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IN RE GUARDIANSHIP OF JAMES M. HYDE, INCOMPETENT. JAMES M. HYDE, APPELLANT, V. CHARLOTTE I. CROCKER ET AL., APPELLEES.

176 N.W. 2d 234

Filed April 10, 1970. No. 37461.

1. **Guardian and Ward.** A proceeding for the appointment of a guardian is a probate matter.
2. **Guardian and Ward: Appeal and Error: Equity.** An appeal in a guardianship matter from the county court to the district court is triable in the district court as a suit in equity, and on appeal to this court from the district court is heard and determined de novo.
3. **Guardian and Ward: Words and Phrases.** The term mentally incompetent as used in the statute (section 38-201, R. R. S. 1943) does not refer to a person who is sane but not as wise, intelligent, or mentally strong as some other person. It applies to the person whose mind is so affected as to have lost control of itself to such a degree as to deprive the person affected of sane and normal action.

Appeal from the district court for Loup County: WILLIAM F. MANASIL, Judge. Reversed and remanded with directions to dismiss.

Thomas O. David, for appellant.

Leo F. Clinch, for appellees.

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

SPENCER, J.

This is an appeal from an order of the district court sustaining a finding by the county court of Loup County that the appellant was mentally incompetent and incapable of having the charge and management of his person and property, and appointing a guardian for him.

In June of 1963, appellant, who had been a very successful rancher, suffered a paralytic stroke. On February 4, 1964, appellant agreed to the appointment of a conservator for his property. Appellant on three occasions thereafter filed applications to have the conserva-

torship dissolved. Two of them were dismissed on his application and the conservatorship was continued until September 16, 1968. Appellant's real and personal property is now of the approximate value of $250,000. His principal asset is a 3,088-acre ranch in Loup County, Nebraska, which in recent years has been leased to his sister. His income during the conservatorship averaged between 11 and 12 thousand dollars a year before expenses. Appellant, who is 73 years of age, is now retired from ranching, lives alone at his ranch home, drives an automobile, and is ambulatory except for some restriction in the use of one leg and one arm as the result of the stroke.

The petitioners, who are the appellees herein, are the appellant's children. During the year 1964, and subsequent to the appointment of the conservator, appellant secured a divorce from his wife. A property settlement between the parties was approved by the Loup County district court.

On August 1, 1967, appellant filed the second application for the dismissal of the conservatorship. This was set for hearing on August 23. On August 15, appellant's children filed the petition for the appointment of a guardian, and that hearing was set for September 20, 1967. On September 2, 1967, appellant dismissed his application for termination of the conservatorship, and no hearing was had on the guardianship petition. Again, on July 23, 1968, appellant filed an application for the dismissal of the conservatorship. This was set for hearing September 16, 1968. On September 11, 1968, the county court ordered that the petition for the appointment of the guardian, filed August 15, 1967, also be heard on September 16, 1968. After hearing on both applications, the county court ordered the conservatorship terminated and appointed a guardian. Pending appeal, a special guardian was appointed to conserve the property. The hearing on the guardianship in the

district court was held on June 30, July 1, and July 9, 1969.

It will serve no useful purpose herein to detail much of the evidence of the petitioners. Most of it concerns the actions of the appellant during the years 1963, 1964, and 1965. For the purposes of this record we can concede that at that time the appointment of the conservator was to the best interest of the appellant.

From December 12, 1963, to January 2, 1964, appellant was under the care of Doctor Charles Landgraf, a specialist in neurology and psychiatry. At that time, his diagnosis was: "* * * he suffered from a cronic (chronic) brain syndrome associated with circulatory disturbance, cerebral vessel thrombosis, manifested by left spastic hemiparesis, impaired judgment, paranoid delusions and irritability." Doctor Landgraf testified at the trial but had no contact with the appellant after January 2, 1964. Basing his opinion on his examination in December 1963, the testimony as to appellant's conduct in 1964 and 1965, an examination of five psychological tests referred to hereafter, and the deposition of Doctor William F. Giles, appellant's psychiatrist, Doctor Landgraf testified that appellant was personally incapable of handling his property.

Relations between the appellant and the petitioners were more or less strained after the conservatorship proceedings. Petitioners rarely visited appellant after 1964. Appellant's witnesses were relatives or neighbors who testified to many contacts with him over the period of the conservatorship and to the date of the hearing in district court. One of appellant's witnesses was a lawyer maintaining an office in Broken Bow. This witness considered appellant sufficiently competent in 1967 to draw a will for him.

A proceeding for the appointment of a guardian is a probate matter. In re Guardianship of Hergenrother, 141 Neb. 858, 5 N. W. 2d 118. An appeal in a guardianship matter from the county court to the district court

is triable in the district court as a suit in equity, and on appeal to this court from the district court is heard and determined de novo. Cass v. Pense, 155 Neb. 792, 54 N. W. 2d 68.

Section 38-201, R. R. S. 1943, provides a guardian may be appointed for any mentally ill person or for any person who by reason of extreme old age or other cause is mentally incompetent to have the charge and management of his property. The power to appoint a guardian depends upon the statute, and the requisites must be shown to exist before the court can appoint a guardian. It is not claimed that appellant is mentally ill, but rather that he is incapable and mentally incompetent to have the charge and management of his person and property.

There is no question the appellant at 73 is not as capable as he was in his younger years. It is inevitable that the advance of years will be marked by a greater or lesser decrease of body powers and mental efficiency, and this is particularly true when accompanied by disease, or, as in this case, a paralytic stroke. As we said in Cass v. Pense, 155 Neb. 792, 54 N. W. 2d 68: "A guardian should not be appointed either of the person or property of an adult simply because he is aged or infirm or because his mind is to some extent impaired by age or disease. On the other hand the object of the statute under which this proceeding is brought is primarily the protection of property and if one does not possess sufficient mentality to understand in a reasonable manner the business he is transacting, or the nature and effect of his acts with reference to business affairs, or if he has lost his reasoning powers to such an extent that he is incapable of understanding or acting with ordinary discretion in common affairs and his property has thus become subject to loss or waste, then a guardian should be appointed to manage his affairs. The term mentally incompetent as used in the statute (section 38-201, R. R. S. 1943) does not refer to a person who

is sane but not as wise, intelligent, or mentally strong as some other person. It applies to the person whose mind is so affected as to have lost control of itself to such a degree as to deprive the person affected of sane and normal action. Obviously no general rule can be stated on this subject. Each case must be determined upon its particular facts."

Is the appellant mentally incompetent within the rule set out above? We conclude that the evidence in this record is wholly insufficient to so find. We are not determining his competency as of 1963, 1964, or 1965, the periods to which the evidence of the petitioners mostly relates. The petition for guardianship was not filed until August 1967, and was permitted to pend for more than a year. We are here concerned with his competency in 1968, at the time of the hearing in county court, and in 1969, when the hearing was held in the district court.

Appellant produced the evidence of Doctor William F. Giles, a psychiatrist practicing that specialty at Omaha, Nebraska, and a series of psychological tests made by a psychologist, H. Dale Goodrow, at the direction of Doctor Giles. These tests and Doctor Giles' observations were made over a period of a week, from May 2 to May 9, 1969, during which period the appellant was hospitalized for the specific purpose of evaluating his mental condition. The tests revealed that appellant is in the average range of mental acuity for his age, and had no severe psychological disturbance. The psychologist's conclusion was that appellant was quite capable of handling himself in his social environment.

Doctor Giles found appellant to be a person of normal intelligence, with a physical handicap which he handled quite well. He did not consider appellant a paranoid personality, but thinks he has always had a suspicious nature. He found appellant's recent memory to be very good. Doctor Giles concurred in the conclusion of the psychologist that appellant had no severe

disturbance and handled himself well in his social environment. It was his opinion that mentally, appellant had good judgment and could handle his personal and financial affairs without the guardianship. He definitely was of the opinion that appellant did not need a guardian, and felt the guardianship had been detrimental to the appellant emotionally and if removed he would not only be happier but able to function better.

On this record it cannot be said that appellant is mentally incompetent. His mind is not so affected as to deprive him of sane and normal action. Petitioners have not met their burden of proving appellant incapable of having charge of his person and property. The judgment of the trial court is reversed, and the cause is remanded with directions to dismiss the proceedings.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. THOMAS F. DAVIS, APPELLANT.

176 N. W. 2d 657

Filed April 24, 1970. No. 37290.

1. **Criminal Law: Aiders and Abettors.** One who incites or instigates the commission of a felony, although not actually or constructively present, is an aider, abettor, or procurer and may be prosecuted and punished as if he were the principal offender.
2. **Criminal Law: Aiders and Abettors: Evidence.** Aiding, abetting, or procuring may be proved by circumstantial evidence.
3. ———: ———: ———. Evidence that the crime was committed by someone and that the defendant aided and abetted in its commission is sufficient to sustain a conviction for aiding and abetting. The actual perpetrator of the crime need not be identified.
4. **Criminal Law: Evidence.** Circumstantial evidence is sufficient to sustain a conviction if the facts which the evidence tends to establish may be accounted for upon no rational theory which does not include the guilt of the accused.
5. **Criminal Law: Constitutional Law: Trial.** In all criminal pros-

ecutions the accused has the right to meet the witness against him face to face. Art. I, § 11, Constitution of Nebraska.

6. **Criminal Law: Trial.** An error which prevents proper consideration of the only question relied upon by the defendant is substantial and may not be disregarded.
7. **Criminal Law: Motions, Rules, and Orders.** The trial court has a broad discretion in ruling upon a discovery motion, but such a motion should be granted where required by the interests of justice.
8. **Criminal Law: Admissions.** Where the circumstances are such that there is no occasion to explain or deny, silence is not an admission.
9. **Criminal Law: Trial: Attorneys at Law.** It is the duty of the prosecuting attorney to conduct the trial in a fair and impartial manner and to not inflame the prejudices or excite the passions of the jury against the accused.
10. ———: ———: ———. No reference or comment should be made by the prosecuting attorney upon the defendant's failure to testify.
11. **Criminal Law: Trial: New Trial.** Where any one of several errors assigned is not in itself sufficient to warrant a reversal, if all of them in the aggregate establish that the defendant did not have a fair trial, then it is the duty of the court to award a new trial.

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

Mitchell & Beatty, 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.

BOSLAUGH, J.

The defendant, Thomas F. Davis, was convicted of first degree murder and sentenced to life imprisonment. His motion for new trial was overruled and he has appealed.

The defendant has filed a lengthy brief containing many assignments of error. In disposing of the appeal we will discuss only those assignments of error which merit or require discussion.

The body of Phyllis Davis, the wife of the defendant, was found at about 2:30 a.m., on August 14, 1968, in a station wagon owned by the defendant. The automobile was in a ditch at an intersection of county roads approximately 3 miles southeast of Grand Island, Nebraska.

The State produced evidence from which the jury could find that the deceased had been severely beaten with a blunt instrument. A pathologist testified that approximately three-fourths of the circumference of the head showed evidence of fresh or very recent lacerations, bruises, cuts, and abrasions. There was a stellate fracture of the skull, about 1 inch in diameter, above the left ear. Death resulted from loss of blood from the lacerations about the head, and would not have occurred if appropriate medical treatment had been administered.

The automobile was found in the west ditch of the north-south road headed in a westerly direction. An east-west road joins the north-south road at the intersection but does not continue to the west of the north-south road.

There was some front-end damage to the automobile, primarily to the radiator and air-conditioning condenser which had struck a projection on a log or tree lying in the ditch. The front bumper of the automobile had been damaged in a previous accident and been removed. The jury could find that the automobile had entered the ditch at a relatively low rate of speed and had been placed in the ditch in an attempt to create the appearance that the deceased had died as the result of injuries sustained in an automobile accident.

The evidence was clearly sufficient to sustain a finding that the deceased had died as the result of having been severely beaten and left to die from loss of blood.

The defendant and Phyllis were married in 1959. Since 1961 they have lived in the Grand Island, Nebraska, area where he has held the franchise for Hobart Sales and Service. Phyllis worked in the office and helped

with the customers when the defendant was not in the store.

A bank officer testified that 76 checks drawn on the Hobart Sales and Service bank account were returned for insufficient funds during the first 7 months of 1968. Of these checks, 28 were returned in May and 21 in June.

The State produced evidence which showed that the defendant had been having sexual relations with Cheryl Crane on an average of about once a week since February 1968. On April 6, 1968, Phyllis learned of the relations between the defendant and Mrs. Crane. At that time Phyllis agreed to give the defendant a divorce if he did not see Mrs. Crane for 6 months. The defendant did not keep the agreement and called Mrs. Crane the next day. In June 1968, Mrs. Crane separated from her husband and moved to near Hickman, Nebraska. While she was living near Hickman, Mrs. Crane corresponded with the defendant three or four times a week by mailing his letters to Herman Jungclaus.

Sometime in June the defendant wrote to Mrs. Crane stating that he would not be writing to her in the future. The defendant had told Mrs. Crane to disregard this letter and explained that Phyllis had found out about their correspondence and that the letter was sent at the request of Phyllis. The defendant continued his relations with Mrs. Crane as before, and later she mailed his letters to general delivery at Hastings. The defendant had previously said that he would be divorced in the fall and he and Mrs. Crane had agreed to each get a divorce and marry each other.

On May 6, 1968, the defendant and Phyllis applied to Northwestern Mutual Life Insurance Company for $50,000, 10-year term, life insurance policies. These policies were never issued.

On June 6, 1968, the defendant and Phyllis made application to Prudential Insurance Company for $50,000 term insurance policies. Both policies provided double

indemnity for accidental death. Her policy was issued June 24, 1968, with the defendant as beneficiary.

On August 7, 1968, the defendant purchased travel accident insurance policies in the amount of $50,000 insuring Phyllis and himself for 15 days from August 8, 1968. The defendant was the beneficiary on the policy insuring Phyllis. An employee of the agency that issued the policies testified that the defendant said they would be in and out of town for a few days at a time and not going any specific place or be gone any length of time.

On August 13, 1968, the defendant and Phyllis purchased mortgage life insurance policies in the amount of $5,000. The defendant was the beneficiary on the policy insuring Phyllis. They were purchasing a property from Jungclaus Enterprises, Inc., on contract for $5,000 and a warranty deed naming them as grantees in joint tenancy had been deposited with an escrow agent by the vendor.

During the conversation with the agent who sold the mortgage insurance, the defendant and Phyllis said that they were leaving on a trip to California the next day. On August 7, 1968, Phyllis had written to the defendant's mother in Lincoln, Nebraska, inquiring if she could take care of two of the boys because the defendant and Phyllis were going on a trip from August 12 to about August 22.

A service and delivery man employed by the defendant testified that he last saw Phyllis at about 5 p.m., on August 13, 1968. Phyllis told this employee that the defendant was in Lincoln; that the defendant was to be back around noon the next day; and that they were planning to leave on a trip at 2 p.m.

Patricia Ewers, a sister of Phyllis Davis, testified that she last saw Phyllis at about 6:30 p.m., on August 13, 1968. Phyllis was planning to leave the two small children with Patricia the next day when they left on their vacation.

The defendant arrived at his mother's tailor shop in

Lincoln, Nebraska, at about 5:30 p.m., on August 13, 1968, with two of the children. After stopping at his parents' home, he borrowed their automobile and drove out to see Mrs. Crane near Hickman, Nebraska. He arranged to meet Mrs. Crane in Lincoln later that evening and returned to his parents' home.

The defendant had dinner at his parents' home and then left at about 8:30 p.m. to meet Mrs. Crane. They spent several hours together and were to meet each other for breakfast at 8:30 a.m. the next morning. The defendant had said that they would have breakfast and "fool around with the kids in the morning and maybe possibly have lunch together." The defendant said nothing to Mrs. Crane about a vacation that was to begin the following day.

The defendant returned to his parents' home and called Phyllis in Grand Island. The call was placed at 10:53 p.m., collect, station-to-station, to the defendant's residence in Grand Island. The defendant's mother testified that she and the defendant and the two children talked with Phyllis. She further testified that the defendant remained in their presence until about 2:30 a.m. when he retired. She also testified that she was up once in the night to see about the children and that she saw the defendant was in bed at that time.

At about 6 a.m. a deputy sheriff called the defendant and advised him that Phyllis was dead. The defendant then returned to Grand Island.

Stacia Larson, a friend of the defendant and Phyllis, testified that she stopped at the defendant's home at about 10:30 or 11 a.m., on August 14, 1968. The witness expressed her sympathy to the defendant and asked if he knew what time it happened. The defendant replied, "'yea, between ten-thirty and eleven.'" This is the only evidence in the record which fixes the time of death of Phyllis with any degree of certainty. The defendant also said to this witness that he had taken two of the children to Lincoln and had planned on coming

back, but that something came up and he wasn't going to come until this morning. He further stated that they were going to leave at twelve or eleven for California.

It was customary for Phyllis to wear glasses. When her body was removed from the automobile and taken to the funeral home the glasses were not found. They were found by Victor Dembowski and Robert Dembowski, an uncle and cousin of Phyllis, at about 6 p.m., on August 14, 1968. The glasses were lying in the ditch in the grass, approximately 3 feet north of where the passenger side of the automobile had been, in a path or area that had been tramped down by people walking in and out of the ditch. The glasses were in plain view from the road but had not been seen by a patrolman who had photographed the same area about an hour before the glasses were found.

The Dembowskis returned to the intersection at about 8 p.m. The glasses were still there. They picked them up and Mrs. Dembowski took them home with her. She called Mrs. Ewers the next morning and told her that the glasses had been found.

The defendant's mother testified that the Dembowski family was at the defendant's home on Wednesday evening, August 14, 1968, and told her that they had found the glasses. Mrs. Dembowski denied that and testified that the first time she told anyone that the glasses had been found was when she called Mrs. Ewers on Thursday morning.

The defendant's mother further testified that Mrs. Ewers called on Thursday morning and said that the glasses had been found. She then gave this information to the defendant.

The defendant, with his lawyer, was in the county attorney's office at abount 11 a.m., on August 15, 1968. There was some discussion about two automobile accidents in which Phyllis had been involved. The county attorney stated that Phyllis had probably been wearing her glasses on those occasions. The defendant then vol-

unteered, " 'and she was wearing them this time too.' "

The foregoing is a summary of the principal evidence which implicates the defendant in the death of his wife. The State had no evidence which placed the defendant at the scene of the crime. Such evidence was not essential because one who incites or instigates the commission of a felony, although neither actually or constructively present, is an aider, abettor, or procurer and may be prosecuted and punished as if he were the principal offender. § 28-201, R. R. S. 1943; Callies v. State 157 Neb. 640, 61 N. W. 2d 370; Neal v. State, 104 Neb. 56, 175 N. W. 669. The crime may be proved by circumstantial evidence. Lamb v. State, 69 Neb. 212, 95 N. W. 1050; Callies v. State, *supra.*

The defendant argues that he cannot be convicted as an aider and abettor because the evidence does not identify the principal or person who actually killed the deceased. The actual perpetrator of the crime need not be identified. The evidence is sufficient if it shows that the crime was committed by someone and the defendant aided and abetted in its commission. Von Patzoll v. United States, 163 F. 2d 216; Spies v. People, 122 Ill. 1, 12 N. E. 865; Howard v. Commonwealth, 110 Ky. 356, 61 S. W. 756; 22 C. J. S., Criminal Law, § 100, p. 279.

The evidence of the State is circumstantial. A person charged with crime may be convicted on circumstantial evidence only, and if the facts which the evidence tends to establish may be accounted for upon no rational theory which does not include the guilt of the accused, the evidence is sufficient to sustain the conviction. State v. Williams, 183 Neb. 257, 159 N. W. 2d 549. The credibility of the witnesses and the weight of their testimony are for the jury.

The evidence against the defendant is substantial. He was engaged in an extra-marital affair with Mrs. Crane which commenced at about the time of the birth of his last child and continued beyond the death of his wife. He had said that he would be divorced in the fall and

would marry Mrs. Crane. His business was in financial difficulty. He purchased insurance coverage upon Phyllis which would pay him $155,000 in the event of her death by accident. The jury could find that this evidence is inconsistent with any reasonable hypothesis except that of guilt.

Phyllis was killed in a manner such as to suggest a fatal automobile accident, but the automobile, which was a 1968 Oldsmobile owned by the defendant, suffered relatively minor damage. The defendant made little or no inquiry of the officials who investigated the crime to find out how the "accident" happened.

The defendant's statement to Mrs. Larson concerning the time when Phyllis was killed and his statement in the county attorney's office to the effect that Phyllis was wearing her glasses when she was killed tend to show guilty knowledge. His statements when purchasing the travel accident policies and the fact that he said nothing to Mrs. Crane on Wednesday evening about the California vacation, that Phyllis thought was going to begin the next day, permits an inference that he knew that there was to be no trip to California commencing on Thursday.

The evidence, although not conclusive, was sufficient to sustain a finding beyond a reasonable doubt that the defendant was guilty as an aider, abettor, or procurer in the murder of his wife.

The defendant called a number of witnesses who testified concerning the extra-marital activities of Phyllis. Several witnesses testified concerning her relations with Merle Booth, also known as "Pete" Booth. Vernie Lorene Allen, a bartender at the Peacock Inn, testified that she had introduced Phyllis to Booth at Phyllis' request. There was testimony that Booth and Phyllis were together on a number of occasions and that Phyllis had loaned $50 to Booth.

Booth, who was a staff sergeant in the Air Force, left Grand Island in June 1968. There was some evidence

that Booth was in Grand Island on August 15, 1968.

On rebuttal, the State called a safety patrolman who was allowed to testify, over objection, that he called the Fitzsimmons General Hospital in Denver, Colorado, and talked with a Dr. Stutz who said that Booth was there on the night of August 13 and 14. The defendant then moved to strike this testimony and the motion was overruled.

The testimony was clearly hearsay and not admissible. Donner v. State, 69 Neb. 56, 95 N. W. 40; Rogers v. State, 97 Neb. 180, 149 N. W. 318, L. R. A. 1915B 1125. In addition thereto, it was a violation of the defendant's right to be confronted by the witnesses against him. Art. I, § 11, Constitution of Nebraska; 23 C. J. S., Criminal Law, § 999, p. 1041. The right of an accused to confront the witnesses against him is also a federal constitutional right under the Sixth and Fourteenth Amendments to the United States Constitution. Pointer v. Texas, 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923.

The State does not contend that the testimony was admissible but argues that the error was not prejudicial. The evidence, if believed, had the effect of destroying a substantial part of the defendant's case. An error which prevents proper consideration of the only question relied upon by the defendant is substantial and may not be disregarded. Wamsley v. State, 171 Neb. 197, 106 N. W. 2d 22. Under the circumstances in this case, and particularly in view of the fact that the State's case was based upon circumstantial evidence and is not conclusive we are unable to say that the error was not prejudicial to the defendant.

There are other errors assigned which may not be of sufficient importance, if considered separately, to require that the judgment be reversed. Considered together they present a question as to whether it can be said that the defendant received a fair trial.

The defendant was denied discovery of reports of examination and scientific tests relating to blood and hair

found on the station wagon. The State called two expert witnesses from the Federal Bureau of Investigation Laboratory in Washington, D. C., who testified concerning specimens of blood and hair found on the station wagon. At the close of the State's evidence the defendant requested a continuance in order to confer with experts in the field of blood and hair concerning the evidence which the State had introduced. This motion was overruled.

We have said that the trial court has a broad discretion in ruling upon a discovery motion, but that such a motion should be granted where required by the interests of justice. State v. Reichel, 184 Neb. 194, 165 N. W. 2d 743. We have been slow to reverse where discovery has been denied. See State v. Williams, 183 Neb. 257, 159 N. W. 2d 549.

