovers a lesser sum in the district court, he cannot be considered to be the "prevailing party."

The use of the term "final judgment" cannot serve to pervert the obvious legislative intent. "A judgment is the final determination of the rights of the parties in an action." Ricketts v. Continental Nat. Bank, 169 Neb. 809, 101 N. W. 2d 153. The primary right of a condemnee is to recover for property taken. The right to recover interest on the amount of the award in the absence of a prompt settlement is secondary and derivative in nature. In view of the history of this statute and the apparent legislative intention, we find that the term "final judgment" refers only to the final amount recovered as damages, exclusive of interest. " '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. "The intention of the Legislature when ascertained will prevail over the literal sense of the words used and this is especially true when the strict letter of the law would lead to injustice or absurdity. In interpreting a statute the legislative intent may be found from the reason of the enactment." Halstead v. Rozmiarek, 167 Neb. 652, 94 N. W. 2d 37. "When the intent of the Legislature is clear, it is the duty of the courts to construe it in accordance with such intent. A sensible construction will be placed upon it to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent." Tom & Jerry, Inc. v. Nebraska

Liquor Control Commission, 183 Neb. 410, 160 N. W. 2d 232.

The judgment of the district court is affirmed.

AFFIRMED.

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SIDNEY R. HENDERSON, APPELLANT, V. THE SCHOOL DISTRICT OF SCOTTSBLUFF, IN THE COUNTY OF SCOTTS BLUFF, IN THE STATE OF NEBRASKA, ET AL., APPELLEES.

173 N. W. 2d 32

Filed December 12, 1969. No. 37291.

1. **Schools and School Districts: Contracts.** Violation by a public school teacher of his contract to teach, without just cause, is a proper ground for suspension of his teacher's certificate.
2. **Schools and School Districts: Appeal and Error.** A proceeding to suspend a teacher's certificate becomes moot on appeal when the period of suspension has elapsed.
3. ———: ———. A teacher who fails to supersede an order suspending his teacher's certificate and fails to seek a prompt hearing on appeal cannot meritoriously complain of a dismissal of his appeal after the period of suspension has elapsed and the appeal has become moot.
4. **Appeal and Error.** An appellate court may properly decline to express an opinion on a mere abstraction or to determine a moot case.
5. **Judgments: Appeal and Error.** A judgment will not ordinarily be reversed where the complaining party would not be entitled to succeed in any event.

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

Kutak, Rock, Campbell & Peters, for appellant.

Clarence A. H. Meyer, Attorney General, Harold Mosher, Lovell & Raymond, and Robert O. Hippe, for appellees.

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

NEWTON, J.

Plaintiff, a teacher in the Scottsbluff, Nebraska, public schools, entered into a contract to teach again during the 1967-68 school year. He later received an opportunity to enter into a business and on August 11, 1967, resigned his teaching position. Complaint was made to the State Board of Education that plaintiff had violated his contract. After hearing on the complaint, plaintiff's teaching certificate was suspended for 1 year commencing December 8, 1967. An appeal was taken but no effort made to supersede the order or have it set for immediate hearing in the district court. The case was heard on December 12, 1968, and dismissed as moot. We affirm the judgment of the district court.

Section 79-1252, R. R. S. 1943, specifically authorizes the State Board of Education to suspend a teacher's certificate for not to exceed 1 year if, after hearing, it is determined that the teacher has violated his contract without just cause. The plaintiff does not dispute the facts stated above, but on the contrary, admits their truth.

At the time of the hearing in the district court, the 1-year period of suspension had elapsed. It was impossible for the court to undo what had already transpired or to give plaintiff any effective relief from the order of suspension. From this standpoint, the case was definitely moot. He insists, however, that he is entitled to a determination of the case on its merits on the theory that he will continue to be adversely affected by the suspension. In this regard he states that it will limit future opportunities to pursue his profession.

We are not inclined to agree with him on this proposition. He admits that he violated his contract and it is this fact, rather than an administrative decision thereon, that might have such a limiting effect. No action of the court could serve to nullify that act or remedy the consequences stemming from it. The criminal cases cited by plaintiff are not in point. When a defendant in a criminal action denies guilt, he is presumed innocent until

finally adjudged to be guilty. If he has served his sentence before his case is heard on appeal, he is still entitled to have his guilt or innocence determined in the hope of removing the stigma attached to the conviction and regaining the civil rights of which he has been deprived. In McFarland v. State, 165 Neb. 487, 86 N. W. 2d 182, the court stated: "In view of what has already been said of civil and criminal contempt, and the purposes thereof, it is self evident that no issue remains to be decided here. Nothing could be gained by our holding that the commitment was improper for respondent is no longer in jail. He has not been found guilty of criminal contempt, in which case he would be entitled to have his conviction reviewed." The present case is akin to one in which a defendant voluntarily pleads guilty and then later insists that his conviction should be set aside on the sole ground that it tends to limit his opportunities for gainful employment. It is not the fact of his conviction, but rather the fact of his guilt, that is damaging. Here the plaintiff does not deny a willful contract violation, but, in effect, pleads guilty to it.

Plaintiff had the opportunity to obtain a determination of his appeal to the district court on its merits, but failed to take steps to bring this about. He sat back and permitted the period of suspension to run before securing a hearing. Under such circumstances, he cannot meritoriously complain of the finding by the court that the case is now moot. See McCarter v. Lavery, 101 Neb. 748, 164 N. W. 1054.

"An appellate court may properly decline to express an opinion on a mere abstraction or to determine a moot case * * *." Dodge Agricultural Credit Assn. v. Tighe, 121 Neb. 458, 237 N. W. 404.

The judgment of the district court dismissing plaintiff's cause of action could not in any event have been prejudicial to plaintiff. Plaintiff appealed from the decision of the State Board of Education under the provisions contained in section 84-917, R. R. S. 1943, and in

taking the appeal demanded and obtained the inclusion in the trancsript on appeal of the evidence adduced at the hearing before the State Board of Education. This evidence is also included in the transcript on appeal to this court. It discloses that the plaintiff testified at the hearing and personally verified the fact of his resignation as a teacher on August 11, 1967, for the reason that he wished to enter into a local business. "Just cause" for a contract violation as contemplated by the statute means a legal or lawful ground for such action. The fact that plaintiff wished to enter some other field of endeavor does not constitute a legal or lawful reason for the violation of his contract. It is therefore apparent that plaintiff is not entitled to any relief as a matter of law. "A judgment will not ordinarily be reversed where the complaining party would not be entitled to succeed in any event." Swink v. Smith, 173 Neb. 423, 113 N. W. 2d 515.

The judgment of the district court is affirmed.

AFFIRMED.

McCOWN and SMITH, JJ., dissenting.

The majority opinion holds that a proceeding to suspend a teacher's certificate becomes moot on appeal when the period of suspension has elapsed and, at least in the absence of a supersedeas, justifies a denial of judicial review and a dismissal.

Any person *aggrieved* by a final administrative decision in a contested case is entitled to judicial review in the district court. The district court may affirm, remand, reverse, or modify the decision if the *substantial rights* of the petitioner may have been *prejudiced.* The review is a de novo proceeding and "in view of the entire record as made on review;". See § 84-917, R. R. S. 1943.

All of the requirements for review on appeal were complied with by the plaintiff within the time and in the manner specified. A supersedeas to stay enforce-

ment is not required by the statute, but is authorized on such terms as may be deemed proper.

The result of the majority opinion now is that except where the order of the administrative agency is superseded before the period of suspension has run, judicial review provided for by the statute will be denied unless the case is heard and decided on appeal before the period of suspension ends. That result also charges the plaintiff with all responsibility for any delay in the district court between the date of filing the petition on appeal and bringing the case to hearing and decision.

Section 84-917, R. R. S. 1943, specifically gives a plaintiff 30 days in which to institute proceedings for review. It is quite obvious, as a practical matter, that the majority holding here denies judicial review of virtually any license suspension which is short in duration. Where an order of the administrative agency does not itself contain a stay of enforcement, an "aggrieved" plaintiff ordinarily would be foreclosed from supersedeas, and, consequently, from judicial review even before the statutory time required to institute the review proceedings. If it be said that the court would grant judicial review if a plaintiff had no reasonable opportunity to obtain a supersedeas before the suspension expired, then it must be conceded that the expiration of a period of suspension does not terminate the prejudice and injury, nor the right of review.

The basic assumption undergirding the majority opinion is that a plaintiff, whose license to practice his profession is suspended, is "aggrieved" or "prejudiced" only during the time the suspension is in effect. The permanent record of that suspension and its continuing effect on his name and reputation in his profession, both now and in the future, are disregarded.

In some criminal cases, courts have recognized and protected an individual's interest in his name and reputation. In State v. Superior Court of Maricopa County, 93 Ariz. 351, 380 P. 2d 1009, the court said: ". . . the

law recognizes and protects an individual's interest in his reputation and it would be absurdly inconsistent to dismiss as moot a proceeding initiated to clear one's name of the stigma and infamy of an alleged erroneous conviction on a criminal charge."

The majority opinion attempts to distinguish such criminal cases by stating that the present case is akin to one in which a defendant voluntarily pleads guilty. Yet this was a contested case before the administrative agency, vigorously resisted by the plaintiff who duly and regularly appealed within the time required. To reach a determination that the plaintiff pleaded "guilty"; or that he did not have just cause for a contract violation; or that he is not entitled to any relief as a matter of law, required the majority to review the transcript of evidence before the State Board of Education. That review is then used to determine that the plaintiff had no right to judicial review and that he was not prejudiced. In any event, whatever review was made by the majority ignores the statute which specifically requires a trial de novo in the district court, and that the decision on appeal be made in view of the entire record "as made on review." Here the district court made no record on review in a trial de novo but dismissed the case as moot which judgment the majority opinion now affirms.

The question here is not a question of whether the State Board of Education was or was not correct, but it is whether or not the plaintiff is entitled to a judicial review of the action of the state board. To deny that judicial review on the ground that no one will continue to be injured after the expiration of a period of suspension of his license to pursue a particular profession is to deny that an individual's record and reputation in a profession are of any value.

In 1896, Mr. Justice Holmes said in a criminal case: "We should be slow to suppose that the Legislature meant to take away the right to undo the disgrace and

legal discredit of a conviction . . . merely because a wrongly convicted person has paid his fine or served his term." See Commonwealth v. Fleckner, 167 Mass. 13, 44 N. E. 1053.

Applying that principle to the suspension of a license to practice a profession, the language may be paraphrased. We should be slow to suppose that the Legislature meant to take away the right to undo the adverse effects upon the plaintiff now and in the future resulting from a suspension of a license to practice a profession, merely because the period of the suspension has already run.

In our view the plaintiff was aggrieved or prejudiced by the order of suspension within the meaning of section 84-917, R. R. S. 1943, sufficiently to entitle him to his day in court.

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STATE OF NEBRASKA, APPELLEE, V. ROBERT PERCY COLE, APPELLANT.
173 N. W. 2d 39

Filed December 12, 1969. No. 37294.

**Criminal Law: Post Conviction.** Where it appears that the questions raised in a second motion to vacate and set aside a judgment and sentence were raised and determined in a prior evidentiary hearing under the Post Conviction Act, the court is not required to entertain such motion under section 29-3001, R. S. Supp., 1967.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Owen A. Giles, for appellant.

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

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

CARTER, J.

This is an appeal from the denial of relief under the Nebraska Post Conviction Act, sections 29-3001 to 29-3004, R. S. Supp., 1967.

On July 23, 1962, defendant, having entered his plea of guilty to the charge of rape, was sentenced to imprisonment for a term of 15 years. On March 15, 1968, defendant filed a motion to vacate and set aside his sentence on the ground that his constitutional rights were violated in that he was not afforded due process in the acceptance of his plea of guilty.

This is a second motion to vacate and set aside the sentence. On the order to show cause in the present case the evidence taken on the evidentiary hearing of the first motion to vacate and set aside the sentence under the Post Conviction Act was offered in evidence. This evidence showed that defendant was afflicted with congenital syphilis for which he had received medical treatment. At one time he had been confined in the state hospital at Hastings. He escaped from that institution and, on his being taken into custody in Omaha, the hospital authorities did not request his return because he was in condition to be released. There is no other evidence in the record of any mental incapacity. On the evidence of the former evidentiary hearing and records before the court, the trial court denied an evidentiary hearing and dismissed the motion to vacate and set aside his sentence.

The motion to vacate and set aside his conviction in the appeal before us contains no allegations that were not disposed of by the final judgment on the previous evidentiary hearing. The claim of mental disability is not asserted by the motion filed in the case resulting in the present appeal. This claim appears to be based on fragmentary evidence of his affliction with congenital syphilis as brought out in the previous evidentiary hearing. The trial court correctly determined that no

basis for another evidentiary hearing existed and dismissed the proceeding.

AFFIRMED.

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HARRY M. SMITH, APPELLEE, V. CANAL INSURANCE COMPANY, AN INSURANCE CORPORATION, APPELLANT.
173 N. W. 2d 36

Filed December 12, 1969. No. 37301.

**Insurance: Automobiles.** The Motor Vehicle Safety Responsibility Act concerning a third-party claim requires an owner's SR 22 policy to cover risks pertaining to an automobile that has replaced an automobile designated in the policy.

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

Cobb, Swartz & Wieland and William A. Ahlstrand, for appellant.

Wilson, Barlow & Watson, for appellee.

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

SMITH, J.

The insured named in an owner's policy certified under the Motor Vehicle Safety Responsibility Act operated a newly acquired automobile without notifying the insurer. The operation resulted in a traffic accident, judgment on plaintiff's negligence claim against the insured for $2,709.25, and plaintiff's present action against the insurer. The district court rendered judgment for plaintiff, and defendant has appealed. Plaintiff admitting the lack of notification and therefore of coverage under the policy apart from the act, the parties argue the effect of the act.

The policy declarations list named insured Merle F. Everhart, Jr.; policy period from November 13, 1964,

to May 13, 1965; public liability coverages; and one automobile, a 1964 Chevrolet Impala. From April to November 1964, Merle, Jr., paid his father monthly installments to purchase the Impala. In applying for the policy he informed defendant's agent that title was in Merle, Sr., but that Merle, Jr., would be the principal driver. Defendant on form SR 22 then certified the owner's policy pertaining to the Impala, the State having suspended the driver's license of Merle, Jr. The license was reinstated on the strength of the SR 22.

In December 1964, Merle, Jr., purchased a 1957 Oldsmobile with certificate of title in his name. His testimony is that: "When it was running I used the Olds but when it wasn't I used the Chevy." On March 5, 1965, he traded the Oldsmobile in for a 1960 Chevrolet with title and registration in himself and wife. After that time all interest in the Impala was owned by Merle, Sr. The collision of the 1960 Chevrolet, operated by Merle, Jr., and plaintiff's automobile happened on May 1 while the SR 22 was still in effect.

The Motor Vehicle Safety Responsibility Act reads: "A motor vehicle liability policy . . . shall mean an owner's or an operator's policy . . . ." § 60-533, R. R. S. 1943. "Such . . . policy: (1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; . . . ." § 60-534, R. R. S. 1943. "Such . . . policy shall insure the person named as insured therein against . . . liability . . . arising out of the use by him of any motor vehicle not owned by him . . . ." § 60-535, R. R. S. 1943. ". . . (1) The liability of the insurance carrier with respect to the insurance required by sections 60-501 to 60-569 shall become absolute whenever injury or damage covered by said . . . policy occurs . . . and no violation of said policy shall defeat or void said policy . . . ." § 60-538, R. R. S. 1943.

A close reading of the act supports defendant's position. Cf. Ohm v. Fireman's Fund Indemnity Co., 211

Ore. 596, 317 P. 2d 575 (1957). Public policy of protecting the third party against loss caused by negligence of the financially irresponsible motorist is, however, especially strong. A policy defense good against the insured may be unavailing against the third party. The act concerning a third-party claim requires an owner's SR 22 policy to cover risks pertaining to an automobile that has replaced an automobile designated in the policy. See, Nimeth v. Felling, 165 N. W. 2d 237 (Minn., 1969); Farm Bureau Auto Ins. Co. v. Martin, 97 N. H. 196, 84 A. 2d 823 (1951).

The 1960 Chevrolet was a replacement automobile within our construction of the act concerning third-party claims. The judgment is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. WILLIAM MAURICE ANDERSON, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. WILLIE BARFIELD, APPELLANT.
173 N. W. 2d 38

Filed December 12, 1969. Nos. 37309, 37317.

**Criminal Law: Appeal and Error.** In a criminal action this court will not interfere with a verdict of guilty based upon conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt.

Appeals from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Renne Edmunds and Thomas F. Ryder, for appellants.

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.

McCOWN, J.

Separate informations were filed charging each of the defendants with robbery. The cases were consolidated for trial without objection. The jury returned separate verdicts of guilty against each defendant. One defendant was sentenced to 5 years imprisonment and the other to 4 years. Both have appealed. The sole assignment of error in both cases is the failure to sustain the motion for directed verdict. The grounds are that the evidence is insufficient to establish guilt beyond a reasonable doubt. The cases were docketed separately in this court, but were consolidated for argument. For that reason, they will be disposed of by one opinion.

The State's evidence established that the victim of the robbery, who had been drinking for several hours, met a woman and two men in the Park Bar in Omaha on the evening of December 27, 1968. The defendants were identified as the two men. The newly found friends and the victim left the bar together and entered an automobile, supposedly to drive the victim home. The automobile was driven into an alley a short distance away and the two men proceeded to beat the victim while the woman took his money. He was then thrown from the car. He returned to the bar a short time later with blood on his face and clothing. He reported the robbery to two policemen who were present. The defendants and a woman were arrested at approximately 9:45 p.m., some distance from the Park Bar. The woman in the car with the defendants at the time of arrest had been in the bar at the time the victim left before the robbery and testified as a witness at the trial.

The basis for the defendants' contentions is that there was a difference in the testimony of the State's witnesses as to the time the victim and the defendants left the bar together before the robbery. It is argued that since the defendants were arrested at 9:45 p.m., they could not have committed the robbery if they left the bar

at 10 p.m., as the victim and one other witness said they did. However, there was also testimony that they left the bar between 9 and 9:30 p.m. Other evidence and testimony, if believed, was amply sufficient to establish defendants' guilt.

The jury is the judge of the credibility of witnesses and the weight to be given their testimony. In a criminal action this court will not interfere with a verdict of guilty based upon conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Wilson, 174 Neb. 86, 115 N. W. 2d 794.

The judgments are affirmed.

AFFIRMED.

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HAROLD SIEWERDSEN, APPELLEE, V. UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, APPELLANT, IMPLEADED WITH JAMES A. SHANE, APPELLEE.
173 N. W. 2d 27

Filed December 12, 1969. No. 37313.

1. **Insurance: Contracts.** An insurance policy is a contract which requires an offer and acceptance to be effective.
2. ———: ———. A custom to renew does not bind the insurer unless it is also binding upon the insured. There must be a contract to renew as distinguished from a mere custom.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Reversed and remanded with directions.

Pilcher, Howard & Dustin, for appellant.

Shrout, Lindquist, Caporale, Brodkey & Nestle, for appellee Siewerdsen.

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

BOSLAUGH, J.

This is an action by Harold Siewerdsen for a declaratory judgment determining that an automobile liability insurance policy was in existence and effect on December 24, 1963. The trial court found that the policy was in full force and effect on December 24, 1963. The defendant United States Fidelity and Guaranty Company, hereinafter referred to as the company, has appealed.

The evidence shows that in June 1962, the plaintiff purchased an automobile liability insurance policy issued by the company. The policy was purchased from the defendant James A. Shane who, at that time, was a soliciting agent for the company writing insurance through the Palmer Agency. The policy, or a copy of it, was delivered to the plaintiff. It was in effect for 1 year from June 6, 1962, and insured a 1960 Pontiac automobile. The plaintiff paid the premium to Shane, one-half in June 1962 and one-half in February 1963. The policy expired by its own terms on June 6, 1963.

During June 1962, Shane entered into an agency agreement with the company and opened his own agency known as the Shane Insurance Agency. The separate agency lasted until about July 1, 1962. The agency agreement was terminated by agreement of the parties and Shane then turned over his records concerning policies written by him to the Sam C. Morgan Agency. These records included a policy of household insurance issued by the company and purchased through Shane but did not include the automobile policy. The agency agreement was formally terminated on August 31, 1963.

At the time Shane established his separate agency he talked with an employee of the company concerning renewals. The employee stated that he would attempt to direct renewals to Shane but that "it was almost practically impossible" to do so. The records concerning the June 1962 automobile insurance policy remained

in the Palmer Agency, and no renewal notice was sent to Shane.

On May 7, 1963, the company mailed a renewal policy to the Palmer Agency. This policy was returned to the company and "cancelled" on its records on June 4, 1963, 2 days before it would have become effective. It is this renewal policy which the trial court found was in existence on December 24, 1963.

An insurance policy is a contract which requires an offer and acceptance to be effective. Haas v. Mutual Life Ins. Co., 90 Neb. 808, 134 N. W. 937; Meyer v. Central States Life Ins. Co., 103 Neb. 640, 173 N. W. 578. If there is no obligation as to one of the parties, there is none as to the other. St. Paul Fire & Marine Ins. Co. v. Ruddy, 299 F. 189.

The renewal policy which the company mailed to the Palmer Agency was but an offer to insure. The offer was never communicated to the plaintiff and was not accepted by him. The plaintiff was not obligated to accept the renewal policy and could have refused it if it had been offered to him. This might well have happened since the plaintiff's contact was with Shane who was no longer connected with the Palmer Agency. The "cancellation" of the policy on the records of the company amounted to a revocation or withdrawal of the uncommunicated offer to insure.

The trial court found that a custom had been established by the parties that policies be issued and credit extended for the payment of premiums. There was no evidence of any custom between the plaintiff and the company. Shane testified that he paid the premium on the June 1962 policy to the Palmer Agency when it was due. But, a custom to renew, even if established, does not bind the insurer unless it is also binding upon the insured. There must be a contract to renew as distinguished from a mere custom. Peterson v. State Automobile Ins. Assn., 160 Neb. 420, 70 N. W. 2d 489.

There was evidence of a conversation between the

plaintiff and Shane in November 1963 concerning the premium that was due on a household policy issued by the company. The plaintiff mentioned that the premium on "my automobile insurance" should be due and inquired as to what it was. Shane replied in the affirmative and stated that he would check on it and let the plaintiff know. At that time the agency agreement had been terminated and there was no automobile policy in existence. Shane's erroneous statement concerning a premium being due could not bind the company and create a contract that did not exist. See Farmers & Merchants Ins. Co. v. Graham, 50 Neb. 818, 70 N. W. 386.

The evidence will not sustain a finding that the renewal policy mailed to the Palmer Agency in May 1963 was in existence and binding on the company on December 24, 1963. The judgment of the district court is reversed and the cause remanded with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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JAMES M. MATHIESEN, APPELLEE, V. ED BLOOMFIELD ET AL., APPELLANTS, CEDRIC HALL, INTERVENER-APPELLANT.
173 N. W. 2d 29

Filed December 12, 1969. No. 37328.

1. **Judgments: Trial.** When a law action is tried without a jury to the court, the findings of the court have the effect of a verdict of the jury, and the judgment thereon will not be disturbed unless clearly wrong.
2. **Landlord and Tenant: Contracts.** Where the tenant has actually abandoned the premises, the landlord is entitled to reenter and take charge and possession; and, even where he acts too hastily, but in good faith and under circumstances justifying belief that the premises have been abandoned, he is guilty only of a technical violation of the tenant's contractual rights under the lease.
3. ———: ———. The question of whether a lease has been abandoned so as to confer a right of reentry on the landlord

is one of fact to be determined from the facts and circumstances of the case and the intentions of the parties.

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

Smith, Smith & Boyd, for appellants.

Ryan & Scoville, for appellee.

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

WHITE, C. J.

The issue presented in this case is whether the plaintiff tenant has abandoned his farm lease and forfeited his right to possession of the premises, even though the intervener had failed to give the requisite 6 months' notice on September 1, 1964, to effectually terminate the plaintiff's year-to-year farm lease. Because of the failure to give the requisite notice on September 1, 1964, the district court entered judgment for the plaintiff in this forcible entry and detainer action. On the factual issue of abandonment raised in the pleadings, the district court by its judgment in effect found that there had been no abandonment and enforced the notice requirement. The case was tried to the court without a jury and as we have many times held when a law action is tried without a jury to the court, the findings of the court have the effect of a verdict of the jury, and the judgment thereon will not be disturbed unless clearly wrong. Scottsbluff National Bank v. Blue J Feeds, Inc., 156 Neb. 65, 54 N. W. 2d 392. We reverse the judgment of the district court and remand the cause with directions to find for all defendants and dismiss plaintiff's complaint at plaintiff's costs.

The background facts are important in the understanding of this case. In 1954 the plaintiff and the intervener-defendant landlord entered into a farm lease

arrangement in the customary leasing arrangement requiring a 6-month notice of termination prior to March 1 of the succeeding year. No subsequent lease was entered into as is customary and the plaintiff-appellant held over during the ensuing years. Sometime in the fall of 1964, subsequent to September 1, 1964, the landlord discovered and asserted that the plaintiff tenant had been converting a portion of his share of the crop, and on January 4, 1965, gave notice attempting to terminate the lease. Shortly thereafter he sued the plaintiff in a separate action for conversion. On January 12, 1965, plaintiff was foreclosed of all of his farm machinery, equipment, and livestock by the Production Credit Association; left the farm home in Dakota County, Nebraska; and took a full time job with a railroad in Lincoln, Nebraska. Further facts concerning the circumstances of his departure and the conduct of the plaintiff will be discussed later in this opinion.

It is conceded by the parties and indeed it is well settled law in Nebraska that on a holdover farm lease from year-to-year that the landlord is required to give 6 months' notice in order to terminate the tenant's lease for the ensuing year. However, the right of a landlord to reenter in the case of the tenant's abandonment of the premises during the 6 months' period of time required by the notice, is also well established in the law. In Langemeier, Inc. v. Pendgraft, 178 Neb. 250, 132 N. W. 2d 880, this court recently stated the rule: "Where the tenant has actually abandoned the premises, the landlord is entitled to reenter and take charge and possession; and, even where he acts too hastily, but in good faith and under circumstances justifying a belief that the premises have been abandoned, he is guilty only of a technical violation of the tenant's contractual rights under the lease." This follows the general rule that where a tenant has actually abandoned the premises, the landlord may reenter and take possession. See 52A C. J. S., Landlord and Tenant, § 717, p. 32. And the

question of whether a lease has been abandoned so as to confer a right of reentry on the landlord is one of fact to be determined from the facts and circumstances of the case and the intentions of the parties. Langemeier, Inc. v. Pendgraft, *supra;* 52A C. J. S., Landlord and Tenant, § 717, p. 32.

Bearing in mind these rules of law we summarize the calendar of facts and events which lead us to the conclusion that upon the undisputed facts, the plaintiff-tenant had abandoned the premises entitling the intervener-owner landlord and his subsequent tenant to reenter and take possession of the premises. The record reveals these undisputed facts: (1) In early December 1964, some 3 months after the expiration of the time for the required notice, the intervener-landlord discovered that his tenant had converted a portion of his crop share under the leasing arrangement for the preceding year. He advised the plaintiff of this contention and notified him that he could not have possession of the farm for the coming year. (2) The Production Credit Association had a mortgage on the plaintiff's farm machinery, equipment, and livestock and initiated foreclosure. (3) On January 4, 1965, the intervener-landlord mailed to the plaintiff a notice that his tenancy under the lease had been terminated because of the conversion by the plaintiff of part of the farm crop. (4) On January 7, 1965, the intervener-landlord initiated a suit for the conversion of his crop share, which resulted in a substantial judgment in favor of the landlord. (5) As a result of the foreclosure action by the Production Credit Association, the plaintiff tenant entered into an agreement and compromise by which all of his farm machinery, equipment, and livestock were publicly sold on January 12, 1965. (6) On or about this date the plaintiff erected a 2 x 4 across the front door of the tenant house he was occupying and left for admitted full-time employment in the City of Lincoln, Nebraska, about 120 miles distant; the evidence also reveals, that in ad-

dition to his full-time employment in the City of Lincoln, the plaintiff also did odd jobs in Lincoln and himself claimed his residence in Lincoln, Nebraska; and at no time were any of these facts or intentions communicated to the landlord-intervener. (7) The plaintiff tenant never contacted nor talked to the landlord after his last conversation with him in December 1964. (8) On January 29, 1965, the owner entered into a lease for the year starting March 1, 1965, with the defendants Bloomfields. (9) On March 25, 1965, the intervener-landlord removed the small amount of furniture and equipment still in the tenant house. Plaintiff had still made no appearance on the premises. (10) Sometime in the spring of 1965 the plaintiff did contact the new tenant and offered to sell him a hot water heater in the house and some window drapes. The new tenant purchased the hot water heater from the plaintiff but did not buy the drapes.

We do not feel that any particular circumstances recited herein would alone establish abandonment or would be conclusive as a matter of law. However, taken together, this court is of the opinion that they conclusively establish an intention on the part of the plaintiff tenant to abandon the lease and the premises. Particularly significant is the removal of the plaintiff's residence to Lincoln, Nebraska, and engaging in full-time employment and activity which would make it impossible for him to farm the premises. It is conceivable, of course, that the plaintiff could farm the premises (in light of modern farming methods) by the rental of equipment and hired help. But no such contention was made by the plaintiff and the record is devoid of any evidence to even remotely establish such facts. The loss of all of his farm equipment, machinery, and livestock tied together in time sequence with his immediate removal to Lincoln, Nebraska, and a full-time job, is more indicative as to his intentions than his now retrospectively declared intentions. The other acts and circumstances,

harmonizing in point and time sequence, including the sale of the hot water heater and the offer to sell the drapes in the tenant house, support this conclusion.