The scientific evidence in this case was of particular importance because it tended to disprove any theory of accidental death. The Legislature has now provided for discovery in felony cases. Laws 1969, c. 235, p. 867.

A part of the State's case depended upon the doctrine of tacit admission. The State was permitted to prove that on certain occasions the defendant had failed to deny the truth of statements made in his presence. In one instance an employee of the defendant testified to a conversation in which the defendant had said that he had heard the State had a witness who had supposedly seen him at the airport at 1 o'clock and that he supposed the witness thought the defendant had flown in by himself. The witness was then allowed to testify, over objection, that the defendant did not deny that he had done so. At the close of the State's evidence the defendant's motion to strike this testimony was overruled. The evidence was referred to in the closing argument and again a motion to strike was overruled.

In Pierce v. State, 173 Neb. 319, 113 N. W. 2d 333, it was pointed out that the failure to explain or deny is

not admissible unless the circumstances are such that there is occasion to explain or deny.

Several assignments of error relate to misconduct of the special prosecutor. It is the duty of the prosecuting attorney to conduct the trial in a fair and impartial manner and to not inflame the prejudices or excite the passions of the jury against the accused. Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151.

On one occasion, after the trial court had sustained the defendant's objection to a hearsay statement, the special prosecutor said to the witness: "Mr. Mitchell is not going to let us talk about what he told you." On another occasion, after the defendant had objected to a question as leading, the special prosecutor said: "Why don't you want to find out where the glasses were, Mr. Mitchell?" During the rebuttal testimony of the safety patrolman concerning his investigation of "Pete" Booth, as the defendant started to object to a question, the special prosecutor said: "Why don't you want the jury to know this?"

In closing arguments a reference was made to "the continual objections made by Mr. Mitchell." A statement was then made that the State had objected "hardly at all" even though much of the evidence had been technically not admissible. The defendant moved to strike the reference and asked that the jury be cautioned. There was no ruling on the motion to strike but the trial court advised the jury that objections were a technical matter that should not be considered one way or the other.

In closing argument a reference was made to the fact that the defendant did not testify. Section 29-2011, R. R. S. 1943, provides that no reference or comment should be made upon the defendant's failure to testify. Such comment may also be a violation of the federal constitutional rights of the accused. See Griffin v. California, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106. We have said that a comment by the prosecuting attorney upon

the failure of the accused to testify is prejudicial unless the evidence of guilt is so conclusive that all will agree that no other factor could have influenced the result. Bruntz v. State, 137 Neb. 565, 290 N. W. 420.

Where any one of several errors assigned is not in itself sufficient to warrant a reversal, if all of them in the aggregate establish that the defendant did not have a fair trial, then it is the duty of the court to award a new trial. Wamsley v. State, *supra;* Pierce v. State, *supra.*

It is unnecessary to discuss the remaining assignments of error. We have considered them and they are without merit, are not prejudicial, or are not likely to occur upon a new trial.

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

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN R. GARZA, APPELLANT.

176 N. W. 2d 664

Filed April 24, 1970. No. 37314.

Criminal Law: Instructions: Juries. The giving of an instruction in the trial of a criminal case which in effect peremptorily directs the jury to return a verdict when a disagreement by the jury is imminent is a form of importunity and coercion which invades the province of the jury and constitutes an invasion of defendant's constitutional right to a speedy, public trial by an impartial jury.

Appeal from the district court for Cass County: WALTER H. SMITH, Judge. Reversed and remanded for a new trial.

Paul E. Watts, 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.

NEWTON, J.

Steven R. Garza was charged in the district court for Cass County, Nebraska, with the offense of stabbing one Robert Fuller with the intent to kill, wound, or maim. Defendant contended that he acted in self-defense. The jury returned a verdict of "guilty" and defendant has appealed to this court. We reverse the judgment of the trial court and remand the cause for a new trial.

Defendant has briefed and argued but two propositions. The first deals with a supplemental oral instruction to the jury. No question regarding the failure to reduce the instruction to writing has been presented, but it is challenged as being coercive. After the jury had deliberated for some time, it reported that it was hopelessly deadlocked at 11 to 1. The court then admonished the jury as follows:

"Well, of course, I recognize and appreciate the fact that you have been out now for better than 15 hours, but in justice to all the parties, the State, and society, and the defendant, *I feel, especially in view of the fact that the vote is now 11 to 1, that this case should be disposed of by your verdict, and it is certainly my earnest hope and, likewise, my firm belief that this can be accomplished. And, especially in view of the fact that the vote is 11 to 1, I just can't be convinced that there is no possibility of your agreeing.* I certainly have every confidence in our jury system and I've got every confidence in you ladies and gentlemen as jurors in this case, and I am going to ask you again to retire to your jury room and *I'm going to ask you to earnestly renew your efforts to come to a verdict in this case.* And I will check with you later on again this afternoon. Thank you very much." (Emphasis supplied.) Forty-five minutes later a verdict of guilty was arrived at.

This type of instruction is commonly referred to as the

"Allen charge." In the case of Allen v. United States, 164 U. S. 492, 17 S. Ct. 154, 41 L. Ed. 528, supplemental instructions were given which were, in substance: "* * * that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority." The instructions were approved, and this decision was followed in United States v. Barnhill, 305 F. 2d 164 (6th Cir., 1962).

Considerable confusion is evidenced by the decisions of the various jurisdictions on this type of instruction. It appears, generally speaking, that although the decisions have been based on the language used in each individual case, the determining feature has been a finding of whether or not the instruction tended to coerce a dissenting juror or jurors.

In Nebraska a rather broad rule has been adopted. In Potard v. State, 140 Neb. 116, 299 N. W. 362, an Allen-type instruction was rejected. The court stated: "We are of the opinion that the giving of this instruction is prejudicial error. The only purpose that can be gleaned from it is that the trial court was peremptorily directing an agreement. In this the court invades and trespasses upon the province of the jury. The defendant in

a criminal case is entitled to an acquittal unless each of the twelve men on the jury is convinced beyond a reasonable doubt of the guilt of the defendant without being importuned or coerced by the trial court. The defendant is entitled to the benefit of a disagreement by the jury. The very fact that each member of the jury must be convinced beyond a reasonable doubt of the guilt of the defendant before a conviction can be had evidences the fact that jurors who are not convinced beyond a reasonable doubt of the guilt of the defendant are obligated to sustain their convictions, even if a disagreement is the result. Of course, verdicts ought to be agreed upon if possible. On the other hand, a disagreement may result because of the very oath taken by a juror as it may be the only way that his reasonable doubt may be manifested. In such a case, disagreement of the jury is a protecting right to which a defendant is entitled.

"The attempt of the court in this instruction to absolve himself from any intent to press or coerce a verdict is of no avail. The prestige of a trial court with the ordinary jury is well known. Any attempt by the court to encourage a verdict will be seized upon by the majority as a coercive argument against the minority, especially if the minority be small. Such a situation does not meet the constitutional requirements of a speedy, public trial by an impartial jury."

The language used is sufficiently broad to require the rejection of any genuine Allen-type instruction.

We are not inclined to approve the Allen-type instruction, but rather, to adhere to the rule found in Potard v. State, *supra*. We do believe that the rule advanced in United States v. Brown, 411 F. 2d 930 (7th Cir., 1969), is consistent with our present rule and merits approval. This rule requires compliance with section 5.4 of the ABA Standards Relating to Trial by Jury:

"Length of deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the court

may give an instruction which informs the jury:

(i) That in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals."

It may be observed that the instruction in the present case violates the rules advanced in both Potard v. State, *supra,* and United States v. Brown, *supra.* Here the court made it very clear that in its judgment a verdict could and should be arrived at. It was tantamount to telling the dissenting juror that he was wrong. The prestige of the court was used to bring him into line with his fellow jurors. It presented a clear invasion of the rights of the jury and prevented the defendant from having his fate determined by an impartial and uncoerced jury.

As a second proposition, defendant insists he is entitled to the benefit of the provisions of Laws 1969, c. 233, § 1, p. 862. Since the judgment must be reversed

on the ground previously mentioned, it is unnecessary to determine at this time the applicability and effect, if any, of this statute in the present case.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

RUTH NIEMANN ET AL., APPELLEES, V. JOHN T. ZACHARIAS ET AL., APPELLEES, IMPLEADED WITH WILLIS B. ZACHARIAS, APPELLANT.

176 N. W. 2d 671

Filed April 24, 1970. No. 37323.

1. **Wills: Decedent's Estates.** Where a devisee or legatee dies before the testator, in the absence of statute, or of other provisions in the will which show that the testator intended the gift to go to some other designated person in case the beneficiary died before the testator, the gift lapses.
2. **Estates: Property.** Whenever the same person acquires a fee simple estate and a lesser estate in the same property, the lesser estate is destroyed by or merged in the fee simple estate.
3. ———: ———. One cannot be the owner of an interest in property and also the donee of a power to appoint that interest.
4. **Wills: Decedent's Estates.** A testator can prevent the lapse of a legacy by providing for the substitution of another beneficiary in case the original beneficiary predeceases the testator.

Appeal from the district court for Nemaha County: WILLIAM F. COLWELL, Judge. Affirmed.

James F. Begley, for appellant.

Thomas R. Burke and Lyman Larsen of Kennedy, Holland, DeLacy & Svoboda, for appellees Niemann et al.

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

MCCOWN, J.

This action is for a declaratory judgment construing a will and determining the persons entitled to the assets

of the residual estate of Alma Hopkins, deceased. The district court entered a decree that the residue of the estate of Alma Hopkins, deceased, vested in Ruth Niemann and Dean Niemann equally, share and share alike, to be theirs absolutely in fee simple without condition or limitation. The defendant Willis B. Zacharias has appealed. We affirm the judgment of the district court.

The will of Alma Hopkins was dated June 27, 1963. Alma Hopkins died January 30, 1968, and her will was duly admitted to probate. The relevant portions of her will provided: "SECOND, All the rest, residue and remainder of my property, both real and personal, wheresoever situated, including after-acquired property, I hereby give, devise and bequeath to NELLIE HOPKINS of Auburn, Nebraska; LUCY B. HOPKINS, of Auburn, Nebraska; RUTH NIEMANN of Auburn, Nebraska, and DEAN NIEMANN of Auburn, Nebraska, equally, share and share alike, and to their heirs, devisees and legatees as set forth in their Last Wills and Testaments, to be theirs absolutely, in fee simple, without condition or limitation.

"THIRD: I well remember my brother, ALBERT A. FENSKE; my nephew, ALBERT FENSKE Jr.; my niece NAOMI NIEMANN; my niece, GLENIS BEHRENDS, and all of my other heirs and relatives, but on account of the foregoing provisions of this my Last Will and Testament, I give them and each of them nothing hereunder."

Nellie Hopkins, one of the four individuals named in the second paragraph of Alma Hopkins' will, died on March 15, 1966. Her will was dated June 21, 1963. Her will left one-half of her estate to Alma Hopkins and one-half to Lucy B. Hopkins. Final decree was entered September 6, 1969. The parties are in agreement that the share of Alma Hopkins' estate given to Nellie Hopkins by Alma's will lapsed back into the residue upon Nellie's death prior to the death of Alma.

Lucy B. Hopkins, named in paragraph Second of Alma

Hopkins' will, died January 24, 1968, leaving a will which was duly admitted to probate. The will was dated August 14, 1964. Paragraph Tenth of the will of Lucy B. Hopkins provided: "TENTH: All inheritances which I may be entitled to at the date of my death by reason of the provisions of the Last Will and Testament of any person or persons, or over which I have any power of appointment, I hereby declare and designate Willis B. Zacharias, my Nephew, to be my sole heir for the purpose of receiving such inheritance, and if I have any power of appointment, I hereby appoint said legacy or device to the said Willis B. Zacharias, to be his absolutely and forever, without condition or limitation, and to his heirs by right of representation, per stirpes." Willis B. Zacharias was also the residual legatee under the will of Lucy B. Hopkins.

Alma Hopkins, the testatrix, was the widow of Wood Hopkins. Neither Alma nor Wood had any children. Nellie Hopkins was a sister of Wood Hopkins and a sister-in-law of Alma Hopkins. Lucy B. Hopkins was a cousin of Wood Hopkins and a cousin-in-law of Alma Hopkins. Neither Nellie Hopkins nor Lucy B. Hopkins were related to Alma Hopkins by blood. Both Nellie Hopkins and Lucy B. Hopkins were spinsters, and had no children.

Ruth Niemann is a niece of Alma Hopkins, a daughter of Albert Fenske, who is a brother of Alma Hopkins. Ruth Niemann is the only person involved who is related to Alma Hopkins by blood. Albert Fenske has three other children who are not beneficiaries of the estate of Alma Hopkins. Albert Fenske and these three children are the four persons named in paragraph Third of Alma Hopkins' will who received nothing under the will.

Dean Niemann is the husband of Ruth Niemann and thus a nephew-in-law of Alma Hopkins.

Defendant Willis B. Zacharias is a nephew of Lucy B. Hopkins.

The district court found and decreed that the residue of the estate of Alma Hopkins vested in Ruth Niemann and Dean Niemann, equally, share and share alike, to be theirs absolutely in fee simple without condition or limitation.

It is the contention of the defendant Willis B. Zacharias that the language of paragraph Second "and to their heirs, devisees and legatees as set forth in their Last Wills and Testaments" shows a controlling intent or dominate purpose of Alma Hopkins that the gifts were not contingent upon the named persons outliving her, but gave to each of them a power of disposition in the event they died prior to the testatrix. Zacharias contends that the quoted language gave to each of the four named individuals a power of appointment of his or her share or a power of testamentary substitution.

The plaintiffs' position is that the will demonstrates the intent to give the four named beneficiaries fee simple title to her estate without condition or limitation, and that since Nellie Hopkins and Lucy B. Hopkins predeceased Alma Hopkins, their fee simple interest therefore lapsed into the residue and goes to Ruth and Dean Niemann.

The parties concede that in construing the will of Alma Hopkins, the intent of the testatrix governs so far as such intent can be collected from the whole instrument, and insofar as such intent is not inconsistent with substantive rules of law.

Where a patent ambiguity in a will is involved, and the search for intent is limited to "the four corners of the will," the difficulty is apparent. Any effort to ascertain the "true intent" of a testator necessitates not only interpreting ambiguous or even contradictory language, but weighing and balancing varying and sometimes conflicting legal rules, principles, and presumptions.

Where a devisee or legatee dies before the testator, in the absence of statute, or of other provisions in the will which show that the testator intended the gift to go

to some other designated person in case the beneficiary died before the testator, the gift lapses. See 6 Page on Wills, § 50.2, p. 62. The Nebraska antilapse statute, section 30-228.03, R. R. S. 1943, does not apply, and the basic common-law rule is in effect.

Whenever the same person acquires a fee simple estate and a lesser estate in the same property, the lesser estate is destroyed by or merged in the fee simple estate. See Watson v. Dalton, on rehearing, 146 Neb. 86, 20 N. W. 2d 610.

In Grant v. Hover, 103 Neb. 730, 174 N. W. 317, this court said: "It has been regarded by the courts that it is impossible to convey an absolute title to real estate in fee simple by deed or will, and at the same time in the same instrument convey to the same person a limited right or title in the same land."

The same principles apply to a power of appointment. "* * * the modern American view is that one cannot be the owner of an interest in property and also the donee of a power to appoint that interest. In other words, there can be no such thing as a power appendant." Simes and Smith, The Law of Future Interests, § 1060, p. 528. See, also, 72 C. J. S., Powers, §§ 17 and 18, p. 410; In re Estate of McCurdy, 197 Cal. 276, 240 P. 498; In re Cardon's Trust, 352 Pa. 23, 42 A. 2d 56.

A testator can prevent the lapse of a legacy by providing for the substitution of another beneficiary in case the original beneficiary predeceases the testator. Here again, the problem is the intention of the testator. See, 57 Am. Jur., Wills, §§ 1428, 1429, pp. 958 and 959; Thompson on Wills (3d Ed.), § 493, p. 714.

The particular words which give rise to the problem here are: "and to their heirs, devisees and legatees as set forth in their Last Wills and Testaments." This language is preceded by the language giving all the residue of the testatrix' property to the four named individuals "equally, share and share alike" and is followed

by the words: "to be theirs absolutely, in fee simple, without condition or limitation."

The issue here is whether the testatrix intended the critical language to be words of limitation or words of substitution. Generally speaking, where words such as "heirs," "estate," "representatives," "executors," or "administrators" have been used following the name of a specific beneficiary, the word "and" has ordinarily carried the connotation that the words are words of limitation rather than of substitution. The use of the word "or" in such an instance has often been construed as indicating words of substitution. See, 96 C. J. S., Wills, § 739, p. 135; Annotation, "Wills—'or his estate'—lapse," 11 A. L. R. 2d 1387. See, also, Justice Traynor's opinion, In re Estate of Brunet, 34 Cal. 2d 105, 207 P. 2d 567, 11 A. L. R. 2d 1382, as to the words "or his estate."

Had the language here stopped with the words "and to their heirs, devisees and legatees" we think there would be little question but that the words would be words of limitation rather than words of substitution. It would seem only logical that the addition of the words "as set forth in their Last Wills and Testaments" merely narrows the limitation rather than broadening it. The language, in whole or in part, is still basically language of limitation rather than language of substitution.

It must be noted too that paragraph Third of the will of Alma Hopkins stated her specific intent that the relatives named in that paragraph, and all of her "other heirs and relatives," should take nothing under her will. This language supports the trial court's finding that it was the intent of the testatrix to benefit only those persons named in paragraph Second of her will and inferentially supports the conclusion that the critical language in paragraph Second was not intended as substitutional.

The language of paragraph Second of Alma Hopkins'

will expresses a clear intent to leave her estate to the four individuals named "to be theirs absolutely, in fee simple, without condition or limitation." That being true, no power of appointment or substitution ever came into existence which could be exercised by any of the named individuals if they predeceased her, nor is there any indication that the testatrix ever intended the four named beneficiaries to receive less than a fee simple estate.

A will speaks only from the date of the testator's death. Neither an absolute fee simple interest nor a power of appointment or substitution could come into existence until the death of Alma Hopkins. If any of the four named beneficiaries predeceased Alma Hopkins, any interest they might have had in her estate never came into existence. If Nellie Hopkins' interest in the estate of Alma Hopkins lapsed upon Nellie's death prior to that of Alma, as the trial court found, and as both parties concede, Lucy B. Hopkins' position and interest cannot be logically distinguished. Both Nellie and Lucy left valid wills and heirs, devisees, and legatees under those wills. The fact that the will of Lucy B. Hopkins contained a clause specifically disposing of inheritances and powers of appointment generally while Nellie's will did not is immaterial. We are dealing here with the language in the will of Alma Hopkins, not the language in the wills of Nellie Hopkins or Lucy B. Hopkins.

The rule that wills should be construed so as to avoid the passing of property by intestacy does not apply here. The trial court was correct in determining that the intent of the testatrix was to benefit only those persons named in paragraph Second of her will; that no life estates were intended; that the testatrix intended to vest in the named individuals an absolute fee simple title without condition or limitation; and that upon the death of any of the four named individuals prior to the testatrix, the interest of that individual lapsed.

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

AFFIRMED.

SPENCER, J., dissenting

In my opinion, the majority opinion herein rather than construing the will of Alma Hopkins emasculates it by in effect striking the last portion of the second paragraph. This we cannot do. It is our duty to ascertain a testator's intent and to give effect to that intent if it can legally be done. To do this, we must try to give effect to every part and portion of the will. We said in Elrod v. Heirs, Devisees, etc., 156 Neb. 269, 55 N. W. 2d 673: "Each word and provision of the conveyance must be given such significance as will make effective the intention of the parties."

We have had a statute on the construction of conveyances since 1866. Section 76-205, R. R. S. 1943, provides: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." This statute is applicable to the construction of wills. In re Estate of Zimmerman, 122 Neb. 812, 241 N. W. 553.

As early as 1899, the law on the subject of will construction was well settled. In Weller v. Noffsinger, 57 Neb. 455, 77 N. W. 1075, this court enunciated the rules by which courts should ascertain and give effect to the intention of the testator, in the following language: "No rule of law is better settled, or more in accord with good sense, than that which requires the intention of the testator to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, no conventional forms of expression, are necessary to enable one to make an effective testamentary disposition of his property. The court,

without much regard to canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it."

The language in question herein is as follows: "SECOND: All the rest, residue and remainder of my property, both real and personal, wheresoever situated, including after-acquired property, I hereby give, devise and bequeath to NELLIE HOPKINS of Auburn, Nebraska; LUCY B. HOPKINS, of Auburn, Nebraska; RUTH NIEMANN of Auburn, Nebraska, and DEAN NIEMANN of Auburn, Nebraska, equally, share and share alike, *and to their heirs, devisees and legatees as set forth in their Last Wills and Testaments,* to be theirs absolutely, in fee simple, without condition or limitation." (Italics supplied.) It seems to me apparent that it was the intention of the testator to give the property equally to the four persons designated, but that in the event any of them predeceased her that person's portion, if so provided by the deceased's will, should pass to the heirs, devisees, and legatees specifically designated in that will. In other words, testator was attempting to divide her property equally between the four persons designated, only one of whom was related to her by blood, or their successors in interest if any of the four being deceased should so direct in a last will and testament. This is the only possible construction which gives effect or meaning to the words used.

It is axiomatic that a will speaks only from the time of the death of the testator. A person has no devisees or legatees until his will is admitted to probate after his death. The testator herein was attempting to maintain equality and to prevent lapsing if any of the four beneficiaries predeceased her, and she gave them the right to designate who should have that individual's share in her property in the event such contingency occurred.

We cannot overlook the following language from the fourth paragraph in construing this will: "As I am

aware of the ruinous consequences of litigation concerning the probate of Wills, if any devisee, legatee or beneficiary under this, my Last Will and Testament, *or any person claiming under or through any devisee, legatee or beneficiary,* * * *." (Italics supplied.) This part could only be effective if the devisees or legatees are substituted for those of the four beneficiaries who predeceased the testator. This indicates to me that the testator contemplated the possibility that one or more of the four beneficiaries might predecease her, and that person would exercise the right to designate a successor in his or her last will and testament. No one would be claiming under or through a devisee, legatee, or beneficiary unless one of the four had predeceased her.

In this instance, only one of the four was a blood relative of the deceased and could conceivably be within the provisions of the antilapse statute, section 30-228.03, R. R. S. 1943. As to the others, without some specific provision the gift would lapse because the contingency testator was seeking to cover what actually happened. Lucy B. Hopkins, one of the four, predeceased the testator, but she availed herself of the privilege of providing in her own last will and testament for the descent of the property testator intended her to have by the following provision: "TENTH: All inheritances which I may be entitled to at the date of my death by reason of the provisions of the Last Will and Testament of any person or persons, or over which I have any power of appointment, I hereby declare and designate Willis B. Zacharias, my Nephew, to be my sole heir for the purpose of receiving such inheritance, and if I have any power of appointment, I hereby appoint said legacy or device (devise) to the said Willis B. Zacharias, to be his absolutely and forever, without condition or limitation, and to his heirs by right of representation, per stirpes."

Another indication of the intention of the testator herein is the fact that in the third paragraph of her will

she expressly excludes every other person than those specifically covered in the second paragraph. She does this by mentioning near relatives by name and including the others as "and all of my other heirs and relatives, * * *."

A patent ambiguity in a will, if this may be considered such, must be resolved by interpretation of the intention of the testator as found within the four corners of the will. Gaughen v. Gaughen, 172 Neb. 740, 112 N. W. 2d 285.

The majority opinion is confusing the issue here by talking about the beneficiaries acquiring a fee simple estate and a lesser estate in the same property, the lesser estate in this instance being a power of appointment, or, more accurately, a power appendant on the theory of the opinion. There is a power of appointment but definitely no power appendant herein because, as suggested heretofore, no interest of any nature is acquired until the death of the testator. The devisees received a fee simple estate if they survived the testator, but until the will became effective by the death of the testator, they had only the right to cover the contingency of their own prior death. What the testator in this instance was trying to do was to permit her devisees and legatees to provide substitute devisees and legatees in case of their death. It is clear that testator did not intend that the gift to Lucy Hopkins or the others be dependent upon their surviving her, so she gave them a testamentary power of disposition by the words which the majority opinion herein ignores. She left it entirely to those named to exercise this right *if they desired.* It is very evident that Alma Hopkins was familiar with the terms of the last will and testament of the testator and desired to avail herself of the right of providing who should receive the interest she would receive if she survived the testator. The antilapse statute would not apply because Lucy Hopkins was not related to the deceased, so some other method was neces-

sary. The method employed herein, as I construe it, would prevent lapse and was undoubtedly intended to do so.

As stated in 57 Am. Jur., Wills, § 1429, p. 959: "There is no doubt that a testator can prevent the lapse of a legacy by providing for the substitution of another beneficiary in case the original beneficiary predeceases the testator."

In Schnitter v. McManaman, 85 Neb. 337, 123 N. W. 299, this court said: "A devise to one in fee, and in the event of his death to another in fee, refers to death during the testator's life, because the event cannot be said to be contingent, and it seems more compatible with reason to say that the testator by the use of the words was providing a substitute for the first taker should that devisee not survive the testator."

Referring to the italicized portion of the second paragraph of testator's will set out heretofore, if the word "and" were read as "or," there would be absolutely nothing for construction herein. In this respect I call attention to the case of Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409, in which we said: "The laxity in the use of the conjunctive 'and' and the disjunctive 'or' is so frequent that the doctrine has been accepted that they are interchangeable and that one may be substituted for the other if to do so is necessary to give effect to any part of a statute or to effectuate the intention of the Legislature. State ex rel. City of Grand Island v. Union P. R. R. Co., 152 Neb. 772, 42 N. W. 2d 867; Carlsen v. State, 127 Neb. 11, 254 N. W. 744."

In Roberts v. Roberts, 147 Neb. 494, 23 N. W. 2d 774, this court in effect held that the intent of the testator would control rather than technical language used in a particular clause of a will, and specifically held the word "if" could be construed to mean "when" in order to advance the apparent intent of the testator. Here it is obvious that there could not be the slightest question if the word "and" were construed to mean "or," al-

though I do not think we need to do so. I believe the intent of the testator is clear.

WHITE, C. J., concurring.

The single issue involved is the construction of the language used in the devise and bequest to four named individuals, two of whom predeceased the testator, "equally, share and share alike, and to their heirs, devisees and legatees as set forth in their Last Wills and Testaments, to be theirs absolutely, in fee simple, *without condition or limitation.*" (Emphasis supplied.)

While concurring with the majority opinion which holds that the interests of the two who predeceased the testator lapsed into the residuary estate, I feel that the proper rationale controls a finding that the above devise is of a fee simple absolute. To the extent, if at all, that the phrase "and to their heirs, devisees and legatees as set forth in their Last Wills and Testaments" can be considered as creating a power of appointment, it is repugnant to the base fee and must fail. Grant v. Hover, 103 Neb. 730, 174 N. W. 317; State Bank of Jansen v. Thiessen, 137 Neb. 426, 289 N. W. 791; Watson v. Dalton, 146 Neb. 86, 20 N. W. 2d 610; Andrews v. Hall, 156 Neb. 817, 58 N. W. 2d 201, 42 A. L. R. 2d 1239.

The compelling consideration in construing the devise as a fee simple absolute is the manifestation of the testator's intent and the last portion of the phrase, to-wit: "to be theirs absolutely, in fee simple, *without condition or limitation.*" (Emphasis supplied.)

The dissent focuses upon the language used in the noncontestability clause of paragraph fourth: "* * * if any devisee, legatee, or beneficiary under this, my Last Will and Testament, or *any person claiming under or through any devisee, legatee or beneficiary* * * *." (Emphasis supplied.)

This language, it is argued, may only be effective if there is a substitution of the devisees or legatees for the four named beneficiaries who may have predeceased the testator. Thus, it is argued, the testator must have in-

tended that a power of appointment be created in the four named beneficiaries. It seems obvious, however, that this clause in the fourth paragraph is mere boilerplate, and that it should not be construed as evidencing an intent to create a power of appointment. Had the testator intended to create such a power in the four named beneficiaries, she could have done so in specific terms. To argue that she has created a power by extrapolating from the language of the noncontestability clause seems anomalous at best. In order to establish such a power, as this case has shown, it is necessary to construe language which, as appellees concede, is patently ambiguous in this regard in the second paragraph. This is directly contrary to the purpose of the noncontestability clause itself. It seems quite clear that the testator would not have been so meticulously subtle with respect to the noncontestability clause, yet so brazenly unsophisticated with respect to the dispositive provision of her will. Additonally, it seems clear that because of the specificity used by the testator in determining who was going to share in her estate, there was no intent to create a power of appointment, especially since it may be created only by the use of clear and unambiguous language. For these reasons, I concur in the result of the majority opinion.

CARTER, J., concurring in result only.

I am not in accord with the holding of the majority opinion. It assumes that the power of appointment would have been valid but for the ambiguities in the language purporting to create it. In my opinion, the power of appointment lapsed whether or not the language of the will purporting to create it was sufficient.

The donee of the power of appointment died prior to the death of the donor. "The usual rules which apply to the lapse of legacies given by a will apply with full force to wills executing powers of appointment, so that where an appointment is made by will in favor of one who predeceases the testator the appointment lapses."

41 Am. Jur., Powers, § 75, p. 860. See, also, 96 C. J. S., Wills, § 1070c, p. 726; 72 C. J. S., Powers, § 37, p. 434; Restatement, Property, § 348, p. 1936; Brown v. Fidelity Union Trust Co., 126 N. J. Eq. 406, 9 A. 2d 311; Burruss v. Nelson's Ex'r., 132 Va. 17, 110 S. E. 254; French v. Heywood, 214 Mass. 582, 102 N. E. 271; In re Cardon's Trust, 352 Pa. 23, 42 A. 2d 56; In re Estate of McCurdy, 197 Cal. 276, 240 P. 498.

Since the power of appointment lapsed, the power itself never came into existence. Applying this rule, the judgment of the trial court was correct in holding that the share of Lucy B. Hopkins vested in Ruth and Dean Niemann.

NEWTON, J., concurs in the foregoing concurrence.

MERVIN D. EVANS, APPELLEE AND CROSS-APPELLANT, V. METROPOLITAN UTILITIES DISTRICT OF OMAHA, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH CITY OF OMAHA ET AL., APPELLEES AND CROSS-APPELLEES.

176 N. W. 2d 679

Filed April 24, 1970. No. 37385.

1. **Parties: Actions.** The general rule is that a plaintiff in a class action must have an interest in the controversy common with those for whom he sues and there must be that unity of interest between them that the action might be brought by them jointly.
2. ———: ———. Persons having an interest adverse to those of parties purported to be represented cannot maintain a representative or class suit on behalf of the latter.

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

Cecil S. Brubaker, Willis L. Strong, and Lester R. Seiler, for appellant.

Foulks, Wall & Wintroub, for appellee Evans.

Herbert M. Fitle and Schmid, Ford, Snow, Green & Mooney, for appellees City of Omaha et al.

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

SPENCER, J.

This is a class action brought by Mervin D. Evans, plaintiff, on his own behalf and that of all other ratepayers, against Metropolitan Utilities District of Omaha, hereinafter referred to as MUD, to enjoin the making of payments under section 14-1041, R. R. S. 1943, and against the City of Omaha, to recover all money paid since 1947 under said statute by MUD to the City of Omaha. Plaintiff's petition and a cross-petition filed by MUD were dismissed, and an appeal was perfected to this court.

Plaintiff is a resident of the Omaha area. For a short period he lived in Douglas county, outside the city limits of Omaha but within the area served by MUD. He has since February 1956, been a ratepayer to MUD for both gas and water services. The boundaries and service area of MUD are not coterminal with the boundaries of the City of Omaha. MUD's source of revenue is the rates charged its ratepayers for gas and water service.

In 1947 the Legislature enacted L. B. 58 (Laws 1947, c. 21, § 2, p. 112) which required metropolitan utility districts to make certain annual payments to the metropolitan city within which the utility is located. This act became a part of section 14-1041, R. R. S. 1943. It provided that payments would be $150,000 for the years 1947 to 1951 and for the years 1952 and thereafter the payment would be equal to 1 percent of the book value after depreciation of the plant and system within the city. This statute was slightly amended in 1961. In 1967 the Legislature made further changes in the statute by L.B. 425 (Laws 1967, c. 47, § 1, p. 179). The change became effective October 23, 1967. It provided for increased payments for the balance of 1967 and future years. All payments previous to January 1, 1967, have been paid pursuant to the statute.

Section 14-1041, R. R. S. 1943, previous to the 1967 amendment, provided in part: "The metropolitan water or utilities district shall pay to said metropolitan city a sum equal to one per cent of the book value, after deduction of depreciation, of the plant and distribution system in service within the corporate limits of the city, said value to be determined as of the last day of the preceding year, and the sum so payable shall be paid by said district to said city in such installments and at such times as may be determined by said district, except that the entire amount due shall be paid not later than the commencement of the fourth quarter of the calendar year; Provided, that notwithstanding the above formula for determining the amount to be paid, the amount so to be paid shall never exceed the total sum of two hundred fifty thousand dollars, nor be less than the sum of one hundred fifty thousand dollars in any year. All payments provided by this section shall be allocated by the metropolitan water or utilities district between the several utilities operated by it upon such basis as said district shall determine. Such metropolitan city shall not levy or collect any license, occupation or excise tax upon or from such district."

The original petition sought a declaration of the unconstitutionality of section 14-1041, R. R. S. 1943, as well as of L.B. 425. The amended petition now involved, however, attacks only the law before the 1967 amendment by L.B. 425. A companion case attacking the statute as amended by L.B. 425, which was before this court in 184 Neb. 172, 166 N. W. 2d 411, is still pending in the district court for Douglas county. MUD filed an answer and cross-petition, also asking that the court declare unconstitutional that portion of section 14-1041, R. R. S. 1943, before the amendment by L. B. 425, requiring payments by MUD to the City of Omaha, and seeking to enjoin any further or future payments thereunder. The petition and the cross-petition differ in the relief asked only in that the plaintiff asks that all pay-

ments made to the city by MUD between 1947 and 1966, inclusive, be returned to MUD, and the cross-petition seeks only to avoid further payments. Counsel for MUD announced in open court that it did not seek the recovery of payments previously made. This raises the question of the status of MUD herein. All the payments involved in this action have been made. MUD is not seeking their return, so there is no subject matter upon which the relief prayed for by it could operate. MUD is concerned only with the 1967 and future payments. These are covered by the 1967 amendment, which is involved in the action still pending in the district court. The present action was properly dismissed as to MUD.

The first question to be answered is whether the plaintiff has the legal capacity to bring the present action as a class action. The amount involved in the payments from 1947 through 1966 is $4,445,850. Plaintiff purports to represent all ratepayers through 1966. Many of these ratepayers are also taxpayers of the defendant city. This action is brought by virtue of section 25-319, R. R. S. 1943, which provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Implicit in this statute is the requirement that for one to bring a suit for the benefit of the class, it must be for the benefit of all members of the class.

The general rule is that a plaintiff in a class action must have an interest in the controversy common with those for whom he sues and there must be that unity of interest between them that the action might be brought by them jointly. Certia v. University of Notre Dame Dulac, 82 Ind. App. 542, 141 N. E. 318. Persons having an interest adverse to those of parties purported to be represented cannot maintain a representative or class suit on behalf of the latter. Drake v. Frazer, 105 Neb.

162, 179 N. W. 393, 11 A. L. R. 766; 39 Am. Jur., Parties, § 47, note 11, p. 922.

Will all of the ratepayers of MUD from 1947 through 1966 be benefited by plaintiff's action if the plaintiff is successful in securing a judgment of $4,445,850? It is obvious that the city could pay such judgment only by the levy of a substantial tax against the taxpayers of the city, many of whom would also be MUD ratepayers. The record would indicate that this would require a levy in excess of 5 mills. Plaintiff has lived both inside and outside the city limits during the period in question, but is at present a resident of the city. Without question, ratepayers who are not taxpayers would benefit if a recovery were made. This would include all the ratepayers outside the city limits and those ratepayers within the city who are not taxpayers. All other ratepayers, and these would constitute the larger group, would undoubtedly suffer a loss because they would be taxed for sufficient funds to pay not only the judgment for the amount of the recovery but also for costs and expenses of the litigation. Their interest cannot be said to be sufficiently identical with other ratepayers to permit plaintiff to maintain this action on behalf of all ratepayers. The trial court determined that the plaintiff's action was not for the benefit of all members of the class, and properly dismissed the action.

In view of the conclusion we have reached herein, we do not consider any of the other issues raised by the parties, including the constitutionality of section 14-1041, R. R. S. 1943. We affirm the judgment of the trial court in dismissing the plaintiff's petition and the cross-petition of MUD.

AFFIRMED.

PATRICIA FISHER, APPELLEE, V. FRANCIS FISHER, APPELLANT.
176 N. W. 2d 667

Filed April 24, 1970. No. 37434.

1. **Divorce: Parent and Child.** A change of circumstances, which will permit a modification of a divorce decree relating to child custody, includes those not known to the court and the opposing party at the time of the entry of the decree and which could not have been discovered by the exercise of reasonable diligence at the time of the entry of the original decree.
2. ———: ———. The discovery of material facts which existed but were unknown to the court and the opposing party and could not have been ascertained with reasonable diligence, which, if known to the court, might have warranted the entry of a different decree, are changed circumstances which the court will consider in an application for a change of child custody.
3. **Divorce: Adultery: Parent and Child.** Whether or not the birth of an illegitimate child after the separation of the parties of itself makes the mother an unfit person to have the care and custody of a child of the marriage is dependent on the facts and circumstances of each particular case to be considered in connection with a determination of the best interests of the child.
4. **Divorce: Parent and Child.** The judicial discretion of the trial court with respect to changing the custody of minor children of a broken marriage will not ordinarily be disturbed unless there is a clear abuse of judicial discretion or it is clearly against the weight of the evidence.

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

Harmon & McCarthy, for appellant.

McCormack, Cooney & Mooney, for appellee.

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

CARTER, J.

This is an application to modify a child custody decree brought by the father against the mother who has the legal custody of the 4-year-old son of the parties under a divorce decree. The trial court denied the application and the father has appealed.

On June 28, 1968, Patricia Fisher obtained a decree of divorce from Francis Fisher and was granted the custody of Charles Fisher who was about 3½ years of age at the time the divorce was granted. It was found in the divorce decree that Patricia was a suitable and fit person to have the custody of Charles. There was no finding of fitness or unfitness of Francis to have custody of the child.

On December 6, 1968, Francis filed his application to modify the divorce decree by changing the care and custody of Charles from Patricia to himself and to relieve him of the child support payments awarded by the divorce decree. Francis alleged a change in circumstances which he asserts require that Patricia be divested of the care and custody of Charles and that he is a fit and proper person to have the child's care and custody.

The changed circumstances claimed are as follows: On December 17, 1968, Patricia gave birth to a child whose father was not her husband. That the birth of the child was the result of sexual relations with a married man whose name she refused to reveal and which occurred after her separation from Francis and before the divorce was granted. Patricia admitted the truth of the allegations but testified that she did not know the father was married at the time and never was in his company after she discovered that he was married. She said she never knew his business or where he lived and has no recollection of the place where the adulterous relationships occurred. She admits the truth of the facts that are readily provable and otherwise has little or no recollection of the surrounding circumstances.

The evidence will not support a finding that she failed to properly provide and care for Charles. Subsistance for herself and the two children is sustained by the child support award of $70 per month paid by Francis, an allowance of $140 per month granted by the welfare department as aid to dependent children, and by work-

ing 3 days a week which amounts to about $33 per week. On the other hand, there is no evidence that Francis is not a fit and proper person to have the care and custody of Charles. He owns a satisfactory home in which his mother and father reside with him. His mother is 62 years of age, in good health, is fond of Charles, and willing to care for him during his father's working hours and at other times as well. The issue here narrows down to a single question: Does the birth of the child out of wedlock, standing alone, require that Patricia be divested of the care and custody of Charles?

At the time the divorce was granted and the custody of Charles granted to Patricia, she did not reveal to the court or to Francis, or to anyone else interested in the case, that she was then pregnant by a man other than Francis. We think this is a change of circumstances within the meaning of the rule and authorizes the court to consider the merits of the application for a change of custody of the infant child. We adopt the rule announced by the Supreme Court of Iowa in a similar case wherein it is said: "We then turn to the question whether defendant's concealed misconduct was such a 'change in circumstances' as to permit modification of the decree. We hold that it was. The 'circumstances' existing at the time of the original decree are those known to the court and to the opposing party, or which could have been discovered by the exercise of reasonable diligence. We think our interpretation of a change in circumstances must be held to mean a change in 'known' circumstances including those which could have been known by the use of reasonable diligence." Harwell v. Harwell, 253 Iowa 413, 112 N. W. 2d 868. See, also, 27B C. J. S., Divorce, § 317(2), p. 538.

Under the foregoing holdings, the application filed by Francis is sufficient to raise the issue as to whether or not Patricia should be divested of the care and custody of Charles.

It is the contention of Francis that under the evi-

dence in this case Patricia is an unfit person as a matter of law to have the care and custody of Charles. He relies on the following cases to support his position: Beck v. Beck, 175 Neb. 108, 120 N. W. 2d 585, wherein it is said: "This court has stated the rule to be that where a wife is found to be guilty of adultery she is an unfit person to have the care and custody of her minor children as against the husband she has wronged." In Wolpa v. Wolpa, 182 Neb. 178, 153 N. W. 2d 746, the rule of the Beck case is adhered to. In Harwell v. Harwell, *supra,* the adulterous wife was given custody of the minor children of the marriage without invoking the rule that she was unfit as a matter of law.

We point out, however, that the rule that a divorced wife who has been guilty of adultery is unfit as a matter of law to have the care and custody of her children has been relaxed by the decisions of this court. Boyer v. Boyer, 183 Neb. 226, 159 N. W. 2d 546; Hausman v. Shields, 184 Neb. 88, 165 N. W. 2d 581. Where a wife has been guilty of adultery, the court will give consideration to three main points in determining if she should be divested of the care and custody of the children on account thereof: (1) The nature of the act and the circumstances surrounding the commission of the offense, (2) the probable effects of the offense as it relates to the future welfare of the children, and (3) the best interests of the children under all the circumstances of the case.

It is generally recognized that the interests of small children are best served by placing their care and custody with the mother if she is a fit and proper person. In this case, the mother has against her the charge of adultery which she admits. It is always true in this class of cases that the decision is most difficult. There is no certain yardstick by which the best interest of the children can be measured. The problems resulting from a broken home arise through no fault of the children and a court in attempting a decision that is calculated to do

the least harm to the children is surrounded by uncertainties and emotional considerations that try the conscience of the court.

It seems clear from the record in this case that the father and grandparents of Charles are of good standing and unblemished character, and fully fit persons to have the care and custody of Charles. Likewise, the mother is a fit person to have the care and custody of Charles except for her admitted adultery and the birth of an illegitimate child. The record shows that Patricia engaged in adulterous acts with one man, which are reprehensible, but it does not indicate a continuing and indiscriminate relationship with the opposite sex. Her testimony is that she has ceased such immoral acts. If she has not, of course, a second application for a modification of the decree would, in all likelihood, be indefensible. The child, Charles, is only 4 years of age and, at this age, needs the care and affection that only a mother can bestow. If only the wishes of the mother were at stake, the divesting of the mother's care and custody of Charles would be less difficult.

Here the primary concern is how to subserve the present and future interests of this 4-year-old boy who is the innocent victim of a broken home. What appears to be best for the child under all the circumstances of the particular case, after giving consideration to the rights of the parents, must be of serious concern to the court. We have, of course, given weight to the findings and judgment of the trial court. The decision of the trial judge is peculiarly entitled to respect. The court saw all the parties and witnesses; it was in closer touch with the situation than this court which is limited to a review of a written record. While this case is triable de novo in this court, we cannot overlook the fact that the judgment of the trial court is entitled to great weight in determining the best interests of children in custody proceedings. Reasonable visitation rights were awarded the husband by general terms. Under this record, they

should be liberally interpreted to insure the well-being of the child. After giving consideration to all the foregoing factors, we find no controlling reason to interfere with the judgment of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROGER M. WESSELS, APPELLANT.

176 N. W. 2d 682

Filed April 24, 1970. No. 37438.

Criminal Law: Trial: Evidence. The trial court's determination of the admissibility of demonstrative evidence will not be overturned except for a clear abuse of discretion.

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

Kelly & Kelly, 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.

MCCOWN, J.

The defendant was found guilty of breaking and entering by a jury, and sentenced to 5 years in the Nebraska Penal and Correctional Complex. Issues on appeal involve the admission of a pair of gloves into evidence and sufficiency of the evidence to sustain the conviction.

A general store in Lushton, York County, Nebraska, was burglarized on the night of January 28, 1969. Property taken consisted of change from the cash register, cigarettes, one carton of cigarette lighters, a radio, two wrist watches, and one or two pairs of brown cotton jersey gloves. The owner of the store identified exhibit 6, a pair of gloves, as the kind that he had in the store,

but he could not definitely identify them as the gloves missing from the store. The defendant now contends that property which cannot be positively identified by an owner should not be admitted into evidence against an accused charged with burglary.

If the evidence of the owner was the only evidence relied on, defendant's position might be well taken. In this case, however, an individual who accompanied the defendant to the scene of the crime as either an accomplice or an onlooker testified. He said that upon the defendant's return to the car parked near the store on the night of the burglary, the defendant had several items of property with him, including exhibit 6. He had not had them when he left the car. The witness identified exhibit 6 as the gloves given to him by the defendant at that time. The gloves were traced through the witness to the sheriff's office and introduced during the direct testimony of the deputy sheriff. There was ample foundation to support the admission of exhibit 6.

The trial court's determination of the admissibility of demonstrative evidence will not be overturned except for a clear abuse of discretion. State v. Huffman, 181 Neb. 356, 148 N. W. 2d 321.

The defendant's remaining assignment of error going to the sufficiency of the evidence to support the conviction is untenable. The same witness previously mentioned furnished virtually a step-by-step eyewitness account of the plannnig and execution of the burglary. It was more than sufficient.

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

AFFIRMED.

CLARA SNYDER, APPELLANT, v. FORT KEARNEY HOTEL CO., INC., A CORPORATION, APPELLEE.
176 N. W. 2d 686

Filed April 24, 1970. No. 37444.

1. **Negligence: Instructions.** Where contributory negligence is an issue under the pleadings and evidence, the court should give an adequate instruction as to contributory negligence, and as to the comparative negligence rule.
2. **Instructions.** Errors in instructions not prejudicial to the complaining party are not a ground for reversal of a judgment otherwise correct.