We come to the conclusion that the plaintiff had abandoned the premises prior to the reentry date of March 1, 1965, and that the landlord had entered in good faith and made a lease with a new tenant. Consequently under the principles of law announced herein, the plaintiff must fail in his action for forcible entry and detainer to regain possession of the premises. The judgment of the district court is reversed and the cause remanded with directions to find for all of the defendants and dismiss plaintiff's complaint at the plaintiff's costs.

REVERSED AND REMANDED WITH DIRECTIONS.

# INDEX

**Abatement.**

1. Where in purchaser's suit purchaser demands compliance with contract of sale of real estate where there is failure of title as to portion of land or quantity of estate, court may require vendor to give best title he can and order amount abated from purchase price for deficiency of title or quantity of estate. Ready Sand & Gravel Co. v. Cornett 726
2. Measure of abatement should be such portion of price as relative value of land lost bears to purchase price of whole tract. Ready Sand & Gravel Co. v. Cornett ---------- 726

**Accord and Satisfaction.**

Settlement between parties involved in accident without express reservation of rights against parties executing release generally operates as accord and satisfaction of all claims of immediate parties to settlement arising out of accident. Burke v. Shaffer 100

**Actions.**

1. Order striking counterclaim not final order which may be reviewed upon appeal while main action is otherwise pending in district court. Pester v. Lowe 23
2. When appellant fails to file a brief as required by rules of Supreme Court, motion to dismiss appeal will be sustained. Pester v. Lowe ---------- 23
3. County must be sued in name designated by statute. Jameson v. Plischke ---------- 97
4. When defect of misjoinder of parties appears on face of petition, it must be raised by special demurrer. Jameson v. Plischke ---------- 97
5. Requirement of demand to sue and subsequent refusal or waiver of demand by indication on part of public corporation of intent not to sue are conditions precedent to representative or derivative suit on behalf of public corporations. Evans v. Metropolitan Utilities Dist. ---------- 172
6. General rule is that where ordinary prudence would have prevented deception, action for fraud perpetrated by such deception will not lie. Swanson Petroleum Corp. v. Cumberland ---------- 323
7. Action to quiet title to real estate and to enforce

contract and agreement is equitable action and is in Supreme Court for trial de novo on record. Liberty Finance Corp. v. Jones ---------- 529

8. If property loss greater than amount of insurance paid, action should be in name of insured, and insured holds as much of judgment recovered as money paid by insurer amounts to, in trust for insurer. Krause v. State Farm Mut. Auto. Ins. Co. 588

9. Uninsured motorist clause in insurance policy reciting that insurer's liability is to pay amount insured shall be legally entitled to recover as damages from operator of uninsured automobile implies that amount plaintiffs may recover should be determined by processes of law and thus by court rather than by arbitrator. Heisner v. Jones ------ 602

10. Provision in automobile liability insurance policy which proscribes and inhibits insured's action and recovery for injuries sustained in accident arising out of ownership or use of uninsured automobile is void. Heisner v. Jones ---------- 602

11. Provision in automobile liability insurance policy with relation to uninsured motorist's coverage which provides that insurer will not be bound unless insured's action is brought with written consent of insurer, and which is incorporated into policy for purpose of enforcing void arbitration provision is void as against public policy. Heisner v. Jones ---------- 602

12. Under cited statute, uninsured motorist's insurance carrier generally has right to intervene in litigation between its insured and uninsured motorist tort-feasor as to issues of liability and damages arising out of accident between its insured and uninsured motorist tort-feasor. Heisner v. Jones ---------- 602

13. New and distinct matter not maintainable under provisions of code as counterclaim and not involved in proper determination of subject matter of original suit must be litigated in separate action. Weller v. Putnam ---------- 692

**Administrative Law.**

1. Writ of mandamus may issue to any inferior tribunal, corporation, board, or person, to compel performance of act which law specifically enjoins as duty resulting from office, trust, or station; may require inferior tribunal to exercise judgment, or proceed to discharge any of its functions, but cannot control judicial discretion. Watts v. City of

Omaha ---------- 41
2. Rule well established that mandamus will lie against public board to compel performance of purely ministerial duties, but not to control exercise of judicial functions. Watts v. City of Omaha ---------- 41
3. Duty deemed to be of judicial nature when it calls for determination of fact question involving examination of evidence and passing on its probative force and effect. Watts v. City of Omaha ---------- 41
4. Writ of mandamus will not be allowed to compel officers vested with discretionary powers to make particular decision or to set aside one already made, notwithstanding such decision is erroneous in sense that it may be reversed upon appeal. Watts v. City of Omaha ---------- 41
5. Mandamus will not lie to coerce judicial discretion of inferior court, nor to predetermine character of judgment that court shall enter; it will not issue to review action of inferior court where there is adequate remedy at law, and writ may not be used to usurp or take place of an appeal or writ of error; rule as applicable to city council as to county court. Watts v. City of Omaha ---------- 41
6. While in matters involving official discretion, mandamus may be used for purpose of compelling exercise thereof, it will not ordinarily be extended beyond, so as to interfere with manner in which discretion shall be exercised or to influence or coerce particular determination. Watts v. City of Omaha ---------- 41
7. Order of railway commission not res judicata as to another application of same nature subsequently filed, nor does it require independent proceeding. Canada v. Peake, Inc. ---------- 52
8. Extent of application of doctrine of res judicata to railway commission stated. Canada v. Peake, Inc. 52
9. Evidence of operations under color of authority may be considered by railway commission in determining whether or not proposed service is or will be required by present or future public convenience and necessity. Canada v. Peake, Inc. ---------- 52
10. Issue of public convenience and necessity ordinarily one of fact and where there is evidence in record to sustain railway commission's order, Supreme Court cannot say that it is unreasonable and arbitrary. Canada v. Peake, Inc. ---------- 52
11. Ruling by railway commission on issuance or denial

of certificate of public convenience and necessity constitutes exercise of administrative and legislative powers and functions. Canada v. Peake, Inc. 52
12. On appeal to Supreme Court from order of railway commission, administrative or legislative in character, only questions to be determined are whether commission acted within scope of its authority and whether order complained of is reasonable and not arbitrarily made. Canada v. Peake, Inc. ---------- 52
13. Findings of fact required by Administrative Procedures Act consist of concise statement of conclusions upon each contested fact issue. Prigge v. Johns ---------- 103
14. Order of Director of Motor Vehicles under implied consent law, containing inadequate findings of fact and conclusions of law, not void because of failure of director to make basic findings of fact in order upon which ultimate facts rest, but is irregular only and will be set aside on appeal. Prigge v. Johns 103
15. When withdrawal petitions presented to State Board of Vocational Education pursuant to cited statute, no adjudicative fact is at issue within principle that trial type hearing is required for dispute of adjudicative facts. Chaloupka v. Area Vocational Tech. School No. 2 ---------- 196
16. State Board of Vocational Education does not act judicially or quasi-judicially but performs purely administrative act when withdrawal petitions presented under cited statute. Chaloupka v. Area Vocational Tech. School No. 2 ---------- 196
17. Action of State Board of Vocational Education in certification of validation of signatures to governing board of area vocational technical school is not affected by constitutional guarantees of procedural due process. Chaloupka v. Area Vocational Tech. School No. 2 ---------- 196
18. Attorney retained by Nebraska State Real Estate Commission not employee within ambit of cited section. Weiner v. State Real Estate Commission 752
19. Nebraska State Real Estate Commission not required by Administrative Procedures Act to set out statutory provisions in rules and regulations. Weiner v. State Real Estate Commission ---------- 752
20. Cited statute only applicable to those procedures not specifically covered by statute. Weiner v. State Real Estate Commission ---------- 752
21. One element of full hearing under due process

clauses is ample opportunity for all parties to establish propriety or impropriety, from standpoint of justice and law, of step asked to be taken. Hall v. Simpson ---------- 762

22. Statutory guidelines to be followed by Nebraska Power Review Board stated; in absence of agreement or failure to meet requirements of guidelines, service area supplier protected against encroachments and invasions of service rights. Cornhusker P. P. Dist. v. Loup River P. P. Dist. ---- 789

23. Supplier of electricity except by agreement may not offer electric service to additional ultimate users outside service area without applying to Nebraska Power Review Board and receiving approval after notice and hearing; such approval cannot be validly granted unless shown that supplier in whose service area customer located cannot or will not furnish adequate electric service or that provision by such supplier of service area would involve wasteful and unwarranted duplication of facilities. Cornhusker P. P. Dist v. Loup River P. P. Dist. ---------- 789

24. Where there is no evidence sufficient to sustain finding that supplier in service area has failed or is unable to comply with duties and responsibilities imposed on such supplier, order of Nebraska Power Review Board permitting others to supply customers is arbitrary and unreasonable, and therefore void. Cornhusker P. P. Dist. v. Loup River P. P. Dist 789

25. Where it appears that Nebraska Power Review Board has complied with controlling statutes in exercising powers, and evidence is sufficient to sustain findings of fact, Supreme Court without authority to substitute its judgment for that of board, and action of board will be sustained; but where evidence on controlling facts does not support action of board, its order is arbitrary and unreasonable. Cornhusker P. P. Dist. v. Loup River P. P. Dist. ---- 789

26. Conviction of felony cannot be collaterally attacked in proceeding before Director of Health for revocation of license to practice. State ex rel. Meyer v. Eyen ---------- 848

**Adoption.**

1. Adopted child is, in legal sense, child both of natural and of adoptive parent, and is not, because of adoption, deprived of right of inheritance from natural parents, unless statute expressly so pro-

vides. Wulf v. Ibsen ---------- 314
2. Statute which includes as principal or dominant feature establishing child as an heir of adoptive parent, without making reference to inheritance from natural parents, will not be construed as depriving child of that inheritance. Wulf v. Ibsen -- 314

**Adverse Possession.**
1. It is established law of this state that, when fence is constructed as boundary line between two properties, and parties claim ownership of land up to fence for full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. McCain v. Cook ---------- 147
2. It is not necessary that possession be accompanied by express declaration or claim of title; it is sufficient if party in possession has acted so as to clearly indicate claim. McCain v. Cook ---------- 147
3. Intention to claim title is usually manifested by acts, not words. McCain v. Cook ---------- 147
4. Fact that one claiming title by adverse possession never intended to claim more land than is called for in deed is not controlling factor. McCain v. Cook -- 147
5. Intent with which possession is held, rather than intention to hold in accordance with deed, is controlling. McCain v. Cook ---------- 147
6. After running statute, adverse possession has indefeasible title which can only be divested by conveyance of land to another, or by subsequent disseisin for statutory limitation period. Title cannot be lost by a mere abandonment, cessation of occupancy, expression of willingness to vacate land, acknowledgment or recognition of title in another, subsequent legislation, or by survey. McCain v. Cook ---------- 147
7. Law well settled that recognition of title in former owner by one claiming adversely, after he has acquired perfect title by adverse possession, will not divest him of title. McCain v. Cook ---------- 147

**Affidavits.**
1. Where venue of affidavit laid in one county, and acknowledgment taken by notary public in different county, presumed that acknowledgment was taken by notary public in county where he had authority to

act. Prigge v. Johns ---------- 103
2. When attention of person making affidavit called to fact that it must be sworn to and, in recognition of this, he is asked to do some corporal act and he does it, instrument constitutes statement under oath, irrespective of other formalities. State v. Howard 274
3. Affiant's asserted personal observation of facts and circumstances supporting finding of probable cause is sufficient. State v. Howard ---------- 274
4. When magistrate has found probable cause, court should not invalidate warrant by interpreting affidavit in hypertechnical, rather than common sense, manner. State v. Howard ---------- 274
5. Observations by fellow officers engaged in common investigation are reliable basis for issuance of search warrant on application made by one of their number. State v. Howard ---------- 274
6. While not easy to determine when affidavit demonstrates existence of probable cause, resolution of doubtful or marginal cases should be largely determined by preference to be accorded to warrants. State v. Howard ---------- 274

**Animals.**

1. At common law, owner of livestock liable for any damage done by it while trespassing upon lands of others, whether such lands were cultivated or uncultivated. Fiene v. Robertson ---------- 668
2. Under existing statutes liability for trespass of animals limited to trespass upon cultivated lands; to render owner liable for trespass upon uncultivated lands, willful trespass must be alleged and proven. Fiene v. Robertson ---------- 668
3. Failure of damaged party to maintain division fence does not relieve owner of domestic animals from liability for damage resulting from trespass by such animals upon cultivated lands. Fiene v. Robertson ---------- 668
4. One who lets horse for hire warrants horse to be suitable for purpose for which let and liable for injuries resulting from viciousness or dangerous propensities of horse if had knowledge, or, in exercise of reasonable care, should have had knowledge, of such propensities. Huber v. Timmons ---------- 718
5. Ordinarily existence of vicious or dangerous propensities in domestic animal and knowledge of such propensities are indispensable to liability on part

of owner. Huber v. Timmons ---------- 718
6. There are many characteristics common to all horses, even most gentle; one such characteristic is propensity to rear or bolt when frightened and is situation that one riding hired horse must expect to encounter. Huber v. Timmons ---------- 718
7. Where ponies remain at all times under supervision of concessionaire, fact that patrons of concession are children is factor to be considered in determining if reasonable care exercised. Huber v. Timmons 718
8. Even in absence of any known viciousness in domestic animal, owner obliged to exercise over it certain degree of care depending upon kind and character of particular animal concerned, circumstances in which it is placed, and purposes for which it is employed or kept; owner charged with knowledge of natural propensities of animals, and, if these propensities are of kind that might cause injury must exercise care necessary to prevent such injuries as may be anticipated. Huber v. Timmons ---------- 718

**Annexation.**

1. Under cited statute city of first class may annex contiguous or adjacent lands which are urban or suburban in character and are not agricultural lands rural in character. Plumfield Nurseries, Inc. v. Dodge County ---------- 346
2. Annexation of lands to cities and towns is legislative function for mayor and city council; not for judicial to determine what lands are to be annexed. Plumfield Nurseries, Inc. v. Dodge County ------ 346
Meyer v. City of Grand Island ---------- 657
3. Power delegated to cities of first class to annex lands by ordinance is to be strictly construed and failure to comply with conditions prescribed or limitations imposed will ordinarily invalidate ordinance. Plumfield Nurseries, Inc. v. Dodge County 346
4. Words "as are urban or suburban in character," as used in cited statute, are not vague and indefinite terms having effect of invalidating act as unconstitutional. Plumfield Nurseries, Inc. v. Dodge County 346
5. Provisions in cited statute providing that adequate plans and necessary city council action to furnish benefits must be adopted not later than 1 year after date of annexation is modified by previous language stating that benefits shall be received as soon as practicable; section construed as whole is

reasonable and does not provide for such lack of equality of benefits as to amount to want of due process. Plumfield Nurseries, Inc. v. Dodge County 346

6. Annexation statute does not require legislative body to conduct trial-type evidentiary hearing or to make express finding on character of land. Meyer v. City of Grand Island ---------- 657

**Appeal and Error.**

1. Absent prejudice, error cannot be predicated on overruling of motion to make more definite and certain. Schroeder v. Oeltjen ---------- 8
2. In an equity case, when there is irreconcilable conflict in evidence, Supreme Court will consider fact that trial court observed witnesses and their manner of testifying and accepted one version rather than other. Schroeder v. Oeltjen ---------- 8
   Parkhurst v. Parkhurst ---------- 687
3. In implied consent case, where there is irreconcilable conflict in evidence on a material issue, Supreme Court will consider fact that trial court observed witnesses and their manner of testifying and must have accepted one version rather than other. Pickard v. Director of Motor Vehicles ---------- 13
4. On appeal to Supreme Court from order of railway commission, administrative or legislative in character, only questions to be determined are whether commission acted within scope of its authority and whether order complained of is reasonable and not arbitrarily made. Canada v. Peake, Inc. ---------- 52
5. If court has instructed jury generally on law of case and not withdrawn any essential issue from consideration of jury, error cannot be predicated on failure to charge on some particular phase of case, unless proper instruction has been requested by party complaining. State v. Lewis ---------- 111
6. In absence of statute which permits appeal from interlocutory order, it is generally held that order requiring or permitting or refusing to permit joinder of additional parties is not appealable. Jung v. Cole ---------- 153
7. Holding of Supreme Court on first appeal becomes law of case on retrial of same issues unless on second trial facts are materially and substantially different. Landmesser v. Ahlberg ---------- 182
8. If fact issue presented, in absence of bill of exceptions there is presumption of correctness of

trial court's determination. Schreiner v. Irby Constr. Co. ---------- 222
9. Verdict of jury rendered in criminal prosecution will not be reversed in absence of showing of prejudice to a substantial right of defendant. State v. Harris ---------- 301
State v. Sharp ---------- 411
10. Review in Supreme Court of proceeding under Juvenile Court Act is by trial de novo. Doeschot v. Dahlberg ---------- 303
McMullen v. Geiger ---------- 581
11. Error may not be predicated on admission of evidence to which no objection is made at time offered. State v. McGhee ---------- 352
12. Failure at trial to challenge constitutionality of prior conviction forecloses challenge on appeal. State v. McGhee ---------- 352
13. Appeal from judgment modifying decree of divorce by authority of statute considered and decided by Supreme Court de novo upon record made in trial court. Fogel v. Fogel ---------- 425
14. Not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence in determining sufficiency of evidence to sustain conviction in criminal proceeding. State v. Howard ---------- 461
State v. Fields ---------- 565
15. Assignment in motion for new trial that errors of law occurred at trial does not present correctness of giving or refusing instructions. Drucker v. Goscar, Inc. ---------- 475
16. Admission or rejection of photographs in evidence largely within discretion of trial court; error may not be predicated thereon in absence of showing of abuse of discretion. Beranek v. Petracek ---------- 516
17. Instructions to jury must be considered as whole, and when thus considered, if law correctly stated and case fairly submitted, and jury could not have been misled, claim of prejudicial error in instructions not available. Beranek v. Petracek ---------- 516
18. Action to quiet title to real estate and to enforce contract and agreement is equitable action and is in Supreme Court for trial de novo on record. Liberty Finance Corp. v. Jones ---------- 529
19. In criminal case, Supreme Court will not interfere with verdict of guilty based upon evidence unless so lacking in probative force that it can say as

matter of law that evidence is insufficient to support finding of guilt beyond reasonable doubt. State v. Goodwin ---------- 537
State v. Anderson ---------- 868

20. Assignments of error relied upon for reversal and intended to be urged in brief shall be separately numbered and paragraphed, bearing in mind that consideration of cause will be limited to errors assigned and discussed. Parkhurst v. Parkhurst -- 687
21. Rule by which to measure exact amount or degree of corroboration required in divorce case has not been formulated; sufficiency or insufficiency of corroboration must be determined from facts and circumstances of each case. Parkhurst v. Parkhurst 687
22. Right of appeal clearly statutory and, unless statute provides for appeal from decision of quasi-judicial tribunal, such right does not exist. Peck v. Dunlevey 812
23. If mode and manner of appeal provided in statute, appellate jurisdiction under such statute can only be conferred in mode and manner provided. Peck v. Dunlevey ---------- 812
24. During pendency of appeal in Supreme Court, district court has power to enter orders for temporary alimony and support. Rickus v. Rickus ---------- 833
25. In divorce action district court has power to modify or terminate temporary support or alimony orders during pendency of action. Rickus v. Rickus ---- 833
26. Order of revocation of license to practice profession will not ordinarily be disturbed in absence of abuse of discretion. State ex rel. Meyer v. Eyen -- 848
27. Cited section designed to permit condemnee to recover expenses of litigation in event of nonmeritorious appeal by condemner to end that he be fully compensated for loss of his property, and to discourage nonmeritorious appeals. Keller v. State -- 853
28. Proceeding to suspend teacher's certificate becomes moot on appeal when period of suspension has elapsed. Henderson v. School Dist. of Scottsbluff -- 858
29. Teacher who fails to supersede order suspending teacher's certificate and fails to seek prompt hearing on appeal cannot meritoriously complain of dismissal of appeal after period of suspension has elapsed and appeal has become moot. Henderson v. School Dist. of Scottsbluff ---------- 858
30. Appellate court may properly decline to express opinion on mere abstraction or to determine moot case. Henderson v. School Dist. of Scottsbluff ---- 858

31. Judgment will not ordinarily be reversed where complaining party would not be entitled to succeed in any event. Henderson v. School Dist. of Scottsbluff ---------- 858

**Arrest.**

1. When arrest made without warrant, it must be based upon probable cause which exists from facts and circumstances within officers' knowledge or of which they had reasonably trustworthy information which was sufficient to warrant men of reasonable caution in belief that offense has been, or is, being committed. State v. Goings ---------- 81
2. Probable cause for arrest in Nebraska without warrant exists when it appears that felony has been committed and there are reasonable grounds to believe that person involved is guilty of offense. State v. Harding ---------- 159
3. Search without warrant valid if made incident to lawful arrest. State v. Agnew ---------- 700

**Attorney and Client.**

1. Under statute, allowance of attorney's fees in divorce action is discretionary, but in absence of unusual circumstances, ordinarily allowed as matter of course to wife. Trautman v. Trautman ---------- 202
2. Statute permits recovery of attorney's fee only when judgment rendered against insurer upon policy of insurance. Lundt v. Insurance Co. of North America ---------- 208
3. Insurer, like any other party, entitled to day in court and to judicial determination of liability on policy before being subjected to payment of costs and attorney's fee. Lundt v. Insurance Co. of North America ---------- 208
4. Standard stated for determining a reasonable attorney's fee. Fotinos v. Fotinos ---------- 486
   Jensen v. State ---------- 802
5. Person who has employed attorney may waive right to have attorney present during interview with county attorney, and statement made voluntarily under such circumstances admissible in evidence. State v. Fields ---------- 565

**Attorneys at Law.**

1. Attorney's fees allowed in eminent domain action should not be fixed on basis of unnecessary multi-

plicity of counsel. Anderson v. State ---------- 467
2. Misconduct of attorney to require new trial must be such as prejudices substantial rights of party. Anderson v. State ---------- 473
3. Attorney retained by Nebraska State Real Estate Commission not employee within ambit of cited section. Weiner v. State Real Estate Commission 752
4. Allowance of reasonable attorney's fee for necessary services performed will not be reversed on appeal in absence of showing of abuse of discretion by trial court. Jensen v. State ---------- 802
5. Claims of lessee and absentee landlord are not sufficiently related to warrant tacking together of awards to justify allowance of attorney's fees. Keller v. State ---------- 853
6. Attorneys' fees allowed and taxed as costs; costs as general rule given to prevailing party. Keller v. State ---------- 853

**Automobiles.**

1. In implied consent case, where there is irreconcilable conflict in evidence on a material issue, Supreme Court will consider fact that trial court observed witnesses and their manner of testifying and must have accepted one version rather than other. Pickard v. Director of Motor Vehicles ---------- 13
2. Range of vision doctrine stated. Newkirk v. Kovanda 127
O'Conner v. Kientz ---------- 554
3. Where presence of frost, ice, snow, mist, fog, or smoke are known, or should have been reasonably anticipated, they are mere conditions and not intervening or proximate causes. Newkirk v. Kovanda 127
4. Word "operate" as used in cited statute relates to actual physical handling of controls of motor vehicle by person while under influence of intoxicating liquor. State v. Dubany ---------- 337
5. Evidence that radar equipment was tested within few hours of use, by means of calibrated tuning fork, or by comparison with speedometer of motor vehicle driven through radar field, and was functioning properly, is sufficient evidence of accuracy of radar equipment. State v. Snyder ---------- 465
6. Offense of operation of motor vehicle without Nebraska motor vehicle operator's license is traffic violation for which 2 points are to be assessed. Wilson v. Johns ---------- 545
7. Range of vision rule has no application in those

cases wherein reasonable minds might differ on question of whether or not operator exercised care, caution, and prudence required of reasonably careful, cautious, and prudent person under circumstances of particular situation. O'Conner v. Kientz ---------- 554
8. Driver of police department vehicle on official business, sounding audible signal by siren, shall have right-of-way, and drivers of other vehicles shall yield such right-of-way. State v. Otto ---------- 597
9. Police officer conducting activity protected under cited statute entitled to exceed speed limit. State v. Otto ---------- 597
10. Audible signal is signal capable of being heard, signal which is heard, or in exercise of ordinary care should have been heard. State v. Otto ---------- 597
11. Where excess insurance clause in automobile driver's liability policy and no-liability clause in automobile owner's liability policy apparently conflict, no-liability clause is ineffective and driver's insurance excess. Bituminous Cas. Corp. v. Andersen ---------- 670
12. Former statute provided: "The driver of any vehicle traveling at an unlawful speed shall forfeit any right-of-way which he might otherwise have hereunder"; provision was inapplicable to motorist who met oncoming vehicle which was being turned left between intersections. Middle v. Mount ---------- 710
13. For the implied consent of a person to be effective, as provided in statute, person must have been arrested or taken into custody before test is given. State v. Baker ---------- 724
14. Statute providing that presumption of intoxication arises under determination that amount of alcohol in subject's body fluid at time in question is 0.15 percent or more by weight, as shown by chemical analysis, is in derogation of common law and subject to strict construction. State v. Baker ---------- 724
15. Hypothetical question as to rate of speed of vehicle must include all factors necessary for reasonably accurate opinion, all such factors must be supported by evidence. Witte v. Lisle ---------- 742
16. Violation of statutes regulating use and operation of motor vehicles upon highways not negligence per se, but evidence of negligence, which may be taken into consideration with all other facts and circumstances in determining whether or not negligence is established thereby. Seeman v. Pagels ---------- 757
17. Under former statute, operator of motor vehicle

on highway who would otherwise have right-of-way at intersection forfeits right-of-way if operates at unlawful rate of speed. Seeman v. Pagels ------ 757

18. Driver of automobile not insurer against injuries to children from operation of car; is bound to exercise ordinary or reasonable care towards children as well as towards adults; age, maturity, and intelligence of child a circumstance to be considered in determining whether or not driver has exercised such care. Ederer v. Van Sant ---------- 774

19. Under "automatic insurance" provision, coverage extends to replacement automobile as defined in policy for 30 days following delivery, in all events, irrespective of notice; but where notice not given prior to accident, there is no coverage with respect to accidents occurring after 30-day period has elapsed. Christiansen v. Moore ---------- 818

20. Motor Vehicle Safety Responsibility Act concerning third-party claim requires an owner's SR 22 policy to cover risks pertaining to automobile that has replaced automobile designated in policy. Smith v. Canal Ins. Co. ---------- 866

**Bankruptcy.**

1. Bankruptcy discharge shall release bankrupt from all provable debts, whether allowable in full or part, except such as are liabilities for obtaining money or property by false pretenses or representations. Swanson Petroleum Corp. v. Cumberland -- 323

2. Purpose of Bankruptcy Act is to release honest debtors from burden of debts and is very liberal towards bankrupt as to discharge and act insofar as it relates to discharge is to be given strict construction in favor of bankrupt. Swanson Petroleum Corp. v. Cumberland ---------- 323

3. Check drawn upon bank in which account maker has been overdrawn does not constitute materially false statement in writing which will bar bankruptcy discharge. Swanson Petroleum Corp. v. Cumberland ---------- 323

4. Frauds included in portion of Bankruptcy Act are those which involve moral turpitude or intentional wrong; fraud implied in law, which may exist without imputation of bad faith, or immorality is insufficient. Swanson Petroleum Corp. v. Cumberland ---------- 323

5. Burden of proof on plaintiff to prove that property

was obtained by false pretenses or false representations to prevent bankrupt from being discharged. Swanson Petroleum Corp. v. Cumberland ---------- 323
6. Actual or intentional fraud in obtaining property is necessary to save liability from operation of discharge; fraud implied in law insufficient. Swanson Petroleum Corp. v. Cumberland ---------- 323
7. Character of fraud necessary to save claim from operation of bankruptcy discharge is actual or positive fraud knowingly and intentionally committed. Swanson Petroleum Corp. v. Cumberland -------- 323

**Banks and Banking.**

Check drawn upon bank in which account maker has been overdrawn does not constitute materially false statement in writing which will bar bankruptcy discharge. Swanson Petroleum Corp. v. Cumberland 323

**Bills and Notes.**

1. Where certain sum of money tendered by debtor to creditor on condition that he accept it in full satisfaction of demand, sum due being in dispute, creditor must either refuse tender or accept it as made subject to condition; if accepts it, he accepts condition also, notwithstanding any protest to the contrary. Growers Cattle Credit Corp. v. Swanson 612
2. Voluntary payment of any part of principal or interest upon promissory note tolls statute of limitations and new right of action accrues after each payment. Pick v. Pick ---------- 716
3. Statute not tolled as to joint maker unless payment made with his authority or consent. Pick v. Pick -- 716

**Bonds.**

1. When foreign corporation has domesticated or has obtained certificate of authority to do business, it is not subject to waiver of bond provisions of statute and bond is required in any attachment proceeding involving it. Schreiner v. Irby Constr. Co. ------ 222
2. Surety upon bond of county treasurer liable for funds received by treasurer and not accounted for by him. City of Bellevue v. Western Surety Co. -- 678
Sanitary & Improvement Dist. v. Western Surety Co. 681
3. Interest on funds received by county treasurer but not accounted for by him runs from date of receipt. City of Bellevue v. Western Surety Co. ---------- 678
Sanitary & Improvement Dist. v. Western Surety Co. 681

**Boundaries.**

It is established law of this state that, when fence is constructed as boundary line between two properties, and parties claim ownership of land up to fence for full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. McCain v. Cook ---------- 147