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

Mitchell & Beatty, for appellant.

Tye, Worlock, Tye, Jacobsen & Orr, for appellee.

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

MCCOWN, J.

This is an action for damages for personal injuries sustained by the plaintiff as the result of a fall in defendant's hotel. The jury verdict was for the defendant and the plaintiff has appealed.

The sole assignment of error is that the trial court failed to give an instruction on the statutory comparative negligence rule. There was also no instruction on contributory negligence, although that issue was raised by the pleadings and the evidence. The essential facts are set out in our former opinion. Snyder v. Fort Kearney Hotel Co., Inc., 182 Neb. 859, 157 N. W. 2d 782.

At the trial involved in this appeal, although it was mentioned to the jury in the summary of the pleadings, no issue as to plaintiff's contributory negligence was submitted to the jury. Only the issue of defendant's negligence was submitted. The jury, in effect, was instructed that if it found the defendant negligent in one or more particulars alleged, and that such negligence was

a proximate cause or a proximately contributing cause of the accident, then the verdict should be for the plaintiff for any damages sustained. If the plaintiff failed to establish negligence on the part of the defendant proximately contributing to the injury, then the verdict should be for the defendant.

It is the plaintiff's position that the trial court has the duty to instruct on every issue raised by the pleadings and evidence, and that where there is an issue of plaintiff's contributory negligence, the court must give instructions stating the statutory comparative negligence rule.

Where contributory negligence is an issue under the pleadings and evidence, the court should give an adequate instruction as to contributory negligence, and as to the comparative negligence rule. See Carlson v. Chambers, 173 Neb. 166, 112 N. W. 2d 729. The contents of a comparative negligence instruction are referred to in Darnell v. Panhandle Coop. Assn., 175 Neb. 40, 120 N. W. 2d 278.

Although instructions on contributory negligence and the comparative negligence rule were both proper here, the failure to give an instruction on the comparative negligence rule was not prejudicial to the plaintiff, where contributory negligence was not submitted to the jury. The case of Reals v. Grazis, 125 Neb. 877, 252 N. W. 413, furnishes the foundation for analogy. In that case, the evidence would not support a finding of contributory negligence on the part of the plaintiff, but an instruction on comparative negligence was given. This court said: "Since there was no issue of fact upon the question of contributory negligence, an instruction on comparative negligence should not have been given. But the giving of such an instruction was not prejudicial to the defendant, although it might have been to the plaintiff if the verdict had been adverse to him."

The defendant might well have complained if an adverse verdict had been rendered because of the lack of

instructions on contributory negligence and the statutory comparative negligence rule. That furnishes no support for a claim of prejudice to the plaintiff, where the only issue submitted to the jury was the defendant's negligence.

Errors in instructions not prejudicial to the complaining party are not a ground for reversal of a judgment otherwise correct. Hansen v. First Westside Bank, 182 Neb. 664, 156 N. W. 2d 790.

On the issues as submitted, the verdict of the jury necessarily found no negligence on the part of the defendant. There was sufficient evidence to support that verdict, and the omission of an instruction on the comparative negligence rule under such circumstances was nonprejudicial error.

Judgment is affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. FRANKLIN DUANE PAULEY, APPELLANT.
176 N. W. 2d 687

Filed April 24, 1970. No. 37454.

Judgments: Appeal and Error: Time. Where a notice of appeal is not filed within 1 month from the entry of the judgment or final order appealed from as required by section 25-1912, R. R. S. 1943, this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed.

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

Franklin Duane Pauley, pro se.

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.

On April 18, 1966, defendant entered a plea of "guilty" to a charge of attempted burglary. On April 28, 1966, his plea of "guilty" was entered to an habitual criminal charge and defendant was found to be an habitual criminal. On May 5, 1966, he was sentenced to serve 15 years in the Nebraska Penal and Correctional Complex. No appeal was instituted.

Subsequently, defendant filed a motion under the Nebraska Post Conviction Act to set aside and vacate his conviction and sentence. An evidentiary hearing was had on the motion and thereafter, on July 11, 1969, the motion was denied by order of the court. No further proceedings were had until defendant filed a notice of appeal on September 15, 1969.

Under section 25-1912, R. R. S. 1943, a failure to file a notice of appeal within 1 month from the entry of the judgment or final order appealed from prevents this court from obtaining jurisdiction of the appeal. See, State v. Blunt, 182 Neb. 477, 155 N. W. 2d 443; State v. Williamsen, 183 Neb. 173, 159 N. W. 2d 206.

We conclude that this court does not have jurisdiction of the attempted appeal in this case and that it must be dismissed.

APPEAL DISMISSED.

IDA M. SIMS, APPELLANT, V. IRVIN SIMS, APPELLEE.
176 N. W. 2d 683

Filed April 24, 1970. No. 37484.

1. **Divorce: Evidence.** No decree of divorce and of the nullity of a marriage shall be made solely on the declarations, confessions, or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose.
2. **Divorce: Words and Phrases.** A continuing course of conduct which so grievously wounds the mental feelings or so utterly destroys the peace of mind so as to nullify or destroy the legiti-

mate objects and ends of matrimony constitutes extreme cruelty within the meaning of the statute.

3. **Divorce: Evidence.** The degree of corroboration required in a divorce action depends on facts and circumstances of the particular case.

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

Andrew J. McMullen, for appelant.

Nye, Wolf & Hove, for appellee.

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

WHITE, C. J.

In this divorce action, the district court dismissed the plaintiff wife's petition at the close of her evidence because of lack of corroborating testimony. We reverse the judgment of the district court and remand the cause for a new trial.

Our statute, section 42-335, R. R. S. 1943, provides: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, *require other satisfactory evidence* of the facts alleged in the petition for that purpose." (Emphasis supplied.)

The plaintiff's alleged statutory ground was "extreme" cruelty (section 42-302, R. R. S. 1943). The term itself is broad and indicates a considerable latitude for the exercise of judicial interpretation. Our definition has been consistent and well established. A continuing course of conduct which so grievously wounds the mental feelings or so utterly destroys the peace of mind so as to nullify or destroy the legitimate objects and ends of matrimony constitutes "extreme cruelty" within the meaning of the statute. Hartshorn v. Hartshorn, 104 Neb. 561, 178 N. W. 186; Chipman v. Chipman, 174 Neb. 584, 118 N. W. 2d 761; Ross v. Ross, 174 Neb. 795, 119 N.

W. 2d 495; Benton v. Benton, 180 Neb. 759, 145 N. W. 2d 576; Mercer v. Mercer, 183 Neb. 515, 162 N. W. 2d 230.

The parties were married on January 27, 1966, for the second time. The prior divorce had been granted to the plaintiff on evidence of excessive drinking and physical abuse. The present action was filed on June 9, 1969, alleging extreme cruelty on the part of the defendant. Plaintiff testified that the defendant had begun drinking again, had abused her by calling her vile names, and had embarrassed her with her friends and her relatives by his drunkenness and actions. Plaintiff also testified that defendant went to the neighbor's home when he was drunk, his actions embarrassed her, and such action made it impossible for plaintiff to live with him; and that the defendant threatened to have his daughter beat her up.

Some of the corroborating witnesses, next-door neighbors of the parties, testified that defendant had, in fact, come to their home and had stumbled around in a manner that would indicate that the defendant had been drinking. At the time, they also testified that they smelled alcoholic liquor on his breath. They further testified that defendant said that his daughter was coming from California to beat the plaintiff up. One witness testified that she had heard the defendant refer to the plaintiff as a "bitch" and further that the defendant complained that the plaintiff would not give him any money. This evidence supported specific allegations in her petition of excessive drinking and cruel and abusive conduct related thereto, repetitive of conduct responsible for the original divorce.

As we summarize it, there was evidence by independent witnesses that the defendant had resumed his excessive drinking habits, had referred to his wife in critical and abusive terms, and had threatened to have his daughter come to beat the plaintiff up. This is "satisfactory" evidence under the statute to support the di-

rect testimony of the plaintiff as to like conduct when they were alone together.

Under our holdings, we know of no requirement that specific and isolated incidents of cruelty be corroborated by the testimony of a physically present third person. Indeed, if this were the rule, corroboration would be almost impossible and easily avoided by the guilty spouse. It is apparent here that the corroborating testimony gave weight to a finding of the *continuous* and repetitive nature of the defendant's conduct, which plaintiff had directly testified to. Moreover, in this case, this conduct was tied in with the previously adjudicated cruel conduct of the defendant resulting in the former divorce decree granted to plaintiff.

The corroboration required in a divorce action depends on facts and circumstances of the particular case. Felton v. Felton, 131 Neb. 488, 268 N. W. 341; Brown v. Brown, 146 Neb. 908, 22 N. W. 2d 148; Green v. Green, 148 Neb. 19, 26 N. W. 2d 299. A general rule as to the *degree* of corroboration cannot be laid down. Schlueter v. Schlueter, 158 Neb. 233, 62 N. W. 2d 871; Read v. Read, 179 Neb. 637, 139 N. W. 2d 829; Benton v. Benton, *supra;* Rickus v. Rickus, 183 Neb. 140, 158 N. W. 2d 540.

The corroborating testimony was "satisfactory" and sufficient to sustain a finding of extreme cruelty under the facts and circumstances of this case. Consequently the dismissal of plaintiff's petition at the close of the presentation of her evidence was erroneous. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

LARRY E. HARRIS, APPELLANT, V. MAURICE H. SIGLER, WARDEN, NEBRASKA PENAL AND CORRECTIONAL COMPLEX, APPELLEE.

176 N. W. 2d 733

Filed April 24, 1970. No. 37496.

Criminal Law: Post conviction. In a post conviction proceeding, petitioner has the burden of establishing a basis for relief.

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

Larry E. Harris, pro se.

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.

MCCOWN, J.

This is an appeal from proceedings had in the district court for Lancaster County, Nebraska, ostensibly pursuant to the Post Conviction Act.

The petitioner, Larry E. Harris, filed a "Motion for Legal Documents," requesting that he be furnished copies of the complaint, arrest warrant, proceedings at preliminary hearing, proceedings at arraignment, all motions filed, proceedings at sentencing, commitment papers, and any other legal documents pertaining to the transcript and bill of exceptions in his criminal case. The district court, after examining the motion and records, denied the motion. The petitioner filed a notice of appeal and motion for appointment of counsel on appeal. The case was docketed, and the matter submitted to this court on briefs without oral argument.

The declared purpose of the petitioner was to attempt to determine whether or not he might have any grounds for filing a motion to vacate sentence under the Post Conviction Act. If the motion be treated as a motion for documents, denial would be interlocutory and not

appealable. Lund v. Holbrook, 157 Neb. 854, 62 N. W. 2d 112. If the matter be treated as a motion to vacate a sentence, as it apparently was by the trial court, it alleged no facts whatever which would entitle the petitioner to relief. While there is no requirement that allegations be in any technical form, nor that the grammar be any more than substantially understandable, the allegations must set forth facts. In a post conviction proceeding, petitioner has the burden of establishing a basis for relief. State v. Williams, 182 Neb. 444, 155 N. W. 2d 377.

Petitioner also complains that the district court did not appoint counsel for him on this appeal. Even if this matter were appealable, the failure to appoint counsel was not error in the absence of a showing of an abuse of discretion. State v. Hizel, 181 Neb. 680, 150 N. W. 2d 217.

There was clearly no abuse of discretion here and the action of the district court in denying petitioner's motion is affirmed.

AFFIRMED.

MIDLAND-ROSS CORPORATION, A CORPORATION, APPELLEE, V. ROBERT SWARTZ, APPELLANT.

176 N. W. 2d 735

Filed May 1, 1970. No. 37393.

1. **Pleadings.** A party claiming that the law of another state is applicable should allege the facts which make the foreign law applicable and the substance of the law relied upon.
2. **Pleadings: Evidence.** The right to introduce evidence depends upon there being an issue of fact raised by the pleadings to which the evidence is relevant.
3. **Pleadings: Bills and Notes.** An allegation that a promissory note was executed as an accommodation maker or surety without consideration does not state a defense where the pleadings show that the other maker was the party accommodated and received the consideration for the note.

4. **Bills and Notes.** A provision in a promissory note waiving any defense upon the ground of an extension of maturity is valid and binding upon parties to the note.
5. **Contracts.** A threat to terminate the distributorship of a distributor who is substantially indebted to the manufacturer does not constitute business coercion in the absence of contractual provisions to the contrary or circumstances which make the threat unjust and inequitable.

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

Abrahams, Kaslow & Cassman, for appellant.

Lyle E. Strom, C. L. Robinson, and Fitzgerald, Brown, Leahy, McGill & Strom, for appellee.

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

BOSLAUGH, J.

This is an action upon a promissory note made April 28, 1965. The trial court entered judgment for the plaintiff in the amount of $14,569.82 at the close of the plaintiff's evidence. The defendant's motion for new trial was overruled and he has appealed.

The note was payable to the plaintiff and signed by the defendant individually and as president of Roberts Supply Company, a corporation. There is no dispute as to the execution of the note or the amount due. The question presented is whether the defendant's answer as amended stated any defense.

The answer contained a general denial and alleged that the laws of Ohio were applicable to the transaction; that the defendant had executed the note as an accommodation maker or surety on behalf of the supply company without consideration; that the plaintiff had modified the terms and conditions of the note and had extended its maturity without the consent of the defendant; and that the defendant's signature had been procured by business compulsion, coercion, and duress.

The plaintiff's proof consisted of the note, the defend-

ant's admissions in response to a request for admissions of fact, and the defendant's testimony in a pre-trial deposition. This evidence established a prima facie case and the defendant's admissions eliminated any defense that might otherwise have been available under the general denial.

The allegation in the answer that the laws of Ohio were applicable to the transaction was a conclusion of law. The answer pleaded no fact which would make the note an Ohio transaction. The answer also failed to plead the substance of the Ohio law upon which the defendant relied. See Scott v. Scott, 153 Neb. 906, 46 N. W. 2d 627, 23 A. L. R. 2d 1431.

The defendant argues that if he had been permitted to offer evidence, he would have produced evidence which would have established that the note was an Ohio transaction. The trial court refused to allow the defendant to make an offer of proof.

The right to introduce evidence depends upon there being an issue of fact as to which it is relevant. The issues are made by the pleadings; and unless there is an issue of fact before the court, there is no right to introduce evidence to prove or disprove the fact.

The allegation that the defendant had executed the note "as an accommodation maker or surety on behalf of Roberts Supply Company without consideration" did not state a defense. In paragraph 6 of the answer, as amended during the trial, the defendant alleged that the supply company was indebted to the plaintiff and that the note had been executed to avoid a threatened cancellation of the distributorship of the supply company by the plaintiff and a refusal to ship any further merchandise. The previous indebtedness of the supply company was a sufficient consideration since the supply company was the party accommodated. See, § 62-125, R. R. S. 1943; Luikart v. Meierjurgen, 124 Neb. 816, 248 N. W. 379.

The note contained a provision that the makers waived

"all defenses on the ground of any extensions." Such a provision is valid and binding on the defendant and prevented an extension of the maturity of the note from being a defense. Nordeen v. Nelson, 134 Neb. 707, 279 N. W. 323.

After the plaintiff had rested, the defendant was permitted to amend his answer to allege that the plaintiff had threatened to terminate the distributorship of the supply company and to refuse to ship any further merchandise unless the defendant joined in the execution of the note, and that this constituted an "unlawful threat of a breach of contract" so that the signature of the defendant was procured through business compulsion, coercion, and duress. The defendant relies upon Ansbacher-Siegle Corp. v. Miller Chemical Co., 137 Neb. 142, 288 N. W. 538, and McCubbin v. Buss, 180 Neb. 624, 144 N. W. 2d 175, and contends that the threat was a breach of contract or unjust and inequitable.

The Ansbacher-Siegle Corporation case involved a written agreement for an exclusive distributorship in a specified territory for a definite term. In that case the indebtedness of the distributor to the manufacturer was past due but the manufacturer had waived the breach.

In the McCubbin case the defendant had obtained the plaintiff's consent to the discharge of a stock purchase contract by a threat to terminate the plaintiff's employment. Approximately 2 months later the defendant, who was the majority stockholder in the close corporation, dismissed the plaintiff. We held the defendant's threat to terminate the plaintiff's employment unjust and inequitable under the circumstances and allowed rescission of the discharge agreement.

The defendant's answer in this case did not allege any facts in regard to the distributorship of the supply company. The pleadings suggest that the indebtedness of the supply company to the plaintiff was good cause to terminate the distributorship and that the action of the plaintiff was not unlawful or unjust or inequitable.

Where the answer does not state a defense, the trial court should direct a verdict for the plaintiff. Sloan Commission Co. v. Fry & Co., 4 Neb. (Unoff.) 647, 95 N. W. 862; Winterringer v. Warder, Bushnell & Glessner Co., 1 Neb. (Unoff.) 413, 95 N. W. 619; Osborne & Co. v. Kline, 18 Neb. 344, 25 N. W. 360; Western Mfg. Co. v. Rogers, 54 Neb. 456, 74 N. W. 849; Hrabak v. Village of Dodge, 62 Neb. 591, 87 N. W. 358. Here the plaintiff proved a prima facie case by the admissions of the defendant. Since the answer failed to state a defense, it was proper for the trial court to enter judgment for the plaintiff. Osborne & Co. v. Kline, *supra;* Hrabak v. Village of Dodge, *supra;* Western Mfg. Co. v. Rogers, *supra.*

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHESTER PAUL CUNNINGHAM, APPELLANT.

176 N. W. 2d 732

Filed May 1, 1970. No. 37397.

1. **Criminal Law: Guilty Plea.** A plea of guilty 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.
2. **Criminal Law: Sentences.** In the absence of an abuse of discretion, a sentence within statutory limits will not be disturbed.

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

Robert C. Guinan, 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.

BOSLAUGH, J.

The defendant was charged with auto theft in violation

of section 28-522, R. R. S. 1943. He waived preliminary hearing and was brought before the district court on December 23, 1968. The record shows that at that time the defendant appeared with private counsel and entered a plea of guilty. The judgment entered on this plea was vacated by the district court on its own motion and a plea of not guilty entered for the defendant.

The case was set for trial on May 21, 1969, and the public defender was appointed to represent the defendant. When the defendant was brought before the district court on that day he withdrew the plea of not guilty that had been previously entered and again pleaded guilty.

On June 24, 1969, the defendant was brought before the district court for sentencing. The defendant asked leave to withdraw his plea of guilty. This request was denied and the defendant was sentenced to 3 to 5 years' imprisonment. The defendant now contends that he should have been allowed to withdraw his plea of guilty entered on May 21, 1969, and that the sentence is excessive.

Although the formal appointment of the public defender as counsel for the defendant occurred on May 21, 1969, the public defender stated in open court at that time that he was "* * * thoroughly familiar with the facts of this case. I have had plenty of opportunity to discuss it with the defendant and we are fully prepared to proceed with the trial." The defendant stated that he had consulted with the public defender and was prepared to proceed at that time.

The trial court carefully explained the rights of the defendant. The information and statute were read to him. He stated that he understood what pleas might be made and that no coercion or inducements had been made concerning his plea. The court was advised that the county attorney had agreed to dismiss a charge of robbery which was pending against the defendant in the event he pleaded guilty to the charge of auto theft. The defendant was advised that the trial court was not

a party to the plea bargaining and the defendant stated that he understood that the bargaining was not binding upon the court. The trial court ascertained that there was a factual basis for the plea and then accepted the defendant's plea of guilty.

The record shows that the defendant pleaded guilty with full knowledge of the charge and the consequences of the plea. There is nothing to indicate fraud, mistake, or other improper means in its procurement. The request for leave to withdraw the plea was properly denied. State v. Eutzy, 184 Neb. 755, 172 N. W. 2d 94.

The statute authorizes a sentence of from 1 to 10 years. § 28-522, R. R. S. 1943. The defendant in this case had been charged with robbery. While the case was pending and he had been released on bond, he was involved in a second robbery. There is nothing in the record to show that the sentence imposed was an abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL, RELATOR, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, ET AL., RESPONDENTS.

176 N. W. 2d 920

Filed May 1, 1970. No. 37479.

1. **Constitutional Law: Governor: Legislature: Powers.** To be effective, each item appearing in a legislative appropriation bill which is an increase over the budget submitted to the Legislature by the Governor must receive a two-thirds vote on final passage.
2. ———: ———: ———: ———. Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function; indeed, it is the extreme legislative prerogative, indispensable to the independence and integrity of the Legislature,

and not to be surrendered or abridged, save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people.

3. ———: ———: ———: ———. The right of the Legislature to control the public treasury, to determine the sources from which the public revenue shall be derived and the objects upon which it shall be expended, to dictate the time, the manner, and the means, both of its collection and disbursement, is firmly and inexpugnably established in our political system.

4. ———: ———: ———: ———. The Legislature has plenary or absolute power over appropriations. It may make them upon such conditions and with such restrictions as it pleases within legal and reasonable limits. It cannot, however, through the power of appropriation exercise or invade the constitutional rights and powers of the executive branch of government.

Original action. Judgment in part for relator and in part for respondents.

Clarence A. H. Meyer, Attorney General, and Gerald S. Vitamvas, for relator.

Edmund D. McEachen, John S. Zeilinger, and Young, Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for respondents.

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

SPENCER, J.

This is an original action brought by the State of Nebraska on the relation of the Attorney General at the express request of the Legislature of the State of Nebraska. It seeks to have certain appropriations vetoed by the Governor declared valid and to uphold certain personal service limitations placed in the appropriation bills by the Legislature.

Five of the appropriation items were included in Legislative Bill 1425 (Laws 1969, c. 481, p. 1987), an act making appropriations for construction, repair, and improvement of state buildings and land acquisition. These items are as follows:

(1) Land acquisition (Medical Center,

	University of Nebraska) in the amount of	$1,000,000
(2)	Land acquisition (University of Nebraska at Omaha) in the amount of	1,350,000
(3)	Home Economics facility (East Compus) in the amount of	1,225,000
(4)	Remodeling of the Administration Building (Kearney State College) in the amount of	1,500,000
(5)	Appropriation for a recreation and activities building (Beatrice State Home) in the amount of	638,400

One of the appropriation items was embraced in Legislative Bill 552 (Laws 1969, c. 466, p. 1619). It was an appropriation of $2,240,000 for a Home Economics facility on the East Campus. No purpose will be served herein by specifically detailing the legislative history of each of these items. The points important for consideration may be raised by general statements.

The Governor presented his budget message and executive budget to the Legislature on January 29, 1969. With relation to the appropriations for the Medical Center, for the Beatrice State Home, the Home Economics facility, and the remodeling of the Administration Building at Kearney State College, specific requests were made to the Governor for such appropriations but the Governor made no recommendations for the same in the budget he submitted to the Legislature. No request was made to the Governor covering land acquisition for the University of Nebraska at Omaha and said item was not included in his budget. In the course of the legislative proceedings these various items were included in the budget by the Legislature. At some stage of the legislative process all of the items above, except item (3), the appropriation of $1,225,000, received at least a two-thirds vote. However, on final passage neither Legislative Bill 1425 nor Legislative Bill 552 received a two-thirds vote. The vote on Legislative Bill 1425 on

final passage was: 28 Ayes, 16 Nays, and 5 Not Voting. The vote on Legislative Bill 552 on final passage was: 30 Ayes, 11 Nays, and 8 Not Voting.

Article IV, section 7, Constitution of Nebraska, provides as follows: "The Governor may, at the commencement of each session, and at the close of his term of office and whenever the Legislature may require, give by message to the Legislature information of the condition of the state, and shall recommend such measures as he shall deem expedient. Within thirty days after the commencement of each regular session he shall present, by message, a complete itemized budget of the financial requirements of all departments, institutions and agencies of the state for the ensuing biennium. Said budget shall be prepared with such expert assistance and under such regulations as may be provided by law. No appropriations shall be made in excess of the recommendation contained in such budget unless by two-thirds vote of the Legislature, and such excess so approved shall not be subject to veto by the Governor."

Article IV, section 15, Constitution of Nebraska, provides as follows: "Every bill passed by the Legislature, before it becomes a law, and every order, resolution or vote to which the concurrence of both Houses may be necessary (except on questions of adjournment) shall be presented to the Governor. If he approves he shall sign it, and thereupon it shall become a law, but if he do not approve, he shall return it with his objections to the House in which it shall have originated, which House shall enter the objections at large upon its journal, and proceed to reconsider the bill. If then three-fifths of the members elected agree to pass the same, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered; and if approved by three-fifths of the members elected to that House, it shall become a law, notwithstanding the objections of the Governor. In all such cases the vote of each House shall be determined by yeas and nays,

to be entered upon the journal. Any bill which shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, shall become a law in like manner as if he had signed it; unless the Legislature by their adjournment prevent its return; in which case it shall be filed, with his objections, in the office of the Secretary of State within five days after such adjournment, or become a law. The Governor may disapprove any item or items of appropriation contained in bills passed by the Legislature, and the item or items so disapproved shall be stricken therefrom, unless repassed in the manner herein prescribed in cases of disapproval of bills."

It is to be noted that the above constitutional provision was adopted while this state had a bicameral legislative system. Since that time, under constitutional authority a unicameral system was adopted and has since been in operation. By the terms of Article III, section 1, Constitution of Nebraska, since January 1937, all provisions referring to the bicameral Legislature in the Constitution are applicable to the unicameral Legislature.

Two issues are presented in regard to these appropriations: (1) Were any of the questioned appropriations validly and effectively enacted; and (2) if validly and effectively enacted, were they effectively vetoed by the Governor?

The 1969 Legislature inserted the following provision: "Expenditures for Personal Services shall not exceed $——— during the period July 1, 1969-June 30, 1970, nor $——— during the period July 1, 1970-June 30, 1971," in Legislative Bills 1421, 928, 831, 552, and 1096. Respondents contend that this provision, which they allege appears 480 times in the above bills, constitutes an unlawful limitation on expenditures for personal services. The issues presented relative to these provisions are: (1) Are the provisions advisory only, or are they mandatory; and (2) if mandatory, are they a valid exercise of the power of the Legislature, or do

they constitute an unconstitutional encroachment on the other branches of government?

In the Governor's veto message as to Legislative Bill 1425 he referred to the authority given him by Article IV, section 15, Constitution of Nebraska, which provides for an item or items veto of appropriations contained in bills passed by the Legislature. Here we are dealing with items added to the appropriations bill for the maintenance and upkeep of a state department, institution, or agency, and they are definitely within the ambit of Article IV, section 7, Constitution of Nebraska. It is immaterial whether all of the items were originally presented to the Governor in the budget presentation of those groups or not. As executive head of the state government, the Governor is charged with the responsibility of preparing, with expert assistance, a completely itemized budget for every department, institution, and agency of state government for the ensuing biennium. The budget requirements of Article IV, section 7, Constitution of Nebraska, apply to all departments, institutions, and agencies of the state in being at the commencement of the legislative session. Mekota v. State Board of Equalization & Assessment, 146 Neb. 370, 19 N. W. 2d 633. No new or increased appropriation may be made for any existing organization included in that classification except by a two-thirds vote of the Legislature, and when so made it is not subject to the Governor's veto.

When is an appropriation made? An appropriation is a law and may be adopted only through a bill. A bill is not passed until it receives the necessary affirmative vote on final passage. An appropriation bill is no different in this respect than any other bill before the Legislature. In the case of an appropriation bill, no appropriation is made until its final passage. Until that stage is reached, it is no more than a mere proposal being moved along for further consideration. To be effective as to an item increasing the amount proposed for

any department in the Governor's budget, the bill must receive a two-thirds vote on final passage.

The constitutional language appears so clear to us that there is no room for construction. We said in State ex rel. School Dist. of Scottsbluff v. Ellis, 168 Neb. 166, 95 N. W. 2d 538: "Before rules of construction become available it must be demonstrated that the constitutional provision is not clear as to its meaning and that the intent of the people in adopting the provision can be determined only by construction."

In Elmen v. State Board of Equalization & Assessment, 120 Neb. 141, 231 N. W. 772, this court said: "We are indebted to the suffrage of the people for the adoption of all amendments submitted and indeed for the adoption of the original Constitution which such amendments changed. From this fact it is patent that, where the language employed is plain, the courts should accord to it the meaning which obviously would be accepted by the layman." In that case, the items of increase were included in the appropriation bill by less than a three-fifths vote (which was then the requirement of Article IV, section 7, Constitution of Nebraska). The question there was whether a three-fifths vote for the bill on final passage was sufficient. We held the required vote on final passage was sufficient, and a three-fifths vote on adding the increase was not required. We now state that it is immaterial whether the increase items receive a two-thirds vote at any other stage of the legislative process. Unless the bill including them receives a two-thirds vote on final passage, they cannot constitutionally be included in the bill. It follows that the appropriation bills having been adopted by less than a two-thirds majority vote of all members elected to the Legislature, the questioned appropriations were not validly or effectively enacted, and therefore never become operative. The disapproval of the Governor in effect pointed up this invalidity.

Does the Legislature have the right to apportion the

amount budgeted for personal service expenditures to specific periods within the biennium? Or, to be more accurate, can the Legislature impose a ceiling on annual personal service expenditures? Article III, section 25, Constitution of Nebraska, provides in part: "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued as the Legislature may direct, * * *." Article III, section 22, Constitution of Nebraska, provides as follows: "Each Legislature shall make appropriations for the expenses of the Government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal quarter. And whenever it is deemed necessary to make further appropriations for deficiencies, the same shall require a two-thirds vote of all the members elected to each House, and shall not exceed the amount of revenue authorized by law to be raised in such time. Bills making appropriations for the pay of members and officers of the Legislature, and for the salaries of the officers of the Government, shall contain no provision on any other subject."

The object and purpose of such constitutional provisions is to render the departments of state government dependent upon the will of the people as expressed by their duly-elected representatives, the members of the legislative branch of the government, and to require such departments, except as may otherwise be provided in the Constitution, to return to that source at regularly stated intervals for the necessary means of existence, because the people have learned that the very preservation of liberty depends upon the control of the purse by their periodically elected representatives. See State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 69 N. W. 373.

This principle is well stated in Colbert v. State, 86 Miss. 769, 39 So. 65, as follows: "Under all constitutional

governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function; indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the legislature, and not to be surrendered or abridged, save by the constitution itself, without disturbing the balance of the system and endangering the liberties of the people. The right of the legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means, both of their collection and disbursement, is firmly and inexpugnably established in our political system. This supreme prerogative of the legislature, called in question by Charles I., was the issue upon which parliament went to war with the king, with the result that ultimately the absolute control of parliament over the public treasury was forever vindicated as a fundamental principle of the British constitution. The American commonwealths have fallen heirs to this great principle, and the prerogative in question passes to their legislatures without restriction or diminution, except as provided by their constitutions, by the simple grant of the legislative power."

Within the limitations of the Constitution, the general authority of the Legislature over the public revenue of the state from taxation is paramount. Without question, the legislative power is supreme in matters relating to appropriations as to which no constitutional restrictions exist.

Article II, section 1, Constitution of Nebraska, provides as follows: "The powers of the government of this state are divided into three distinct departments, the Legislative, Executive and Judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

Article IV, section 6, Constitution of Nebraska, provides as follows: "The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed and the affairs of the state efficiently and economically administered."

Article III, section 6, Constitution of Nebraska, provides for biennial sessions of the Legislature. Article III, section 22, Constitution of Nebraska, requires the Legislature to make appropriations for the expenses of government until the expiration of the first fiscal quarter after the adjournment of the next regular session. Respondents argue that the entire state budget process contemplated by our constitutional provisions is based on biennial budgeting. Respondents argue that the personal services provisions are on an annual basis and are in violation of the requirement for biennial budgeting. We agree with respondents' premise, but do not accept respondents' conclusions.

The various departments of the government submit their appropriation requests to the Governor, who after reviewing them with expert assistance, submits a completely itemized budget for the biennium to the Legislature. In the various hearings by the budget committee of the Legislature, department heads are questioned as to the necessity for and the extent of the programs for which appropriations are requested. These procedures over the years have been used to permit the Legislature to determine the full extent to which appropriations should be made for the operation of the various departments of the state government for the next biennium.

The Legislature actually made the appropriations for the biennium. Respondents do not question its sufficiency. They question the right of the Legislature to impose a ceiling on an annual basis upon the personal services expenditures from that biennial appropriation.

The Legislature has plenary or absolute power over appropriations. It may make them upon such condi-

tions and with such restrictions as it pleases within constitutional limits. There is one thing, however, which it cannot do, and this is inherent in Article II, section 1, Constitution of Nebraska. It cannot through the power of appropriation exercise or invade the constitutional rights and powers of the executive branch of the government. It cannot administer the appropriation once it has been made. When the appropriation is made, its work is complete and the executive authority takes over to administer the appropriation to accomplish its purpose, subject to the limitations imposed. Is the condition imposed an attempt to administer the appropriation?

All authorities are in agreement that it is impossible to fix exact limits in the area of constitutional separation of powers. All states approach the problem on a case-by-case basis. We realize it is possible to impose undue spacing limitations or to carry the imposition of ceilings for varying periods to an extreme. We also realize that the Legislature cannot be permitted to hamper the necessary operation of constitutional officers by unreasonable appropriation restraints. These, however, are not the situations we have before us. We do not believe the imposition of a ceiling for personal services on an annual basis is unreasonable. Most governments operate on a fiscal year basis. The salaries of our public officials are determined on an annual basis. It is within the power of the Legislature to fix the amount it will appropriate for personal services in any state department or agency. The appropriation is strictly in line with the requirements of equalization and uniformity in our constitutional revenue provisions. The Legislature has made the appropriation for the biennium. It has seen fit to divide that portion of the appropriation allocated for personal services by imposing an annual ceiling. This is within the legislative prerogative and is not an unlawful attempt to control the operation of the executive department or to administer the appropriation.

This court in State ex rel. Dales v. Moore, 36 Neb. 579, 54 N. W. 866, inferentially suggested that the Legislature had the power to provide for the lapsation of an appropriation within the biennium. That case held: "No appropriation made by the legislature will lapse before the end of the first fiscal quarter after the adjournment of the next regular session, unless there is a special provision in the act itself to provide that if it is not used by a certain time that it shall lapse." This language clearly implies that the Legislature does have the power to limit an appropriation in a specific manner in the act making the appropriation. See, also, State ex rel. Bullock v. Babcock, 22 Neb. 33, 33 N. W. 709. We determine in this instance that the legislative condition is reasonable and constitutional.

For the reasons given, we declare the challenged portions of Legislative Bills 552 and 1425 invalid and of no force and effect. We further declare that the personal service annual ceiling provisions included generally in the appropriation bills of the 1969 regular session of the Legislature are valid and in full force and effect.

JUDGMENT IN PART FOR RELATOR AND IN PART FOR RESPONDENTS.

JOSEPH CONNOLLEY, AN INFANT BY AND THROUGH HIS MOTHER AND NEXT FRIEND, GENEVIEVE CONNOLLEY, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLEE.

177 N. W. 2d 492

Filed May 8, 1970. No. 37257.

1. **Trespass: Words and Phrases.** Trespass to land is a breaking of the close; an invasion of one's property or any encroachment thereon. It was anciently referred to as trespass quare clausum fregit.
2. **Trespass: Negligence: Damages.** If injury or damage to a property owner or to a member of his household results primarily and directly from the act of trespass, the trespasser is

liable therefor even though his act is not negligent or willful.

3. ———: ———: ———. A trespass to land does not make the trespasser an insurer of the landowner and members of his household for injuries or damages which may be a secondary, indirect, or consequential result of his trespass.

4. ———: ———: ———. An action in tort or negligence, known at common law as trespass on the case, is the proper action to recover for secondary, indirect, or consequential injuries or damages resulting from a trespass.

5. ———: ———: ———. In a trespass on the case action the recovery is based on negligence. In such a case contributory negligence, assumption of risk, and other defenses common to tort actions may be relied on by the trespasser.

6. **Trespass: Negligence: Trial.** A trespass which merely produces a condition cannot be considered to be the proximate cause of an accident which would not have occurred except for the subsequent independent act of a third person. Where reasonable minds could not differ on the facts adduced it is the duty of the court to decide this issue and not submit it to the jury.

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

Seymour L. Smith and Eisenstatt, Morrison, Higgins, Miller, Kinnamon & Morrison, for appellant.

Fraser, Stryker, Marshall & Veach, for appellee.

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

KOKJER, District Judge.

The plaintiff was injured by electricity when a metal flagpole he was helping to lower came in contact with a wire of defendant's transmission line. He claims that defendant is liable for his damages because the wire, at the point of contact, hung over the property of plaintiff's family 54/100ths of a foot. No negligence on the part of the defendant was proved. The claim for recovery is based on the asserted trespass of defendant upon the property. When the evidence was completed, defendant moved for a directed verdict or for a dismissal of the case. The motion was sustained and the case was dismissed. Plaintiff appealed.

The evidence, construed most favorably to plaintiff, as it must be in this situation, sustains the trespass. The power line had been constructed along the east line of the property in the year 1930. Plaintiff's father bought the lot in the year 1959. He started to construct a house on it in 1962. Some work was done the same year on the line but the location of the wires had not been changed between the time the house was constructed and the date of the accident on July 3, 1965. Plaintiff's father testified that he believed they had moved into the house in March 1964.

Shortly before July 3, 1965, plaintiff's father had poured a concrete base rising 6 to 8 inches above the ground, and included therein a hole in which to insert a flagpole. The base was 2.61 feet west of the west wire of the transmission line and 3.15 feet west of the east property line. The wire at that point on April 15, 1967, was 30.24 feet above the ground. The plaintiff's father had assembled a flagpole by taking a section of pipe, inserting a smaller pipe into it, bolting them together, then inserting a still smaller pipe into that one, and bolting them together. The length of the finished flagpole was 33 feet, 5 inches.

On July 3, 1965, plaintiff, plaintiff's father, and a neighbor placed the butt end of the flagpole against the concrete base. Taking hold of the outer end, they walked toward the base, lifting the outer end of the pole higher as they walked, until it was vertical, and then slipped the butt end into the hole in the base. The neighbor went home and plaintiff's uncle then arrived. It was discovered that the pulley rope to which the flag was to be attached was too high to be reached, and they decided to take the pole down and cut off some of the bottom of it. The three of them took hold of the pole and, after lifting it up out of the hole, set it on top of the concrete base.

On direct examination plaintiff's father testified as follows: "Q. Go ahead and tell the Jury then what

happened. A. I don't know what happened after that hit us or the length of time, I wouldn't know this, but evidently if it had struck that wire up there, which that evidently is what it did, then we fell away to the ground unconscious."

On cross-examination plaintiff's father testified as follows: "Q. And as you stood there, was there any particular length of time went by before this accident occurred? A. It was a very short while, very, very short while after we had it out of the socket that it made contact with, I would imagine, the electric wire. Q. Well, there is no doubt in your mind but what the electrict wire was contacted, is there? A. No doubt, no sir."

An electric shock injured plaintiff severely and also injured his father and uncle to a degree not disclosed by the record.

Both plaintiff and his father admitted they knew that it was dangerous to contact an electric wire. They knew the wires were there but as they proceeded to erect the flagpole they paid no attention to them and did not discuss the possibility of danger.

An engineer testified that on April 15, 1967, somewhat over a year and 9 months after the incident he, with the assistance of two boys, by use of a transit, a method known as triangulation, and trigonometry, determined that on that date the westernmost wire of the transmission line hung 54/100ths of a foot, a little more than 6 inches, inside the property line.

Later, plaintiff, a minor, by his mother and next friend, filed this suit against defendant to recover for his injuries.

Plaintiff's attorneys had evidently decided that the facts would not sustain a suit against the defendant for any negligence on its part; and that if plaintiff were to recover at all, it would have to be on the theory that defendant had trespassed upon the property of plaintiff's family. They asked the court to require the de-

fendant to pay for plaintiff's damages on the following theories:

(1) A trespasser on land is subject to liability for bodily harm caused to the possessor thereof, or to the members of his household, by the trespass, irrespective of whether the trespasser's conduct is such as would subject him to liability were he not a trespasser.

(2) Trespass and negligence are distinguishable. To recover against a trespasser, it is not necessary to prove negligence.

(3) Neither contributory negligence nor assumption of risk constitutes a defense in an action for trespass.

(4) Proximate cause is ordinarily a question for the jury. It is that cause which is an efficient agent in producing a given result. Where several causes concur to produce a certain result, either may be termed a proximate cause if it is an efficient cause of the result in question.

The district court sustained one other of plaintiff's theories and held there was a reasonable inference of trespass, but held that plaintiff's case based on trespass to real estate, anciently referred to as trespass quare clausum fregit, had to rest on proof that the injury complained of was the immediate and direct result of the trespass, and this proof was lacking. The district court also held that, even construing the action as one for negligence, anciently referred to as trespass on the case, it would be defeated by negligence of plaintiff and his father which were the proximate cause of the injuries.

Since nearly every violation of one's rights was anciently considered a trespass, there are literally hundreds of cases dealing with trespass vi et armis, trespass de bonis asportatis, trespass quare clausum fregit, trespass on the case, and so forth. In many of the reported cases the distinctions are blurred, and a negligence case may be treated loosely as one for trespass. The opinions frequently commingled the theories.

"Generally speaking, trespass on the case lies for an

injury resulting from a wrongful act other than physical force, or for an injury resulting from nonfeasance or negligence, or for an injury which is a consequential, as distinguished from a direct or immediate, result of the wrongful act." 52 Am. Jur., Trespass on the Case, § 5, p. 901.

Such would be an action for injuries contributed to by an electric company's negligence in permitting wires to sag so the wind might blow them and cause a dangerous condition; or to construct their lines too low or too close to a place where contact with any person or thing could be reasonably expected.

"An injury is considered as immediate and therefore remediable by an action of trespass, as distinguished from trespass on the case, only when it is directly occasioned by, and is not merely a consequence resulting from, the act complained of." 52 Am. Jur., Trespass on the Case, § 5, p. 901.

Such would be an act directly damaging a person's house or garden or trees during line construction, and perhaps initially energizing a new line into a home without providing an adequate transformer, so that by that act excessively high voltages would burn out appliances, cause a fire, or personally injure the home owner's family.

The difficulty in applying the correct rules in this area of the law is summarized in Corpus Juris as follows:

"Case and trespass are clearly distinguishable, although the distinction is somewhat subtle and sometimes difficult of application. As ordinarily stated, the distinction is that where the injury resulting from a particular act is direct and immediate, trespass is the proper remedy, but that where it is not direct, but merely consequential, the proper remedy is case. * * * but it has been suggested that the true gist of the distinction intended lies not so much in the proximate or remote character of the damage as in the primary or secondary nature of the trespass." 1 C. J., Actions, § 117, p. 996.

"While theoretically the distinction between the actions of case and trespass is clear and well settled, yet it is one which is often difficult to apply to the facts and circumstances of particular cases." 1 C. J., Actions, § 126, p. 999.

In note 75 to the above section appears the following: "The probability of injury resulting from the act done, under the circumstances of the particular case, is an element to be considered in determining the directness of the injury as affecting the proper form of action. Cole v. Fisher, 11 Mass. 137. See also Loubz v. Hafner, 12 N. C. 185."

There are cases where the distinction is not precise which would appear to lend support to the theories advanced by plaintiff's attorneys. One of these upon which they rely is Kopka v. Bell Telephone Co. of Pennsylvania, 171 Pa. 444, 91 A. 2d 232, in which the defendant unlawfully dug a hole on plaintiff's property. Plaintiff was advised of this fact by a neighbor, and, while searching for it, fell into the hole and sustained injury. There the court said: "The liability of defendant Company for the trespass in the digging of the hole on plaintiff's land, without his knowledge or consent being thus established, does liability extend to the personal injuries sustained by him as the result of his falling into the hole? The authorities are clear to the effect that where the complaint is for trespass on land the trespasser becomes liable not only for personal injuries resulting directly and proximately from the trespass but also for those which are indirect or consequential."

It will be noted that there was no immediate or direct injury to plaintiff's person from the digging of the hole, although there was to his land, so the recovery for injury to his body could not have been properly allowed for trespass. However, it could have been and apparently was allowed on the theory of a consequential injury for defendant's negligence in leaving an unguarded hole at a place where it could be reasonably

anticipated that some person might fall into it. This would be an action for trespass on the case to which contributory negligence, if any, would be a defense. This case and others like it merely illuminate the manner in which the distinction between trespass and trespass on the case is confused.

Plaintiff herein proposes a rule which would make a power district or other proprietor of an electric transmission line an insurer for all time of a property owner and his family so long as the transmission line hangs over the property to any degree, even though it is constructed and maintained without negligence. Such a rule would require payment of damages regardless of any reckless, negligent, or even willful act of the property owner and his family. There is no sound basis in reason, statute, or applicable case law for such a rule.

Plaintiff claims that the district court erred in not submitting the question of proximate cause to the jury. It is true that ordinarily this is a jury question. Could it be in this case where: (1) Defendant cannot be held liable, in any event, on the theory of trespass for an act which was not a direct, immediate, or primary result of the injury; and (2) there is no proof whatever of any negligence on the part of the defendant? We think not.

The district court held correctly, we think, that defendant could not be held liable in trespass for injuries which were indirect and consequential. The court then stated that even construing the action as one based on negligence, there was gross negligence on the part of plaintiff's father. The rule in Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117, and Bruno v. Gunnison Contractors, Inc., 176 Neb. 462, 126 N. W. 2d 477, where the negligence charged furnishes only a condition by which the injury is made possible, and a subsequent independent act of a third party causes the injury, the two acts are not concurrent, and the existence of the condition is not the proximate cause of the injury, is applicable here. Under the facts of this case, the

district court was correct in not submitting the question of proximate cause to the jury.

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

AFFIRMED.

SPENCER, J., dissenting.

I am not in agreement with the majority opinion herein, and in dissent make the following observations.

The base for the flagpole was constructed on and 3.15 feet from the east lot line of the property. The defendant owned, maintained, and operated an electrical distribution line on North Seventy-eighth Street in Omaha, Nebraska, which runs north and south in the parkway along the east side of the Connolley property but has no connection to that property. The west wire of said line is conceded to be .54 feet into the Connolley property. For the purposes of this case, it must be conceded that the defendant had no right by consent, prescription, easement, or otherwise to maintain the west wire over or upon the Connolley property. The electrical energy carried at the time of the accident was 13,000 volts. It is undisputed that there were no warning signs showing that this line carried a dangerous charge of electricity or that this highly energized wire was protruding over the property. This line did not serve the Connolley property. It was served with electricity by a transmission line behind the house from a line which comes off a pole in the southwest corner of the property.

Other than the participants, the only eyewitness was one Emil John Torres who testified that he lives four lots south of the Connolleys, or approximately 400 feet away, and that he did not know them personally. At the time of the accident he was in his front yard and noticed some people in the Connolley front yard who were holding something straight up in the air, approximately vertical. About the same instant he noticed a yellow flash in the vicinity of the west wire. The flash was directly above what he saw the people holding. The

flash was yellow like an arc, and was plainly visible.