**Brokers.**

1. Generally, a broker's contract which by its own terms has expired, cannot thereafter be extended by parol. Property Sales, Inc. v. Irvington Ice Cream & Frozen Arts, Inc. ---------- 17
2. One who appraises real estate for another, for fee, commission, or other valuable consideration, is by statutory definition a real estate broker. Anderson v. State ---------- 467
3. Unlawful for any person to act as real estate broker unless properly licensed. Anderson v. State 467
4. One not licensed as real estate broker may not be allowed expert witness' fee for testifying in regard to real estate values. Anderson v. State -------- 467

**Burglary.**

Unlawful entry may be shown by circumstantial evidence in burglary prosecution. State v. McIntire 50

**Case Overruled.**

Previous case regarding performance of real estate contracts overruled to extent it conflicts. Heine v. Fleischer ---------- 379

**Claims.**

Settlement between parties involved in accident without express reservation of rights against parties executing release generally operates as accord and satisfaction of all claims of immediate parties to settlement arising out of accident. Burke v. Shaffer 100

**Common Carriers.**

Company furnishing communication services for hire in Nebraska intrastate commerce is common carrier subject to general control of railway commission. American Communication Co., Inc. v. Buntemeyer 220

**Confessions.**

1. Confession given to police officer in patrol car while defendant was being questioned concerning unsolved crime of statutory rape was not product of process of interrogation aimed at eliciting incriminating statements from defendant and was admissible, despite lack of warning to defendant of his right to remain silent where police officer merely asked defendant to explain any relationship he may have had with prosecutrix. State v. Caha ---------- 70
2. Adequate foundation for admissibility of written document purported to be written confession of defendant may not be made unless there is proof of signature or acknowledgment of purported confessor or unless person or officer who took notes and transcribed them testifies as to their accuracy. State v. Harding ---------- 159
3. Generally purported written confession is inadmissible unless defendant is accorded constitutional right of confrontation and right to cross-examine stenographer or person who took and transcribed notes of oral statements and admissions which furnished basis for purported written confession. State v. Harding ---------- 159

**Conflict of Laws.**

1. If chief place of business of debtor not in state, law, including conflict-of-laws rules, of jurisdiction where chief place of business located governs perfection of security interest and possibility and effect of proper filing with regard to construction machinery. General Electric Credit Corp. v. Western Crane & Rigging Co. ---------- 212
2. Interest acquired in movables by buyer in ordinary course of business under U.C.C. may be subject to pre-code security interest in movables. General Electric Credit Corp. v. Western Crane & Rigging Co. -- 212

**Constitutional Law.**

1. Constitution of Nebraska preserves right to trial by jury as it existed at common law or by statute but does not extend the right beyond limits existing at time of adoption of Constitution. Schroeder v. Oeltjen ---------- 8
2. Photographs taken of defendant without permission or consent do not infringe constitutional prohibition of Article I, section 12, Constitution of Ne-

braska, against compelling defendant to give evidence against himself. State v. Blackwell ---------- 121
3. Fourth Amendment to United States Constitution prohibits unreasonable searches and seizures and requires that probable cause exists for arrest before warrantless search can be made of premises or other property of suspect. State v. Harding -- 159
4. Habitual Criminal Law does not violate constitutional guarantees of due process and equal protection. State v. Losieau ---------- 178
5. Action of State Board of Vocational Education in certification of validation of signatures to governing board of area vacational technical school is not affected by constitutional guarantees of procedural due process. Chaloupka v. Area Vocational Tech. School No. 2 ---------- 196
6. Statute dealing with withdrawal petitions and State Board of Vocational Education is constitutional. Chaloupka v. Area Vocational Tech. School No. 2 -- 196
7. For Constitution to restrict plenary power of Legislature to tax, language must be clear. R-R Realty Co. v. Metropolitan Utilities Dist. ---------- 237
8. Statute authorizing or requiring city or county to levy propery tax for local fire protection purposes does not contravene constitutional prohibition against state levy of property tax for state purposes. R-R Realty Co. v. Metropolitan Utilities Dist. ---------- 237
9. Where title of act fairly gives expression to general subject-matter contained, act will not be held invalid as being broader than title. Duerfeldt v. State -- 242
10. Constitutional provision relating to titles to be liberally construed so as to admit of insertion in legislative act of all provisions which, although not specifically expressed in title, are comprehended within the objects and purposes of act as expressed in title, and to admit all germane provisions and not foreign, to provisions of act as expressed in title. Duerfeldt v. State ---------- 242
11. Legislature may make reasonable classification, resting on grounds of public policy, or some substantial difference of situation or circumstance that would naturally suggest justice or expediency of diverse legislation with respect to objects classified and if statute operates equally upon all persons or objects of class so constituted it is not void as being special or local law. Duerfeldt v. State ---------- 242
12. Legislature has right to delegate power of eminent

domain and to restrict or limit extent of its use. Duerfeldt v. State ---------- 242
13. Generally deemed sufficient if act authorizing eminent domain specifies purposes for which property may be acquired, provides for just compensation, and satisfies demands of due process. Duerfeldt v. State ---------- 242
14. State may develop workable rules governing searches and seizures to meet practical demands of effective criminal investigation and law enforcement, provided that rules do not violate constitutional processes of unreasonable searches and seizures. State v. Howard ---------- 274
15. Protection of Fourth Amendment is restriction on governmental action only. State v. Howard ---------- 274
16. In on-the-scene investigations law enforcement officers may interview any person not in custody and not subject to coercion for purpose of determining whether crime has been committed and who committed it; such interview would not be violation of one's constitutional rights. State v. Dubany ---- 337
17. State and federal Constitutions prohibit only unreasonable searches and seizures. State v. Smith ---- 363
18. Opening of automobile door by police officer solely for purpose of determining where and to whom motor vehicle was registered, when owner not being investigated for or suspected of crime, does not constitute unreasonable search within constitutional prohibitions. State v. Smith ---------- 363
19. Right of speedy trial is necessarily relative; is consistent with delays and depends upon circumstances; secures rights to defendant; but does not preclude rights of public justice. State v. Ellis ---------- 523
20. Unexplained delay of 43 days between arrest and preliminary hearing, standing alone, does not demonstrate violation of constitutional guarantee of speedy trial, in absence of showing of prejudice. State v. Ellis ---------- 523
21. Constitutional provision that amendatory acts shall contain section amended does not apply to independent act which is complete in itself. Blair Co. v. American Savings Co. ---------- 557
22. Nebraska Trust Deeds Act constitutional. Blair Co. v. American Savings Co. ---------- 557
23. Legislative function in transfer of land among school districts unaffected by constitutional guarantees of procedural due process. Hall v. Simpson 762

24. One element of full hearing under due process clauses is ample opportunity for all parties to establish propriety or impropriety, from standpoint of justice and law, of step asked to be taken. Hall v. Simpson ---------- 762
25. Property of no person shall be taken or damaged for public use without just compensation therefor. Keller v. State ---------- 853

**Continuance.**

Application for continuance addressed to sound discretion of trial court and ruling thereon will not be disturbed unless it appears that rights of defendant were prejudiced thereby. State v. Schumacher 653

**Contracts.**

1. Statute of frauds requires every contract for sale of lands between owner thereof and any broker shall be void, unless contract is in writing and subscribed by owner of land and broker. Property Sales, Inc. v. Irvington Ice Cream & Frozen Arts, Inc. ---------- 17
2. Generally, a broker's contract which by its own terms has expired, cannot thereafter be extended by parol. Property Sales, Inc. v. Irvington Ice Cream & Frozen Arts, Inc. ---------- 17
3. To bring terms of an extinguished contract into renewed existence requires new contract embodying such terms. Property Sales, Inc. v. Irvington Ice Cream & Frozen Arts, Inc. ---------- 17
4. While contract remains executory, and has not by its own terms expired, parties thereto, acting upon sufficient consideration, may by agreement rescind, alter, modify, supplement, or replace it; but when contract has terminated or been extinguished, it is no longer subject to extension by subsequent oral agreement. Property Sales, Inc. v. Irvington Ice Cream & Frozen Arts, Inc. ---------- 17
5. Contract for sale or sale of securities in violation of Blue Sky Law not void but voidable by purchaser; remedies embrace enforcement or rescission whichever is appropriate. Huryta v. White ---------- 24
6. When parties have made written contract to which both have assented as complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for purpose of

varying or contradicting the writing. Ely Constr. Co. v. S & S Corp. ---------- 59
Transportation Equipment Rentals, Inc. v. Mauk -- 309
7. Written contract expressed by clear and unambiguous language ordinarily not subject to interpretation or construction. Ely Constr. Co. v. S & S Corp. ---------- 59
8. In interpreting written contract, meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings admissible to discover meaning which each party had reason to know would be given to words by other party. Ely Constr. Co. v. S & S Corp. ---------- 59
9. Where evidence relating to ambiguities and contradictory provisions in written contract is conflicting, interpretation to be given contract is for jury. Ely Constr. Co. v. S & S Corp. ---------- 59
10. Written instrument is open to explanation by parol evidence when its terms are susceptible of two constructions or where language employed is vague or ambiguous. Ely Constr. Co. v. S & S Corp. ------ 59
11. Parol evidence generally admissible when offered for purpose of explaining and showing true nature of transaction between parties. Ely Constr. Co. v. S & S Corp. ---------- 59
12. Under contract to manufacture goods according to specifications, where completed goods do not correspond to contract requirements, there was no transfer of title to such goods, under Uniform Sales Act, now repealed. Duplex Manuf. Co. v. Atlas Leasing Corp. ---------- 294
13. Purchaser of personal property, under implied warranty, has reasonable time to test same to ascertain whether or not it is as warranted, and ordinarily this would be question for jury. Duplex Manuf. Co. v. Atlas Leasing Corp. ---------- 294
14. Situations where silence and inaction of offeree who fails to reply to offer constitute acceptance stated. David City Hospital v. Gilmore ---------- 342
15. Memorandum required by statute of frauds must contain essential terms of contract. Heine v. Fleischer ---------- 379
16. Time for performance is not ordinarily essential contract term because law implies that it shall take place within reasonable time. Heine v. Fleischer 379
17. Provision concerning time for delivery of possession in oral contract for sale of land is unen-

forceable unless it is included in memorandum. Heine v. Fleischer ---------- 379
18. Payment of entire consideration of oral contract for purchase of real estate is not alone sufficient part performance to prevent application of statute of frauds. Heine v. Fleischer ---------- 379
19. Previous case regarding performance of real estate contracts overruled to extent it conflicts. Heine v. Fleischer ---------- 379
20. Where sales contract provides for usurious interest on part of purchase price and for legal interest on another part of purchase price represented by note, illegal interest charged and paid may be offset against sums due on note. Agri-Tek Supply Co. v. Gaeth ---------- 423
21. In action for breach of contract plaintiff must allege facts showing promise and breach thereof as basis for recovery. Pinkerton v. Leonhardt ---------- 430
22. Where there is contract to sell goods by description, there is implied warranty under statute existing in 1961 that goods shall correspond with description. Western Plastics Corp. v. Westinghouse Electric Corp. 498
23. Teacher whose contract automatically renewed under provisions of cited statute must file written notice of acceptance with secretary of board within 15 days after April 15. Balka v. School Dist. No. 53-J ---- 706
24. To obtain reformation of written instrument on ground of mistake, mistake must be mutual; to grant such relief, equity insists that reformation be consistent with complete mutual understanding of essential terms of bargain. Ready Sand & Gravel Co. v. Cornett ---------- 726
25. To warrant reformation of written instrument in any material respect, evidence must be clear, convincing, and satisfactory; and, until overcome by such proof, terms of instrument must stand as evidencing intention of parties. Ready Sand & Gravel Co. v. Cornett 726
26. Where in purchaser's suit purchaser demands compliance with contract of sale of real estate where there is failure of title as to portion of land or quantity of estate, court may require vendor to give best title he can and order amount abated from purchase price for deficiency of title or quantity of estate. Ready Sand & Gravel Co. v. Cornett 726
27. Measure of abatement should be such portion of price as relative value of land lost bears to purchase price of whole tract. Ready Sand & Gravel

Co. v. Cornett ---------- 726
28. Where grantor conveys land in consideration of agreement of grantee to support, maintain, and care for grantor during lifetime and grantee neglects or refuses to comply with contract, deed may be set aside and title quieted in grantor. Hansen v. Goins 765
29. To come within ambit of rule regarding conveyances in consideration of support, care, and maintenance agreement, plaintiff has burden of proof to establish case by preponderance of evidence. Hansen v. Goins ---------- 765
30. Two essential issues involved in burden of proof in action regarding conveyance in consideration of support, care, and maintenance agreement stated. Hansen v. Goins ---------- 765
31. Under Uniform Commercial Code, after-acquired property clause in security agreement creates valid security interest in crops which are planted and become such within one year after security agreement executed, where rights in crops are acquired by debtor in ordinary course of business. Overland Nat. Bank v. Aurora Coop. Elevator Co. ---------- 843
32. Provision in security agreement granting security interest in proceeds of collateral, as well as in collateral, should be interpreted to mean only that should sale, exchange, or other disposition occur, proceeds resulting also would be covered by security agreement. Overland Nat. Bank v. Aurora Coop. Elevator Co. ---------- 843
33. Violation by public school teacher of contract to teach, without just cause, proper ground for suspension of teacher's certificate. Henderson v. School Dist. of Scottsbluff ---------- 858
34. Insurance policy is contract which requires offer and acceptance to be effective. Siewerdsen v. United States F. & G. Co. ---------- 870
35. Custom to renew does not bind insurer unless also binding upon insured; must be contract to renew as distinguished from mere custom. Siewerdsen v. United States F. & G. Co. ---------- 870
36. Where tenant actually abandoned premises, landlord entitled to reenter and take charge and possession; even where acts too hastily, but in good faith and under circumstances justifying belief that premises have been abandoned, guilty only of technical violation of tenant's contractual rights under lease. Mathiesen v. Bloomfield ---------- 873

7. Question of whether lease has been abandoned so as to confer right of reentry on landlord one of fact to be determined from facts and circumstances of case and intentions of parties. Mathiesen v. Bloomfield ---------- 873

**Conversion.**

In action for conversion plaintiff must allege facts showing right to immediate possession of property at time of conversion. Pinkerton v. Leonhardt 430

**Corporations.**

1. Officer or director of a seller who knew, or in exercise of reasonable care should have known, of facts by reason of which civil liability existed, may be individually liable with seller to a purchaser of securities under provisions of Blue Sky Law. Huryta v. White ---------- 24
2. Statute gives foreign corporation obtaining certificate of authority same standing in eyes of law as domestic corporation except where specifically prohibited by law. Schreiner v. Irby Constr. Co. 222
3. When foreign corporation has domesticated or has obtained certificate of authority to do business, it is not subject to waiver of bond provisions of statute and bond is required in any attachment proceeding involving it. Schreiner v. Irby Constr. Co. ---- 222

**Costs.**

1. Cited section designed to permit condemnee to recover expenses of litigation in event of nonmeritorious appeal by condemner to end that he be fully compensated for loss of his property, and to discourage nonmeritorious appeals. Keller v. State -- 853
2. Attorneys' fees allowed and taxed as costs; costs as general rule given to prevailing party. Keller v. State ---------- 853

**Counties.**

County must be sued in name designated by statute. Jameson v. Plischke ---------- 97

**Courts.**

1. When sentence imposed by district court within statutory limits it will not be disturbed on appeal in absence of abuse of discretion. State v. Stock -- 29
State v. Agostine ---------- 158

State v. Hake ---------- 381
State v. Curry ---------- 682
State v. Strong ---------- 690

2. Sentencing judge has wide discretion as to sources and types of information used in determining sentence to be imposed. State v. Rapp ---------- 156
3. Sentencing judge may properly consider reports of probation officers, police reports, affidavits, and other relevant information including his own observations of defendant. State v. Rapp ---------- 156
4. Due process clauses of state and federal Constitutions do not require that person convicted after fair trial be confronted with and permitted to cross-examine witnesses as to his prior criminal record considered by judge in determining sentence to impose pursuant to wide discretion vested in him under law. State v. Rapp ---------- 156
5. Proper method of presenting case to jury is clear and concise statement by court of those issues which find support in evidence, and not by substantially copying pleadings of parties. Kresha Constr. Co., Inc. v. Kresha ---------- 188
6. Instructions of court must be considered in toto and if so considered they cover issues raised by pleadings and supported by evidence, they are adequate. Kresha Constr. Co., Inc. v. Kresha ---------- 188
7. It is duty of trial court to control propounding of hypothetical questions to expert witnesses and to regulate form, length, and content of questions. In so doing court exercises judicial discretion which ought not be overridden unless it very clearly appears to have been wrongly exercised. Kresha Constr. Co., Inc. v. Kresha ---------- 188
8. Supervision and review of testamentary trustee's acts is jurisdiction concurrently lodged in district and county courts. Love v. Fauquet ---------- 250
9. Concurrent and original jurisdiction of district court to supervise and control execution and administration of testamentary trusts ordinarily limited to unusual situations where there is failure of proper exercise of concurrent jurisdiction of county court in which ordinarily administration of trust can be coordinated and given continual scrutiny and supervision necessary, Love v. Fauquet ---------- 250
10. Purpose of order nunc pro tunc stated. State v. Coffen ---------- 254
11. Well-settled principle of equity jurisprudence that,

where court of equity has obtained jurisdiction of cause for any purpose, it will retain it for all and will proceed to final determination of case, adjudicate all matters at issue, and thus avoid unnecessary litigation. Muff v. Mahloch Farms, Co., Inc. ------ 286
Ready Sand & Gravel Co. v. Cornett ---------- 726

12. Equity court in making final determination of case, may properly limit decree to issues actually determined, by findings of fact or otherwise, and thereby limit rule of res judicata to issues actually tried without binding parties to issues not litigated or intended to be litigated. Muff v. Mahloch Farms Co., Inc. ---------- 286
13. Where no obscurity or ambiguity in statute and Legislature has spoken in plain and ordinary language, it is not for Supreme Court to interpret that which needs no interpretation, it is court's duty to declare what has been plainly written into law. Sadler v. Sadler ---------- 318
14. In reviewing criminal sentence in Supreme Court, burden of proof on defendant to show by record abuse of discretion by trial court; if abuse of discretion established, and sentence imposed found to be excessive, Supreme Court may reduce sentence of accused as in its opinion may be warranted by evidence. State v. Curry ---------- 682
15. Moral turpitude involved in commission of criminal offense proper element to be considered in fixing sentence. State v. Strong ---------- 690

**Covenants.**

1. Lawful covenants restricting use of land and binding upon successors in title constitute interest in land, and property in constitutional sense. Horst v. Housing Authority ---------- 215
2. Provision in lease granting lessee option to purchase property during term is supported by consideration paid for lease and cannot without consent of lessee be revoked during period granted for its exercise. Jamson v. Poulos ---------- 480
3. Where lease of real property contains agreement giving lessee privilege of purchasing property covered by lease which is not specifically restricted to lessee, such covenant runs with land and option to purchase passes upon assignment of lease to assignee thereof. Jamson v. Poulos ---------- 480
4. Covenants in lease against assignment or under-

letting are not favorably regarded by courts and are liberally construed in favor of lessee. Jamson v. Poulos ---------- 480

5. Option to purchase real estate contained in lease agreement not terminated by death of lessee during term and before exercise of option, in absence of express limitation. Jamson v. Poulos ---------- 480

6. Where rights of assignee of lease have been recognized by lessor notwithstanding prohibition against assignment of lease, and no forfeiture of lease for lessee's breach of covenant or condition has been declared during term thereof, assignee may exercise option given lessee by lease to purchase leased property. Jamson v. Poulos ---------- 480

7. Covenants which require parties to arbitrate any future dispute and to be bound by result, thus precluding them from presenting controversy in court, will not be enforced. Heisner v. Jones ---- 602

**Criminal Law.**

1. When sentence imposed by district court within statutory limits it will not be disturbed on appeal in absence of abuse of discretion. State v. Stock ---- 29
State v. Agostine ---------- 158
State v. Hake ---------- 381
State v. Curry ---------- 682
State v. Strong ---------- 690
State v. Chaney ---------- 734

2. Unlawful entry may be shown by circumstantial evidence in burglary prosecution. State v. McIntire 50

3. Confession given to police officer in patrol car while defendant was being questioned concerning unsolved crime of statutory rape was not product of process of interrogation aimed at eliciting incriminating statements from defendant and was admissible, despite lack of warning to defendant of his right to remain silent where police officer merely asked defendant to explain any relationship he may have had with prosecutrix. State v. Caha -- 70

4. In rape prosecution where no request for such an instruction is made, it is not error for trial court to fail to instruct on lesser included offenses. State v. Caha ---------- 70

5. Argument by prosecuting attorney based on evidence and inferences drawn therefrom does not ordinarily constitute misconduct. State v. Botts ---------- 78

6. When arrest made without warrant, it must be based

upon probable cause which exists from facts and circumstances within officers' knowledge or of which they had reasonably trustworthy information which was sufficient to warrant men of reasonable caution in belief that offense has been, or is, being committed. State v. Goings ---------- 81

7. Search and seizure incident to lawful arrest not violative of Fourth Amendment. State v. Goings -- 81
State v. Agnew ---------- 700

8. Existence of probable cause determined by practical and not by technical standard. State v. Goings -- 81

9. Information given by informer to officer leading to search and subsequent arrest of defendant for violation of carrying of concealed weapons law, even though hearsay, and even though not legally competent evidence in criminal trial, can be considered in determining whether officer had probable cause and reasonable grounds to search and subsequently arrest defendant without warrant. State v. Goings 81

10. In rape prosecution, if prosecutrix testifies to facts constituting crime and accused unequivocally denies commission of offense, testimony of prosecutrix must be corroborated on material points by other evidence to sustain conviction. State v. Gero ------ 107

11. In rape prosecution, not essential that prosecutrix be corroborated by testimony of other witnesses as to particular act constituting offense, but is sufficient if corroborated as to material facts and circumstances which tend to support testimony and from which, together with testimony as to principal fact, inference of guilt may be drawn. State v. Gero ---------- 107

12. In rape prosecution, fact that evidence does not show prosecutrix made complaint to others within reasonable time does not affect validity of conviction where ample corroborating evidence otherwise shown by record. State v. Gero ---------- 107

13. Credibility of witnesses and weight of evidence in criminal case are for jury and verdict will not be set aside if evidence sustains some rational theory of guilt. State v. Lewis ---------- 111

14. Evidence which does not tend to impeach witness on a material point and which is not substantive proof of any fact relevant to issues is properly excluded in trial of criminal case. State v. Lewis 111

15. Not necessary that penal statute be so written as to be beyond mere possibility of more than one

construction. State v. Lewis ---------- 111
16. Although penal statute is to be strictly construed, it should be given sensible construction and general terms therein should be limited in their construction and application so as not to lead to injustice, oppression, or absurd consequence. State v. Lewis 111
17. Duty of Supreme Court to give penal statute interpretation which meets constitutional requirements if it can reasonably be done. State v. Lewis ---- 111
18. Photographs taken of defendant without permission or consent do not infringe constitutional prohibition of Article I, section 12, Constitution of Nebraska, against compelling defendant to give evidence against himself. State v. Blackwell ---------- 121
19. Photograph proved to be true representation of person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for witness to give verbal description. State v. Blackwell ---------- 121
20. Fact that photograph might present grusome spectacle does not prohibit its admission. State v. Blackwell ---------- 121
21. Sentencing judge has wide discretion as to sources and types of information used in determining sentence to be imposed. State v. Rapp ---------- 156
22. Sentencing judge may properly consider reports of probation officers, police reports, affidavits, and other relevant information including his own observations of defendant. State v. Rapp ---------- 156
23. Due process clauses of state and federal Constitutions do not require that person convicted after fair trial be confronted with and permitted to cross-examine witnesses as to his prior criminal record considered by judge in determining sentence to impose pursuant to wide discretion vested in him under law. State v. Rapp ---------- 156
24. Probable cause for arrest in Nebraska without warrant exists when it appears that felony has been committed and there are reasonable grounds to believe that person involved is guilty of offense. State v. Harding ---------- 159
25. Statute which permits peace officer having probable cause to believe that vehicle is being used for unlawful transportation of narcotic drugs to make search with or without warrant incorporates the same standard of probable cause for police action without warrant in crimes relating to narcotics as

governs police action in other criminal areas. State v. Harding ---------- 159
26. Not necessary that actual formal arrest occur before search is undertaken as long as probable cause for arrest does exist prior to search. State v. Harding 159
27. Not significant in determining probable cause for warrantless search, whether search preceded or followed formal arrest. State v. Harding -------- 159
28. Controlling factor in warrantless search is whether officer had reasonable grounds before search to make arrest. State v. Harding ---------- 159
29. In determining whether officer acted with probable cause, essential test is whether facts available to officer at moment of search or of seizure would warrant man of reasonable caution in belief that action taken is appropriate. State v. Harding ---- 159
30. Adequate foundation for admissibility of written document purported to be written confession of defendant may not be made unless there is proof of signature or acknowledgment of purported confessor or unless person or officer who took notes and transcribed them testifies as to their accuracy. State v. Harding. ---------- 159
31. Generally purported written confession is inadmissible unless defendant is accorded constitutional right of confrontation and right to cross-examine stenographer or person who took and transcribed notes of oral statements and admissions which furnished basis for purported written confession. State v. Harding ---------- 159
32. Habitual Criminal Law does not violate constitutional guarantees of due process and equal protection. State v. Losieau ---------- 178
33. Habitual Criminal Law does not set out distinct crime, but provides that repetition of criminal conduct aggravates guilt and justifies heavier penalties. Fact that defendant has been guilty of second felony does not make him guilty under Habitual Criminal Law of offense for which he may be separately sentenced, but increases punishment for last felony. Increased punishment for latest felony is court determination and not one for jury. State v. Losieau ---------- 178
34. "Habitual criminality" under statute is a state rather than crime, and warrants greater punishment because of past conduct. State v. Losieau 178
35. Trial court has broad discretion in ruling upon

discovery motion in criminal case. State v. Reichel 194
36. Discovery motion in criminal case should be granted where required by interests of justice, but burden is on defendant to show why motion should be granted. State v. Reichel ---------- 194
37. Evidence sufficient to sustain verdict of guilt in criminal prosecution only when jury could properly find guilt beyond reasonable doubt. State v. Houp ---------- 206
38. State may develop workable rules governing searches and seizures to meet practical demands of effective criminal investigation and law enforcement, provided that rules do not violate constitutional processes of unreasonable searches and seizures. State v. Howard ---------- 274
39. When performance of duty requires officer to enter upon private property, conduct, otherwise trespass, justifiable. State v. Howard ---------- 274
40. Protection of Fourth Amendment is restriction on governmental action only. State v. Howard ------ 274
41. Search implies some exploratory investigation, not search to observe that which is open and patent either in daylight or artificial light. State v. Howard 274
42. Firemen entering premises in response to call to duty do so rightfully under license of law. State v. Howard ---------- 274
43. Denial of continuance where defendant alleged he could have not have fair and impartial trial before regular panel of jurors, because jury selected therefrom had previously found companion guilty of another offense, was not prejudicially erroneous where record showed each juror selected for second trial was duly qualified to act. State v. Harris -- 301
44. Defendant who fails to challenge jurors for disqualification and passes jurors for cause waives right to object to selection and cannot later object after receiving unfavorable verdict. State v. Harris ---------- 301
45. Verdict of jury rendered in criminal prosecution will not be reversed in absence of showing of prejudice to a substantial right of defendant. State v. Harris ---------- 301
State v. Sharp ---------- 411
46. In on-the-scene investigations law enforcement officers may interview any person not in custody and not subject to coercion for purpose of determining whether crime has been committed and who com-

mitted it; such interview would not be violation of one's constitutional rights. State v. Dubany ---- 337
47. Waiver of right to counsel must be made competently and intelligently. State v. McGhee -------- 352
State v. Beasley ---------- 649
48. Reasonable search not to be determined by any fixed formula, but is to be resolved according to facts of particular case. State v. Smith ---------- 363
49. State and federal Constitutions prohibit only unreasonable searches and seizures. State v. Smith 363
50. Under cited statute, where motion for suppression of evidence filed more than 10 days prior to commencement of trial and overruled by court, it is not prejudicial error for trial court at trial to reconsider motion; waiver of objections to evidence on ground that it was obtained by unreasonable search occurs only when no objection made more than 10 days before trial where exceptions thereto have no application. State v. Smith ---------- 363
51. When witness gives testimony which as to material facts is in such obvious and irreconcilable conflict that if part of it be true rest must be false, it ordinarily may not be accepted as basis of judicial conclusion. State v. Bundy ---------- 406
52. Reasonableness of search or seizure in first instance is substantive determination to be made by trial court from facts and circumstances of case and in light of fundamental criteria laid down by Fourth Amendment to Constitution of United States and opinions of United States Supreme Court. State v. Sharp ---------- 411
53. Competent for prosecution to put in evidence all relevant facts and circumstances which tend to establish any of constituent elements of crime with which accused is charged or which justify search and seizure without warrant even though such facts and circumstances may prove or tend to prove that defendant committed other crimes. State v. Sharp -- 411
54. Error in allocution may be harmless. State v. Brockman ---------- 435
55. Post Conviction Act specifically authorizes trial court to examine files and records to see if prisoner entitled to relief. State v. Pilgrim ---------- 457
56. If files and records show to satisfaction of district court that prisoner entitled to no relief under Post Conviction Act, court may overrule motion to vacate sentence without hearing. State v. Pilgrim ------ 457

57. Where justiciable issue of law or fact presented, indigent defendant entitled to appointment of counsel. State v. Pilgrim ---------- 457
58. Not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence in determining sufficiency of evidence to sustain conviction in criminal proceeding. State v. Howard ---------- 461
State v. Fields ---------- 565
59. Within discretion of trial court to permit introduction of rebuttal evidence that is not strictly rebutting. State v. Howard ---------- 461
60. Defendant in criminal case who becomes witness subjects himself to rules of law applicable to other witnesses. State v. Howard ---------- 461
61. Defendant in criminal proceeding who has waived privilege against self-incrimination by testifying in own behalf may be required to repeat certain statements, put on jacket, or perform other similar acts as part of cross-examination. State v. Howard 461
62. Testimony of witness at previous trial admissible if witness is unavailable. State v. Howard ---------- 461
63. Within discretion of trial court to determine whether unavailability of witness has been shown. State v. Howard ---------- 461
64. Unavailability of witness due to illness may be shown by affidavit in criminal proceeding. State v. Howard ---------- 461
65. Asking improper questions of witness to which objections sustained by court do not constitute prejudicial error in absence of showing that defendant was thereby deprived of fair and impartial trial. State v. Country ---------- 493
66. Right of speedy trial is necessarily relative; is consistent with delays and depends upon circumstances; secures rights to defendant; but does not preclude rights of public justice. State v. Ellis ---------- 523
67. Unexplained delay of 43 days between arrest and preliminary hearing, standing alone, does not demonstrate violation of constitutional guarantee of speedy trial, in absence of showing of prejudice. State v. Ellis ---------- 523
68. Ordinarily, necessary elements required to be alleged in charging crime of obtaining property by false pretenses include reliance of defrauded party upon such false pretenses and obtaining of something of value by party making false representations.