There is only one issue presented in this appeal: Did the trial court err in sustaining defendant's motion for a directed verdict, thereby removing from the jury the question of the proximate cause of the plaintiff's injury? In determining whether the plaintiff's evidence is sufficient to present a question for the jury, it must be considered in the light most favorable to him, every controverted fact must be resolved in his favor, and he must have the benefit of every inference that can be reasonably drawn from the evidence. Reeder v. Rinne, 183 Neb. 734, 164 N. W. 2d 203.

There can be no question the defendant is a trespasser on the property involved herein. A taking of land for public use without authorization is a trespass. Martin v. Norris Public Power Dist., 175 Neb. 815, 124 N. W. 2d 221.

We are concerned here with what is described as a continuing trespass. A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor or his predecessor in legal interest has placed on the land. Restatement 2d, Torts, § 160, p. 284. The actor's failure to remove from land in the possession of another a structure, chattel, or other thing which he has tortiously erected or placed on the land constitutes a continuing trespass for the entire time during which the thing is wrongfully on the land. Restatement 2d, Torts, § 161, comment b. p. 289.

In the instant case, the wire overhanging the property of plaintiff's parents is constantly energized and the trespass was active and operative at the moment of plaintiff's injury. The Restatement rule on the extent of a trespasser's liability for harm is as follows: "A trespass on land subjects the trespasser to liability for physical harm to the possessor of the land at the time of the trespass, or to the land or to his things, or to members of his household or to their things, caused by any act done, activity carried on, or condition created by the

trespasser, irrespective of whether his conduct is such as would subject him to liability were he not a trespasser." Restatement 2d, Torts, § 162, p. 291.

This is not a case where we can assume that the Connolleys lost control of the pole and that it fell eastward onto the offending wire. The evidence which we must consider herein is otherwise. The reasonable inference from the testimony of the only disinterested eyewitness is that the electricity arced or jumped from the wire to the pole. This must be considered in connection with the plaintiff's testimony that the pole was straight up and down at the time he was knocked unconscious. When the parties were knocked to the ground, the pole fell. The marks on the pole, shown by exhibit 29, would indicate that the pole could have slid along the wire when it fell, after electricity jumped the gap between the wire and the pole. Defendant's crew foreman on cross-examination admitted that after the initial contact further contact might have been made between the pole and the wire.

Plaintiff's father was erecting the flagpole on his own property. The base he prepared for it was located more than 3 feet from the east lot line. If the defendant's wire had not been over his property but in the parkway adjoining it, we would have an entirely different situation. Then the authorities relied on by the majority opinion would be relevant. We cannot separate the accident herein from defendant's trespass. Even if we assume negligence on the part of plaintiff's father, it still took the trespass to produce the injury.

The plaintiff herein testified that he had no occasion to look up at the wires; that he had never paid any attention to them; and even if he had, he would not have know what they were. This testimony should be considered in connection with the fact that the plaintiff's home was not served with electricity from these wires but from one coming into the home from the rear. Further, he had a right to be where he was at the time of

the accident; he was engaged in assisting his father in a family project wholly upon his parent's property. Defendant's wire was suspended over this property without right.

Plaintiff could not be held contributorily negligent as a matter of law. In fact, the evidence was insufficient to submit the issue to the jury. On the facts herein, it must be assumed that plaintiff had no knowledge of the extremely dangerous character of the wire. Even if plaintiff had specifically observed the wire, there is a serious question as to whether a child of his years and experience would realize the danger. Also, he might have assumed it to be further away than it actually was. It is of interest that defendant's crew foreman, who had considerable experience in such matters, placed the wire as 4 feet from the base of the pole. This statement, made in Henderson v. Kansas Power & Light Co., 184 Kan. 691, 339 P. 2d 702: "A high-voltage power line is one of the most dangerous things known to man. Not only is the current deadly, but the ordinary person has no means of knowing whether any particular wire is carrying a deadly current or is harmless," is certainly appropriate herein.

Defendant was unlawfully maintaining a dangerous energized wire over the property on which plaintiff resided. Plaintiff's injury arose out of this unauthorized invasion of that property. This continuous trespass is at the very least a proximate cause of plaintiff's injury.

This case is not too far different from Kopka v. Bell Telephone Co. of Pennsylvania, 371 Pa. 444, 91 A. 2d 232, cited in the majority opinion. There the defendant unlawfully dug a hole on plaintiff's property. Plaintiff was advised of this fact by a neighbor, and while searching for it fell into the hole and sustained injury. There the court said: "The liability of defendant Company for the trespass involved in the digging of the hole on plaintiff's land without his knowledge or consent being thus established, does such liability extend to the per-

sonal injuries sustained by him as the result of his falling into the hole? The authorities are clear to the effect that where the complaint is for trespass on land the trespasser becomes liable not only for personal injuries resulting directly and proximately from the trespass but also for those which are indirect and consequential. In Restatement, Torts, § 380, it is stated that 'A trespasser on lands is subject to liability for bodily harm caused to the possessor thereof * * * by any * * * condition created by the trespasser while upon the land irrespective of whether the trespasser's conduct is such as would subject him to liability were he not a trespasser.' And in comment c to this section, it is said: 'It is, therefore, not necessary to the liability of the trespasser that his conduct should be intentionally wrongful or recklessly or negligently disregardful of the interests of the possessor * * *. Thus, one who trespasses upon the land of another incurs the risk of becoming liable for any bodily harm which is caused to the possessor of the land * * * by any conduct of the trespasser during the continuance of his trespass no matter how otherwise innocent such conduct may be.' And in comment f to § 163, it is said: 'So too, he (a trespasser) is liable for any harm to the possessor * * * if such harm is caused by the actor's presence on the land, irrespective of whether it was caused by conduct which, were the actor not a trespasser, would have subjected him to liability.'

"The authorities uniformly support the principle thus stated; see, for example: Troth v. Wills, 8 Pa. Superior Ct. 1; Newsom v. Meyer, 102 Conn. 93, 128 A. 699; Brackett v. Bellows Falls Hydro-Electric Corporation, 87 N. H. 173, 175 A. 822; Ham v. Maine-New Hampshire Interstate Bridge Authority, 92 N. H. 268, 275, 30 A. 2d 1, 6; Van Alstyne v. Rochester Telephone Corporation, 296 N. Y. S. 726; Keesecker v. G. M. McKelvey Co., 141 Ohio St. 162, 170-172, 47 N. E. 2d 211, 215, 216; Wyant v. Crouse, 127 Mich. 158, 86 N. W. 527; Cribbs v. Stiver,

181 Mich. 82, 147 N. W. 587; Bouillon v. Laclede Gas Light Co., 148 Mo. App. 462, 129 S. W. 401."

In Card v. Wenatchee Valley Gas & Electric Co., 77 Wash. 564, 137 P. 1047, deceased came in contact with an electric power transmission line unlawfully maintained across his property. Deceased was irrigating on his land under defendant's transmission line. He had a length of wrought iron pipe about 20 feet long, which came in contact with defendant's transmission line. In that case, the court said: "It is finally argued that the deceased was negligent in allowing the pipe in his hands to come in contact with the wire. This, we think, was also a question for the jury, and could not be determined as a matter of law, in view of the facts we have noticed; especially in view of the fact that deceased was where he had a right to be, engaged in his usual avocation, that appellant's wire was suspended over his land without right, and it not being shown that deceased had knowledge of the extremely dangerous character of the current carried on the wire."

CHARLES L. PEDERSEN, APPELLANT, V. DONALD SCHULTZ, APPELLEE.

176 N. W. 2d 917

Filed May 8, 1970. No. 37337.

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

Robert E. Paulick, for appellant.

Arthur C. Mayer, for appellee.

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

PER CURIAM.

Plaintiff appeals after return of a jury verdict for him, filing of an alternative motion by defendant for

judgment notwithstanding the verdict or a new trial, and rendition of judgment nothwithstanding the verdict. The judgment is affirmed. For affirmance: White, C. J., and Carter and Newton, JJ. For reversal and remand for a new trial: Spencer and Boslaugh, JJ. For reversal and remand with directions to render judgment on the jury verdict: Smith and McCown, JJ.

AFFIRMED.

CHICAGO ROLLER SKATE MANUFACTURING COMPANY, INC., A CORPORATION, APPELLEE, V. SOKOL MANUFACTURING COMPANY, A PARTNERSHIP, APPELLANT.
177 N. W. 2d 25

Filed May 8, 1970. No. 37368.

1. **Sales: Damages.** When a seller, to which goods that are not resaleable are returned, salvages such goods and credits the buyer with the reasonable value of the salvaged goods, it is acting in good faith to mitigate its damages and in a manner sanctioned by the Uniform Commercial Code.
2. ———: ———. Under such circumstances, the measure of damages is controlled by section 2-708 (2), U. C. C., and the seller is entitled to recover its lost profits together with the expense or cost incurred in salvaging the goods.

Appeal from the district court for Madison County: MERRITT C. WARREN, Judge. Affirmed.

Robek & Geschell and Barney, Carter & Buchholz, for appellant.

Moyer & Moyer and Hal B. Hasselbalch, for appellee.

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

NEWTON, J.

This is an action for damages for breach of contract. A jury was waived and trial had to the court. Defendant purchased of plaintiff truck and wheel assemblies with plates and hangers for use in the manufacture of

skate boards. The skate board fad terminated and several weeks later, defendant returned, without plaintiff's consent, a quantity of the merchandise purchased. There was due plaintiff the sum of $12,860. The merchandise was not suitable for other uses and could not be resold. It was held by plaintiff for 7 months. Plaintiff offered a credit of 70 cents per unit which defendant neither accepted nor rejected. Plaintiff then disassembled, cleaned, and rebuilt the units to make them suitable for use on roller skates. The undisputed evidence shows the rebuilt units had a reasonable value of 67 cents and 69 cents. In the salvage operation plaintiff incurred an expense of $3,540.76. Profits lost amounted to an additional $2,572. Plaintiff, disregarding its expense, credited defendant with 70 cents per unit and brought suit for the balance due of $4,285 for which sum it recovered judgment in the trial court. We affirm the judgment.

Section 1-103, U. C. C., provides: "Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, * * * or other validating or invalidating cause shall supplement its provisions."

Section 1-106, U. C. C., provides in part: "(1) The remedies provided by this act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this act or by other rule of law."

Section 1-203, U. C. C., states: "Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement."

Section 2-718 (4), U. C. C., provides: "Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments * * *."

In accordance with section 2-709, U. C. C., plaintiff was entitled to hold the merchandise for defendant and recover the full contract price of $12,860. Plaintiff did not elect to enforce this right, but recognizing that there was no market for the goods or resale value and that they were consequently worthless for the purpose for which they were designed, it attempted to mitigate defendant's damages by converting the goods to other uses and credited defendant with the reasonable value of the goods as converted or rebuilt for use in roller skates. In so doing, plaintiff was evidencing good faith and conforming to the general rule requiring one damaged by another's breach of contract to reduce or mitigate damages. See Selig v. Wunderlich Contracting Co., 160 Neb. 215, 69 N. W. 2d 861.

The Uniform Commercial Code contemplates that it shall be supplemented by existing principles of law and equity. It further contemplates that the remedies provided shall be liberally administered to the end that an aggrieved party shall be put in as good a position as it would have been in if the contract had been performed. Here the buyer was demanding of the seller credit for the full contract price for goods that had become worthless. The seller was the aggrieved party and a return of worthless goods did not place it in as good a position as it would have been in had the contract been performed by the buyer paying the contract price. On the other hand, the crediting to defendant of the reasonable value of the rebuilt materials and recovery of the balance of the contract price did reasonably reimburse plaintiff. This procedure appears to be contemplated by section 2-718 (4), U. C. C., which requires that a seller paid in goods credit the buyer with the reasonable value of the goods.

It is the defendant's theory that since the goods were not resold or held for the buyer, the seller cannot maintain an action for the price. We agree with this proposition. We also agree with defendant in its conten-

tion that the controlling measure of damages is that set out in section 2-708 (2), U. C. C. This section provides that the measure of damages is the profit which the seller would have made from full performance by the buyer, together with any incidental damages resulting from the breach and costs reasonably incurred. Defendant overlooks the provision for allowance of incidental damages and costs incurred. The loss of profits, together with the additional costs or damage sustained by plaintiff amount to $6,112.76, a sum considerably in excess of that sought and recovered by plaintiff. Although the case was tried by plaintiff and determined on an erroneous theory of damages, the error is without prejudice to defendant. There being no cross-appeal, the judgment of the district court is affirmed.

AFFIRMED.

HENRIETTE J. MCBRIDE, AS EXECUTRIX OF THE LAST WILL AND ESTATE OF ROBERT J. MCBRIDE, DECEASED, APPELLEE, V. FORT KEARNEY HOTEL, INC., APPELLANT.

176 N. W. 2d 911

Filed May 8, 1970. No. 37464.

1. **Contracts: Trial.** In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relations of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract.
2. **Judgments: Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain a judgment in a law action, evidence must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it.
3. **Judgments: Appeal and Error.** The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside unless clearly wrong.

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

Knapp, Tarrell & State and Marmion F. Yeagley, for appellant.

H. L. Blackledge, for appellee.

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

CARTER, J.

This is an action at law to recover damages for breach of contract by the defendant in failing to pay the cash rentals due on two leases of an outdoor steel advertising sign. A jury was waived and the court found for the plaintiff on both leases. The defendant has appealed.

The plaintiff's deceased, Robert J. McBride, constructed the outdoor advertising sign in the winter of 1965-1966 in substantially an east-west position near the south end of an overpass in Kearney, Nebraska. The complete structure was about 65 feet in height and was supported by four heavy 12-inch pipes set in concrete. The sign proper at the top was 40 feet by 10 feet and was attached to stringers welded to the pipes. The sign proper had back to back surfaces each of which was covered with 20 steel panels 10 feet 7 inches in height and 2 feet in width. Electric lights were placed at the top of the sign which automatically cast light on the sign during periods of darkness. The foregoing materials were purchased, installed, and paid for by McBride.

On January 5, 1966, McBride leased the south side of the sign to the Fort Kearney Hotel, Inc., from February 1, 1966, to December 31, 1970, at a rental rate of $95 per month. On November 15, 1966, McBride leased the north side of the sign to the Fort Kearney Hotel, Inc., from January 1, 1967, to December 31, 1970, at a rental rate of $55 per month. Fort Kearney Hotel, Inc., paid the rentals due under the leases to and including April 1968 and thereafter refused to make the payments

and asserted a breach of the leases. This action is for the rentals due for May 1968 to and including December 1968 in the total amount of $1,200.

The first lease shows that at the time it was executed by the parties, Joe P. Helleberg was the owner of the Fort Kearney Hotel, Inc., and a signer of the lease. He did not testify. There is testimony by Joe Gallagher, the vice president and manager of the Fort Kearney Hotel, Inc., that in April 1968 he observed that the paint on the south side of the sign was chipping or peeling off and making the wording of the sign illegible. He testified that the damage to the sign was not contributed to by the officers or employees of the Fort Kearney Hotel, Inc.

There are two paragraphs of the lease which bear upon the issue before the court. They are: "Helleberg is to pay for the painting of the sign, and agrees that any person or firm employed by Helleberg for such purpose shall be required to carry their own liability and workmen's compensation insurance. McBride agrees to carry liability, personal property, wind and hail insurance on the sign structure. Helleberg agrees not to install a neon sign or make any holes in the sign, or otherwise alter or disfigure the construction thereof in any way without written permission from McBride. * * *

"In the event said sign is damaged or destroyed other than by the acts or omissions of Helleberg, his agents or employees, then Helleberg is relieved of any liability to pay rental for the period until such sign has been repaired and restored to is intended use." It is clear from the lease that the Fort Kearney Hotel, Inc., was to pay for the painting of the sign. We think it is also clear that the Fort Kearney Hotel, Inc., was to paint the sign, otherwise there was no reason for the provision that the hotel company should carry liability and compensation insurance on any person or firm employed by it for that purpose. It is contended by the hotel company that the damage was caused by other than the hotel

company, its agents, or employees and, under the second quoted paragraph of the lease, it is relieved from the payment of the rentals. In a section of the lease not herein quoted, it is provided that McBride agrees to keep the structure to which the sign is attached painted and in repair.

The evidence shows that McBride sought the assistance of Dowers & Kempf Sign Service in determining the nature of the surface to be applied on the sign. As a result of this meeting, McBride selected preprimed steel panels which were ordered by the sign service company. The steel panels for both sides of the sign were purchased in one order, were shipped in one lot, delivered at the same time, and eventually used on both sides of the sign. One of the partners, Kempf, an experienced sign painter, was employed by the hotel company to paint the sign. He testified that the primer on the panels was a khaki or yellowish-green color which appeared to be cyclomate, a primer recommended by paint companies. It is noteworthy that the paint on the north side of the sign did not chip or peel, and that certain colors on the south side of the sign did not chip or peel. The evidence will not support a finding that the steel panels were not preprimed.

There is no provision in the lease regarding the surfaces of the sign to be installed. The painter employed by the hotel company, a painter of long experience, testified that he merely assumed that the panels had been properly preprimed before painting the signs. He further testified that if he had known then what he knew at the time he testified, he would have proceeded with the painting of the sign much differently than he did. The evidence does not establish with any certainty the cause of the chipping or peeling on the south side of the sign only.

On the evidence, the trial court could well find, as it did, that McBride agreed to keep the structure, other than the signboard, painted and in repair and that the

hotel company was to paint and pay for the painting of the signboard. The trial court could find from the evidence that the defects in the paint job resulted from the acts of omission on the part of the painter, either in failing to correctly determine the nature of the surface to be painted or the type or quality of the paint to be applied. Under such circumstances, if found to be true, the defect complained of is caused by the hotel company's agents or employees within the meaning of the lease.

"The general rule to be applied in construing contracts is to ascertain and give effect to the intention and purpose of the parties executing such contract. As was said by this court in Nebraska Hardware Co. v. Humphrey Hardware Co., 81 Neb. 693, 116 N. W. 659: 'In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relation of the parties, the nature and situation of the subject-matter, and the apparent purpose of making the contract. The court will, so far as possible, put itself in the place of the parties and interpret the contract in the light of the circumstances surrounding them at the time it was made and the object which they had in view.' " Clough v. Standard Oil Co., 130 Neb. 136, 264 N. W. 170. See, also, Podewitz v. Gering Nat. Bank, 171 Neb. 380, 106 N. W. 2d 497.

The record discloses that McBride caused the lease to be prepared and the hotel company argues that it should be contrued most strongly against him. Ericson v. Nebraska-Iowa Farm Inv. Co., 134 Neb. 391, 278 N. W. 841. The rule is not questioned and irrespective thereof the finder of facts found that there was no warranty in the lease, express or implied, upon which the hotel company had a right to rely. The lease contains no provision imposing upon McBride any duty to prime or paint the faces of the sign. The finding of the

trial court in this respect is sustained by evidence which, if believed, is sufficient to sustain the judgment entered. The hotel company accepted the use of the sign as it was, and employed and paid a painter of long experience to paint it. McBride did not agree to paint the sign, nor did he warrant that the panels of the sign were pre-primed or that the paint applied by the hotel company or its agent was suitable for the purposes of the hotel company.

"In determining the sufficiency of evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence." Lucht v American Propane Gas Co., 183 Neb. 583, 162 N. W. 2d 891. See, also, Kehm v. Dumpert, 183 Neb. 568, 162 N. W. 2d 520.

This is an action at law in which a jury was waived. "In a jury-waived law action, the judgment of the district court on the facts has the same force as a jury verdict and will not be set aside if there is sufficient, competent evidence to support it." Winchell v. National Bank of Commerce Trust & Sav. Assn., 181 Neb. 870, 152 N. W. 2d 2. "The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside unless clearly wrong." Wonderling v. Conley, 182 Neb. 446, 155 N. W. 2d 349.

The evidence was in conflict and the facts as found by the trier of facts are supported by evidence which, if believed, are sufficient to support the judgment. Under these circumstances, the judgment is not clearly wrong and an affirmance is required.

The second lease is in the same language as the first except as to its date, the term of the lease, and the monthly rentals to be paid. The north side of the sign which was the subject of the second lease admittedly was not damaged. The failure to pay the rentals due on

the second lease constituted a breach of the lease. The trial court, on the reasoning applicable to the first lease, was correct in entering judgment for McBride on the cause of action on the second lease.

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

AFFIRMED.

BOSLAUGH, J., dissenting in part.

I dissent from that part of the opinion of the court which holds that the evidence was sufficient to sustain the finding for the plaintiff on the first cause of action.

Fred Kempf, who painted the sign, testified positively that the paint peeled from the panels on the south side of the sign "because the primer was letting go of the sheet metal surface." This testimony is not contradicted any place in the record. A photograph which appears in the record indicates that the peeling was not uniform as to the panels or the colors of paint, but there is no evidence that the painter was negligent or that the paint which he applied was defective.

The lease relieved the defendant from the payment of rental in the event the sign was damaged other than by the acts or omissions of the defendant. The defendant should not be required to bear the loss resulting from the defective primer which was applied to the panels by the manufacturer before they were sold to the plaintiff.

ALLIED SECURITIES, INC., A NEBRASKA CORPORATION, APPELLANT, V. CLARENCE L. D. CLOCKER, APPELLEE.
176 N. W. 2d 914

Filed May 8, 1970. No. 37469.

1. **Principal and Agent.** Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.
2. ———. Unless otherwise agreed, an agent is subject to a duty not to deal with his principal as an adverse party in a trans-

action connected with his agency without the principal's knowledge. The burden of proof is upon the agent to show that he has satisfied the duty.

3. ———. A principal whose agent has violated his duties may properly refuse to pay compensation.

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

Hutton, Hutton & Garden, for appellant.

James J. McNally and Elmer C. Rakow, for appellee.

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

SMITH, J.

Plaintiff claiming a real estate commission for selling a farm of defendant, Clarence L. D. Clocker, the district court on motion rendered summary judgment for Clocker.

Plaintiff's president was Morris D. Patton. He also was a director and former president of the Greater Norfolk Corporation, a nonprofit corporation buying and selling land to attract industry. Clocker had been acquainted with Patton since 1952.

Minutes pertaining to meetings of Greater Norfolk's board of directors referred to the transaction in question. September 17, 1965: ". . . it was moved . . . that Patton be authorized to secure an option from Mr. Clocker on the entire property at a price not to exceed five hundred dollars per acre, seconded . . . and carried." March 30, 1966: "The Union Pacific representative discussed . . . acquiring the . . . Clocker site . . . . No action was taken." April 8: ". . . Patton reported he had written Mr. Clocker . . ., but that he had not received a reply." May 6: "Patton reported he had written Mr. Clocker again telling him that it is urgent that negotiations begin . . .. No reply received."

On June 10, 1966, Patton as plaintiff's president wrote Clocker, a Boyd County resident: "I would like to . . . visit with you . . . next week . . . . I am sure I

will have a proposition . . . that will be acceptable to you." Clocker replied June 14: ". . . I don't agree . . . as to price . . . or option . . .. I want the same . . . terms as the first sale I made on the 30 acres . . .. I think this land should be selling right now at $1,000 (an acre) . . . ."

On June 21, 1966, plaintiff through Patton obtained a listing agreement on the farm for $800 an acre. The same day an option paper signed by Greater Norfolk was proposed by Patton and accepted by Clocker. After survey a controversy arose over acreage. Patton and an employee of plaintiff attempted to close the sale on the basis of 129.84 acres. Clocker refused, contending the quantity was 132.25 acres. A suit followed, but Greater Norfolk over Patton's objection settled for the larger quantity.

Shortly after the closing, Greater Norfolk sold approximately 95 acres of the tract for $1,050 an acre. It did not sell the balance, and in the words of its president, "We wouldn't break even on (the whole tract) . . . ."

In October 1963, Clocker and Greater Norfolk by its president, Patton, had made an option agreement to the latter for purchase of 30 acres of the farm at $800 an acre. Clocker received correspondence about the transaction from Greater Norfolk by Patton. The sale was closed, and a broker's commission was received by plaintiff from Clocker.

Clocker in a deposition testified that in 1963 he had not known of Patton's connection with Greater Norfolk. Plaintiff argues knowledge and acquiescence by Clocker in 1966 solely on the evidence of the transaction in 1963 and of the service of Patton without pay from Greater Norfolk. The argument will not suffice.

"Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." Restatement, Agency 2d, § 387, p. 201. See, also, Pike

v. Triska, 165 Neb. 104, 84 N. W. 2d 311 (1957).

"Unless otherwise agreed, an agent is subject to a duty not to deal with his principal as an adverse party in a transaction connected with his agency without the principal's knowledge. . . . Comment c. . . . The rule . . . is not based upon . . . harm to the principal in the . . . (transaction) . . . . It exists to prevent a conflict of opposing interests in the minds of agents whose duty it is to act solely for the benefit of their principals. . . . Comment d. . . . in the absence of definite knowledge that the agent is acting on his own account, the principal is not barred by the fact that he has merely reason to know that the agent is so acting. . . . Comment e. . . . The burden of proof is upon the agent to show that he has satisfied the duties required by the rules stated in this Section." Restatement, Agency 2d, § 389, p. 205. See, also, Gutting v. Jacobson, 184 Neb. 402, 167 N. W. 2d 762 (1969); Schepers v. Lautenschlager, 173 Neb. 107, 112 N. W. 2d 767 (1962); Northup v. Bathrick, 80 Neb. 36, 113 N. W. 808 (1907); Jansen v. Williams, 36 Neb 869, 55 N. W. 279 (1893).

A principal whose agent has violated his duties may properly refuse to pay compensation. See Hillyer v. Stansbery, 105 Neb. 636, 181 N. W. 534 (1921). See, also, Restatement, Agency 2d, § 399, p. 231.

The record establishes that no genuine issue existed as to any material fact and that Clocker was entitled to judgment as a matter of law.

AFFIRMED.

CHARLES LECHLITER ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.
176 N. W. 2d 917

Filed May 8, 1970. No. 37471.

1. **New Trial: Appeal and Error.** A motion for a new trial is ordinarily addressed to the sound discretion of the trial court and is not subject to review absent an abuse of discretion.

2. ———: ———. This court will not ordinarily disturb a trial court's order granting a new trial, and not at all unless it clearly appears that no tenable ground existed therefor.
3. **Eminent Domain: Damages.** The compensation for land taken by right of eminent domain is measured by its full market value as of the date of the appropriation.
4. ———: ———. Anything connected with the land that would influence its market value in the mind of a good-faith intending purchaser is an element for consideration in considering damages.
5. ———: ———. The law in this jurisdiction is well settled that when land occupied for business purposes is taken by eminent domain, anticipated profits from the carrying on of the business in its established location cannot be considered in estimating the damages.

Appeal from the district court for Nemaha County: WILLIAM F. COLWELL, Judge. Affirmed.

Dwight Griffiths and Perry, Perry & Witthoff, for appellants.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., Robert G. Avey, and Royce N. Harper, for appellee.

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

SPENCER, J.

This is a condemnation action involving the total taking of a combination home and service station 5 miles south of Auburn, Nebraska, at the southwest corner of the intersection of U. S. Highway No. 73-75 and a graveled country road, commonly known as the "Howe" corner. The jury made an award of $31,700. The trial judge sustained a motion for a new trial, and the plaintiffs have perfected an appeal to this court.

The home, which was completely modern, contained 960 square feet. It had a private sewer system and a water system pumping water from a private well. The driveway was rocked and the premises had a grassed area used for picnics and occasional parking of trailers.

The service station was operated by Mrs. Lechliter in connection with the home. Mr. Lechliter operated a Skelly oil tank wagon out of the service station, serving both wholesale and retail customers.

One of plaintiffs' expert witnesses, Alfred R. Larson, testified the value of the property was $33,400. To arrive at this figure, he gave the value of all improvements as $18,000, the value of the land as $1,000, and the value of the business as $14,400. He testified he arrived at the value of the business by multiplying an annual net profit of $1,800 by 8 years. This testimony was properly stricken on motion. Thereafter the witness was permitted to testify as follows: "Q What, Mr. Larson, what I am seeking to get at is: you have given the component items of your reason for the $33,400.00, total damage, total value, of this property, is that correct? A Yes sir. Q We have one other factor that conerns (concerns) a value on this, and a component part of the value of this real estate, because there was located thereon and operating thereon a going business. Now, to the extent that, in your opinion, the items that you have allocated to the total damage do not include, what item do you include in your opinion of the overall total market value of this property for the presence thereon of a going business on April 25, 1968?" Objection as to improper measure of damages overruled. "A $14,400.00."

Plaintiffs' other expert testified that the fair market value of the property was $30,000. This valuation was premised on his statement that he thought he could sell it for that figure.

Under our law, a motion for a new trial is ordinarily addressed to the sound discretion of the trial court and is not subject to review absent an abuse of discretion. The trial court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion. As used in this connection, judicial discretion means the application of statutes and legal principles to all of the facts of the case. State v.

Wixson, 175 Neb. 431, 122 N. W. 2d 72.

This court will not ordinarily disturb a trial court's order granting a new trial, and not at all unless it clearly appears that no tenable ground existed therefor. Webster v. Halbridge, *ante* p. 409, 176 N. W. 2d 8.

The compensation for land taken by right of eminent domain is measured by its full market value as of the date of the appropriation. Stewart v. City of Lincoln, 108 Neb. 825, 189 N. W. 279. Anything connected with the land that would influence its market value in the mind of a good-faith intending purchaser is an element for consideration in determining damages. Papke v. City of Omaha, 152 Neb. 491, 41 N. W. 2d 751. For the purposes of this case, we consider the highest and best use of the property taken was as a home and the operation of the business in conjunction with that home.

The condemnation, however, did not involve the taking of the business but the property on which the business was conducted. The condemner acquired only the real estate, the improvements, and the location. The plaintiffs retained any element of goodwill and the option of continuing the business in some other location. Actually, the tank truck business was moved to a new home in Auburn. There can be no damage allowed for the destruction of the business. The only issue relating to the business is the extent to which the operation of the business on the land enhanced the value of the property. Injury to a business or loss of profit or the inconvenience of the carrying on of the business in another location are not elements of damages in this state. See Bickels v. State, 178 Neb. 825, 135 N. W. 2d 872, in which we held: "The law in this jurisdiction is well settled that when land occupied for business purposes is taken by eminent domain, anticipated profits from the carrying on of the business in its established location cannot be considered in estimating the damages."

The evidence herein would indicate that the top net profit from the business being operated on the prem-

ises, making no allowance for Mrs. Lechliter's services, was $1,800 per year. Plaintiffs' expert testified that to determine the value of the business to the property, he multiplied the net profit of $1,800 by 8, representing 8 years profit, to obtain a value of $14,400. This was the explanation heard by the jury.

As stated above, the compensation for land taken by eminent domain must be measured by its full market value at the time taken. The method used by plaintiffs' expert would seem to be a recovery based upon the value of the real estate and improvements, plus a projection of possible profits for 8 years for the loss of the business. The trial court did not err in sustaining the motion for a new trial herein.

We affirm the judgment ordering a new trial.

AFFIRMED.

FARMERS UNDERWRITERS ASSOCIATION, A CORPORATION, ET AL., APPELLEES, V. LAURENCE B. ECKEL, APPELLANT.
FARMERS UNDERWRITERS ASSOCIATION, A CORPORATION, ET AL., APPELLEES, V. CLARENCE F. G. PETER, APPELLANT.
177 N. W. 2d 274

Filed May 15, 1970. Nos. 37335, 37336.

1. **Principal and Agent: Contracts.** A requirement for specific enforcement of provisions for postemployment restraints in covenants ancillary to employment contracts is that the restraints be reasonable.
2. ———: ———. Courts considering specific postemployment restraints strike a balance among competing interests of principal and agent. The balancing itself accommodates the public interest in productive principal-agent relationships and in freedom of the individual to earn his own living.

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

Cobb, Swartz & Wieland and Douglas W. Marolf, for appellants.

Baylor, Evnen, Baylor, Urbom & Curtiss and Robert T. Grimit, for appellees.

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

SMITH, J.

Temporary orders enjoined former agents of plaintiff insurers from breaching covenants not to solicit plaintiffs' policyholders in the agents' district for 1 year. After expiration of the 1-year period without further judicial determination of the controversy, defendants alleged damage from the orders. The basic issue was enforceability of the covenants. The district court found for plaintiffs, dismissing the damage claims. Defendants appeal.

In November 1963, defendant Laurence B. Eckel, local agent since 1960, became manager of plaintiffs' district composed of Lancaster and adjoining counties. His agreement with plaintiffs provided as follows: Plaintiffs or Eckel had the right to cancel the agreement on 30 days' notification at will. Eckel was to represent no other insurer. Commission rates were to be fixed and changed in plaintiffs' sole discretion. Commissions and bonuses unpaid on effective date of cancellation were to be deemed unearned. After 3 years and at plaintiffs' request Eckel would sell 50 percent of his insurance business to plaintiffs' nominee as an additional district manager.

Eckel's agreement further provided: "C. (Eckel) . . . agrees . . . to surrender on . . . termination . . . all records, levy lists . . ., or other material . . ., whether or not furnished by any of the Companies, having to do . . . with the business of the Companies . . . H. (Eckel) . . . agrees that in the event of cancellation . . . For . . . one year thereafter he will . . . (not) solicit, accept or service . . . insurance business of any policyholder of any of the COMPANIES in the (district) . . . I. . . . all lists and records . . . pertaining

to policyholders or expirations . . . are . . . confidential . . . and shall never be used or divulged except as specifically authorized by, and for the benefit of, the COMPANIES."

Defendant Clarence F. G. Peter had been appointed local agent of plaintiffs in 1962. His agreement contained the substance of provisions applicable to Eckel as well as local agents. A supplement provided for payment of $485 a month to Peter under a program which imposed an obligation on him to repay any unearned part.

Defendants after their resignations breached the agreements by soliciting approximately 1,000 of plaintiffs' policyholders in the district. They intended to form an independent agency and to switch business to plaintiffs' competitors. At the time the number of plaintiffs' policies in effect in the district was 3,500, several hundred less than the number in effect in November 1963.

There is testimony concerning effect of specific enforcement of the covenants upon defendants. Eckel in 1965 was age 26 and father of four children. Peter was age 40 and father of four children, ages 10 to 18. The men possessed no other income source, no other skills, and no formal education beyond high school. Each furnished all support for his family. Eckel received gross commissions and subsidies in years indicated as follows: 1960 - $2,681.56; 1961 - $5,355.67; 1962 - $6,227.98; 1963 - $9,621.06; 1964 - $20,439.56; 1965 - $5,556.12. Plaintiffs notified Peter that his deficit under the program amounted to $1,719.72.

A requirement for specific enforcement of provisions for postemployment restraints in covenants ancillary to employment contracts is that the restraints be reasonable. Courts in considering the requirement strike a balance among competing interests of principal and agent. The balancing itself accommodates the public interest in productive, principal-agent relationship and in freedom of the individual to earn his own living. See Securities Acceptance Corp. v. Brown, 171 Neb. 406,

106 N. W. 2d 456 (1960), opinion supplemented, 171 Neb. 701, 107 N. W. 2d 540 (1961).

Among the circumstances to be considered in the determination of reasonableness of such covenants are the following ones: Degree of inequality in bargaining power. Presence of a substantial risk of the principal's losing customers to the former agent. Extent of respective participation by principal and agent in securing and retaining customers. Good faith of the principal. Existence of a directory or general knowledge pertaining to the list of customers. The nature and extent of the business position held by the agent and the circumstances of his employment. The agent's training, health, and education. Needs of the agent's family. Current conditions of employment. Necessity of the agent's changing his calling or residence. Correspondence of the covenanted restraint with the legitimate interest of the principal in protection. See, Securities Acceptance Corp. v. Brown, *supra;* Smith Baking Co. v. Behrens, 125 Neb. 718, 251 N. W. 826 (1933); Dow v. Gotch, 113 Neb. 60, 201 N. W. 655 (1924). See, also, Lakeside Oil Co. v. Slutsky, 8 Wis. 2d 157, 98 N. W. 2d 415 (1959); 6A Corbin on Contracts, § 1394, p. 89 (1962).

Elsewhere insurers in situations somewhat like the present ones have been allowed injunctive relief. See, Hedberg v. State Farm Mut. Auto. Ins. Co., 350 F. 2d 924 (8th Cir., 1965), affirming State Farm Mut. Auto. Ins. Co. v. Hedberg, 236 F. Supp. 797 (D. C. Minn., 1964); Farmers Underwriters Assn. v. Reid, 425 S. W. 2d 247 (Mo. App., 1967).

We conclude that plaintiffs were entitled to injunctive relief against Eckel and Peter unless at least part of defendants' following contention is good: Injunctive relief was not available because "mutuality of obligation" and mutuality of remedy were not present.

Plaintiffs rendered substantial performance by actual employment of Eckel and Peter for a substantial period. There was no lack of "mutuality of obligation" to defeat

specific enforcement. Different viewpoints on the general subject do not weaken our conclusion. See, Austin, "Mutuality of Obligation: A Multi-Dimensional Doctrine for All Seasons," 30 Ohio S. L. J. 61 (1969); 1A Corbin on Contracts, § 152, p. 2 (1963); 1 Williston on Contracts (3d Ed., Jaeger 1957), §§ 49 and 105A, pp. 158 and 427.

Respecting mutuality of remedy we have said if one party cannot enforce substantial performance, equity will not decree specific performance at the instance of the other party. See, Electronic Development Co. v. Robson, 148 Neb. 526, 28 N. W. 2d 130 (1947); Wilson v. Nelson, 130 Neb. 1, 262 N. W. 433 (1935), noted 17 Neb. L. Bull. 239 (1938); Rudolph v. Andrew Murphy & Son, 121 Neb. 612, 237 N. W. 659 (1931); Moore v. Markel, 112 Neb. 743, 201 N. W. 147 (1924). Those cases are distinguishable from the present cases.

"What equity exacts today as a condition of relief is the assurance that the decree, as rendered, will operate without injustice or oppression either to the plaintiff or the defendant. . . . Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end. The formula had its origin in an attempt to fit the equitable remedy to the needs of equal justice. We may not suffer it to petrify at the cost of its animating principle." Epstein v. Gluckin, 233 N. Y. 490, 135 N. E. 861 (1922).

The fact that the remedy of specific enforcement is not available to one party is not sufficient reason for refusing it to the other party. Restatement, Contracts § 372(1), p. 677; 5A Corbin on Contracts, § 1210, p. 420 (1964). Defendants' contentions are without merit.

The judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH DOUGLAS MOSS, APPELLANT.

177 N. W. 2d 284

Filed May 15, 1970. No. 37388.

1. **Criminal Law: Post Conviction: Attorneys at Law.** For post conviction relief on the ground of ineffective assistance of counsel, it must appear that counsel's assistance was so grossly inept as to shock the conscience of the court.
2. **Criminal Law: Attorneys at Law.** Court assigned counsel in a criminal case have no greater or different duties than those of retained counsel.

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

Gordon H. Miles of Walsh, Walentine, Miles & Katskee, 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.

WHITE, C. J.

In this post conviction appeal the defendant claims that he was inadequately represented by counsel in his original trial and therefore deprived of his Sixth Amendment rights under the federal Constitution. On appeal, we affirm the judgment of the district court dismissing, after an evidentiary hearing, the petition for post conviction relief.

The defendant was tried and convicted for shooting with intent to kill, wound, or maim (section 28-410, R. R. S. 1943). On appeal in the original case this court affirmed his conviction. State v. Moss, 182 Neb. 502, 155 N. W. 2d 435 (1968). The record shows that the defendant, in the original trial, was represented by the public defender's office of Douglas County, Nebraska, and that on his appeal he was represented by different counsel

of his own choosing, which appeal resulted in affirmance in this court.

In his reply brief, in the original appeal, the defendant assigned as error and argued that he was inadequately represented by counsel. With reference to that contention, this court said in the original appeal: "It is asserted that defendant's counsel failed to make such an investigation of the facts as to enable him to properly cross-examine the witnesses or to know how best to bring out the facts most helpful to defendant. It is pointed out as an example that defendant's counsel did not bring out whether or not the bullet entered Higgins' body directly from the gun or if it ricocheted off the pavement. The bullet was not received in evidence on defendant's objection to foundation. We have found nothing in the record before us to justify the charge that defendant's counsel was ineffective unless the failure of the jury to acquit may afford the basis of such a charge, which it does not. There is nothing to indicate that counsel's assistance was so grossly inept as to shock the conscience of the court. State v. Putnam, ante p. 185, 153 N. W. 2d 456."

Ignoring questions of res judicata, we have examined the record and this same contention of inadequacy of counsel is supported by the same, although more elaborate, argument made on the first appeal. The record conclusively shows, despite defendant's unsupported testimony to the contrary, that his appointed counsel represented him or was in conference with him at least five times prior to his original trial. It also shows that the prosecution's file of witnesses and testimony in the case were completely disclosed to the defendant's counsel. It shows full and adequate representation by counsel at the trial of the cause. Defendant's counsel was successful in keeping out of evidence a bullet, which had entered the body of the prosecuting witness when shot by the defendant from the back. The defendant now asserts that since his defense was that he did not

intend to shoot the prosecuting witness, but merely to scare him, the introduction of the bullet in evidence would have either supported or demonstrated that it ricocheted into the body of the prosecuting witness. The defendant called no witnesses and had no witnesses, but testified in his own behalf. He testified as follows: "I asked her to leave, her and Herman then left I kept arguing with him about the money and he said he wasn't going to give me anything and he walked out the door and that *I shot him.*" (Emphasis supplied.)

There was insufficient foundation for the introduction of the bullet. The objection was properly sustained. We are asked now to publicly castigate a lawyer, representing a defendant who admits that he shot the prosecuting witness, by sustaining a contention that he was grossly negligent in keeping inadmissible evidence out of the record. It would seem that this borders on the incredible. We point out that the adversary system requires counsel and the court to make quick, and sometimes instantaneous, judgments as to the nature and advisability of objections to testimony. These decisions are interwoven with trial stategy and cannot await the calculated and meticulous hindsight examination that the defendant would now require us to perform.

We note further that despite the fact that the defendant was given an opportunity prior to sentencing to voice any complaint about his appointed counsel, he failed to do so. There was no complaint about his keeping the bullet out of evidence or any other matter, notwithstanding the fact that he was given a full opportunity to do so.

The burden of proof is upon the defendant to assert and to prove a violation of his constitutional right to effective counsel in the original trial. By the defendant's own testimony, whether the bullet ricocheted or not, his intention to shoot the prosecuting witness emerged from his own lips at the time he was a witness in his own behalf in the trial. It does not appear that the de-

fense counsel's successful attempt to keep the slug out of evidence was unreasonable, much less sufficient proof to sustain the burden of proof that defendant's appointed counsel failed to exercise that judgment which might be expected of one trained in the law and committed to the diligent application of its principles. There is nothing to indicate that counsel's assistance was so grossly inept as to shock the conscience of the court. State v. Putnam, 182 Neb. 185, 153 N. W. 2d 456; State v. Moss, *supra;* Taylor v. United States, 282 F. 2d 16 (8th Cir., 1960); Scalf v. Bennett, 408 F. 2d 325 (8th Cir., 1969).

There is no merit to defendant's contention that court appointed counsel have a greater or a different duty than those of retained counsel. See, Taylor v. United States, *supra;* Slawek v. United States, 413 F. 2d 957 (8th Cir., 1969); Kress v. United States, 411 F. 2d 16 (8th Cir., 1969).

The contentions of the defendant are without merit and the judgment of the trial court should be and is affirmed.

AFFIRMED.

HAZEL CAHILL ET AL., APPELLANTS, V. LEO J. ARMATYS ET AL., APPELLEES.
177 N. W. 2d 277

Filed May 15, 1970. No. 37462.

1. **Wills: Trusts.** In determining whether or not a trust has been created by a will, the intent and purpose of the testator as disclosed by the language used is to be ascertained and given effect if not contrary to law or public policy.
2. ———: ———. In order that there may be a valid trust created by a will, there must be a trustee, an estate devised to him, and the trustee and beneficiary must be separate and distinct entities. However, this exception does not apply if there is more than one trustee and the trustees and the beneficiaries are identical.

3. **Trusts.** A trust is passive if it imposes no affirmative duties upon the trustee but merely conveys the bare legal title to him with all beneficial use passing to the cestui que trust.
4. **Wills: Trusts.** While, as a general rule, a family settlement may provide for disbursement of the estate of the testator in a manner at variance with his will, a valid, unexecuted testamentary trust cannot thus be modified or destroyed.
5. ———: ———. When an act or agreement of the parties disappoints the purpose of the settlor by divesting the property from the purposes named, such act or agreement is void ab initio.

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

William L. Walker and Earl Ludlam, for appellants.

Charles H. Phares and Sampson & Armatys, for appellees.

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

SPENCER, J.

The appellants, who are daughters of Fred H. Garbers, deceased, brought this action to construe his last will and testament, which was admitted to probate September 23, 1968.

The questioned provisions of the will are as follows: "II. I do hereby give, devise and bequeath all of my real estate to my daughters Caroline Green and Hazel Cahill, in trust, nevertheless, for the following uses and purposes.

"(a.) To hold, manage, control and lease upon such terms as my trustees deem best, all of my real property until such time as it is sold as hereinafter provided.

"(b.) To pay to my daughters Caroline Green and Hazel Cahill, their heirs or assigns, in annual payments to be made on or before December 31, the net income and profits from said trust estate, in equal shares; and to pay to my said daughters Caroline Green and Hazel Cahill, their heirs or assigns, upon the sale of any of my real estate as hereinafter provided, the net proceeds of said sale, in equal shares.

"(c.) To sell all or any part of my real estate for such prices and upon such terms of credit or otherwise, and in such manner as my trustees may deem best, and to execute and deliver to the purchaser or purchasers, all necessary or proper deeds or other instruments of conveyance and transfer thereof. No purchaser from my said trustees need see to the application of the purchase money for or to the purposes of trust, but the receipt of my said trustees therefor shall be a complete acquittance and discharge.

"(d.) In the event of the death of either of my said trustees, the surviving trustee shall be vested with the same powers, rights, privileges and obligations herein given to my said trustees; provided, however, said surviving trustee shall sell all remaining assets of my trust estate as soon as practicable, and within one year after her succession to sole trusteeship, at public sale, for cash, and shall execute and deliver to the purchaser or purchasers all necessary or proper deeds or other instruments of conveyance and transfer thereof, and shall divide the net proceeds of sale into two equal parts, and pay one part thereof to my surviving daughter, and one part to the children of my deceased daughter, per stirpes and not per capita."