State v. Banse ---------- 534
69. Essential elements of offense of securing money by false pretenses stated. State v. Banse ---------- 534
70. To charge statutory offense, information or complaint must contain distinct allegation of each essential element of crime as defined by law creating it, either in language of statute or its equivalent. State v. Banse ---------- 534
71. In criminal case, Supreme Court will not interfere with verdict of guilty based upon evidence unless so lacking in probative force that it can say as matter of law that evidence is insufficient to support finding of guilt beyond reasonable doubt. State v. Goodwin ---------- 537
State v. Anderson ---------- 868
72. Loaded pistol locked in glove compartment is concealed on or about person of driver. State v. Goodwin ---------- 537
73. Words "concealed on or about person" defined. State v. Goodwin ---------- 537
74. Weapon is concealed when it is hidden from ordinary observation and is readily accessible on person or in motor vehicle operated by defendant. State v. Goodwin ---------- 537
75. To be within exception provided by statute, one must be engaged in lawful business, calling, or employment, and circumstances must be such as to justify prudent person in carrying weapon for defense of person, property, or family. State v. Goodwin ---------- 537
76. Information may allege crime in language of statute. State v. Fields ---------- 565
77. Person who has employed attorney may waive right to have attorney present during interview with county attorney, and statement made voluntarily under such circumstances admissible in evidence. State v. Fields ---------- 565
78. That county attorney has brought civil action in behalf of county against defendant charged with embezzlement not admissible as showing interest in other litigation pending against defendant. State v. Fields ---------- 565
79. Ruling excluding evidence not prejudicial if fact is established by other evidence. State v. Fields -- 565
80. Mentally incompetent accused has no right to conduct own defense without assistance of counsel. State v. Beasley ---------- 649

81. In absence of prejudice or miscarriage of justice, complaint regarding admission of evidence ineffective. State v. Schumacher ---------- 653
82. Testimony by witness of similarities between tire tracks, and between such tracks and tire, comprise statements of fact, not of opinion, and are not necessarily subject for expert testimony. State v. Schumacher ---------- 653
83. Where requested instruction substantially covered by another instruction, not error to refuse request. State v. Schumacher ---------- 653
84. Application for continuance addressed to sound discretion of trial court and ruling thereon will not be disturbed unless it appears that rights of defendant were prejudiced thereby. State v. Schumacher 653
85. In reviewing criminal sentence in Supreme Court, burden of proof on defendant to show by record abuse of discretion by trial court; if abuse of discretion established, and sentence imposed found to be excessive, Supreme Court may reduce sentence of accused as in its opinion may be warranted by evidence. State v. Curry ---------- 682
86. Provision in sentence in effect directing that jail sentence authorized by cited statute shall be served in Nebraska Penal and Correctional Complex unauthorized and void; the transfer of prisoners sentenced to county jail is governed by statute. State v. Curry ---------- 682
87. Moral turpitude involved in commission of criminal offense proper element to be considered in fixing sentence. State v. Strong ---------- 690
88. All defects that may be excepted to by motion to quash are taken to be waived by defendant pleading general issue. State v. Fiegl ---------- 704
89. Party in selection of jury ordinarily has no right to examine juror out of presence of all other jurors. State v. Fiegl ---------- 704
90. Warrantless search of defendant's automobile and seizure of materials found therein are reasonable when defendant has consented freely and intelligently. State v. Fiegl ---------- 704
91. Order in which proof introduced is to large extent within discretion of trial court and ruling in that regard is no cause for reversal where rights of defendant are not shown to have been prejudiced. State v. Chaney ---------- 734
92. It is only where there is total failure of compe-

tent proof in criminal case to support material allegation in information, or where testimony adduced is of so weak or doubtful character that conviction based thereon could not be sustained, that trial court will be justified in directing verdict of not guilty. State v. Chaney ---------- 734

93. Plea of guilty or nolo contendere, made with full knowledge of charge and consequences of plea, will not be permitted to be withdrawn in absence of fraud, mistake, or other improper means used in its procurement. State v. Eutzy ---------- 755

94. Post conviction relief should be denied where record does not show infringement of constitutional rights sufficient to invalidate judgment. State v. Sheldon 852

95. Where questions raised in second motion to vacate and set aside judgment and sentence were raised and determined in prior evidentiary hearing under Post Conviction Act, court not required to entertain such motion. State v. Cole ---------- 865

**Crops.**

Under Uniform Commercial Code, after-acquired property clause in security agreement creates valid security interest in crops which are planted and become such within one year after security agreement executed, where rights in crops are acquired by debtor in ordinary course of business. Overland Nat. Bank v. Aurora Coop. Elevator Co. ---------- 843

**Damages.**

1. Property owner whose property does not abut upon portion of street to be vacated has no right of action to restrain vacation unless he suffers special or peculiar damage differing in kind from that of general public. Feldman v. City of Omaha -------- 226

2. In injunction suit, failure to show damages, presently or in future, operates to defeat application for relief, and court of equity will not grant relief unless it be shown that injury has been or will be suffered by party seeking relief. Muff v. Mahloch Farms Co., Inc. ---------- 286

3. Particular need of seller for money due is not proper element of damage. Duplex Manuf. Co. v. Atlas Leasing Corp. ---------- 294

4. Elements to be proven in action for damages for false representation stated. Swanson Petroleum Corp. v. Cumberland ---------- 323

5. Where unitization agreement approved by Nebraska Oil and Gas Conservation Commission, operator refusing to join project limited in any recovery of damages to amount he can prove by preponderance of evidence he could have obtained through his own efforts if he had drilled, developed, and operated his property outside unitization project. Baumgartner v. Gulf Oil Corp. ---------- 384
6. At common law, owner of livestock liable for any damage done by it while trespassing upon lands of others, whether such lands were cultivated or uncultivated. Fiene v. Robertson ---------- 668
7. Under existing statutes liability for trespass of animals limited to trespass upon cultivated lands; to render owner liable for trespass upon uncultivated lands, willful trespass must be alleged and proven. Fiene v. Robertson ---------- 668
8. Failure of damaged party to maintain division fence does not relieve owner of domestic animals from liability for damage resulting from trespass by such animals upon cultivated lands. Fiene v. Robertson 668
9. Landlord may not unreasonably refuse to accept qualified and suitable substitute tenant for purpose of mitigating damages recoverable from tenant who has abandoned leased premises prior to expiration of term. Berntein v. Seglin ---------- 673
10. In action by landlord to recover rental from tenant who has abandoned leased premises prior to expiration of term, burden is on tenant to prove that landlord unreasonably failed to relet premises and mitigate damages. Bernstein v. Seglin ---------- 673
11. Amount of damages sustained in eminent domain action peculiarly of local nature and ordinarily to be determined by jury, and Supreme Court will not ordinarily interfere with verdict if based upon admissible testimony. Jensen v. State ---------- 802
12. Verdict of jury will not be set aside unless shown to be clearly wrong and in determining this issue in condemnation case verdict may not be set aside as excessive except where so clearly exorbitant as to indicate result of passion, prejudice, or mistake, or that it is clear that jury disregarded evidence or controlling rules of law. Jensen v. State ------ 802
13. In view of history of cited statute, and apparent legislative intention, term "final judgment" refers only to final amount recovered as damages, exclusive of interest. Keller v. State ---------- 853

**Debts and Debtors.**

Purpose of Bankruptcy Act is to release honest debtors from burden of debts and is very liberal towards bankrupt as to discharge and act insofar as it relates to discharge is to be given strict construction in favor of bankrupt. Swanson Petroleum Corp. v. Cumberland ---------- 323

**Dedication.**

1. Filing of written consent is necessary to confer jurisdiction upon county board to establish consent road. County of Banner v. Young ---------- 546
2. To determine whether or not highway has been established, court required to examine proceedings had to determine if jurisdictional requirements necessary for that purpose have been met; if not met, right does not exist and lapse of time will not supply defect. County of Banner v. Young ------ 546
3. Where acts of owner of land relied on to establish dedication of land for purpose of public road, acceptance of same by public must be proven. County of Banner v. Young ---------- 546
4. To constitute valid dedication of private property for public highway, must clearly appear that owner intended to dedicate land for highway, and that public by use or otherwise accepted land for purpose. County of Banner v. Young ---------- 546
5. In consent dedication of private property for public highway, necessary to prove acceptance of land for highway purposes by proving that road was opened or used; until opened or used by public, it is not finally established. County of Banner v. Young ---------- 546

**Deeds.**

1. Where grantor conveys land in consideration of agreement of grantee to support, maintain, and care for grantor during lifetime and grantee neglects or refuses to comply with contract, deed may be set aside and title quieted in grantor. Hansen v. Goins 765
2. To come within ambit of rule regarding conveyances in consideration of support, care, and maintenance agreement, plaintiff has burden of proof to establish case by preponderance of evidence. Hansen v. Goins 765
3. Two essential issues involved in burden of proof in action regarding conveyance in consideration of support, care, and maintenance agreement stated.

Hansen v. Goins ---------- 765

**Demurrer.**

1. Statute relating to right of party to amend after sustaining of demurrer does not declare absolute right of amendment. Evans v. Metropolitan Utilities Dist. ---------- 172
2. Right to amend petition after sustaining of demurrer rests within sound discretion of district court. Evans v. Metropolitan Utilities Dist. ----- 172

**Depositions.**

1. Statutory requirement that deposition be signed by witness is not mandatory provision. Rockland Chemical Co., Inc. v. F. & F. Manufacturing, Inc. 235
2. Statute providing procedure to be followed where witness does not sign deposition in event of nonwaiver, must be substantially complied with in order to warrant admission of deposition over proper objection on motion to suppress. Rockland Chemical Co., Inc. v. F. & F. Manufacturing, Inc. -------- 235

**Descent and Distribution.**

1. Adopted child is, in legal sense, child both of natural and of adoptive parent, and is not, because of adoption, deprived of right of inheritance from natural parents, unless statute expressly so provides. Wulf v. Ibsen ---------- 314
2. Statute which includes as principal or dominant feature establishing child as an heir of adoptive parent, without making reference to inheritance from natural parents, will not be construed as depriving child of that inheritance. Wulf v. Ibsen -- 314
3. If married man by will disposes of all property, real and personal, to others, and gives nothing to wife, she will be entitled to take distributive share given her by statute as though he had died intestate. Sadler v. Sadler ---------- 318
4. Cited statute undertakes to give widow right of election, but gives her such right only in case provision is made for her in will, right of election is applicable only when widow prefers property given her by law to that given her by will. Sadler v. Sadler ---------- 318
5. Under cited statute, wife has interest in real estate of her husband which he cannot alienate without her consent. Sadler v. Sadler ---------- 318

**Divorce.**

1. Under statute, allowance of attorney's fees in divorce action is discretionary, but in absence of unusual circumstances, ordinarily allowed as matter of course to wife. Trautman v. Trautman ------ 202
2. In determining reasonable visitation rights in divorce action, court should consider rights of parents in light of paramount needs of child for stability and continuity in home and school environment. Trautman v. Trautman ---------- 202
3. Conditions constituting extreme cruelty stated. Stevens v. Stevens ---------- 370
4. Earning capacity of husband is element to be considered in allowance of alimony. Stevens v. Stevens 370
5. Appeal from judgment modifying decree of divorce by authority of statute considered and decided by Supreme Court de novo upon record made in trial court. Fogel v. Fogel ---------- 425
6. While discretion of trial court with respect to awarding or changing support of minor children is subject to review, determination of court will not ordinarily be disturbed unless there is clear abuse of discretion or it is clearly against weight of evidence. Fogel v. Fogel ---------- 425
7. Divorce decree does not freeze father in his employment; may in good faith make occupational change even though change may reduce ability to meet financial obligation to children. Fogel v. Fogel 425
8. Although voluntary conveyance of real property from husband to wife without consideration except love and affection will vest her with legal title, in action for dissolution of marriage court will inquire as to source of accumulated property and in exercise of discretion will divide property between parties awarding to husband equitable portion thereof. Fotinos v. Fotinos ---------- 486
9. Elements to be considered in determining question of alimony or division of property as between parties stated. Fotinos v. Fotinos ---------- 486
10. Standard stated for determining a reasonable attorney's fee. Fotinos v. Fotinos ---------- 486
11. Assignments of error relied upon for reversal and intended to be urged in brief shall be separately numbered and paragraphed, bearing in mind that consideration of cause will be limited to errors assigned and discussed. Parkhurst v. Parkhurst -- 687
12. Sufficiency of corroboration in divorce case tested

upon particular facts and circumstances in each case. Parkhurst v. Parkhurst ---------- 687
Bauer v. Bauer ---------- 777

13. Equity actions appealed to Supreme Court triable de novo, subject to rule that when credible evidence on material questions of fact is in irreconcilable conflict Supreme Court will, in determining weight of evidence, consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Parkhurst v. Parkhurst ---------- 687
14. Modification of child support judgment because of change in parties' circumstances ordinarily should rest only upon facts which have occurred since rendition of judgment; res judicata applies. Schlothauer v. Schlothauer ---------- 750
15. Proceeding to modify judgment for child support not retrial of original case or reveiw of equities of original decree. Schlothauer v. Schlothauer ------ 750
16. Original decree fixing custody of minor children will not be modified unless there has been change in circumstances indicating that person having custody is unfit for purpose or that best interests of child require such action. Packett v. Packett ---- 769
17. Misconduct on part of plaintiff in action for divorce, not amounting to statutory ground for divorce, will not sustain denial of divorce on grounds of recrimination. Bauer v. Bauer ---------- 777
18. Ordinarily custody of children of tender years should be awarded to mother unless affirmatively demonstrated that she is unsuitable, unfit, or unable to provide good home. Bauer v. Bauer ---------- 777
19. Ordinarily custody of children of tender years in divorce case should be kept within jurisdiction of court having control over them, unless best interests of children demand otherwise. Bauer v. Bauer -- 777
20. Child's preferential statement as to custody, while deserving to be considered, should be closely scrutinized, is not controlling in determination of custody. Bauer v. Bauer ---------- 777
21. During pendency of appeal in Supreme Court, district court has power to enter orders for temporary alimony and support. Rickus v. Rickus ---------- 833
22. In divorce action district court has power to modify or terminate temporary support or alimony orders during pendency of action. Rickus v. Rickus 833

**Drugs, Narcotics, and Poisons.**

Statute which permits peace officer having probable cause to believe that vehicle is being used for unlawful transportation of narcotic drugs to make search with or without warrant incorporates the same standard of probable cause for police action without warrant in crimes relating to narcotics as governs police action in other criminal areas. State v. Harding ---------- 159

**Electricity.**

1. Public policy of state regarding electric service stated. Cornhusker P. P. Dist. v. Loup River P. P. Dist. ---------- 789
2. Statutory guidelines to be followed by Nebraska Power Review Board stated; in absence of agreement or failure to meet requirements of guidelines, service area supplier protected against encroachments and invasions of service rights. Cornhusker P. P. Dist. v. Loup River P. P. Dist. ---------- 789
3. Supplier of electricity except by agreement may not offer electric service to additional ultimate users outside service area without applying to Nebraska Power Review Board and receiving approval after notice and hearing; such approval cannot be validly granted unless shown that supplier in whose service area customer located cannot or will not furnish adequate electric service or that provision by such supplier of service area would involve wasteful and unwarranted duplication of facilities. Cornhusker P. P. Dist. v. Loup River P. P. Dist. ---------- 789
4. Where there is no evidence sufficient to sustain finding that supplier in service area has failed or is unable to comply with duties and responsibilities imposed on such supplier, order of Nebraska Power Review Board permitting others to supply customers is arbitrary and unreasonable, and therefore void. Cornhusker P. P. Dist. v. Loup River P. P. Dist. -- 789
5. Where it appears that Nebraska Power Review Board has complied with controlling statutes in exercising powers, and evidence is sufficient to sustain findings of fact, Supreme Court without authority to substitute its judgment for that of board, and action of board will be sustained; but where evidence on controlling facts does not support action of board, its order is arbitrary and unreasonable. Cornhusker P. P. Dist. v. Loup River P. P. Dist. ---------- 789

**Eminent Domain.**

1. Where taking of land by eminent domain permits use violative of restrictions and extinguishes such interest, there is taking of property of owners of land for whose benefit restrictions were imposed, and such owner is entitled to compensation for damage to his property. Horst v. Housing Authority ---------- 215
2. Legislature has right to delegate power of eminent domain and to restrict or limit extent of its use. Duerfeldt v. State ---------- 242
3. Generally deemed sufficient if act authorizing eminent domain specifies purposes for which property may be acquired, provides for just compensation, and satisfies demands of due process. Duerfeldt v. State ---------- 242
4. In eminent domain action, evidence of comparable sales not inadmissible merely because secondary or hearsay. Anderson v. State ---------- 467
5. In eminent domain proceeding, wide discretion granted trial judge in determining admissibility of other sales; evidence should not be admitted where there is marked difference in situation of properties or unless judge satisfied that price paid was sufficiently voluntary to be reasonable index of value. Anderson v. State ---------- 467
6. Witness who testifies as expert on subject requiring special knowledge and skill is, in absence of special contract, entitled only to statutory fee. Anderson v. State ---------- 467
7. One who appraises real estate for another, for fee, commission, or other valuable consideration, is by statutory definition a real estate broker. Anderson v. State ---------- 467
8. Unlawful for any person to act as real estate broker unless properly licensed. Anderson v. State ------ 467
9. One not licensed as real estate broker may not be allowed expert witness' fee for testifying in regard to real estate values. Anderson v. State ---------- 467
10. Attorney's fees allowed in eminent domain action should not be fixed on basis of unnecessary multiplicity of counsel. Anderson v. State ---------- 467
11. Expert opinion evidence in condemnation case, as in all other cases, to be considered and weighed by triers of fact like any other testimony; is only advisory in nature and not binding upon jury or court. Jensen v. State ---------- 802
12. Weight and credibility of testimony of either lay or

expert witnesses in eminent domain action for jury. Jensen v. State ---------- 802
13. Amount of damages sustained in eminent domain action peculiarly of local nature and ordinarily to be determined by jury, and Supreme Court will not ordinarily interfere with verdict if based upon admissible testimony. Jensen v. State ---------- 802
14. Verdict of jury will not be set aside unless shown to be clearly wrong and in determining this issue in condemnation case verdict may not be set aside as excessive except where so clearly exorbitant as to indicate result of passion, prejudice, or mistake, or that it is clear that jury disregarded evidence or controlling rules of law. Jensen v. State -------- 802
15. Not necessary that qualified witness in condemnation case be familiar with every possible element that goes into determination of market values. Jensen v. State ---------- 802
16. Cited section designed to permit condemnee to recover expenses of litigation in event of nonmeritorious appeal by condemner to end that he be fully compensated for loss of his property, and to discourage nonmeritorious appeals. Keller v. State -- 853
17. In view of history of cited statute, and apparent legislative intention, term "final judgment" refers only to final amount recovered as damages, exclusive of interest. Keller v. State ---------- 853

**Equity.**

1. Well-settled principle of equity jurisprudence that, where court of equity has obtained jurisdiction of cause for any purpose, it will retain it for all and will proceed to final determination of case, adjudicate all matters at issue, and thus avoid unnecessary litigation. Muff v. Mahloch Farms Co., Inc. -- 286
Ready Sand & Gravel Co. v. Cornett ----------726
2. Equity court in making final determination of case, may properly limit decree to issues actually determined, by findings of fact or otherwise, and thereby limit rule of res judicata to issues actually tried without binding parties to issues not litigated or intended to be litigated. Muff v. Mahloch Farms Co., Inc. ---------- 286

**Estoppel.**

Estoppel cannot arise where all parties interested have equal knowledge of facts, or where party setting

up estoppel is chargeable with notice of facts, or is equally negligent or at fault. Trausch v. Knecht 134

**Evidence.**

1. In an equity case, when there is irreconcilable conflict in evidence, Supreme Court will consider fact that trial court observed witnesses and their manner of testfiying and accepted one version rather than other. Schroeder v. Oeltjen ---------- 8
   Parkhurst v. Parkhurst ---------- 687
2. In implied consent case, where there is irreconcilable conflict in evidence on a material issue, Supreme Court will consider fact that trial court observed witnesses and their manner of testifying and must have accepted one version rather than other. Pickard v. Director of Motor Vehicles ---------- 13
3. Status once proved to exist presumed to continue as long as is usual with things of that nature in absence of contrary evidence. Huryta v. White ---- 24
4. When parties have made written contract to which both have assented as complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for purpose of varying or contradicting the writing. Ely Constr. Co. v. S. & S. Corp. ---------- 59
   Transportation Equipment Rentals, Inc. v. Mauk -- 309
5. In interpreting written contract, meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings admissible to discover meaning which each party had reason to know would be given to words by other party. Ely Constr. Co. v. S & S Corp. ---------- 59
6. Written instrument is open to explanation by parol evidence when its terms are susceptible of two constructions or where language employed is vague or ambiguous. Ely Constr. Co. v. S & S Corp. ---- 59
7. Parol evidence generally admissible when offered for purpose of explaining and showing true nature of transaction between parties. Ely Constr. Co. v. S & S Corp. ---------- 59
8. Information given by informer to officer leading to search and subsequent arrest of defendant for violation of carrying of concealed weapons law, even though hearsay, and even though not legally competent evidence in criminal trial, can be considered in determining whether officer had probable cause and

reasonable grounds to search and subsequently arrest defendant without warrant. State v. Goings 81

9. In rape prosecution, if prosecutrix testifies to facts constituting crime and accused unequivocally denies commission of offense, testimony of prosecutrix must be corroborated on material points by other evidence to sustain conviction. State v. Gero ------ 107

10. In rape prosecution, not essential that prosecutrix be corroborated by testimony of other witnesses as to particular act constituting offense, but is sufficient if corroborated as to material facts and circumcumstances which tend to support testimony and from which, together with testimony as to principal fact, inference of guilt may be drawn. State v. Gero ---------- 107

11. In rape prosecution, fact that evidence does not show prosecutrix made complaint to others within reasonable time does not affect validity of conviction where ample corroborating evidence otherwise shown by record. State v. Gero ---------- 107

12. Evidence which does not tend to impeach witness on a material point and which is not substantive proof of any fact relevant to issues is properly excluded in trial of criminal case. State v. Lewis -- 111

13. Photographs taken of defendant without permission or consent do not infringe constitutional prohibition of Article I, section 12, Constitution of Nebraska, against compelling defendant to give evidence against himself. State v. Blackwell ---------- 121

14. Photograph proved to be true representation of person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for witness to give verbal description. State v. Blackwell ---------- 121

15. Upon proper foundation, photographs of victim in homicide case may be received to show nature or extent of wounds or injuries. State v. Blackwell 121

16. Fact that photograph might present gruesome spectacle does not prohibit its admission. State v. Blackwell ---------- 121

17. Where evidence is presented which could, if accepted by jury, give rise to application of sudden emergency rule, an instruction on rule is proper. Jones v. Peterson ---------- 141

18. Declarations of alleged agent are not admissible for purpose of establishing or enlarging his authority. J. R. Watkins Co. v. Wiley ---------- 144

19. Party alleging existence of agency relationship assumes burden of proving agent's authority and acts of agent, for which liability against principal is sought, must be shown to be within scope of agent's authority. J. R. Watkins Co. v. Wiley ---------- 144
20. Circumstantial evidence is not sufficient to sustain verdict depending solely thereon for support, unless circumstances proved by evidence are of such nature and so related to each other that conclusion reached by jury is only one that can fairly and reasonably be drawn therefrom. J. R. Watkins Co. v. Wiley -- 144
21. Prerequisite to Supreme Court's examination of evidence adduced on summary judgment hearing is that it be embodied in bill of exceptions. Jung v. Cole 153
22. In absence of bill of exceptions in summary judgment proceeding, only issue that will be considered on appeal is sufficiency of pleadings to support judgment, presumptions as to evidence and fact issues stated. Jung v. Cole ---------- 153
23. Adequate foundation for admissibility of written document purported to be written confession of defendant may not be made unless there is proof of signature or acknowledgment of purported confessor or unless person or officer who took notes and transcribed them testifies as to their accuracy. State v. Harding ---------- 159
24. Generally purported written confession is inadmissible unless defendant is accorded constitutional right of confrontation and right to cross-examine stenographer or person who took and transcribed notes of oral statements and admissions which furnished basis for purported written confession. State v. Harding ---------- 159
25. Evidence sufficient to sustain verdict of guilt in criminal prosecution only when jury could properly find guilt beyond reasonable doubt. State v. Houp 206
26. Post conviction proceeding burden of proof on movant to establish basis for relief, where burden not met, denial of relief required. State v. Coffen -- 254
27. In workmen's compensation case, plaintiff has burden of establishing by preponderance of evidence that accident in employment in reasonable probability contributed in some material and substantial degree to cause injury. Todd v. Mer-Del Enterprises, Inc. 258
28. Plaintiff must prove personal injury as result of accident arising out of and in course of employment and that disability caused by accident. Yost v.

City of Lincoln ---------- 263
29. Direct expert testimony not indispensable if issue can be determined from evidence presented and common knowledge and usual experience of trier of fact. Yost v. City of Lincoln ---------- 263
30. Opinion of physician or surgeon as to condition of injured or diseased person not rendered incompetent by fact that it is based upon history of case given by patient to physician or surgeon on his examination of patient, when examination was made for purpose of treatment and cure. Martin v. Frear 266
31. Where expert witness gives opinion based on facts established by record upon matter recognized as proper subject of expert opinion, unless impeached to such an extent as to have no probative value, it is ordinarily sufficient to sustain judgment. Martin v. Frear ---------- 266
32. Where different minds may draw different conclusions or inferences, or where there is conflict in evidence, the matter at issue must be submitted to jury. Sacher v. Petersen ---------- 305
33. Elements to be proven in action for damages for false representation stated. Swanson Petroleum Corp. v. Cumberland ---------- 323
34. Error may not be predicated on admission of evidence to which no objection is made at time offered. State v. McGhee ---------- 352
35. Under cited statute, where motion for suppression of evidence filed more than 10 days prior to commencement of trial and overruled by court, it is not prejudicial error for trial court at trial to reconsider motion; waiver of objections to evidence on ground that it was obtained by unreasonable search occurs only when no objection made more than 10 days before trial where exceptions thereto have no application. State v. Smith ---------- 363
36. When witness gives testimony which as to material facts is in such obvious and irreconcilable conflict that if part of it be true rest must be false, it ordinarily may not be accepted as basis of judicial conclusion. State v. Bundy ---------- 406
37. Competent for prosecution to put in evidence all relevant facts and circumstances which tend to establish any of constituent elements of crime with which accused is charged or which justify search and seizure without warrant even though such facts and circumstances may prove or tend to prove that

defendant committed other crimes. State v. Sharp 411
38. Within discretion of trial court to permit introduction of rebuttal evidence that is not strictly rebutting. State v. Howard ---------- 461
39. Evidence that radar equipment was tested within few hours of use, by means of calibrated tuning fork, or by comparison with speedometer of motor vehicle driven through radar field, and was functioning properly, is sufficient evidence of accuracy of radar equipment. State v. Snyder ---------- 465
40. In eminent domain action, evidence of comparable sales not inadmissible merely because secondary or hearsay. Anderson v. State ---------- 467
41. In eminent domain proceeding, wide discretion granted trial judge in determining admissibility of other sales; evidence should not be admitted where there is marked difference in situation of properties or unless judge satisfied that price paid was sufficiently voluntary to be reasonable index of value. Anderson v. State ---------- 467
42. Admission or rejection of photographs in evidence largely within discretion of trial court; error may not be predicated thereon in absence of showing of abuse of discretion. Beranek v. Petracek -------- 516
43. That county attorney has brought civil action in behalf of county against defendant charged with embezzlement not admissible as showing interest in other litigation pending against defendant. State v. Fields ---------- 565
44. Ruling excluding evidence not prejudicial if fact is established by other evidence. State v. Fields ---- 565
45. General allegation of negligence good against demurrer and where no motion for more specific statement filed, it is competent under general allegation of negligence to offer evidence of any fact which contributed to injury. Root v. School Dist. No. 25 ---------- 570
46. In determining if evidence sufficient to submit issue supported by pleadings and evidence, successful party entitled to have all conflicts in evidence resolved in his favor including any inferences reasonably drawn therefrom. Schmidt v. Johnson -- 643
47. In absence of prejudice or miscarriage of justice, complaint regarding admission of evidence ineffective. State v. Schumacher ---------- 653
48. Testimony by witness of similarities between tire tracks, and between such tracks and tire, comprise

statements of fact, not of opinion, and are not necessarily subject for expert testimony. State v. Schumacher ---------- 653

49. To warrant reformation of written instrument in any material respect, evidence must be clear, convincing, and satisfactory; and, until overcome by such proof, terms of instrument must stand as evidencing intention of parties. Ready Sand & Gravel Co. v. Cornett ---------- 726

50. Slightest penetration of the sexual organ of female is sufficient, if established beyond reasonable doubt, to constitute necessary element of penetration in prosecution for rape, and such element may be proved by either direct or circumstantial evidence. State v. Chaney ---------- 734

51. It is only where there is total failure of competent proof in criminal case to support material allegation in information, or where testimony adduced is of so weak or doubtful character that conviction based thereon could not be sustained, that trial court will be justified in directing verdict of not guilty. State v. Chaney ---------- 734

52. In prosecution for rape, after prosecutrix has testified to commission of offense, competent to prove in corroboration of testimony as to main fact that within reasonable time after alleged outrage she made complaint to person to whom statement of such occurrence would naturally be made. State v. Chaney ---------- 734

53. Testimony concerning such complaint should on direct examination be confined to fact that complaint was made, and details of event, including identity of person accused, are not proper subject of inquiry unless complaint was a spontaneous, unpremeditated statement so closely connected with act as to be part of res gestae. State v. Chaney ---------- 734

54. Hypothetical question as to rate of speed of vehicle must include all factors necessary for reasonably accurate opinion, all such factors must be supported by evidence. Witte v. Lisle ---------- 742

55. Admission of testimony wrongfully received in case tried to jury is prejudicial error where it may have influenced verdict. Witte v. Lisle ---------- 742

56. To come within ambit of rule regarding conveyances in consideration of support, care, and maintenance agreement, plaintiff has burden of proof to establish case by preponderance of evidence. Hansen

v. Goins ---------- 765
57. Two essential issues involved in burden of proof in action regarding conveyance in consideration of support, care, and maintenance agreement stated. Hansen v. Goins ---------- 765
58. Excluding testimony during oral examination on sole ground of nonresponsiveness raised by counsel who is not interrogating witness is error. Isham v. Birkel ---------- 800
59. Expert opinion evidence in condemnation case, as in all other cases, to be considered and weighed by triers of fact like any other testimony; is only advisory in nature and not binding upon jury or court. Jensen v. State ---------- 802
60. Weight and credibility of testimony of either lay or expert witnesses in eminent domain action for jury. Jensen v. State ---------- 802
61. Verdict of jury will not be set aside unless shown to be clearly wrong and in determining this issue in condemnation case verdict may not be set aside as excessive except where so clearly exorbitant as to indicate result of passion, prejudice, or mistake, or that it is clear that jury disregarded evidence or controlling rules of law. Jensen v. State ---------- 802
62. Admission or rejection of photographs in evidence largely within discretion of trial court and, in absence of showing of abuse of discretion, error may not be predicated upon such ruling. Jensen v. State ---------- 802

**False Pretenses.**

1. Ordinarily, necessary elements required to be alleged in charging crime of obtaining property by false pretenses include reliance of defrauded party upon such false pretenses and obtaining of something of value by party making false representations. State v. Banse ---------- 534
2. Essential elements of offense of securing money by false pretenses stated. State v. Banse ---------- 534
3. To charge statutory offense, information or complaint must contain distinct allegation of each essential element of crime as defined by law creating it, either in language of statute or its equivalent. State v. Banse ---------- 534

**Fees.**

1. Witness who testifies as expert on subject requiring

special knowledge and skill is, in absence of special contract, entitled only to statutory fee. Anderson v. State ---------- 467
2. One not licensed as real estate broker may not be allowed expert witness' fee for testifying in regard to real estate values. Anderson v. State ---------- 467
3. Attorney's fees allowed in eminent domain action should not be fixed on basis of unnecessary mutliplicity of counsel. Anderson v. State ---------- 467
4. Where holder of subrogation right asserts right to equitable subrogation in avails of litigation or settlement created by efforts of insured and his attorney, and insurance company fails to make, or to offer to make, itself party to action against wrong-doer, or in any manner to assist in prosecution of claim or contribute towards expense thereof, although having full knowledge of its pendency and object, insured entitled to retain proportionate share of expenses, including attorney's fees, incurred in recovery from which insurance company will benefit to extent of subrogation claim. Krause v. State Farm Mut. Auto. Ins. Co. ---------- 588
5. Determination of amount of reasonable referee's fee in partition action rests in sound judicial discretion of trial court; will not be disturbed on appeal in absence of abuse of discretion. Snook v. Snook 798
6. Elements to be considered in determination of reasonable attorney's fee stated. Jensen v. State ---- 802
7. Allowance of reasonable attorney's fee for necessary services performed will not be reversed on appeal in absence of showing of abuse of discretion by trial court. Jensen v. State ---------- 802
8. Claims of lessee and absentee landlord are not sufficiently related to warrant tacking together of awards to justify allowance of attorney's fees. Keller v. State ---------- 853
9. Attorneys' fees allowed and taxed as costs; costs as general rule given to prevailing party. Keller v. State ---------- 853

**Fences.**

Failure of damaged party to maintain division fence does not relieve owner of domestic animals from liability for damage resulting from trespass by such animals upon cultivated lands. Fiene v. Robertson 668

**Fraud.**

1. Issuance, assignment, sale, exchange, or transfer of securities in violation of Blue Sky Law shall, in civil action involving said acts, be deemed prima facie evidence of fraud upon part of issuer, assignor, transferor, or seller. Huryta v. White ---------- 24
2. Essential elements required to sustain an action for fraud stated. Transportation Equipment Rentals, Inc. v. Mauk ---------- 309
3. Fraud must relate to present or preexisting fact and may not generally be predicated on inference concerning any event in future or acts to be done in future unless representations as to future acts are falsely and fraudulently made with intent to deceive. Transportation Equipment Rentals, Inc. v. Mauk ---------- 309
4. Bankruptcy discharge shall release bankrupt from all provable debts, whether allowable in full or part, except such as are liabilities for obtaining money or property by false pretenses or representations. Swanson Petroleum Corp. v. Cumberland -------- 323
5. Check drawn upon bank in which account maker has been overdrawn does not constitute materially false statement in writing which will bar bankruptcy discharge. Swanson Petroleum Corp. v. Cumberland -- 323
6. Frauds included in portion of Bankruptcy Act are those which involve moral turpiture or intentional wrong; fraud implied in law, which may exist without imputation of bad faith, or immorality is insufficient. Swanson Petroleum Corp. v. Cumberland -- 323
7. Actual, overt, false pretense or representation in debt creation are only kind of fraud which will prevent bankruptcy discharge. Swanson Petroleum Corp. v. Cumberland ---------- 323
8. Burden of proof on plaintiff to prove that property was obtained by false pretenses or false representations to prevent bankrupt from being discharged. Swanson Petroleum Corp. v. Cumberland ---------- 323
9. Elements to be proven in action for damages for false representation stated. Swanson Petroleum Corp. v. Cumberland ---------- 323
10. General rule is that where ordinary prudence would have prevented deception, action for fraud perpetrated by such deception will not lie. Swanson Petroleum Corp. v. Cumberland ---------- 323
11. Actual or intentional fraud in obtaining property is necessary to save liability from operation of dis-

charge; fraud implied in law insufficient. Swanson Petroleum Corp. v. Cumberland ---------- 323
12. Character of fraud necessary to save claim from operation of bankruptcy discharge is actual or positive fraud knowingly and intentionally committed. Swanson Petroleum Corp. v. Cumberland ---------- 323

**Frauds, Statute of.**
1. Statute of frauds requires every contract for sale of lands between owner thereof and any broker shall be void, unless contract is in writing and subscribed by owner of land and broker. Property Sales, Inc. v. Irvington Ice Cream & Frozen Arts, Inc. -- 17
2. Memorandum required by statute of frauds must contain essential terms of contract. Heine v. Fleischer 379
3. Payment of entire consideration of oral contract for purchase of real estate is not alone sufficient part performance to prevent application of statute of frauds. Heine v. Fleischer ---------- 379

**Garnishment.**
1. Omaha Public Power District subject to garnishment process to same extent as any electric light and power company by virtue of statute. Schreiner v. Irby Constr. Co. ---------- 222
2. Under cited statute where material issues of fact are presented in contested garnishment proceeding, they are triable by jury unless waived. Christiansen v. Moore ---------- 818

**Guaranty.**
1. Under contract to manufacture goods according to specifications, where completed goods do not correspond to contract requirements, there was no transfer of title to such goods, under Uniform Sales Act, now repealed. Duplex Manuf. Co. v. Atlas Leasing Corp. ---------- 294
2. Purchaser of personal property, under implied warranty, has reasonable time to test same to ascertain whether or not it is as warranted, and ordinarily this would be question for jury. Duplex Manuf. Co. v. Atlas Leasing Corp. ---------- 294

**Guilty Plea.**
Plea of guilty or nolo contendere, made with full knowledge of charge and consequences of plea, will not be permitted to be withdrawn in absence of

fraud, mistake, or other improper means used in its procurement. State v. Eutzy ---------- 755

**Habeas Corpus.**

1. Habeas corpus may be maintained by complete stranger to child to test question of custody between stranger and natural parent. Hausman v. Shields ---------- 88
2. In habeas corpus action, where custody of minor children is involved, custody of child to be determined by best interests of child, with due regard for superior rights of fit, proper, and suitable parents. Hausman v. Shields ---------- 88

**Highways.**

1. Filing of written consent is necessary to confer jurisdiction upon county board to establish consent road. County of Banner v. Young ---------- 546
2. To determine whether or not highway has been established, court required to examine proceedings had to determine if jurisdictional requirements necessary for that purpose have been met; if not met, right does not exist and lapse of time will not supply defect. County of Banner v. Young ---------- 546
3. Where acts of owner of land relied on to establish dedication of land for purpose of public road, acceptance of same by public must be proven. County of Banner v. Young ---------- 546
4. To constitute valid dedication of private property for public highway, must clearly appear that owner intended to dedicate land for highway, and that public by use or otherwise accepted land for purpose. County of Banner v. Young ---------- 546
5. In consent dedication of private property for public highway, necessary to prove acceptance of land for highway purposes by proving that road was opened or used; until opened or used by public, it is not finally established. County of Banner v. Young -- 546
6. Driver of police department vehicle on official business, sounding audible signal by siren, shall have right-of-way, and drivers of other vehicles shall yield such right-of-way. State v. Otto ---------- 597
7. Police officer conducting activity protected under cited statute entitled to exceed speed limit. State v. Otto ---------- 597

**Homesteads.**

Lack of statutory acknowledgment to improvement mortgage on homestead does not preclude enforcement of mortgage. Miles Homes, Inc. v. Muhs -- 617

**Homicide.**

1. Upon proper foundation, photographs of victim in homicide case may be received to show nature or extent of wounds or injuries. State v. Blackwell 121
2. Malice and purpose to kill are essential elements of second degree murder, burden upon State to prove both elements beyond reasonable doubt. State v. Blackwell ---------- 121
3. Continuity and violence of stabbing, although gruesome, may be shown as relevant to prove elements of malice and purpose to kill in prosecution for second degree murder. State v. Blackwell -------- 121

**Husband and Wife.**

1. If married man by will disposes of all property, real and personal, to others, and gives nothing to wife, she will be entitled to take distributive share given her by statute as though he had died intestate. Sadler v. Sadler ---------- 318
2. Cited statute undertakes to give widow right of election, but gives her such right only in case provision is made for her in will, right of election is applicable only when widow prefers property given her by law to that given her by will. Sadler v. Sadler ---------- 318
3. Under cited statute, wife has interest in real estate of her husband which he cannot alienate without her consent. Sadler v. Sadler ---------- 318

**Indictments and Informations.**

1. Requirement that names of witnesses for State must be endorsed upon information has no application to rebuttal witnesses. State v. Dubany ---------- 337
2. Information may allege crime in language of statute. State v. Fields ---------- 565

**Infants.**

1. Habeas corpus may be maintained by complete stranger to child to test question of custody between stranger and natural parent. Hausman v. Shields ---------- 88
2. In habeas corpus action, where custody of minor

children is involved, custody of child to be determined by best interests of child, with due regard for superior rights of fit, proper, and suitable parents. Hausman v. Shields ---------- 88
3. Ordinarily, custody of child of tender years should be awarded to mother, unless shown that she is unsuitable or unfit to have custody, or through some peculiar circumstance is unable to furnish good home. Hausman v. Shields ---------- 88
4. Allowance made for support and maintenance of child should be fair and reasonable under circumstances. Trautman v. Trautman ---------- 202
5. Supreme Court will take judicial notice of cost of living and medical, dental, and other expenses incident to child support. Trautman v. Trautman ------ 202
6. Liability for support of child is primary responsibility of father. Trautman v. Trautman ---------- 202
7. Review in Supreme Court of proceeding under Juvenile Court Act is by trial de novo. Doeschot v. Dahlberg ---------- 303
McMullen v. Geiger ---------- 581
8. Child under age of 18 years who deports himself so as to seriously injure or endanger morals or health of himself or others is child in need of special supervision under Juvenile Court Act. Doeschot v. Dahlberg ---------- 303
McMullen v. Geiger ---------- 581
9. Driver of automobile not insurer against injuries to children from operation of car; is bound to exercise ordinary or reasonable care towards children as well as towards adults; age, maturity, and intelligence of child a circumstance to be considered in determining whether or not driver has exercised such care. Ederer v. Van Sant ---------- 774

**Injunctions.**

1. In injunction suit, failure to show damages, presently or in future, operates to defeat application for relief, and court of equity will not grant relief unless it be shown that injury has been or will be suffered by party seeking relief. Muff v. Mahloch Farms Co., Inc. ---------- 286
2. Resident taxpayer without proof of interest peculiar to himself may enjoin illegal expenditure of money by public board. Haschke v. School Dist. of Humphrey ---------- 298

**Instructions.**

1. District court under initial duty without request to define issues of ultimate fact for jury. St. Paul Fire & Marine Ins. Co. v. Hoffman ---------- 247
2. Error for district court to frame jury issue over ultimate fact that no reasonable man can fail to find. St. Paul Fire & Marine Ins. Co. v. Hoffman -- 247
3. To preserve instructional objection at step of filing motion for new trial, party may simply allege court erred in giving particular instruction. St. Paul Fire & Marine Ins. Co. v. Hoffman ---------- 247
4. Instructions objected to must be specifically designated by number in motion for new trial in order for such alleged error to be considered on appeal, otherwise, such instructions taken as law of case. Duplex Manuf. Co. v. Atlas Leasing Corp. ------- 294
5. Instructions to jury must be considered as whole, and when thus considered, if law correctly stated and case fairly submitted, and jury could not have been misled, claim of prejudicial error in instructions not available. Beranek v. Petracek ---------- 516
6. Where litigant has approved instructions in trial court, either by word or act, cannot thereafter effectively complain of instructions given. Martinez v. Hoveling ---------- 560
7. Giving further instruction defining gun as dangerous instrumentality, handling of which calls for highest degree of care, may be regarded as surplusage. Martinez v. Hoveling ---------- 560
8. Duty of trial court to submit to jury only material issues presented by pleadings which find support in evidence; failure to so instruct, if objection thereto timely made, constitutes prejudicial error. Schmidt v. Johnson ---------- 643
9. Where jury has been otherwise properly instructed on issues, issue of unavoidable accident is sufficiently submitted and ordinarily not prejudicial error to either give or refuse instruction on that issue. Schmidt v. Johnson ---------- 643
10. Where, in action to recover for personal injuries, jury properly instructed as to burden of proving negligence charged against defendant as proximate cause of injury, defense that negligence of third person not party to action is sole proximate cause is not affirmative plea in avoidance of plaintiff's cause and imposes no burden of proof upon defendant with relation thereto, but is consistent with and

provable under general issue where burden of proof remains with plaintiff to prove alleged negligence of defendant. Schmidt v. Johnson ---------- 643
11. Where requested instruction substantially covered by another instruction, not error to refuse request. State v. Schumacher ---------- 653
12. Duty of trial judge to instruct on law of case, and law so given to jury in instructions must apply even though jury may decide that law be otherwise. State v. Chaney ---------- 734
13. Charge of trial court to jury should be confined to issues presented by pleadings and supported by evidence. Seeman v. Pagels ---------- 757
14. Not error to refuse requested instruction if legal principles therein announced are either incorrectly stated or inapplicable to issues involved. Krantz v. Marge's Mufflers, Inc. ---------- 838

**Insurance.**

1. Violation of provision in insurance policy requiring insured to forward summons or other process, in absence of showing of prejudice or detriment to insurer, is not valid defense to action on policy. Trausch v. Knecht ---------- 134
2. Where prejudice results from failure of insured to forward process as required by terms of policy, such violation is good defense to action on policy. Trausch v. Knecht ---------- 134
3. Violation or breach of terms of contract of insurance not subject to waiver prior to occurrence. Trausch v. Knecht ---------- 134
4. Statute permits recovery of attorney's fee only when judgment rendered against insurer upon policy of insurance. Lundt v. Insurance Co. of North America ---------- 208
5. Insurer, like any other party, entitled to day in court and to judicial determination of liability on policy before being subjected to payment of costs and attorney's fee. Lundt v. Insurance Co. of North America ---------- 208
6. Insured's cause of action against tort-feasor cannot be split; at all times there is one cause of action on part of insured against tort-feasor. Krause v. State Farm Mut. Auto. Ins. Co. ---------- 588
7. Where holder of subrogation right asserts right to equitable subrogation in avails of litigation or settlement created by efforts of insured and his attorney,

and insurance company fails to make, or to offer to make, itself party to action against wrong-doer, or in any manner to assist in prosecution of claim or contribute towards expense thereof, although having full knowledge of its pendency and object, insured entitled to retain proportionate share of expenses, including attorney's fees, incurred in recovery from which insurance company will benefit to extent of subrogation claim. Krause v. State Farm Mut. Auto. Ins. Co. ---------- 588

8. Insurer entitled to subrogation, either by contract or in equity for amount of indemnity paid. Krause v. State Farm Mut. Auto. Ins. Co. -------- 588

9. If property loss greater than amount of insurance paid, action should be in name of insured, and insured holds as much of judgment recovered as money paid by insurer amounts to, in trust for insurer. Krause v. State Farm Mut. Auto. Ins. Co. 588

10. Covenants which require parties to arbitrate any future dispute and to be bound by result, thus precluding them from presenting controversy in court, will not be enforced. Heisner v. Jones ---------- 602

11. Uninsured motorist clause in insurance policy reciting that insurer's liability is to pay amount insured shall be legally entitled to recover as damages from operator of uninsured automobile implies that amount plaintiffs may recover should be determined by processes of law and thus by court rather than by arbitrator. Heisner v. Jones ---------- 602

12. Provision in automobile liability insurance policy which proscribes and inhibits insured's action and recovery for injuries sustained in accident arising out of ownership or use of uninsured automobile is void. Heisner v. Jones ---------- 602

13. Provision in automobile liability insurance policy with relation to uninsured motorist's coverage which provides that insurer will not be bound unless insured's action is brought with written consent of insurer, and which is incorporated into policy for purpose of enforcing void arbitration provision is void as against public policy. Heisner v. Jones ---- 602

14. Under cited statute, uninsured motorist's insurance carrier generally has right to intervene in litigation between its insured and uninsured motorist tort-feasor as to issues of liability and damages arising out of accident between its insured and uninsured motorist tort-feasor. Heisner v. Jones ---------- 602

15. Where excess insurance clause in automobile driver's liability policy and no-liability clause in automobile owner's liability policy apparently conflict, no-liability clause is ineffective and driver's insurance excess. Bituminous Cas. Corp. v. Andersen ------ 670
16. Under "automatic insurance" provision, coverage extends to replacement automobile as defined in policy for 30 days following delivery, in all events, irrespective of notice; but where notice not given prior to accident, there is no coverage with respect to accidents occurring after 30-day period has elapsed. Christiansen v. Moore ---------- 818
17. Statute prohibits agent of insurance company from issuing any estimate, statement, or circular misrepresenting benefits promised under any policy issued by company. Bayer v. Lutheran Mut. Life Ins. Co. ---------- 826
18. Insured has no right to rely on agent's patently absurd interpretation. Bayer v. Lutheran Mut. Life Ins. Co. ---------- 826
19. Insured ordinarily may rightfully rely on agent's interpretation that is plausible and not in patent conflict with printed policy although legally untenable. Bayer v. Lutheran Mut. Life Ins. Co. ---- 826
20. Insurer treating general agents' correspondence as its records ordinarily charged with knowledge of general agents' letters that promise policyholders future dividends. Bayer v. Lutheran Mut. Life Ins. Co. ---------- 826
21. Motor Vehicle Safety Responsibility Act concerning third-party claim requires an owner's SR 22 policy to cover risks pertaining to automobile that has replaced automobile designated in policy. Smith v. Canal Ins. Co. ---------- 866
22. Insurance policy is contract which requires offer and acceptance to be effective. Siewerdsen v. United States F. & G. Co. ---------- 870
23. Custom to renew does not bind insurer unless also binding upon insured; must be contract to renew as distinguished from mere custom. Siewerdsen v. United States F. & G. Co. ---------- 870

**Interest.**

Where sales contract provides for usurious interest on part of purchase price and for legal interest on another part of purchase price represented by note, illegal interest charged and paid may be offset against

sums due on note. Agri-Tek Supply Co. v. Gaeth 423

**Intoxicating Liquors.**

1. Word "operate" as used in cited statute relates to actual physical handling of controls of motor vehicle by person while under influence of intoxicating liquor. State v. Dubany ---------- 337
2. For the implied consent of a person to be effective, as provided in statute, person must have been arrested or taken into custody before test is given. State v. Baker ---------- 724
3. Statute providing that presumption of intoxication arises under determination that amount of alcohol in subject's body fluid at time in question is 0.15 percent or more by weight, as shown by chemical analysis, is in derogation of common law and subject to strict construction. State v. Baker ---------- 724

**Joint Tenancy.**

1. Mere commencement of action for partition of property held in joint tenancy does not serve to terminate such tenancy; only judgment or decree has that effect. Stiff v. Stiff ---------- 432
2. Death of one of two joint tenants pending obtaining of judgment or decree of partition leaves nothing to be partitioned, interest in whole having passed to survivor. Stiff v. Stiff ---------- 432

**Joint Ventures.**

1. Agent in connection with agency ought not to deal with principal as adverse party, unless principal knows or consents. Gutting v. Jacobson ---------- 402
2. Agent who, to knowledge of principal, acts on his own account in transaction in which he is employed has duty to deal fairly with principal and to disclose to him all facts which agent knows or should know would reasonably affect principal's judgment, unless principal manifests that he knows such facts or that he does not care to know them. Gutting v. Jacobson ---------- 402
3. Principal may by acquiescence release agent from liability for self-dealing. Gutting v. Jacobson ------ 402

**Judges.**

District judge not disqualified to hear case because he previously presided in proceeding involving one of parties. Liberty Finance Corp. v. Jones ------ 529

**Judgments.**

1. Equity court in making final determination of case, may properly limit decree to issues actually determined, by findings of fact or otherwise, and thereby limit rule of res judicata to issues actually tried without binding parties to issues not litigated or intended to be litigated. Muff v. Mahloch Farms Co., Inc. ---------- 286
2. Mere commencement of action for partition of property held in joint tenancy does not serve to terminate such tenancy; only judgment or decree has that effect. Stiff v. Stiff ---------- 432
3. Death of one of two joint tenants pending obtaining of judgment or decree of partition leaves nothing to be partitioned, interest in whole having passed to survivor. Stiff v. Stiff ---------- 432
4. Whether retrospective statute allowed reasonable period for enforcement of judgment lien, court may consider time interval between passage and effective date of statute. Hidy v. Hidy ---------- 527
5. On summary judgment motion, movant has burden of proof to pierce pleadings and show conclusively that there was no genuine issue of fact prohibiting movant from judgment in his favor as matter of law. Cover v. Scott ---------- 585
6. Purpose of summary judgment proceeding stated. Growers Cattle Credit Corp. v. Swanson ---------- 612
7. Modification of child support judgment because of change in parties' circumstances ordinarily should rest only upon facts which have occurred since rendition of judgment; res judicata applies. Schlothauer v. Schlothauer ---------- 750
8. Proceeding to modify judgment for child support not retrial of original case or review of equities of original decree. Schlothauer v. Schlothauer ---- 750
9. As general rule money paid by judgment debtor into registry of court in satisfaction of judgment may be applied by court in such manner, in view of all circumstances, as is most in accord with justice and equity and will best protect and maintain rights of both debtor and creditor. Rickus v. Rickus ---- 833
10. A judgment is final determination of rights of parties. Keller v. State ---------- 853
11. In view of history of cited statute, and apparent legislative intention, term "final judgment" refers only to final amount recovered as damages, exclusive of interest. Keller v. State ---------- 853

12. Judgment will not ordinarily be reversed where complaining party would not be entitled to succeed in any event. Henderson v. School Dist. of Scottsbluff ---------- 858
13. When law action tried without jury to court, findings of court have effect of jury verdict and judgment thereon will not be disturbed unless clearly wrong. Mathiesen v. Bloomfield ---------- 873

**Judicial Sales.**

1. Upset bid following judicial sale and before final confirmation should be considered only when it affords convincing proof that property was sold at inadequate price and that just regard for rights of all concerned and stability of judicial sales permits its acceptance. Rupe v. Oldenburg ---------- 229
2. Confirmation of judicial sales is within discretion of trial court, which may not be arbitrarily exercised but must be sound and equitable under circumstances. Rupe v. Oldenburg ---------- 229
3. In partition proceedings, duty of referees and trial courts to secure highest possible price for benefit of persons lawfully entitled to proceeds of sale. Rupe v. Oldenburg ---------- 229
4. Where there has been upset bid before final confirmation of partition sale, matter of confirmation of sale left to judicial discretion of trial court with due regard to stability of judicial sales, discretion is judicial one which may not be arbitrarily exercised and Supreme Court will not intervene except in case of abuse of such discretion. Rupe v. Oldenburg ---------- 229
5. In absence of abuse of judicial discretion district court on motion has power within term to set aside order confirming judicial sale. Rupe v. Oldenburg 229
6. When district court has found upset bid to be substantial, all interested parties are in open court, and there is no evidence that new sale would produce greater sum than upset bid, it is not error for trial court to deny confirmation of high bidder at public sale and to confirm sale in upset bidder. Rupe v. Oldenburg ---------- 229

**Juries.**

1. Denial of continuance where defendant alleged he could not have fair and impartial trial before regular panel of jurors, because jury selected there-

from had previously found companion guilty of another offense, was not prejudicially erroneous where record showed each juror selected for second trial was duly qualified to act. State v. Harris ---- 301

2. Defendant who fails to challenge jurors for disqualification and passes jurors for cause waives right to object to selection and cannot later object after receiving unfavorable verdict. State v. Harris 301

3. Party in selection of jury ordinarily has no right to examine juror out of presence of all other jurors. State v. Fiegl ---------- 704

4. Duty of trial judge to instruct on law of case, and law so given to jury in instructions must apply even though jury may decide that law be otherwise. State v. Chaney ---------- 734

**Juvenile Courts.**

1. Review in Supreme Court of proceeding under Juvenile Court Act is by trial de novo. McMullen v. Geiger ---------- 581

2. A child under age of 18 who deports himself so as to injure or endanger seriously morals or health of himself or others is child in need of special supervision under Juvenile Court Act. McMullen v. Geiger ---------- 581

**Landlord and Tenant.**

1. Landlord may not unreasonably refuse to accept qualified and suitable substitute tenant for purpose of mitigating damages recoverable from tenant who has abandoned leased premises prior to expiration of term. Bernstein v. Seglin ---------- 673

2. In action by landlord to recover rental from tenant who has abandoned leased premises prior to expiration of term, burden is on tenant to prove that landlord unreasonably failed to relet premises and mitigate damages. Bernstein v. Seglin ------ 673

3. Where tenant actually abandoned premises, landlord entitled to reenter and take charge and possession; even where acts too hastily, but in good faith and under circumstances justifying belief that premises have been abandoned, guilty only of technical violation of tenant's contractual rights under lease. Mathiesen v. Bloomfield ---------- 873

4. Question of whether lease has been abandoned so as to confer right of reentry on landlord one of fact to be determined from facts and circumstances of

case and intentions of parties. Mathiesen v. Bloomfield ---------- 873

**Libel and Slander.**

1. In libel action truth itself and alone is complete defense unless proven by plaintiff that publication made with actual malice. Whitcomb v. Nebraska State Education Assn. ---------- 31
2. Actual malice shall not be inferred or presumed from publication. Whitcomb v. Nebraska State Education Assn. ---------- 31
3. To extent that it placed burden of disproving presumption of actual malice on defendant, Hall v. Rice, 117 Neb. 813, 223 N. W. 4, overruled. Whitcomb v. Nebraska State Education Assn. ---------- 31

**Licensees and Invitees.**

1. Possessor of land subject to liability for physical harm caused to invitees by condition on land if, but only if, he should realize that it involves an unreasonable risk of harm to such invitees, and should expect that they will not discover or realize danger, or will fail to protect against it. Hilker v. N. P. Dodge Building Co. ---------- 495
2. Person lawfully on premises assumes dangers which are open and obvious and which can be seen readily and avoided by exercise of ordinary care. Hilker v. N. P. Dodge Building Co. ---------- 495

**Licenses and Permits.**

1. Order of revocation of license to practice profession will not ordinarily be disturbed in absence of abuse of discretion. State ex rel. Meyer v. Eyen ---------- 848
2. Conviction of felony cannot be collaterally attacked in proceeding before Director of Health for revocation of license to practice. State ex rel. Meyer v. Eyen ---------- 848

**Limitations of Actions.**

1. Voluntary payment of any part of principal or interest upon promissory note tolls statute of limitations and new right of action accrues after each payment. Pick v. Pick ---------- 716
2. Statute not tolled as to joint maker unless payment made with his authority or consent. Pick v. Pick -- 716

**Malice.**

1. In libel action truth itself and alone is complete defense unless proven by plaintiff that publication made with actual malice. Whitcomb v. Nebraska State Education Assn. ---------- 31
2. Actual malice shall not be inferred or presumed from publication. Whitcomb v. Nebraska State Education Assn. ---------- 31
3. To extent that it placed burden of disproving presumption of actual malice on defendant, Hall v. Rice, 117 Neb. 813, 223 N. W. 4, overruled. Whitcomb v. Nebraska State Education Assn. ---------- 31
4. Malice and purpose to kill are essential elements of second degree murder, burden upon State to prove both elements beyond reasonable doubt. State v. Blackwell ---------- 121
5. Continuity and violence of stabbing, although gruesome, may be shown as relevant to prove elements of malice and purpose to kill in prosecution for second degree murder. State v. Blackwell ---------- 121

**Mandamus.**

1. Writ of mandamus may issue to any inferior tribunal, corporation, board, or person, to compel performance of act which law specifically enjoins as duty resulting from office, trust, or station; may require inferior tribunal to exercise judgment, or proceed to discharge any of its functions, but cannot control judicial discretion. Watts v. City of Omaha ---------- 41
2. Writ of mandamus may not issue in any case where plain and adequate remedy in ordinary course of law exists. Watts v. City of Omaha ---------- 41
3. Rule well established that mandamus will lie against public board to compel performance of purely ministerial duties, but not to control exercise of judicial functions. Watts v. City of Omaha ---------- 41
4. Duty deemed to be of judicial nature when it calls for determination of fact question involving examination of evidence and passing on its probative force and effect. Watts v. City of Omaha ---------- 41
5. Writ of mandamus will not be allowed to compel officers vested with discretionary powers to make particular decision or to set aside one already made, notwithstanding such decision is erroneous in sense that it may be reversed upon appeal. Watts v. City of Omaha ---------- 41

6. Mandamus will not lie to coerce judicial discretion of inferior court, nor to predetermine character of judgment that court shall enter; it will not issue to review action of inferior court where there is adequate remedy at law, and writ may not be used to usurp or take place of an appeal or writ of error; rule as applicable to city council as to county court. Watts v. City of Omaha ---------- 41
7. While in matters involving official discretion, mandamus may be used for purpose of compelling exercise thereof, it will not ordinarily be extended beyond, so as to interfere with manner in which discretion shall be exercised or to influence or coerce particular determination. Watts v. City of Omaha 41

**Mechanic's Liens.**

1. Mechanic's lien action tried de novo in Supreme Court. Occidental S. & L. Assn. v. Cannon ------ 659
2. Burden of proof upon one claiming mechanic's lien to prove that claim was filed in time to create lien. Occidental S. & L. Assn. v. Cannon ---------- 659
3. Lien of materialman for materials furnished for erection of building, by virtue of agreement with contractor, extends to such materials only as are used in or delivered at building for use therein. Occidental S. & L. Assn. v. Cannon ---------- 659
4. After contract for material or labor substantially completed, there should be no unreasonable delay in filing claim for lien if one desired. Occidental S. & L. Assn. v. Cannon ---------- 659
5. Time for filing mechanic's lien cannot be delayed by performing minor labor or furnishing minor items of material. Occidental S. & L. Assn. v. Cannon -- 659
6. Purpose of mechanic's lien statute to protect diligent contractor or materialman, not to provide relief for careless or negligent one. Occidental S. & L. Assn. v. Cannon ---------- 659

**Mistake.**

1. Testator bound to employ apt words to express meaning, and if, knowing words intended to be used, he approves them and executes his will, he thereby knows and approves contents of his will even though such approval be due to mistaken belief of his own, or the honest advice of others, as to their true meaning and legal effect. Sadler v. Sadler ------- 318
2. More important that probate of wills of dead

persons be effectively shielded from attacks of multitude of fictitious mistakes than that it be purged of wills containing a few real ones, testator can avoid latter by due care in lifetime while against former he would be helpless. Sadler v. Sadler ---------- 318

3. Generally rule on nonrecoverability of voluntary payments made under mistake of law does not apply to, but recovery may be had of, payments made to officer of court under misapprehension as to legal rights. Rickus v. Rickus ---------- 833

**Mortgages.**

Lack of statutory acknowledgment to improvement mortgage on homestead does not preclude enforcement of mortgage. Miles Homes, Inc. v. Muhs ---- 617

**Motions, Rules, and Orders.**

1. Order striking counterclaim not final order which may be reviewed upon appeal while main action is otherwise pending in district court. Pester v. Lowe 23
2. When appellant fails to file a brief as required by rules of Supreme Court, motion to dismiss appeal will be sustained. Pester v. Lowe -------- 23
3. Trial court has broad discretion in ruling upon discovery motion in criminal case. State v. Reichel -- 194
4. Discovery motion in criminal case should be granted where required by interests of justice, but burden is on defendant to show why motion should be granted. State v. Reichel ---------- 194
5. Purpose of order nunc pro tunc stated. State v. Coffen ---------- 254
6. Entertainment of belated motion to strike testimony, no objection having been previously made thereto, is discretionary with trial court. Western Plastics Corp. v. Westinghouse Electric Corp. ---- 498
7. Court on timely motion may properly vacate stipulation that is improvident and not conducive to justice. Meyer v. City of Grand Island ---------- 657
8. Order allowing party to withdraw rest and adduce evidence is discretionary. Meyer v. City of Grand Island ---------- 657
9. When motion made to amend pleading to include material allegation upon which some evidence has been received, such amendment should be allowed. Seeman v. Pagels ---------- 757

**Municipal Corporations.**

1. Property owner whose property does not abut upon portion of street to be vacated has no right of action to restrain vacation unless he suffers special or peculiar damage differing in kind from that of general public. Feldman v. City of Omaha ---------- 226
2. Fact that vacation is made at instance and request of certain owners whose property will be benefited is not ground for declaring vacation ordinance void. Feldman v. City of Omaha ---------- 226
3. Under cited statute city of first class may annex contiguous or adjacent lands which are urban or suburban in character and are not agricultural lands rural in character. Plumfield Nurseries, Inc. v. Dodge County ---------- 346
4. Annexation of lands to cities and towns is legislative function for mayor and city council; not for judicial to determine what lands are to be annexed. Plumfield Nurseries, Inc. v. Dodge County ---------- 346
   Meyer v. City of Grand Island ---------- 657
5. Power delegated to cities of first class to annex lands by ordinance is to be construed strictly and failure to comply with conditions prescribed or limitations imposed will ordinarily invalidate ordinance. Plumfield Nurseries, Inc. v. Dodge County 346
6. Words "as are urban or suburban in character," as used in cited statute, are not vague and indefinite terms having effect of invalidating act as unconstitutional. Plumfield Nurseries, Inc. v. Dodge County ---------- 346
7. Provisions in cited statute providing that adequate plans and necessary city council action to furnish benefits must be adopted not later than 1 year after date of annexation is modlified by previous language stating that benefits shall be received as soon as practicable; section construed as whole is reasonable and does not provide for such lack of equality of benefits as to amount to want of due process. Plumfield Nurseries, Inc. v. Dodge County 346
8. Civil service commission certifying eligibles for fire chief has broad discretion in absence of legislative restriction to choose between promotion examinations and original entrance examinations. Short v. Kissinger ---------- 491
9. Municipal university organized under cited statute subject to suit. Johnson v. Municipal University of Omaha ---------- 512

10. Cities, counties, and all other governmental subdivisions, and local public entities of this state, including municipal universities, not immune from tort liability arising out of physical condition, affirmatively and voluntarily created by public body on its premises, where existence of condition not reasonably visible or apparent, and where condition constitutes unreasonable risk of harm to persons authorized to use and reasonably using premises for purposes intended. Johnson v. Municipal University of Omaha ---------- 512
11. Annexation statute does not require legislative body to conduct trial-type evidentiary hearing or to make express finding on character of land. Meyer v. City of Grand Island ---------- 657
12. Municipal corporation may maintain action in equity to enjoin maintenance of nuisance. City of Lyons v. Betts ---------- 746
13. Power to enjoin nuisance extends to nuisance maintained outside corporate limits of municipality. City of Lyons v. Betts ---------- 746

**Negligence.**

1. Doctrine of res ipsa loquitur stated. McCall v. St. Joseph's Hospital ---------- 1
2. Pleading founded upon doctrine of res ipsa loquitur does not permit allegations of specific acts of negligence. McCall v. St. Joseph's Hospital ---------- 1
3. Three situations listed where negligence inferred without affirmative proof thereof in res ipsa loquitur action. McCall v. St. Joseph's Hospital ---- 1
4. Exclusive control element of res ipsa loquitur doctrine satisfied if shown that the injury resulted from external force applied while plaintiff was in exclusive control or custody of defendants, even though by subsequent explanation some of defendants are exonerated from charge of negligence. McCall v. St. Joseph's Hospital ---------- 1
5. Person of mature years and ordinary intelligence assumed to know operation of familiar laws of gravitation. Mendoza v. Aguilera ---------- 94
6. One capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid open and obvious defects and dangers is negligent or contributorily negligent. Mendoza v. Aguilera -- 94
7. Range of vision doctrine stated. Newkirk v. Kovanda 127
O'Conner v. Kientz ---------- 554

8. Where presence of frost, ice, snow, mist, fog, or smoke are known, or should have been reasonably anticipated, they are mere conditions and not intervening or proximate causes. Newkirk v. Kovanda 127
9. Negligence defined. Good v. Jones ---------- 454
Martinez v. Hoveling ---------- 560
10. Negligence and duty to use due care do not exist in abstract but must be considered against particular set of facts and circumstances. Good v. Jones ---- 454
11. Person has no duty to anticipate negligence on part of others in absence of knowledge or notice to the contrary; is entitled to assume and act on assumption that others will exercise ordinary care. Good v. Jones ---------- 454
12. Ordinary care defined. Good v. Jones ---------- 454
13. Possessor of land subject to liability for physical harm caused to invitees by condition on land if, but only if, he should realize that it involves an unreasonable risk of harm to such invitees, and should expect that they will not discover or realize danger, or will fail to protect against it. Hilker v. N. P. Dodge Building Co. ---------- 495
14. Person lawfully on premises assumes dangers which are open and obvious and which can be seen readily and avoided by exercise of ordinary care. Hilker v. N. P. Dodge Building Co. ---------- 495
15. Tort-feasor answerable for all consequences that, in natural course of events, flow from unlawful or negligent acts, although those results are brought about by intervening agency of others, provided intervening agents were set in motion by primary wrongdoer, or were natural consequences of original wrongful act. Beranek v. Petracek ---------- 516
16. Proximate cause of injury is that cause which, in natural and continuous sequence, unaccompanied by any efficient intervening cause, produces injury, and without which result would not have occurred. Beranek v. Petracek ---------- 516
17. Not sufficient that negligence charged furnishes only condition by which injury made possible, for if such condition causes injury by subsequent independent act of third person, two acts are not concurrent and existence of condition is not proximate cause of injury. Beranek v. Petracek ---------- 516
18. Range of vision rule has no application in those cases wherein reasonable minds might differ on question of whether or not operator exercised care, cau-

tion, and prudence required of reasonably careful, cautious, and prudent person under circumstances of particular situation. O'Conner v. Kientz ..... 554
19. Degree of care required varies with circumstances and increases greatly when dealing with dangerous instrumentality. Martinez v. Hoveling ..... 560
20. Giving further instruction defining gun as dangerous instrumentality, handling of which calls for highest degree of care, may be regarded as surplusage. Martinez v. Hoveling ..... 560
21. Action for negligence based on legal duty owed by defendant to plaintiff which has been breached by defendant. Root v. School Dist. No. 25 ..... 570
22. General allegation of negligence good against demurrer and where no motion for more specific statement filed, it is competent under general allegation of negligence to offer evidence of any fact which contributed to injury. Root v. School Dist. No. 25 ..... 570
23. Where, in action to recover for personal injuries, jury properly instructed as to burden of proving negligence charged against defendant as proximate cause of injury, defense that negligence of third person not party to action is sole proximate cause is not affirmative plea in avoidance of plaintiff's cause and imposes no burden of proof upon defendant with relation thereto, but is consistent with and provable under general issue where burden of proof remains with plaintiff to prove alleged negligence of defendant. Schmidt v. Johnson ..... 643
24. One who lets horse for hire warrants horse to be suitable for purpose for which let and liable for injuries resulting from viciousness or dangerous propensities of horse if had knowledge, or, in exercise of reasonable care, should have had knowledge, of such propensities. Huber v. Timmons ..... 718
25. Ordinarily existence of vicious or dangerous propensities in domestic animal and knowledge of such propensities are indispensable to liability on part of owner. Huber v. Timmons ..... 718
26. There are many characteristics common to all horses, even most gentle; one such characteristic is propensity to rear or bolt when frightened and is situation that one riding hired horse must expect to encounter. Huber v. Timmons ..... 718
27. Where ponies remain at all times under supervision of concessionaire, fact that patrons of concession

are children is factor to be considered in determining if reasonable care exercised. Huber v. Timmons 718
28. Even in absence of any known viciousness in domestic animal, owner obliged to exercise over it certain degree of care depending upon kind and character of particular animal concerned, circumstances in which it is placed, and purposes for which it is employed or kept; owner charged with knowledge of natural propensities of animals, and, if these propensities are of kind that might cause injury must exercise care necessary to prevent such injuries as may be anticipated. Huber v. Timmons ---------- 718
29. Person who attempts to rescue another placed in imminent peril does not assume risk incident thereto and is not guilty of contributory negligence unless acts in rash, imprudent, or negligent manner. Huber v. Timmons ---------- 718
30. Where negligence of defendants and contributory negligence of plaintiff stem from same identical situation, negligence of neither can be greater nor lesser than that of other and under rule of comparative negligence there can be no recovery. Huber v. Timmons ---------- 718
31. Violation of statutes regulating use and operation of motor vehicles upon highways not negligence per se, but evidence of negligence, which may be taken into consideration with all other facts and circumstances in determining whether or not negligence is established thereby. Seeman v. Pagels ---- 757
32. Where different minds may draw different conclusions from evidence in regard to negligence, question should be submitted to jury. Seeman v. Pagels ---- 757
33. Driver of automobile not insurer against injuries to children from operation of car; is bound to exercise ordinary or reasonable care towards children as well as towards adults; age, maturity, and intelligence of child a circumstance to be considered in determining whether or not driver has exercised such care. Ederer v. Van Sant ---------- 774
34. Duty to maintain proper lookout is part of duty to use due care. Krantz v. Marge's Mufflers, Inc. ---- 838
35. Doctrine of sudden emergency not applicable where emergency caused in part by negligence of party claiming benefit. Krantz v. Marge's Mufflers, Inc. 838

**New Trial.**

1. Error in specific instructions must be objected to and called to attention of trial court in motion for new trial before it may be properly presented to Supreme Court for consideration. Jones v. Peterson 141
2. Holding of Supreme Court on first appeal becomes law of case on retrial of same issues unless on second trial facts are materially and substantially different. Landmesser v. Ahlberg ---------- 182
3. To preserve instructional objection at step of filing motion for new trial, party may simply allege court erred in giving particular instruction. St. Paul Fire & Marine Ins. Co. v. Hoffman ---------- 247
4. Instructions objected to must be specifically designated by number in motion for new trial in order for such alleged error to be considered on appeal, otherwise, such instructions taken as law of case. Duplex Manuf. Co. v. Atlas Leasing Corp. -------- 294
5. Misconduct of attorney to require new trial must be such as prejudices substantial rights of party. Anderson v. State ---------- 473
6. Assignment in motion for new trial that errors of law occurred at trial does not present correctness of giving or refusing instructions. Drucker v. Goscar, Inc. ---------- 475

**Notice.**

One put on inquiry is charged with notice of all such facts as he would have learned by reasonable inquiry. Swanson Petroleum Corp. v. Cumberland 323

**Nuisances.**

1. Municipal corporation may maintain action in equity to enjoin maintenance of nuisance. City of Lyons v. Betts ---------- 746
2. Power to enjoin nuisance extends to nuisance maintained outside corporate limits of municipality. City of Lyons v. Betts ---------- 746
3. Ordinarily property owner does not have and cannot acquire vested right, or constitutional privilege, to maintain or continue nuisance. City of Lyons v. Betts ---------- 746

**Oaths and Affirmations.**

1. When attention of person making affidavit called to fact that it must be sworn to and, in recognition of this, he is asked to do some corporal act and

he does it, instrument constitutes statement under oath, irrespective of other formalities. State v. Howard ---------- 274
2. Affiant's asserted personal observation of facts and circumstances supporting finding of probable cause is sufficient. State v. Howard ---------- 274

**Oil and Gas.**
1. Under law of capture, owner of land acquires title to oil or gas produced from wells on his land although part of oil or gas may have migrated from adjoining wells; and may thus appropriate oil and gas that flowed from adjacent lands without consent of owner of those lands and without incurring drainage liability. Baumgartner v. Gulf Oil Corp. ------ 384
2. Where primary recoverable oil has been exhausted, all interested parties in field must be offered opportunity to join in any unitization project to recover secondary oil on fair and equitable basis. Baumgartner v. Gulf Oil Corp. ---------- 384
3. Where secondary recovery project authorized by Nebraska Oil and Gas Conservation Commission, operator not liable for willful trespass to owners who refuse to join project when injected recovery substance moves across lease lines. Baumgartner v. Gulf Oil Corp. ---------- 384
4. Orthodox rules and principles applied by courts as regards surface invasions of land may not be appropriately applied to subsurface invasions arising out of secondary recovery of oil and gas. Baumgartner v. Gulf Oil Corp. ---------- 384
5. It is basic and fundamental principle of all conservation legislation that correlative and constitutional right of landowner or leaseholder is not right to drill but right to recover just and equitable share of oil and gas underlying property. Baumgartner v. Gulf Oil Corp. ---------- 384
6. Meaning of "correlative rights" in oil and gas law stated. Baumgartner v. Gulf Oil Corp. ---------- 384
7. Where unitization agreement approved by Nebraska Oil and Gas Conservation Commission, operator refusing to join project limited in any recovery of damages to amount he can prove by preponderance of evidence he could have obtained through his own efforts if he had drilled, developed, and operated his property outside unitization project. Baumgartner v. Gulf Oil Corp. ---------- 384

**Ordinances.**

Fact that vacation is made at instance and request of certain owners whose property will be benefited is not ground for declaring vacation ordinance void. Feldman v. City of Omaha ---------- 226

**Parent and Child.**

1. Ordinarily custody of children of tender years should be awarded to mother unless affirmatively demonstrated that she is unsuitable, unfit, or unable to provide good home. Hausman v. Shields ---------- 88
   Bauer v. Bauer ---------- 777
2. Allowance made for support and maintenance of child should be fair and reasonable under circumstances. Trautman v. Trautman ---------- 202
3. Supreme Court will take judicial notice of cost of living and medical, dental, and other expenses incident to child support. Trautman v. Trautman ---- 202
4. Liability for support of child is primary responsibility of father. Trautman v. Trautman ---------- 202
5. In determining reasonable visitation rights in divorce action, court should consider rights of parents in light of paramount needs of child for stability and continuity in home and school environment. Trautman v. Trautman ---------- 202
6. Adopted child is, in legal sense, child both of natural and of adoptive parent, and is not, because of adoption, deprived of right of inheritance from natural parents, unless statute expressly so provides. Wulf v. Ibsen ---------- 314
7. Statute which includes as principal or dominant feature establishing child as an heir of adoptive parent, without making reference to inheritance from natural parents, will not be construed as depriving child of that inheritance. Wulf v. Ibsen ---------- 314
8. While discretion of trial court with respect to awarding or changing support of minor children is subject to review, determination of court will not ordinarily be disturbed unless there is clear abuse of discretion or it is clearly against weight of evidence. Fogel v. Fogel ---------- 425
9. Divorce decree does not freeze father in his employment; may in good faith make occupational change even though change may reduce ability to meet financial obligation to children. Fogel v. Fogel ---------- 425

10. Modification of child support judgment because of change in parties' circumstances ordinarily should rest only upon facts which have occurred since rendition of judgment; res judicata applies. Schlothauer v. Schlothauer ---------- 750
11. Proceeding to modify judgment for child support not retrial of original case or review of equities of original decree. Schlothauer v. Schlothauer ---- 750
12. Original decree fixing custody of minor children will not be modified unless there has been change in circumstances indicating that person having custody is unfit for purpose or that best interests of child require such action. Packett v. Packett ------ 769
13. Ordinarily custody of children of tender years in divorce case should be kept within jurisdiction of court having control over them, unless best interests of children demand otherwise. Bauer v. Bauer ---- 777
14. Child's preferential statement as to custody, while deserving to be considered, should be closely scrutinized, is not controlling in determination of custody. Bauer v. Bauer ---------- 777

**Parties.**

1. When defect of misjoinder of parties appears on face of petition, it must be raised by special demurrer. Jameson v. Plischke ---------- 97
2. Estoppel cannot arise where all parties interested have equal knowledge of facts, or where party setting up estoppel is chargeable with notice of facts, or is equally negligent or at fault. Trausch v. Knecht ---------- 134
3. In absence of statute which permits appeal from interlocutory order, it is generally held that order requiring or permitting or refusing to permit joinder of additional parties is not appealable. Jung v. Cole 153
4. Insured's cause of action against tort-feasor cannot be split; at all times there is one cause of action on part of insured against tort-feasor. Krause v. State Farm Mut. Auto. Ins. Co. ---------- 588
5. If property loss greater than amount of insurance paid, action should be in name of insured, and insured holds as much of judgment recovered as money paid by insurer amounts to, in trust for insurer. Krause v. State Farm Mut. Auto. Ins. Co. -------- 588

**Partition.**

1. In partition proceedings, duty of referees and trial

courts to secure highest possible price for benefit of persons lawfully entitled to proceeds of sale. Rupe v. Oldenburg ---------- 229
2. Where there has been upset bid before final confirmation of partition sale, matter of confirmation of sale left to judicial discretion of trial court with due regard to stability of judicial sales, discretion is judicial one which may not be arbitrarily exercised and Supreme Court will not intervene except in case of abuse of such discretion. Rupe v. Oldenburg ---------- 229
3. Mere commencement of action for partition of property held in joint tenancy does not serve to terminate such tenancy; only judgment or decree has that effect. Stiff v. Stiff ---------- 432
4. Death of one of two joint tenants pending obtaining of judgment or decree of partition leaves nothing to be partitioned, interest in whole having passed to survivor. Stiff v. Stiff ---------- 432
5. Determination of amount of reasonable referee's fee in partition action rests in sound judicial discretion of trial court; will not be disturbed on appeal in absence of abuse of discretion. Snook v. Snook -- 798

**Paupers.**

Common law imposes no quasi-contractual duty on children of pauper to pay supplier for necessaries furnished pauper. David City Hospital v. Gilmore 342

**Payment.**

1. As general rule money paid by judgment debtor into registry of court in satisfaction of judgment may be applied by court in such manner, in view of all circumstances, as is most in accord with justice and equity and will best protect and maintain rights of both debtor and creditor. Rickus v. Rickus 833
2. Generally rule on nonrecoverability of voluntary payments made under mistake of law does not apply to, but recovery may be had of, payments made to officer of court under misapprehension as to legal rights. Rickus v. Rickus ---------- 833

**Pleadings.**

1. Pleading founded upon doctrine of res ipsa loquitur does not permit allegations of specific acts of negligence. McCall v. St. Joseph's Hospital ---------- 1

2. Absent prejudice, error cannot be predicated on overruling of motion to make more definite and certain. Schroeder v. Oeltjen ---------- 8
3. Charge of trial court to jury should be confined to issues presented by pleadings and supported by evidence. Newkirk v. Kovanda ---------- 127
4. Ordinarily, it is error to submit to jury issue which is not pleaded in case. Newkirk v. Kovanda ------ 127
5. Instructions should be considered and construed together and if on whole they fairly state law as applied to issues pleaded, and evidence received, there can be no prejudicial error in giving of any one instruction. Newkirk v. Kovanda ---------- 127
6. In absence of bill of exceptions in summary judgment proceeding, only issue that will be considered on appeal is sufficiency of pleadings to support judgment, presumptions as to evidence and fact issues stated. Jung v. Cole ---------- 153
7. Defendant has right to insist that all facts essential to existence of cause of action against him be stated in petition. Pinkerton v. Leonhardt ---------- 430
8. In action for conversion plaintiff must allege facts showing right to immediate possession of property at time of conversion. Pinkerton v. Leonhardt ---- 430
9. In action for breach of contract plaintiff must allege facts showing promise and breach thereof as basis for recovery. Pinkerton v. Leonhardt -------- 430
10. If petition states facts which entitle plaintiff to relief, whether legal or equitable, it is not demurrable upon ground that it does not state facts sufficient to constitute cause of action. Higgs v. Hall County 508
11. Ordinarily, necessary elements required to be alleged in charging crime of obtaining property by false pretenses include reliance of defrauded party upon such false pretenses and obtaining of something of value by party making false representations. State v. Banse ---------- 534
12. Essential elements of offense of securing money by false pretenses stated. State v. Banse ---------- 534
13. To charge statutory offense, information or complaint must contain distinct allegation of each essential element of crime as defined by law creating it, either in language of statute or its equivalent. State v. Banse ---------- 534
14. General allegation of negligence good against demurrer and where no motion for more specific state-

ment filed, it is competent under general allegation of negligence to offer evidence of any fact which contributed to injury. Root v. School Dist. No. 25 570

15. On summary judgment motion, movant has burden of proof to pierce pleadings and show conclusively that there was no genuine issue of fact prohibiting movant from judgment in his favor as matter of law. Cover v. Scott ---------- 585

16. General demurrer tests substantive legal rights of parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. Krause v. State Farm Mut. Auto. Ins. Co. ---------- 588

17. Purpose of summary judgment proceedings stated. Growers Cattle Credit Corp. v. Swanson ---------- 612

18. In determining if evidence sufficient to submit issue supported by pleadings and evidence, successful party entitled to have all conflicts in evidence resolved in his favor including any inferences reasonably drawn therefrom. Schmidt v. Johnson ------ 643

19. Proper manner in which to challenge appropriateness of counterclaim or cross-petition is by motion to strike rather than demurrer. Weller v. Putnam ---- 692

20. Defendant in an action not restricted to counterclaim provided for in cited statutes but, in proper case, may seek affirmative relief, either against plaintiff or against co-defendants, by cross-petition. Weller v. Putnam ---------- 692

21. New issues which defendant may introduce by cross-petition or cross-bill are limited to such as is necessary for court to have before it in deciding questions raised in original suit in order to do complete justice to all parties with respect to cause of action on which plaintiff bases claim. Weller v. Putnam -- 692

22. All defects that may be excepted to by motion to quash are taken to be waived by defendant pleading general issue. State v. Fiegl ---------- 704

23. When motion made to amend pleading to include material allegation upon which some evidence has been received, such amendment should be allowed. Seeman v. Pagels ---------- 757

24. Under cited statute where material issues of fact are presented in contested garnishment proceeding, they are triable by jury unless waived. Christiansen v. Moore ---------- 818

**Post Conviction.**

1. Post conviction proceeding burden of proof on movant to establish basis for relief, where burden not met, denial of relief required. State v. Coffen ------ 254
2. Post Conviction Act specifically authorizes trial court to examine files and records to see if prisoner entitled to relief. State v. Pilgrim ---------- 457
3. If files and records show to satisfaction of district court that prisoner entitled to no relief under Post Conviction Act, court may overrule motion to vacate sentence without hearing. State v. Pilgrim -- 457
4. Post conviction relief should be denied where record does not show infringement of constitutional rights sufficient to invalidate judgment. State v. Sheldon 852
5. Where questions raised in second motion to vacate and set aside judgment and sentence were raised and determined in prior evidentiary hearing under Post Conviction Act, court not required to entertain such motion. State v. Cole ---------- 865

**Powers.**

School district possesses no powers other than those granted by Legislature. Haschke v. School Dist. of Humphrey ---------- 298

**Principal and Agent.**

1. Declarations of alleged agent are not admissible for purpose of establishing or enlarging his authority. J. R. Watkins Co. v. Wiley ---------- 144
2. Party alleging existence of agency relationship assumes burden of proving agent's authority and acts of agent, for which liability against principal is sought, must be shown to be within scope of agent's authority. J. R. Watkins Co. v. Wiley ------ 144
3. Agent in connection with agency ought not to deal with principal as adverse party, unless principal knows or consents. Gutting v. Jacobson ---------- 402
4. Agent who, to knowledge of principal, acts on his own account in transaction in which he is employed has duty to deal fairly with principal and to disclose to him all facts which agent knows or should know would reasonably affect principal's judgment, unless principal manifests that he knows such facts or that he does not care to know them. Gutting v. Jacobson ---------- 402
5. Principal may by acquiescence release agent from liability for self-dealing. Gutting v. Jacobson ------ 402

6. Statute prohibits agent of insurance company from issuing any estimate, statement, or circular misrepresenting benefits promised under any policy issued by company. Bayer v. Lutheran Mut. Life Ins. Co. 826
7. Insured has no right to rely on agent's patently absurd interpretation. Bayer v. Lutheran Mut. Life Ins. Co. ---------- 826
8. Insured ordinarily may rightfully rely on agent's interpretation that is plausible and not in patent conflict with printed policy although legally untenable. Bayer v. Lutheran Mut. Life Ins. Co. ---------- 826
9. Insurer treating general agents' correspondence as its records ordinarily charged with knowledge of general agents' letters that promise policyholders future dividends. Bayer v. Lutheran Mut. Life Ins. Co. ---------- 826

**Principal and Surety.**

Sureties not discharged from further liability by execution of new agreement by principal if in undertaking they waive notice thereof. Watkins Products, Inc. v. Busch ---------- 359

**Probable Cause.**

1. When arrest made without warrant, it must be based upon probable cause which exists from facts and circumstances within officers' knowledge or of which they had reasonably trustworthy information which was sufficient to warrant men of reasonable caution in belief that offense has been, or is, being committed. State v. Goings ---------- 81
2. Existence of probable cause determined by practical and not by technical standard. State v. Goings -- 81
3. Information given by informer to officer leading to search and subsequent arrest of defendant for violation of carrying of concealed weapons law, even though hearsay, and even though not legally competent evidence in criminal trial, can be considered in determining whether officer had probable cause and reasonable grounds to search and subsequently arrest defendant without warrant. State v. Goings ------ 81
4. Affiant's asserted personal observation of facts and circumstances supporting finding of probable cause is sufficient. State v. Howard ---------- 274
5. When magistrate has found probable cause, court should not invalidate warrant by interpreting affi-

davit in hypertechnical, rather than common sense, manner. State v. Howard ---------- 274
6. Observations by fellow officers engaged in common investigation are reliable basis for issuance of search warrant on application made by one of their number. State v. Howard ---------- 274
7. While not easy to determine when affidavit demonstrates existence of probable cause, resolution of doubtful or marginal cases should be largely determined by preference to be accorded to warrants. State v. Howard ---------- 274

**Process.**

1. Violation of provision in insurance policy requiring insured to forward summons or other process, in absence of showing of prejudice or detriment to insurer, is not valid defense to action on policy. Trausch v. Knecht ---------- 134
2. Where prejudice results from failure of insured to forward process as required by terms of policy, such violation is good defense to action on policy. Trausch v. Knecht ---------- 134

**Proof.**

Generally, burden of proving issue lies on party holding affirmative of that issue. County of Banner v. Young ---------- 546

**Property.**

1. In determining the valuation of a school district, the assessed valuation of intangible as well as tangible property must be considered. Schroeder v. Oeltjen ---------- 8
2. Correction of error in legal description of land lying within a school district occurring in petition for the consolidation of districts not subject to objection by one not a party to such petition. Schroeder v. Oeltjen ---------- 8
3. Lawful covenants restricting use of land and binding upon successors in title constitute interest in land, and property in constitutional sense. Horst v. Housing Authority ---------- 215
4. Where taking of land by eminent domain permits use violative of restrictions and extinguishes such interest, there is taking of property of owners of land for whose benefit restrictions were imposed, and such

owner is entitled to compensation for damage to his property. Horst v. Housing Authority ---------- 215
5. Property owner whose property does not abut upon portion of street to be vacated has no right of action to restrain vacation unless he suffers special or peculiar damage differing in kind from that of general public. Feldman v. City of Omaha ---------- 226
6. Fact that vacation is made at instance and request of certain owners whose property will be benefited is not ground for declaring vacation ordinance void. Feldman v. City of Omaha ---------- 226
7. Bona fide purchaser of land defined. Love v. Fauquet ---------- 250
8. Generally, where trustee, by terms of trust, has general and unrestricted power to transfer or encumber property, one dealing with him in good faith not bound to go further and ascertain whether in fact act of trustee is justified. Love v. Fauquet ---------- 250
9. Provision in lease granting lessee option to purchase property during term is supported by consideration paid for lease and cannot without consent of lessee be revoked during period granted for its exercise. Jamson v. Poulos ---------- 480
10. Where lease of real property contains agreement giving lessee privilege of purchasing property covered by lease which is not specifically restricted to lessee, such covenant runs with land and option to purchase passes upon assignment of lease to assignee thereof. Jamson v. Poulos ---------- 480
11. Covenants in lease against assignment or underletting are not favorably regarded by courts and are liberally construed in favor of lessee. Jamson v. Poulos ---------- 480
12. Option to purchase real estate contained in lease agreement not terminated by death of lessee during term and before exercise of option, in absence of express limitation. Jamson v. Poulos ---------- 480
13. Where rights of assignee of lease have been recognized by lessor notwithstanding prohibition against assignment of lease, and no forfeiture of lease for lessee's breach of covenant or condition has been declared during term thereof, assignee may exercise option given lessee by lease to purchase leased property. Jamson v. Poulos ---------- 480
14. Although voluntary conveyance of real property from husband to wife without consideration except

love and affection will vest her with legal title, in action for dissolution of marriage court will inquire as to source of accumulated property and in exercise of discretion will divide property between parties awarding to husband equitable portion thereof. Fotinos v. Fotinos ---------- 486

15. Action to quiet title to real estate and to enforce contract and agreement is equitable action and is in Supreme Court for trial de novo on record. Liberty Finance Corp. v. Jones ---------- 529

16. Property of no person shall be taken or damaged for public use without just compensation therefor. Keller v. State ---------- 853

**Public Corporations.**

1. Requirement of demand to sue and subsequent refusal or waiver of demand by indication on part of public corporation of intent not to sue are conditions precedent to representative or derivative suit on behalf of public corporations. Evans v. Metropolitan Utilities Dist. ---------- 172

2. Omaha Public Power District subject to garnishment process to same extent as any electric light and power company by virtue of statute. Schreiner v. Irby Constr. Co. ---------- 222

**Public Funds.**

Resident taxpayer without proof of interest peculiar to himself may enjoin illegal expenditure of money by public board. Haschke v. School Dist. of Humphrey 298

**Public Officers and Employees.**

1. When performance of duty requires officer to enter upon private property, conduct, otherwise trespass, justifiable. State v. Howard ---------- 274

2. Firemen entering premises in response to call to duty do so rightfully under license of law. State v. Howard ---------- 274

3. Civil service commission certifying eligibles for fire chief has broad discretion in absence of legislative restriction to choose between promotion examinations and original entrance examinations. Short v. Kissinger ---------- 491

4. Driver of police department vehicle on official business, sounding audible signal by siren, shall have right-of-way, and drivers of other vehicles shall yield

such right-of-way. State v. Otto ---------- 597
5. Police officer conducting activity protected under cited statute entitled to exceed speed limit. State v. Otto ---------- 597
6. Surety upon bond of county treasurer liable for funds received by treasurer and not accounted for by him. City of Bellevue v. Western Surety Co. ---------- 678
Sanitary & Improvement Dist. v. Western Surety Co. 681
7. Interest on funds received by county treasurer but not accounted for by him runs from date of receipt. City of Bellevue v. Western Surety Co. ---------- 678
Sanitary & Improvement Dist. v. Western Surety Co. 681

**Public Service Commissions.**
1. Order of railway commission not res judicata as to another application of same nature subsequently filed, nor does it require independent proceeding. Canada v. Peake, Inc. ---------- 52
2. Extent of application of doctrine of res judicata to railway commission stated. Canada v. Peake, Inc. -- 52
3. Evidence of operations under color of authority may be considered by railway commission in determining whether or not proposed service is or will be required by present or future public convenience and necessity. Canada v. Peake, Inc. ---------- 52
4. Issue of public convenience and necessity ordinarily one of fact and where there is evidence in record to sustain railway commission's order, Supreme Court cannot say that it is unreasonable and arbitrary. Canada v. Peake, Inc. ---------- 52
Ace Gas, Inc. v. Peake, Inc. ---------- 448
5. Ruling by railway commission on issuance or denial of certificate of public convenience and necessity constitutes exercise of administrative and legislative powers and functions. Canada v. Peake, Inc. ------ 52
6. On appeal to Supreme Court from order of railway commission, administrative or legislative in character, only questions to be determined are whether commission acted within scope of its authority and whether order complained of is reasonable and not arbitrarily made. Canada v. Peake, Inc. ---------- 52
Ace Gas, Inc. v. Peake, Inc. ---------- 448
7. Determination of consistent with public interest, or public convenience and necessity, one that is peculiarly for railway commission; if there is evidence to sustain finding of commission, Supreme Court cannot intervene. Ace Gas, Inc. v. Peake, Inc. -------- 448

**Public Utilities.**

1. Public policy of state regarding electric service stated. Cornhusker P. P. Dist. v. Loup River P. P. Dist. ---------- 789
2. Statutory guidelines to be followed by Nebraska Power Review Board stated; in absence of agreement or failure to meet requirements of guidelines, service area supplier protected against encroachments and invasions of service rights. Cornhusker P. P. Dist. v. Loup River P. P. Dist. ---------- 789
3. Supplier of electricity except by agreement may not offer electric service to additional ultimate users outside service area without applying to Nebraska Power Review Board and receiving approval after notice and hearing; such approval cannot be validly granted unless shown that supplier in whose service area customer located cannot or will not furnish adequate electric service or that provision by such supplier of service area would involve wasteful and unwarranted duplication of facilities. Cornhusker P. P. Dist. v. Loup River P. P. Dist. ---------- 789
4. Where there is no evidence sufficient to sustain finding that supplier in service area has failed or is unable to comply with duties and responsibilities imposed on such supplier, order of Nebraska Power Review Board permitting others to supply customers is arbitrary and unreasonable, and therefore void. Cornhusker P. P. Dist. v. Loup River P. P. Dist. -------- 789
5. Where it appears that Nebraska Power Review Board has complied with controlling statutes in exercising powers, and evidence is sufficient to sustain findings of fact, Supreme Court without authority to substitute its judgment for that of board, and action of board will be sustained; but where evidence on controlling facts does not support action of board, its order is arbitrary and unreasonable. Cornhusker P. P. Dist. v. Loup River P. P. Dist. ---------- 789

**Public Welfare.**

Common law imposes no quasi-contractual duty on children of pauper to pay supplier for necessaries furnished pauper. David City Hospital v. Gilmore ---- 342

**Rape.**

1. Slightest penetration of the sexual organ of female is sufficient, if established beyond reasonable doubt,

to constitute necessary element of penetration in prosecution for rape, and such element may be proved by either direct or circumstantial evidence. State v. Chaney ---------- 734

2. In prosecution for rape, after prosecutrix has testified to commission of offense, competent to prove in corroboration of testimony as to main fact that within reasonable time after alleged outrage she made complaint to person to whom statement of such occurrence would naturally be made. State v. Chaney 734

3. Testimony concerning such complaint should on direct examination be confined to fact that complaint was made, and details of event, including identity of person accused, are not proper subjects of inquiry unless complaint was a spontaneous, unpremeditated statement so closely connected with act as to be part of res gestae. State v. Chaney ---------- 734

**Real Property.**

Payment of entire consideration of oral contract for purchase of real estate is not alone sufficient part performance to prevent application of statute of frauds. Heine v. Fleischer ---------- 379

**Reformation of Instruments.**

1. To obtain reformation of written instrument on ground of mistake, mistake must be mutual; to grant such relief, equity insists that reformation be consistent with complete mutual understanding of essential terms of bargain. Ready Sand & Gravel Co. v. Cornett ---------- 726

2. To warrant reformation of written instrument in any material respect, evidence must be clear, convincing, and satisfactory; and, until overcome by such proof, terms of instrument must stand as evidencing intention of parties. Ready Sand & Gravel Co. v. Cornett 726

**Res Judicata.**

1. Extent of application of doctrine of res judicata to railway commission stated. Canada v. Peake, Inc. -- 52

2. Equity court has right to limit rule of res judicata to issues actually tried without binding parties to issues not litigated or intended to be litigated. Brummund v. Vogel ---------- 415

**Right to Counsel.**

1. Waiver of right to counsel must be made competently

and intelligently. State v. McGhee ---------- 352
State v. Beasley ---------- 649
2. Where justiciable issue of law or fact presented, indigent defendant entitled to appointment of counsel. State v. Pilgrim ---------- 457
3. Mentally incompetent accused has no right to conduct own defense without assistance of counsel. State v. Beasley ---------- 649

**Sales.**

1. Officer or director of a seller who knew, or in exercise of reasonable care should have known, of facts by reason of which civil liability existed, may be individually liable with seller to a purchaser of securities under provisions of Blue Sky Law. Huryta v. White ---------- 24
2. Contract for sale or sale of securities in violation of Blue Sky Law not void but voidable by purchaser; remedies embrace enforcement or rescission whichever is appropriate. Huryta v. White ---------- 24
3. Issuance, assignment, sale, exchange, or transfer of securities in violation of Blue Sky Law shall, in civil action involving said acts, be deemed prima facie evidence of fraud upon part of issuer, assignor, transferor, or seller. Huryta v. White ---------- 24
4. If chief place of business of debtor not in state, law, including conflict-of-laws rule, of jurisdiction where chief place of business located governs perfection of security interest and possibility and effect of proper filing with regard to construction machinery. General Electric Credit Corp. v. Western Crane & Rigging Co. ---------- 212
5. Interest acquired in movables by buyer in ordinary course of business under U.C.C. may be subject to pre-code security interest in movables. General Electric Credit Corp. v. Western Crane & Rigging Co. -- 212
6. Bona fide purchaser of land defined. Love v. Fauquet ---------- 250
7. Where general power of law given testamentary trustee for sale of land, bona fide purchaser not affected by secret restrictions on power to sell; to entitle purchaser from trustee, having general power to sell for reinvestment or like, to claim protection as bona fide purchaser, no duty rests upon purchaser to see to due application of purchase money. Love v. Fauquet 250
8. Beneficiaries of trust have only equitable interest in property, if trustee transfers property in breach

of trust to bona fide purchaser transferee entitled to hold property free of trust and under no liability to beneficiaries. Love v. Fauquet ---------- 250
9. Under contract to manufacture goods according to specifications, where completed goods do not correspond to contract requirements, there was no transfer of title to such goods, under Uniform Sales Act, now repealed. Duplex Manuf. Co. v. Atlas Leasing Corp. 294
10. Purchaser of personal property, under implied warranty, has reasonable time to test same to ascertain whether or not it is as warranted, and ordinarily this would be question for jury. Duplex Manuf. Co. v. Atlas Leasing Corp. ---------- 294
11. Particular need of seller for money due is not proper element of damage. Duplex Manuf. Co. v. Atlas Leasing Corp. ---------- 294
12. Where seller expressly refuses to warrant subject matter of sale in certain particulars under statutory law existing in 1961, there can be no implied warranty of character covering those particulars, and such disclaimer of warranty not voided by Uniform Sales Act. Western Plastics Corp. v. Westinghouse Electric Corp. ---------- 498
13. In action to recover for breach of warranty, burden of proof on plaintiff to show that goods were defective at time of sale; must show basis of recovery over and above mere speculation and conjecture. Western Plastics Corp. v. Westinghouse Electric Corp. ---------- 498
14. In breach of warranty action plaintiff must show by proof that breach of warranty occurred beyond scope of disclaimer of warranty made prior to purchase. Western Plastics Corp. v. Westinghouse Electric Corp. ---------- 498
15. Trustee may sell trust property under conditions prescribed in Nebraska Trust Deeds Act without judicial proceeding. Blair Co. v. American Savings Co. ---------- 557

**Schools and School Districts.**

1. On appeal from decision of county superintendent in school reorganization matter, cause triable in district court without a jury. Schroeder v. Oeltjen -- 8
2. In determining validity of instrument filed for purpose of complying with statutory procedures in reorganization of school districts, substance not form of instrument controls. Schroeder v. Oeltjen ------ 8

3. Change in classification of school district resulting from change of boundaries does not necessarily create new school district requiring compliance with cited statute. Schroeder v. Oeltjen ---------- 8
4. In determining the valuation of a school district, the assessed valuation of intangible as well as tangible property must be considered. Schroeder v. Oeltjen ---------- 8
5. Correction of error in legal description of land lying within a school district occurring in petition for the consolidation of districts not subject to objection by one not a party to such petition. Schroeder v. Oeltjen ---------- 8
6. When withdrawal petitions presented to State Board of Vocational Education pursuant to cited statute, no adjudicative fact is at issue within principle that trial type hearing is required for dispute of adjudicative facts. Chaloupka v. Area Vocational Tech. School No. 2 ---------- 196
7. State Board of Vocational Education does not act judicially or quasi-judicially but performs purely administrative act when withdrawal petitions presented under cited statute. Chaloupka v. Area Vocational Tech. School No. 2 ---------- 196
8. Action of State Board of Vocational Education in certification of validation of signatures to governing board of area vocational technical school is not affected by constitutional guarantees of procedural due process. Chaloupka v. Area Vocational Tech. School No. 2 ---------- 196
9. Statute dealing with withdrawal petitions and State Board of Vocational Education is constitutional. Chaloupka v. Area Vocational Tech. School No. 2 196
10. School district possesses no powers other than those granted by Legislature. Haschke v. School Dist. of Humphrey ---------- 298
11. Provision of cited statute is independent alternative ground for transferring land from one school district to another. Pischel v. Kreycik ---------- 332
12. Retroactive date for nonimmunity of school district from tort liability stated. Root v. School Dist. No. 25 570
13. Legislature has specifically authorized school board or board of education of certain school districts to petition for boundary changes. Kosmicki v. Kowalski 639
14. Legislature has plenary power in creation and control of school districts, and may, if it thinks proper,

modify or withdraw any powers or destroy such school districts without consent of legal voters or even over their protests. Kosmicki v. Kowalski -- 639
15. Teacher whose contract automatically renewed under provisions of cited statute must file written notice of acceptance with secretary of board within 15 days after April 15. Balka v. School Dist. No. 53-J 706
16. Legislative function in transfer of land among school districts unaffected by constitutional guarantees of procedural due process. Hall v. Simpson 762
17. Initial decision concerning change of school district boundaries does not resolve disputes of adjudicative fact unless Legislature has provided otherwise. Hall v. Simpson ---------- 762
18. Violation by public school teacher of contract to teach, without just cause, proper ground for suspension of teacher's certificate. Henderson v. School Dist. of Scottsbluff ---------- 858
19. Proceeding to suspend teacher's certificate becomes moot on appeal when period of suspension has elapsed. Henderson v. School Dist. of Scottsbluff -- 858
20. Teacher who fails to supersede order suspending teacher's certificate and fails to seek prompt hearing on appeal cannot meritoriously complain of dismissal of appeal after period of suspension has elapsed and appeal has become moot. Henderson v. School Dist. of Scottsbluff ---------- 858

**Searches and Seizures.**

1. Search and Seizure incident to lawful arrest not violative of Fourth Amendment. State v. Goings ------ 81
State v. Agnew ---------- 700
2. Fourth Amendment to United States Constitution prohibits unreasonable searches and seizures and requires that probable cause exists for arrest before warrantless search can be made of premises or other property of suspect. State v. Harding ------ 159
3. Not necessary that actual formal arrest occur before search is undertaken as long as probable cause for arrest does exist prior to search. State v. Harding ---------- 159
4. Not significant in determining probable cause for warrantless search, whether search preceded or followed formal arrest. State v. Harding ---------- 159
5. Controlling factor in warrantless search is whether officer had reasonable grounds before search to make arrest. State v. Harding ---------- 159

6. In determining whether officer acted with probable cause, essential test is whether facts available to officer at moment of search or of seizure would warrant man of reasonable caution in belief that action taken is appropriate. State v. Harding ..... 159
7. State may develop workable rules governing searches and seizures to meet practical demands of effective criminal investigation and law enforcement, provided that rules do not violate constitutional processes of unreasonable searches and seizures. State v. Howard 274
8. Search implies some exploratory investigation, not search to observe that which is open and patent either in daylight or artificial light. State v. Howard 274
9. Observations by fellow officers engaged in common investigation are reliable basis for issuance of search warrant on application made by one of their number. State v. Howard ..... 274
10. Reasonable search not to be determined by any fixed formula, but is to be resolved according to facts of particular case. State v. Smith ..... 363
11. State and federal Constitutions prohibit only unreasonable searches and seizures. State v. Smith .. 363
12. Opening of automobile door by police officer solely for purpose of determining where and to whom motor vehicle was registered, when owner not being investigated for or suspected of crime, does not constitute unreasonable search within constitutional prohibitions. State v. Smith ..... 363
13. Reasonableness of search or seizure in first instance is substantive determination to be made by trial court from facts and circumstances of case and in light of fundamental criteria laid down by Fourth Amendment to Constitution of United States and opinions of United States Supreme Court. State v. Sharp ..... 411
14. Competent for prosecution to put in evidence all relevant facts and circumstances which tend to establish any of constituent elements of crime with which accused is charged or which justify search and seizure without warrant even though such facts and circumstances may prove or tend to prove that defendant committed other crimes. State v. Sharp 411
15. Warrantless search of defendant's automobile and seizure of materials found therein are reasonable when defendant has consented freely and intelligently. State v. Fiegl ..... 704

**Sentences.**

1. Error in allocution may be harmless. State v. Brockman ---------- 435
2. Where sentence imposed by district court within statutory limits, it ordinarily will not be disturbed in absence of abuse of discretion. State v. Chaney 734

**Set-Off and Counterclaim.**

1. Proper manner in which to challenge appropriateness of counterclaim or cross-petition is by motion to strike rather than demurrer. Weller v. Putnam 692
2. Defendant in an action not restricted to counterclaim provided for in cited statutes but, in proper case may seek affirmative relief, either against plaintiff or against co-defendants, by cross-petition. Weller v. Putnam ---------- 692
3. New issues which defendant may introduce by cross-petition or cross-bill are limited to such as is necessary for court to have before it in deciding questions raised in original suit in order to do complete justice to all parties with respect to cause of action on which plaintiff bases claim. Weller v. Putnam 692
4. New and distinct matter not maintainable under provisions of code as counterclaim and not involved in proper determination of subject matter of original suit must be litigated in separate action. Weller v. Putnam ---------- 692

**Statutes.**

1. In determining validity of instrument filed for purpose of complying with statutory procedures in reorganization of school districts, substance not form of instrument controls. Schroeder v. Oeltjen ------ 8
2. Change in classification of school district resulting from change of boundaries does not necessarily create new school district requiring compliance with cited statute. Schroeder v. Oeltjen ---------- 8
3. Not necessary that penal statute be so written as to be beyond mere possibility of more than one construction. State v. Lewis ---------- 111
4. Although penal statute is to be strictly construed, it should be given sensible construction and general terms therein should be limited in their construction and application so as not to lead to injustice, oppression, or absurd consequences. State v. Lewis ------ 111
5. Duty of Supreme Court to give penal statute inter-

pretation which meets constitutional requirements if it can reasonably be done. State v. Lewis ---------- 111
6. Ordinarily, words of common usage need not be defined in statute or in instruction. State v. Lewis -- 111
7. Statute dealing with withdrawal petitions and State Board of Vocational Education is constitutional. Chaloupka v. Area Vocational Tech. School No. 2 -- 196
8. Statute gives foreign corporation obtaining certificate of authority same standing in eyes of law as domestic corporation except where specifically prohibited by law. Schreiner v. Irby Constr. Co. ---- 222
9. Where title of act fairly gives expression to general subject-matter contained, act will not be held invalid as being broader than title. Duerfeldt v. State ---- 242
10. Constitutional provision relating to titles to be liberally construed so as to admit of insertion in legislative act of all provisions which, although not specifically expressed in title, are comprehended within the objects and purposes of act as expressed in title, and to admit all germane provisions and not foreign, to provisions of act as expressed in title. Duerfeldt v. State ---------- 242
11. Legislature may make reasonable classification, resting on grounds of public policy, or some substantial difference of situation or circumstance that would naturally suggest justice or expediency of diverse legislation with respect to objects classified and if statute operates equally upon all persons or objects of class so constituted it is not void as being special or local law. Duerfeldt v. State ---------- 242
12. Specific statutory provisions, relating to particular subject, control over general provisions. Duerfeldt v. State ---------- 242
13. Where statute is plain, direct, and unambiguous words therein must be given ordinary meaning and courts have no right to read different meaning into or out of words of such statute. Sadler v. Sadler -- 318
State v. Sabin ---------- 784
Peck v. Dunlevey ---------- 812
14. Where seller expressly refuses to warrant subject matter of sale in certain particulars under statutory law existing in 1961, there can be no implied warranty of character covering those particulars, and such disclaimer of warranty not voided by Uniform Sales Act. Western Plastics Corp. v. Westinghouse Electric Corp. ---------- 498

15. Whether retrospective statute allowed reasonable period for enforcement of judgment lien, court may consider time interval between passage and effective date of statute. Hidy v. Hidy ---------- 527
16. Offense of operation of motor vehicle without Nebraska motor vehicle operator's license is traffic violation for which 2 points are to be assessed. Wilson v. Johns ---------- 545
17. Constitutional provision that amendatory acts shall contain section amended does not apply to independent act which is complete in itself. Blair Co. v. American Savings Co. ---------- 557
18. Nebraska Trust Deeds Act constitutional. Blair Co. v. American Savings Co. ---------- 557
19. Trustee may sell trust property under conditions prescribed in Nebraska Trust Deeds Act without judicial proceeding. Blair Co. v. American Savings Co. ---------- 557
20. "Private person" as used in statute refers to natural person as distinguished from artificial person such as corporation, copartnership, or joint stock company. State v. Fields ---------- 565
21. Provision in sentence in effect directing that jail sentence authorized by cited statute shall be served in Nebraska Penal and Correctional Complex unauthorized and void; the transfer of prisoners sentenced to county jail is governed by statute. State v. Curry ---------- 682
22. In construing 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. Balka v. School Dist. No. 53-J -- 706
23. Nebraska State Real Estate Commission not required by Administrative Procedures Act to set out statutory provisions in rules and regulations. Weiner v. State Real Estate Commission ---------- 752
24. Cited statute only applicable to those procedures not specifically covered by statute. Weiner v. State Real Estate Commission ---------- 752
25. Violation of statutes regulating use and operation of motor vehicles upon highways not negligence per se, but evidence of negligence, which may be taken into consideration with all other facts and circumstances in determining whether or not negligence is established thereby. Seeman v. Pagels ---------- 757
26. Under former statute, operator of motor vehicle on

highway who would otherwise have right-of-way at intersection forfeits right-of-way if operates at unlawful rate of speed. Seeman v. Pagels ---------- 757
27. Legislative function in transfer of land among school districts unaffected by constitutional guarantees of procedural due process. Hall v. Simpson ---------- 762
28. Initial decision concerning change of school district boundaries does not resolve disputes of adjudicative fact unless Legislature has provided otherwise. Hall v. Simpson ---------- 762
29. If statute unambiguous, Supreme Court will not usurp function of lawmaking body to give meaning to statute not intended by Legislature. State v. Sabin ---------- 784
30. Right of appeal clearly statutory and, unless statute provides for appeal from decision of quasi-judicial tribunal, such right does not exist. Peck v. Dunlevey 812
31. If mode and manner of appeal provided in statute, appellate jurisdiction under such statute can only be conferred in mode and manner provided. Peck v. Dunlevey ---------- 812
32. Under Uniform Commercial Code, after-acquired property clause in security agreement creates valid security interest in crops which are planted and become such within one year after security agreement executed, where rights in crops are acquired by debtor in ordinary course of business. Overland Nat. Bank v. Aurora Coop. Elevator Co. ---------- 843
33. In determining legislative intent, all statutes relating to same subject should be construed and considered together. Keller v. State ---------- 853
34. In construing statute, court must look to object to be accomplished, evils and mischief sought to be remedied, or purpose to be subserved, and make reasonable or liberal construction which will best effect purpose rather than one which will defeat it. Keller v. State ---------- 853
35. Intention of Legislature when ascertained will prevail over literal sense of words used and this is especially true when strict letter of law would lead to injustice or absurdity; in interpreting statute legislative intent may be found from reason of enactment. Keller v. State ---------- 853
36. When intent of Legislature clear, it is duty of courts to construe statute in accordance with such intent; sensible construction will be placed to effectuate ob-

ject of legislation rather than literal meaning that would have effect of defeating legislative intent. Keller v. State ---------- 853

**Stipulations.**

Court on timely motion may properly vacate stipulation that is improvident and not conducive to justice. Meyer v. City of Grand Island ---------- 657

**Subrogation.**

1. Where holder of subrogation right asserts right to equitable subrogation in avails of litigation or settlement created by efforts of insured and his attorney, and insurance company fails to make, or to offer to make, itself party to action against wrong-doer, or in any manner to assist in prosecution of claim or contribute towards expense thereof, although having full knowledge of its pendency and object, insured entitled to retain proportionate share of expenses, including attorney's fees, incurred in recovery from which insurance company will benefit to extent of subrogation claim. Krause v. State Farm Mut. Auto. Ins. Co. ---------- 588
2. Insurer entitled to subrogation, either by contract or in equity for amount of indemnity paid. Krause v. State Farm Mut. Auto. Ins. Co. ---------- 588

**Summary Judgments.**

1. Prerequisite to Supreme Court's examination of evidence adduced on summary judgment hearing is that it be embodied in bill of exceptions. Jung v. Cole 153
2. In absence of bill of exceptions in summary judgment proceeding, only issue that will be considered on appeal is sufficiency of pleadings to support judgment, presumptions as to evidence and fact issues stated. Jung v. Cole ---------- 153

**Taxation.**

1. For Constitution to restrict plenary power of Legislature to tax, language must be clear. R-R Realty Co. v. Metropolitan Utilities Dist. ---------- 237
2. Statute authorizing or requiring city or county to levy property tax for local fire protection purposes does not contravene constitutional prohibition against state levy of property tax for state purposes. R-R Realty Co. v. Metropolitan Utilities Dist. ---------- 237

**Telecommunications.**

Company furnishing communication services for hire in Nebraska intrastate commerce is common carrier subject to general control of railway commission. American Communication Co., Inc. v. Buntemeyer -- 220

**Tender.**

Where certain sum of money tendered by debtor to creditor on condition that he accept it in full satisfaction of demand, sum due being in dispute, creditor must either refuse tender or accept it as made subject to condition; if accepts it, he accepts condition also, notwithstanding any protest to the contrary. Growers Cattle Credit Corp. v. Swanson ---- 612

**Time.**

1. Time for performance is not ordinarily essential contract term because law implies that it shall take place within reasonable time. Heine v. Fleischer -- 379
2. Provision concerning time for delivery of possession in oral contract for sale of land is unenforceable unless it is included in memorandum. Heine v. Fleischer ---------- 379

**Torts.**

1. Possessor of land subject to liability for physical harm caused to invitees by condition on land if, but only if, he should realize that it involves an unreasonable risk of harm to such invitees, and should expect that they will not discover or realize danger, or will fail to protect against it. Hilker v. N. P. Dodge Building Co. ---------- 495
2. Person lawfully on premises assumes dangers which are open and obvious and which can be seen readily and avoided by exercise of ordinary care. Hilker v. N. P. Dodge Building Co. ---------- 495
3. Municipal university organized under cited statute subject to suit. Johnson v. Municipal Uinversity of Omaha ---------- 512
4. Cities, counties, and all other governmental subdivisions, and local public entities of this state, including municipal universities, not immune from tort liability arising out of physical condition, affirmatively and voluntarily created by public body on its premises, where existence of condition not reasonably visible or apparent, and where condition con-

stitutes unreasonable risk of harm to persons authorized to use and reasonably using premises for purposes intended. Johnson v. Municipal University of Omaha ---------- 512
5. Tort-feasor answerable for all consequences that, in natural course of events, flow from unlawful or negligent acts, although those results are brought about by intervening agency of others, provided intervening agents were set in motion by primary wrongdoer, or were natural consequences of original wrongful act. Beranek v. Petracek ---------- 516
6. Proximate cause of injury is that cause which, in natural and continuous sequence, unaccompanied by any efficient intervening cause, produces injury, and without which result would not have occurred. Beranek v. Petracek ---------- 516
7. Not sufficient that negligence charged furnishes only condition by which injury made possible, for if such condition causes injury by subsequent independent act of third person, two acts are not concurrent and existence of condition is not proximate cause of injury. Beranek v. Petracek ---------- 516
8. Retroactive date for nonimmunity of school district from tort liability stated. Root v. School Dist. No. 25 570

**Trespass.**

1. Under law of capture, owner of land acquires title to oil or gas produced from wells on his land although part of oil or gas may have migrated from adjoining wells; and may thus appropriate oil and gas that flowed from adjacent lands without consent of owner of those lands and without incurring drainage liability. Baumgartner v. Gulf Oil Corp. ------ 384
2. Where secondary recovery project authorized by Nebraska Oil and Gas Conservation Commission, operator not liable for willful trespass to owners who refuse to join project when injected recovery substance moves across lease lines. Baumgartner v. Gulf Oil Corp. ---------- 384
3. Orthodox rules and principles applied by courts as regards surface invasions of land may not be appropriately applied to subsurface invasions arising out of secondary recovery of oil and gas. Baumgartner v. Gulf Oil Corp. ---------- 384
4. At common law, owner of livestock liable for any damage done by it while trespassing upon lands of others, whether such lands were cultivated or un-

cultivated. Fiene v. Robertson ---------- 668
5. Under existing statutes liability for trespass of animals limited to trespass upon cultivated lands; to render owner liable for trespass upon uncultivated lands, willful trespass must be alleged and proven. Fiene v. Robertson ---------- 668

**Trial.**

1. Three situations listed where negligence inferred without affirmative proof thereof in res ipsa loquitur action. McCall v. St. Joseph's Hospital ---------- 1
2. Exclusive control element of res ipsa loquitur doctrine satisfied if shown that the injury resulted from external force applied while plaintiff was in exclusive control or custody of defendants, even though by subsequent explanation some of defendants are exonerated from charge of negligence. McCall v. St. Joseph's Hospital ---------- 1
3. Constitution of Nebraska preserves right to trial by jury as it existed at common law or by statute but does not extend the right beyond limits existing at time of adoption of Constitution. Schroeder v. Oeltjen ---------- 8
4. On appeal from decision of county superintendent in school reorganization matter, cause triable in district court without a jury. Schroeder v. Oeltjen -- 8
5. Where evidence relating to ambiguities and contradictory provisions in written contract is conflicting, interpretation to be given contract is for jury. Ely Constr. Co. v. S & S Corp. ---------- 59
6. In rape prosecution where no request for such an instruction is made, it is not error for trial court to fail to instruct on lesser included offenses. State v. Caha ---------- 70
7. Argument by prosecuting attorney based on evidence and inferences drawn therefrom does not ordinarily constitute misconduct. State v. Botts ---------- 78
8. Credibility of witnesses and weight of evidence in criminal case are for jury and verdict will not be set aside if evidence sustains some rational theory of guilt. State v. Lewis ---------- 111
9. If court has instructed jury generally on law of case and not withdrawn any essential issue from consideration of jury, error cannot be predicated on failure to charge on some particular phase of case, unless proper instruction has been requested by party complaining. State v. Lewis ---------- 111

10. Charge of trial court to jury should be confined to issues presented by pleadings and supported by evidence. Newkirk v. Kovanda ---------- 127
Seeman v. Pagels ---------- 757
11. Ordinarily, it is error to submit to jury issue which is not pleaded in case. Newkirk v. Kovanda ------ 127
12. Instructions to jury must be considered as whole, and when thus considered, if law correctly stated and case fairly submitted, and jury could not have been misled, claim of prejudicial error in instructions not available. Newkirk v. Kovanda ---------- 127
Kresha Constr. Co., Inc. v. Kresha ---------- 188
Beranek v. Petracek ---------- 516
13. Where evidence is presented which could, if accepted by jury, give rise to application of sudden emergency rule, an instruction on rule is proper. Jones v. Peterson ---------- 141
14. Instructions which properly present theory of party as pleaded and present applicable law thereto are not erroneous merely because they contain assumptions of fact favorable to party claiming error or because, in absence of request, do not more completely instruct on subject matter in issue. Jones v. Peterson ---------- 141
15. Error to submit to jury issue upon which there is no material dispute. Jones v. Peterson ---------- 141
16. Circumstantial evidence is not sufficient to sustain verdict depending solely thereon for support, unless circumstances proved by evidence are of such nature and so related to each other that conclusion reached by jury is only one that can fairly and reasonably be drawn therefrom. J. R. Watkins Co. v. Wiley -- 144
17. Statute relating to right of party to amend after sustaining of demurrer does not declare absolute right of amendment. Evans v. Metropolitan Utilities Dist. ---------- 172
18. Right to amend petition after sustaining of demurrer rests within sound discretion of district court. Evans v. Metropolitan Utilities Dist. ---------- 172
19. Habitual Criminal Law does not set out distinct crime, but provides that repetition of criminal conduct aggravates guilt and justifies heavier penalties. Fact that defendant has been guilty of second felony does not make him guilty under Habitual Criminal Law of offense for which he may be separately sentenced, but increases punishment for last felony. In-

creased punishment for latest felony is court determination and not one for jury. State v. Losieau --- 178
20. "Habitual criminality" under statute is a state rather than crime, and warrants greater punishment because of past conduct. State v. Losieau ---------- 178
21. Meaning of instruction, not phraseology, is important consideration, and claim of prejudice will not be sustained when meaning of instruction is reasonably clear. Landmesser v. Ahlberg ---------- 182
22. Where meaning of instruction is clear and a correct statement of law, error cannot be predicated on selection of words. Landmesser v. Ahlberg ---------- 182
23. Proper method of presenting case to jury is clear and concise statement by court of those issues which find support in evidence, and not by substantially copying pleadings of parties. Kresha Constr. Co., Inc. v. Kresha ---------- 188
24. It is duty of trial court to control propounding of hypothetical questions to expert witnesses and to regulate form, length, and content of questions. In so doing court exercises judicial discretion which ought not be overridden unless it very clearly appears to have been wrongly exercised. Kresha Constr. Co., Inc. v. Kresha ---------- 188
25. If fact issue presented, in absence of bill of exceptions there is presumption of correctness of trial court's determination. Schreiner v. Irby Constr. Co. ---------- 222
26. District court under initial duty without request to define issues of ultimate fact for jury. St. Paul Fire & Marine Ins. Co. v. Hoffman ---------- 247
27. Error for district court to frame jury issue over ultimate fact that no reasonable man can fail to find. St. Paul Fire & Marine Ins. Co. v. Hoffman -------- 247
28. Direct expert testimony not indispensable if issue can be determined from evidence presented and common knowledge and usual experience of trier of fact. Yost v. City of Lincoln ---------- 263
29. Where different minds may draw different conclusions or inferences, or where there is conflict in evidence, the matter at issue must be submitted to jury. Sacher v. Petersen ---------- 305
Seeman v. Pagels ---------- 757
30. Failure at trial to challenge constitutionality of prior conviction forecloses challenge on appeal. State v. McGhee ---------- 352

31. Under cited statute, where motion for suppression of evidence filed more than 10 days prior to commencement of trial and overruled by court, it is not prejudicial error for trial court at trial to reconsider motion; waiver of objections to evidence on ground that it was obtained by unreasonable search occurs only when no objection made more than 10 days before trial where exceptions thereto have no application. State v. Smith ---------- 363
32. Within discretion of trial court to permit introduction of rebuttal evidence that is not strictly rebutting. State v. Howard ---------- 461
33. Defendant in criminal case who becomes witness subjects himself to rules of law applicable to other witnesses. State v. Howard ---------- 461
34. Defendant in criminal proceeding who has waived privilege against self-incrimination by testifying in own behalf may be required to repeat certain statements, put on jacket, or perform other similar acts as part of cross-examination. State v. Howard ---- 461
35. Testimony of witness at previous trial admissible if witness is unavailable. State v. Howard ------ 461
36. Within discretion of trial court to determine whether unavailability of witness has been shown. State v. Howard ---------- 461
37. Unavailability of witness due to illness may be shown by affidavit in criminal proceeding. State v. Howard 461
38. Asking improper questions of witness to which objections sustained by court do not constitute prejudicial error in absence of showing that defendant was thereby deprived of fair and impartial trial. State v. Country ---------- 493
39. Entertainment of belated motion to strike testimony, no objection having been previously made thereto, is discretionary with trial court. Western Plastics Corp. v. Westinghouse Electric Corp. ---------- 498
40. If petition states facts which entitle plaintiff to relief, whether legal or equitable, it is not demurrable upon ground that it does not state facts sufficient to constitute cause of action. Higgs v. Hall County 508
41. Party should not be permitted to cross-examine witness as to matter foreign to scope of direct examination; rule of strict cross-examination has been adopted and is in force in this state. Beranek v. Petracek ---------- 516
42. Violation of strict rule of cross-examination will not

be considered ground for reversal unless it clearly results in prejudice to substantial rights of party complaining. Beranek v. Petracek ---------- 516

43. Admission or rejection of photographs in evidence largely within discretion of trial court; error may not be predicated thereon in absence of showing of abuse of discretion. Beranek v. Petracek ---------- 516

44. Right of speedy trial is necessarily relative; is consistent with delays and depends upon circumstances; secures rights to defendant; but does not preclude rights of public justice. State v. Ellis ---------- 523

45. Unexplained delay of 43 days between arrest and preliminary hearing, standing alone, does not demonstrate violation of constitutional guarantee of speedy trial, in absence of showing of prejudice. State v. Ellis ---------- 523

46. District judge not disqualified to hear case because he previously presided in proceeding involving one of parties. Liberty Finance Corp. v. Jones -------- 529

47. Generally, burden of proving issue lies on party holding affirmative of that issue. County of Banner v. Young ---------- 546

48. Where litigant has approved instructions in trial court, either by word or act, cannot thereafter effectively complain of instructions given. Martinez v. Hoveling ---------- 560

49. Fact issues not fully explored and which may rest on determination of credibility of witnesses must be resolved by trial on merits. Cover v. Scott -------- 585

50. General demurrer tests substantive legal rights of parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. Krause v. State Farm Mut. Auto. Ins. Co. ---------- 588

51. Credibility for trier of facts and uncontradicted testimony of witness does not have to be accepted. State v. Graham ---------- 635

52. Duty of trial court to submit to jury only material issues presented by pleadings which find support in evidence; failure to so instruct, if objection thereto timely made, constitutes prejudicial error. Schmidt v. Johnson ---------- 643

53. Where jury has been otherwise properly instructed on issues, issue of unavoidable accident is sufficiently submitted and ordinarily not prejudicial error to either give or refuse instruction on that issue.

Schmidt v. Johnson ---------- 643
54. Where, in action to recover for personal injuries, jury properly instructed as to burden of proving negligence charged against defendant as proximate cause of injury, defense that negligence of third person not party to action is sole proximate cause is not affirmative plea in avoidance of plaintiff's cause and imposes no burden of proof upon defendant with relation thereto, but is consistent with and provable under general issue where burden of proof remains with plaintiff to prove alleged negligence of defendant. Schmidt v. Johnson ---------- 643
55. Application for continuance addressed to sound discretion of trial court and ruling thereon will not be disturbed unless it appears that rights of defendant were prejudiced thereby. State v. Schumacher 653
56. Court on timely motion may properly vacate stipulation that is improvident and not conducive to justice. Meyer v. City of Grand Island ---------- 657
57. Order allowing party to withdraw rest and adduce evidence is discretionary. Meyer v. City of Grand Island ---------- 657
58. All defects that may be excepted to by motion to quash are taken to be waived by defendant pleading general issue. State v. Fiegl ---------- 704
59. Party in selection of jury ordinarily has no right to examine juror out of presence of all other jurors. State v. Fiegl ---------- 704
60. Party against whom motion to dismiss made entitled to have every controverted fact resolved in his favor and to have benefit of every inference that can reasonably be drawn from evidence. Pick v. Pick ---------- 716
61. Order in which proof introduced is to large extent within discretion of trial court and ruling in that regard is no cause for reversal where rights of defendant are not shown to have been prejudiced. State v. Chaney ---------- 734
62. Practice of reading law to jury is in conflict with and totally inimical to fundamental concept inherent in jury system. State v. Chaney ---------- 734
63. Duty of trial judge to instruct on law of case, and law so given to jury in instructions must apply even though jury may decide that law be otherwise. State v. Chaney ---------- 734
64. Admission of testimony wrongfully received in case

tried to jury is prejudicial error where it may have influenced verdict. Witte v. Lisle ---------- 742
65. Manner in which witness may be examined is within sound discretion of court. Ederer v. Van Sant ------ 774
66. Excluding testimony during oral examination on sole ground of nonresponsiveness raised by counsel who is not interrogating witness is error. Isham v. Birkel ---------- 800
67. Admission or rejection of photographs in evidence largely within discretion of trial court and, in absence of showing of abuse of discretion, error may not be predicated upon such ruling. Jensen v. State 802
68. Under cited statute where material issues of fact are presented in contested garnishment proceeding, they are triable by jury unless waived. Christiansen v. Moore ---------- 818
69. Not error to refuse requested instruction if legal principles therein announced are either incorrectly stated or inapplicable to issues involved. Krantz v. Marge's Mufflers, Inc. ---------- 838
70. Although witness may be impeached by proof of previous inconsistent statements, counsel should not be permitted to read at length from pre-trial depositions during cross-examination where no substantial variance in testimony. Krantz v. Marge's Mufflers, Inc. ---------- 838
71. When law action tried without jury to court, findings of court have effect of jury verdict and judgment thereon will not be disturbed unless clearly wrong. Mathiesen v. Bloomfield ---------- 873

**Trusts.**

1. Supervision and review of testamentary trustee's acts is jurisdiction concurrently lodged in district and county courts. Love v. Fauquet ---------- 250
2. Concurrent and original jurisdiction of district court to supervise and control execution and administration of testamentary trusts ordinarily limited to unusual situations where there is failure of proper exercise of concurrent jurisdiction of county court in which ordinarily administration of trust can be coordinated and given continual scrutiny and supervision necessary. Love v. Fauquet ---------- 250
3. Generally, where trustee, by terms of trust, has general and unrestricted power to transfer or encumber property, one dealing with him in good faith not bound to go further and ascertain whether in

fact act of trustee is justified. Love v. Fauquet ---- 250
4. Where general power of sale given testamentary trustee for sale of land, bona fide purchaser not affected by secret restrictions on power to sell; to entitle purchaser from trustee, having general power to sell for reinvestment or like, to claim protection as bona fide purchaser, no duty rests upon purchaser to see to due application of purchase money. Love v. Fauquet ---- 250
5. Beneficiaries of trust have only equitable interest in property, if trustee transfers property in breach of trust to bona fide purchaser transferee entitled to hold property free of trust and under no liability to beneficiaries. Love v. Fauquet ---- 250
6. Nebraska Trust Deeds Act constitutional. Blair Co. v. American Savings Co. ---- 557
7. Trustee may sell trust property under conditions prescribed in Nebraska Trust Deeds Act without judicial proceeding. Blair Co. v. American Savings Co. ---- 557

**Usury.**

Where sales contract provides for usurious interest on part of purchase price and for legal interest on another part of purchase price represented by note, illegal interest charged and paid may be offset against sums due on note. Agri-Tek Supply Co. v. Gaeth ---- 423

**Venue.**

Where venue of affidavit laid in one county, and acknowledgment taken by notary public in different county, presumed that acknowledgment was taken by notary public in county where he had authority to act. Prigge v. Johns ---- 103

**Warranty.**

1. Where there is contract to sell goods by description, there is implied warranty under statute existing in 1961 that goods shall correspond with description. Western Plastics Corp. v. Westinghouse Electric Corp. ---- 498
2. Where seller expressly refuses to warrant subject matter of sale in certain particulars under statutory law existing in 1961, there can be no implied warranty of character covering those particulars, and

such disclaimer of warranty not voided by Uniform Sales Act. Western Plastics Corp. v. Westinghouse Electric Corp. ---------- 498

3. In action to recover for breach of warranty, burden of proof on plaintiff to show that goods were defective at time of sale; must show basis of recovery over and above mere speculation and conjecture. Western Plastics Corp. v. Westinghouse Electric Corp. ---------- 498

4. In breach of warranty action plaintiff must show by proof that breach of warranty occurred beyond scope of disclaimer of warranty made prior to purchase. Western Plastics Corp. v. Westinghouse Electric Corp. ---------- 498

**Waters.**

1. Upper proprietor has right to change course of surface waters falling or flowing on his land, but may not collect and cast them on lower proprietor to his damage except in natural watercourse. Muff v. Mahloch Farms Co., Inc. ---------- 286

2. Owner of real estate may grade land and apply irrigation water to it as an incident of ownership and act of good husbandry of natural resources. Muff v. Mahloch Farms Co., Inc. ---------- 286

3. Owner of land upon which springs are located which are source of watercourse does not have exclusive right to control and use waters to injury of lower riparian owner or senior appropriator. Brummund v. Vogel ---------- 415

4. Right of downstream user of water for domestic purposes has preference to upstream appropriator's right to construct reservoir for either agricultural or recreational purposes, where such use will not result in any unreasonable diminution of water resulting in injury to domestic user. Brummund v. Vogel ---------- 415

5. Effect of proposed construction of dam on flow of water in nonnavigable stream affected by many factors and conditions and is generally subject for opinion of expert witnesses with special knowledge and experience in this field of engineering. Brummund v. Vogel ---------- 415

**Weapons and Firearms.**

1. Loaded pistol locked in glove compartment is con-

cealed on or about person of driver. State v. Goodwin ---------- 537
2. Words "concealed on or about person" defined. State v. Goodwin ---------- 537
3. Weapon is concealed when it is hidden from ordinary observation and is readily accessible on person or in motor vehicle operated by defendant. State v. Goodwin ---------- 537
4. To be within exception provided by statute, one must be engaged in lawful business, calling, or employment, and circumstances must be such as to justify prudent person in carrying weapon for defense of person, property, or family. State v. Goodwin ---------- 537
5. Giving further instruction defining gun as dangerous instrumentality, handling of which calls for highest degree of care, may be regarded as surplusage. Martinez v. Hoveling ---------- 560

**Wills.**

1. If married man by will disposes of all property, real and personal, to others, and gives nothing to wife, she will be entitled to take distributive share given her by statute as though he had died intestate. Sadler v. Sadler ---------- 318
2. Cited statute undertakes to give widow right of election, but gives her such right only in case provision is made for her in will, right of election is applicable only when widow prefers property given her by law to that given her by will. Sadler v. Sadler ---------- 318
3. Under cited statute, wife has interest in real estate of her husband which he cannot alienate without her consent. Sadler v. Sadler ---------- 318
4. Testator bound to employ apt words to express meaning, and if, knowing words intended to be used, he approves them and executes his will, he thereby knows and approves contents of his will even though such approval be due to mistaken belief of his own, or the honest advice of others, as to their true meaning and legal effect. Sadler v. Sadler ---------- 318
5. More important that probate of wills of dead persons be effectively shielded from attacks of multitude of fictitious mistakes than that it be purged of wills containing few real ones, testator can avoid latter by due care in lifetime while against former he would be helpless. Sadler v. Sadler ---------- 318

**Witnesses.**

1. In rape prosecution, if prosecutrix testifies to facts constituting crime and accused unequivocally denies commission of offense, testimony of prosecutrix must be corroborated on material points by other evidence to sustain conviction. State v. Gero ---------- 107
2. In rape prosecution, not essential that prosecutrix be corroborated by testimony of other witnesses as to particular act constituting offense, but is sufficient if corroborated as to material facts and circumstances which tend to support testimony and from which, together with testimony as to principal fact, inference of guilt may be drawn. State v. Gero ---------- 107
3. In rape prosecution, fact that evidence does not show prosecutrix made complaint to others within reasonable time does not affect validity of conviction where ample corroborating evidence otherwise shown by record. State v. Gero ---------- 107
4. It is duty of trial court to control propounding of hypothetical questions to expert witnesses and to regulate form, length, and content of questions. In so doing court exercises judicial discretion which ought not be overridden unless it very clearly appears to have been wrongly exercised. Kresha Constr. Co., Inc. v. Kresha ---------- 188
5. Statutory requirement that deposition be signed by witness is not mandatory provision. Rockland Chemical Co., Inc. v. F. & F. Manufacturing, Inc. ---------- 235
6. Statute providing procedure to be followed where witness does not sign deposition in event of nonwaiver, must be substantially complied with in order to warrant admission of deposition over proper objection on motion to suppress. Rockland Chemical Co., Inc. v. F. & F. Manufacturing, Inc. ---------- 235
7. Opinion of physician or surgeon as to condition of injured or diseased person not rendered incompetent by fact that it is based upon history of case given by patient to physician or surgeon on his examination of patient, when examination was made for purpose of treatment and cure. Martin v. Frear ---- 266
8. Where expert witness gives opinion based on facts established by record upon matter recognized as proper subject of expert opinion, unless impeached to such an extent as to have no probative value, it is ordinarily sufficient to sustain judgment. Martin v.

Frear ---------- 266
9. Requirement that names of witnesses for State must be endorsed upon information has no application to rebuttal witnesses. State v. Dubany ---------- 337
10. Effect of proposed construction of dam on flow of water in nonnavigable stream affected by many factors and conditions and is generally subject for opinion of expert witness with special knowledge and experience in this field of engineering. Brummund v. Vogel ---------- 415
11. Defendant in criminal case who becomes witness subjects himself to rules of law applicable to other witnesses. State v. Howard ---------- 461
12. Defendant in criminal proceeding who has waived privilege against self-incrimination by testifying in own behalf may be required to repeat certain statements, put on jacket, or perform other similar acts as part of cross-examination. State v. Howard ---- 461
13. Testimony of witness at previous trial admissible if witness is unavailable. State v. Howard ---------- 461
14. Within discretion of trial court to determine whether unavailability of witness has been shown. State v. Howard ---------- 461
15. Unavailability of witness due to illness may be shown by affidavit in criminal proceeding. State v. Howard 461
16. Witness who testifies as expert on subject requiring special knowledge and skill is, in absence of special contract, entitled only to statutory fee. Anderson v. State ---------- 467
17. One who appraises real estate for another, for fee, commission, or other valuable consideration, is by statutory definition a real estate broker. Anderson v. State ---------- 467
18. One not licensed as real estate broker may not be allowed expert witness' fee for testifying in regard to real estate values. Anderson v. State ---------- 467
19. Party should not be permitted to cross-examine witness as to matter foreign to scope of direct examination; rule of strict cross-examination has been adopted and is in force in this state. Beranek v. Petracek ---------- 516
20. Violation of strict rule of cross-examination will not be considered ground for reversal unless it clearly results in prejudice to substantial rights of party complaining. Beranek v. Petracek ---------- 516
21. Fact issues not fully explored and which may rest

on determination of credibility of witnesses must be resolved by trial on merits. Cover v. Scott ------ 585
22. Credibility for trier of facts and uncontradicted testimony of witness does not have to be accepted. State v. Graham ---------- 635
23. Hypothetical question as to rate of speed of vehicle must include all factors necessary for reasonably accurate opinion, all such factors must be supported by evidence. Witte v. Lisle ---------- 742
24. Manner in which witness may be examined is within sound discretion of court. Ederer v. Van Sant ---- 774
25. Expert opinion evidence in condemnation case, as in all other cases, to be considered and weighed by triers of fact like any other testimony; is only advisory in nature and not binding upon jury or court. Jensen v. State ---------- 802
26. Weight and credibility of testimony of either lay or expert witnesses in eminent domain action for jury. Jensen v. State ---------- 802
27. Not necessary that qualified witness in condemnation case be familiar with every possible element that goes into determination of market values. Jensen v. State ---------- 802
28. Although witness may be impeached by proof of previous inconsistent statements, counsel should not be permitted to read at length from pre-trial depositions during cross-examination where no substantial variance in testimony. Krantz v. Marge's Mufflers, Inc. ---------- 838

**Words and Phrases.**

1. Ordinarily, words of common usage need not be defined in statute or in instruction. State v. Lewis -- 111
2. Word "entity" means real being, existence, "legal entity," therefore means legal existence, Game and Parks Commission, created by statute is department of state government having actual legal existence and is legal entity. Duerfeldt v. State ---------- 242
3. "Accident" defined. Yost v. City of Lincoln ------ 263
4. Word "operate" as used in cited statute relates to actual physical handling of controls of motor vehicle by person while under influence of intoxicating liquor. State v. Dubany ---------- 337
5. Meaning of "correlative rights" in oil and gas law stated. Baumgartner v. Gulf Oil Corp. ---------- 384
6. Words "concealed on or about person" defined. State v. Goodwin ---------- 537

7. "Private person" as used in statute refers to natural person as distinguished from artificial person such as corporation, copartnership, or joint stock company. State v. Fields ---------- 565
8. Audible signal is signal capable of being heard, signal which is heard, or in exercise of ordinary care should have been heard. State v. Otto ---------- 597
9. In construing 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. Balka v. School Dist. No. 53-J -- 706
10. Where statute is plain, direct, and unambiguous words therein must be given ordinary meaning and courts have no right to read different meaning into or out of words of such statute. Peck v. Dunlevey 812

**Workmen's Compensation.**

1. In workmen's compensation case, plaintiff has burden of establishing by preponderance of evidence that accident in employment in reasonable probability contributed in some material and substantial degree to cause injury. Todd v. Mer-Del Enterprises, Inc. 258
2. Workmen's compensation case considered de novo upon record in Supreme Court. Yost v. City of Lincoln ---------- 263
3. Plaintiff must prove personal injury as result of accident arising out of and in course of employment and that disability caused by accident. Yost v. City of Lincoln ---------- 263
4. "Accident" defined. Yost v. City of Lincoln ------ 263
5. Injury and resulting disability not compensable if due to natural causes or is result of natural progression of preexisting condition. Yost v. City of Lincoln ---------- 263
6. Employer engaged in custom combining for public as regular commercial business not an employer of "farm or ranch laborers," and employee of such employer is within provisions of Workmen's Compensation Act. Hawthorne v. Hawthorne ---------- 372
7. Waiting time in statute begins to run when employer receives notice of disability, not when notice is given to compensation carrier. Gill v. Hrupek -- 436
8. Workmen's Compensation Act remedial in nature and purpose is to do justice to workmen without expensive litigation and unnecessary delay. Gill v. Hrupek ---------- 436
9. In workmen's compensation case death caused by (1)

heart disease that was personal risk and (2) emotional strain that was employment risk not compensable in these circumstances: Strain was no greater than that of nonemployment life. Beck v. State ---------- 477

10. For partial disability, workmen's compensation shall be 66⅔ percent of difference between wages received at time of injury and earning power thereafter, not to exceed $45 per week or to continue beyond 300 weeks. Colgrove v. City of Wymore -- 712

11. Disability under subdivisions (1) and (2) of cited statute refers to loss of earning power rather than loss of bodily function; losses in bodily function, so far as these subdivisions of statute concerned, are important only as relate to earning capacity. Colgrove v. City of Wymore ---------- 712

12. One of determinating factors in reaching conclusion on impairment of earning ability is capacity of workman to earn wages in employment in which previously engaged or for which is fitted. Colgove v. City of Wymore ---------- 712

13. Ordinarily, injury sustained by employee while going to and from work does not arise out of and in course of employment. Monroe v. St. Marks Lutheran Church ---------- 741