In addition to the above, the following is pertinent: "* * * I do hereby give and bequeath to William G. Molleran, husband of my deceased daughter, Marie Molleran, the sum of $2,000.00 in cash, to be paid to him by the trustees named in my said last will and testament, within 60 days after sale of my real estate as provided in said last will and testament. This bequest shall not draw interest if paid within 60 days after the date of sale of said real estate."

On December 20, 1968, appellants as trustees conveyed the title to the real estate involved in the trust referred to above to themselves in fee simple, as tenants in common. The legacy provided for William G. Molleran has never been paid. The appellees herein are

the duly qualified and acting executors of the last will and testament of Fred H. Garbers, deceased, and the minor children of Hazel Cahill, one of the appellants, who are represented herein by Charles H. Phares, their duly appointed guardian ad litem.

It is the position of the appellants that the trust set up by the will is a dry passive trust and is invalid and void. The trial court held the trust to be a valid and active one; decreed that the deed executed by the parties conveying the real estate to themselves was null and void; and quieted title to it in appellants as trustees.

In determining whether or not a trust has been created by a will, the intent and purpose of the testator as disclosed by the language used is to be ascertained and given effect if not contrary to law or public policy. Jones v. Shrigley, 150 Neb. 137, 33 N. W. 2d 510.

A trust is ordinarily passive if there is no separation of the equitable and legal interest. In order that there may be a valid trust created by will, there must be a trustee, an estate devised to him, and the trustee and beneficiary must be separate and distinct entities. However, this exception does not apply if there is more than one trustee and the trustees and the beneficiaries are identical. Jones v. Shrigley, *supra*. Consequently, the fact that the trustees and the beneficiaries are identical is of no moment herein.

Testator conveyed all of his personal property to his two daughters, but conveyed his real property to them as trustees. The will requires them to manage, control, or lease the property until sale, and permits them by agreement to sell it in whole or in part, in which event they are to pay a $2,000 bequest made contingent upon sale and divide the net proceeds between them. If the land is not sold during the lifetime of the trustees, it must be sold by the surviving trustee within 1 year, and after payment of the bequest made contingent on the sale, the net proceeds are to be divided one-half to

the surviving trustee and the other one-half to the children of the deceased trustee.

There is nothing contrary to law or public policy in the provisions of the will. The intent to put the real estate in trust is clear. It is evident that testator purposely put his real property in trust rather than devising it directly to his daughters, as he did his personal property. Obviously, he did not intend them to have a devise in fee simple. Why we can only speculate. By doing so he avoids the effect of a devise in fee simple. Legal title vests in them as trustees. The trust prevents either daughter from forcing a sale or partition of the real estate without the consent of the other during their lifetime. Neither daughter can sell or mortgage an undivided interest in the property. As trustees, both daughters must jointly make all decisions on the control, operation, and management of the property. By forcing a sale of all of the property within a year after the death of the first trustee to die, testator has avoided any possible partition action among the survivors. It is significant that upon the forced sale of the property after the death of the first trustee to die, the net proceeds are not distributable to the heirs of the deceased trustee but to her children per stirpes. It is also significant that testator made the $2,000 legacy to the husband of a deceased daughter payable after the sale of the real estate, and provided that if paid within 60 days thereafter, there would be no interest.

A trust is passive if it imposes no affirmative duties upon the trustee but merely conveys the bare legal title to him with all beneficial use passing to the cestui que trust. That is not the situation here. The trustees do have affirmative duties in addition to the control and management of the trust estate. They may sell the land, but if they do not, the survivor is eventually required to do so. After a sale the legacy contingent on sale must be paid and then distribution is to be made of the net proceeds in accordance with the terms given in the will.

It is obvious from the will that the daughters could operate and manage the land only as trustees. There is no power in the will permitting them to convey the land to themselves to terminate the trust, as they attempted to do by the deed of December 20, 1968. As we construe the will, the testator never intended his daughters to have the legal title to the land. They were given the power of sale and the right to the net proceeds if the land was sold during their lifetime, but their only right to convey was pursuant to a sale. The trust can only be terminated by the sale of the land and the distribution of the proceeds in accordance with the terms of the will.

Even if we were to consider the conveyance of December 20, 1968, as an attempted family settlement, it is not effective for that purpose. This jurisdiction is partial to family settlements when all parties are in full agreement. However, that remedy is not available herein because we have heretofore declared that a family settlement cannot extinguish a trust. See In re Estate of Mowinkel, 130 Neb. 10, 263 N. W. 488, in which we held: "While, as a general rule, a family settlement may provide for disbursement of the estate of testator in a manner at variance with his will, a valid, unexecuted testamentary trust cannot thus be modified or destroyed."

When an act or agreement of the parties disappoints the purpose of the settlor by divesting the property from the purposes named, such act or agreement is void ab initio. Lancaster County Bank v. Marshel, 130 Neb. 141, 264 N. W. 470.

The judgment of the trial court is affirmed.

AFFIRMED.

JOHN W. SNYDER, APPELLEE, V. WOXO, INC., A CORPORATION, ET AL., APPELLANTS.

177 N. W. 2d 281

Filed May 15, 1970. No. 37468.

1. **Statutes: Constitutional Law.** Without convincing evidence that the Legislature intended to adopt former constitutional limitations, this court will not so interpret simultaneous repealer and reenactment.
2. ———: ———. The Constitution of Nebraska is not a grant but a restriction of legislative power; consequently courts will enforce only those limitations that the Constitution imposes.
3. **Usury: Statutes: Constitutional Law.** Section 45-101, R. S. Supp., 1967, concerning prohibition of usury defenses by corporations, does not violate Article III, section 18, Constitution of Nebraska, concerning classification of loans and establishment of maximum rates.
4. **Usury: Statutes.** A statute that prohibits the usury defense by a corporate maker of an obligation may impliedly prohibit the defense by an individual who is subject to secondary liability on the obligation.

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

Dalke & Carlson, Robert A. Miller, Jr., and Clarence E. Danley, for appellants.

Wilson, Barlow & Watson and Kile W. Johnson, for appellee.

Morsman, Fike, Sawtell & Davis, for amici curiae.

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

SMITH, J.

Plaintiff sued (1) on the loan agreement of Woxo, Inc., in 1969 to pay principal and interest at 12 percent a year and (2) on the agreement of Margaret Lenhart to guarantee part of Woxo's obligation. Defendants presented separate defenses of usury on undisputed facts. Judgment went for plaintiff. Both defendants appeal.

Woxo challenged the constitutionality of section 45-101, R. S. Supp., 1967 (L. B. 13, Laws 1967, c. 276, § 1, p. 743, concerning prohibition of the usury defense by a corporation. It advanced two contentions: (1) The section continued the uninterrupted operation of section 45-101, R. S. Supp., 1965 (L. B. 546, Laws 1963, c. 272, § 1, p. 818), which constituted special legislation violative of Article III, section 18, Constitution of Nebraska (1963); and (2) the section violated the foregoing provision as amended in 1964.

The amendment in 1964 to the constitutional provision deleted the following language shown in parenthesis, and it added the following language shown in italics: "The Legislature shall not pass . . . special laws . . . (Regulating the interest on money.) . . . Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever; *Provided, that notwithstanding any other provisions of this Constitution, the Legislature shall have authority to separately define and classify loans and installment sales, to establish maximum rates within classifications of loans or installment sales which it establishes, and to regulate with respect thereto.* In all other cases where a general law can be made applicable, no special law shall be enacted."

Section 45-101, R. S. Supp., 1965 (L. B. 546, Laws 1963, c. 272, § 1, p. 818), authorized agreed interest not exceeding 9 percent a year. A proviso read: ". . . that corporations . . . may by an agreement in writing which clearly spells out either the amount or the rate of interest charged . . . , agree to pay any rate of interest in excess of the maximum rate provided in this section and, in such instances where the rate is above such maximum rate, the defense of usury is prohibited."

The quoted proviso was retained in L.B. 16, Laws 1963, Spec. Sess., c. 8, § 4, p. 100. We held that L.B. 16 unconstitutionally classified installment loans incident to sales apart from other loans. We did not consider the

proviso. See Davis v. General Motors Acceptance Corp., 176 Neb. 865, 127 N. W. 2d 907 (1964). Meanwhile L.B. 11, Laws 1963, Spec. Sess., c. 7, §§ 3 and 16, pp. 89 and 97, repealed the proviso. In State Securities Co. v. Ley, 177 Neb. 251, 128 N. W. 2d 766 (1964), we held that L.B. 11 constituted special legislation regulating interest on money in violation of Article III, section 18, Constitution of Nebraska (1963). L.B. 13, Laws 1967, c. 276, §§ 1 and 4, pp. 743 and 745, simultaneously repealed and reenacted section 45-101, R. S. Supp., 1965.

The first question is whether constitutionality of section 45-101, R. S. Supp., 1967, is determinable by the constitutional provision in force in 1963. We have said that unconstitutional legislation ordinarily cannot become valid by removal of the reason for its invalidity without reenactment. See, Swanson v. Dolezal, 114 Neb. 540, 208 N. W. 639 (1926) (Removal by Legislature); Central Nat. Bank v. Sutherland, 113 Neb. 126, 202 N. W. 428 (1925) (Removal by Act of Congress). We have not insisted that effective repealer and reenactment be independent of each other. See Crawford, "The Legislative Status of an Unconstitutional Statute," 49 Mich. L. Rev. 645 at 665 (1951). Without convincing evidence that the Legislature intended to adopt former constitutional limitations, this court will not so interpret simultaneous repealer and reenactment. We therefore test section 45-101, R. S. Supp., 1967, by the 1964 amendment.

Woxo concedes that the 1964 constitutional amendment relaxed limitations on the power of the Legislature to classify loans. It nevertheless contends that the amendment prohibits the classification of borrowers contained in section 45-101, R. S. Supp., 1967. The argument is not persuasive for two reasons. First, classification of loans to corporations apart from loans to others in usury statutes has been upheld under equal protection and special legislation clauses of constitutions in most cases. See, Carozza v. Federal Finance & Credit

Co., 149 Md. 223, 131 A. 332, 43 A. L. R. 1 (1925); Thomas v. Union Trust Co., 251 Mich. 279, 231 N. W. 619 (1930); Country Motors, Inc. v. Friendly Finance Corp., 13 Wis. 2d 475, 109 N. W. 2d 137 (1961); Annotation, 63 A. L. R. 2d 924 (1959). Second, the Constitution of Nebraska is not a grant but a restriction of legislative power; consequently courts will enforce only those limitations that the Constitution imposes. United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576 (1956). The text of the 1964 amendment does not preclude definition of loan classes in terms of borrowers. It should receive an interpretation to effect its purpose of relaxing stringent restrictions on legislative power over classification and regulation of loans. See Engelmeyer v. Murphy, 180 Neb. 295, 142 N. W. 2d 342 (1966). We reject Woxo's contentions.

Margaret Lenhart contends that usury was a good defense to liability on her part, and that in no event was she subject to the statutory prohibition against the corporate defense. She has some support. See, Meadow Brook Nat. Bank v. Recile, 302 F. Supp. 62 at 78 (E.D. La., 1969); All Purpose Finance Corp. v. D'Andrea, 427 Pa. 341, 235 A. 2d 808 (1967) (Roberts, J., dissenting). We approve, however, the majority general rule. A statute that prohibits the usury defense by a corporate maker of an obligation may impliedly prohibit the defense by an individual who is subject to secondary liability on the obligation. See E'Town Shopping Center, Inc. v. Lexington Finance Co., 436 S. W. 2d 267 (Ky. App., 1969); Pardee v. Fetter, 345 Mich. 548, 77 N. W. 2d 124 (1956); Dahmes v. Industrial Credit Co., 261 Minn. 26, 110 N. W. 2d 484 (1961); All Purpose Finance Corp. v. D'Andrea, *supra;* Annotation, 63 A. L. R. 2d 924 at 950. Although the general rule governs this case, we otherwise leave open questions concerning effect of the statutory provision upon individuals. See, generally, In re Greenberg, 21 N. J. 213, 121 A. 2d 520 (1956); Leader v. Dinkler

Management Corp., 20 N. Y. 2d 393, 283 N. Y. S. 2d 281, 230 N. E. 2d 120 (1967).

The judgment is affirmed.

AFFIRMED.

JOHANNES MYRON SCHOLTING, A MINOR, BY MILDRED SCHOLTING, HIS LEGAL GUARDIAN, APPELLEE, V. FREDA M. ALLEY ET AL., APPELLANTS.

178 N. W. 2d 273

Filed May 22, 1970. No. 37343.

1. **Statutes: Actions: Parties.** Section 25-301, R. R. S. 1943, requires that every action be prosecuted in the name of the real party in interest.
2. **Actions: Parties: Property.** The courts will not entertain a controversy as to title or right of possession of real or personal property, except at the instance of some person having or claiming a right thereto.

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

Marks, Clare, Hopkins & Rauth, Schmid, Ford, Snow, Green & Mooney, Keith Frederick, and Guy J. Birch, for appellants.

Dixon G. Adams, for appellee.

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

WHITE, C. J.

This is an action brought in the district court for Sarpy County by Mildred Scholting, guardian of Johannes Myron Scholting, a minor, against Freda M. Alley and Pearl M. Alley, wife and husband, James R. Frazier and Edith M. Frazier, husband and wife, and the Prudential Insurance Company praying that a deed to Freda and Pearl Alley be set aside and canceled. The deed in question conveyed 240 acres of land to Freda and Pearl

Alley. The Fraziers and the Prudential Insurance Company are the subsequent purchasers and encumbrancer of 160 of the 240 acres.

The present action is a companion case to Scholting v. Scholting, 183 Neb. 850, 164 N. W. 2d 918, and Scholting v. Scholting, 183 Neb. 862, 164 N. W. 2d 926. In those two cases inter vivos deeds by decedent, Johannes F. Heuck, to Melvin and Lola Scholting, husband and wife, were set aside as being obtained by the undue influence of Freda Alley, sister of Melvin Scholting and sister-in-law of Mildred Scholting.

The previous cases were reversed and remanded because the record supported the view that a presumption of undue influence arose and that the defendants failed to meet the burden of going forward with the evidence when the burden consequently shifted.

In the instant case the trial court also found in favor of the defendants but, after examining our opinions in the Scholting cases, *supra,* subsequently sustained plaintiff's motion for a new trial. Defendants are herein appealing the judgment granting plaintiff's motion for a new trial.

The facts in the present case are essentially the same as in the previous Scholting cases, *supra,* and will not be repeated here. The defendants make seven assignments of error, but, due to the approach we take, only one need be considered. The decisive assignment is that the trial court was in error in failing to dismiss the action for plaintiff's want of capacity to sue. It is our conclusion that plaintiff was not a real party in interest and that the judgment granting plaintiff's motion for a new trial should be and is hereby reversed.

In the previous cases the canceling and setting aside of the deeds caused the property to pass by decedent's will with one tract being specifically devised to a new owner and the other tract passing to a new owner through the residuary clause. The new owners are the minor sons of Mildred Scholting, plaintiffs in the previous

cases. The instant case is peculiar in that Freda Alley will receive the same property by specific devise as she and her husband did by inter vivos conveyance. The testator's will devised property in question in this case to Freda Alley. The will was admitted to probate and was uncontested. No contention is now made or could be made that title of Freda Alley to this property is absolute and her interest in the property became vested at the time of the death of the decedent. There is no contention in these proceedings or in the assignments of error that this is not a fact.

At the time of the conveyance in question no gift tax was paid by decedent. Thus the estate has a gift tax liability of approximately $3,000 which has been partially paid. The sole purpose of this action is for title to pass by devise rather than by deed and thus subject the land to its proportionate share of estate expenses, taxes, and costs of administration as provided in decedent's will. Plaintiff argues that if this is not done the estate will be insolvent because of, among other things, the federal gift tax deficiency and that this would result in the plaintiff residuary legatee getting nothing. But, due to our decisions in the previous two cases this statement is not now applicable, as the land there involved now passes by decedent's will and the estate is solvent.

Section 25-301, R. R. S. 1943, requires that every action be prosecuted in the name of the real party in interest. The purpose of statutes such as this is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause as well as to discourage harassing litigation and to keep litigation within certain bounds in the interest of sound public policy. 67 C. J. S., Parties, § 10 a, p. 910. The courts will not entertain a controversy as to title or right of possession of real or personal property, except at the instance of some person having or claiming a right thereto. Bonacum v. Murphy, on rehearing, 71 Neb. 487, 104 N. W. 180.

On the facts of this case it is clear that the plaintiff does not have any claim or right to the property itself. Any interest in the property is an indirect interest through the contribution that the property would make to expenses, taxes, and costs of administration of the estate.

The fact that the property passes the same by will as by deed is conclusive of the issue that neither the executor nor the beneficiaries of the will have any right, title, claim, or interest in the property so as to make any of them a real party in interest within the meaning of section 25-301, R. R. S. 1943. On the facts before this court the only real party in interest who could bring an action to set aside the deed is Freda Alley. Her interest arises from the fact that she took by deed as a joint tenant with her husband and would have taken by specific devise as owner of the entire fee.

The judgment of the district court is therefore reversed and the cause remanded with directions to reinstate its original findings and judgment dismissing the action.

REVERSED AND REMANDED WITH DIRECTIONS.

DOROTHY C. DIERS, APPELLANT AND CROSS-APPELLEE, V. BUFORD JOHN DIERS, JR., APPELLEE AND CROSS-APPELLANT.
177 N. W. 2d 503

Filed May 22, 1970. No. 37361.

1. **Divorce: Alimony.** The court in determining the amount of alimony or in making a division of property in a divorce case will consider the age of the parties, their earning ability, the duration of the marriage, the conduct of each during the marriage, their station in life, the circumstances and necessities of each, the physical condition of each, the property owned by them and whether or not it was acquired by their joint efforts, and any other pertinent facts.
2. ———: ———. It is the duty of the trial court in a divorce action to scrutinize a property settlement made before the

granting of a divorce and see to it that no unconscionable advantage is taken through fraud or intimidation, or by reason of ignorance, passion, or improvidence.

3. ———: ———. Where an agreement for the division of property between the parties to a divorce action is submitted to the court and not approved, it is the function of the court to divide the property in accordance with justice and right.

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

Sidner, Svoboda & Schilke, for appellant.

Kerrigan, Line & Martin, for appellee.

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

CARTER, J.

This is a divorce action in which the wife was granted an award of $20,000 in the division of the property of the parties. On appeal she claims the award is inadequate. The husband has cross-appealed, asserting that the trial court erred in failing to approve a property settlement entered into by the parties. The evidence sustains the granting of a divorce and no error is claimed with reference thereto. The only issue is the correctness of the amount of property awarded to the wife.

The parties were married on January 28, 1950. No children were born to the marriage. The wife was 48 and the husband 47 years of age at the time of trial. The wife had been married twice previously and was the mother of four children by her first marriage, three of whom had been placed in the custody of others. At the time of her marriage to the defendant she had custody of one small son. The husband had been previously married and had the care and custody of three small children under 5 years of age when he entered into the marriage. The parties raised these four children and, at the time of the entry of the divorce decree, all were self-supporting.

At the time of the marriage, the wife had no property.

The husband was operating a gasoline station in California. The husband had the gasoline station, an automobile, and some cabins. The value of the property does not appear to have been great. After operating the station for 3 or 4 years, it was sold and the husband engaged in the trucking business. He owned as many as 15 trucks at one time and the business appears to have prospered. After the operation of the trucking business for 8 or 9 years, the business was sold and the parties moved to Nebraska. The husband purchased a farm near West Point, Nebraska, and it was farmed by the parties until the divorce action was commenced.

The wife ran the home, cared for the four children, and assisted to some extent in both the trucking and farming operations. There was some conflict in the evidence concerning her running of the home due to the claim of the husband that she drank intoxicating liquor to excess at times. In 1965, the wife worked for Campbell Soup Company as a production line worker and as a helper and waitress in the Veterans Club restaurant. At the time of the divorce the wife was earning as much as $320 per month which was expended largely on groceries, insurance, car payments, gasoline, and the like. The husband was admittedly a hard worker and successful in his farming operations. On June 4, 1969, the trial court granted a divorce to the wife on the ground of adultery by the husband.

The net value of the property accumulated during the marriage is not in dispute. It is approximately $80,000 to $82,000. It is established almost wholly from the evidence of the husband and the income tax returns of the parties. Both of the parties are in good health and both have contributed to the accumulation of practically all of the property owned by the parties. The trial court awarded the wife the property in her possession at the time the divorce was entered which was little, the French Provincial living room set, a double bed, the electric roaster, personal clothing and effects located in the

former residence of the parties, and the sum of $20,000 which includes $5,000 paid by the husband to the wife after the petition was filed and before the divorce was granted. The award is not adequate under the holdings of this court.

The rule for determining the division of property in a divorce action is 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." Kidder v. Kidder, 159 Neb. 666, 68 N. W. 2d 279. See, also, Neeman v. Neeman, 183 Neb. 105, 158 N. W. 2d 236.

The evidence shows that the property owned by the parties was almost wholly accumulated by their joint efforts. They have raised the wife's child and the three children of the husband. The wife has reached the age of 49 years and cannot be expected to work at common labor indefinitely into the future. In 1966, 1967, and 1968, the wife earned $2,412.77, $3,148.83, and $2,508.44, respectively, indicating she had some earning ability. The record shows that she assisted in the trucking and farming businesses to the extent that most wives do. The marriage lasted for more than 19 years and until a divorce was brought about by the misconduct of

the husband. Considering all the elements involved, the wife is entitled to an award of $32,000. We consider such an award to be just and equitable. Roach v. Roach, 174 Neb. 266, 117 N. W. 2d 549; Eno v. Eno, 159 Neb. 1, 65 N. W. 2d 145; Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22.

The defendant has cross-appealed alleging that the trial court was in error in not approving a property settlement entered into by the parties. The petition for a divorce by the wife was filed on January 3, 1969. On January 13, 1969, prior to the granting of the divorce, the parties entered into a property settlement agreement in the presence of their respective lawyers. By its terms the husband paid $5,000 which was used immediately by the wife as the cash payment on a $15,000 home. The agreement gave to the wife a total sum of approximately $13,000. The wife's lawyer strongly advised her not to sign the property settlement agreement, but she did so notwithstanding his advice. On January 18, 1969, or within a day or two thereafter, the wife rescinded the property settlement agreement for reasons that are not important here. The trial court on the trial did not approve the property settlement, in fact, it was not mentioned in the decree of divorce. The defendant relies on such cases as Clatterbaugh v. Clatterbaugh, 182 Neb. 160, 153 N. W. 2d 749; Hubbard v. Hubbard, 176 Neb. 768, 127 N. W. 2d 503; and Firebaugh v. Firebaugh, 163 Neb. 79, 77 N. W. 2d 891. But these cases are ones where the trial court approved the property settlement in the decree and a subsequent attempt was made to set it aside for fraud, deception, or overreaching. The rules of law therein announced apply in such situations, but they have no application where the property settlement was not approved by the court.

In the instant case the property settlement was offered in evidence and thereby submitted to the court. The court by entering a decree in an amount in excess of that provided by the settlement agreement evidently found the agreement to be unconscionable or obtained

through ignorance, passion, or improvidence. It is the duty of the court to scrutinize settlement agreements closely in divorce actions and to protect against fraud, intimidation, and ignorance and guard against unconscionable results. The court is required to render a fair and equitable result under all the circumstances. A trial court is not foreclosed from the performance of this duty by a property settlement entered into before a divorce is granted. The contention of the husband that the court erred in not approving a division of property by the parties, made before a divorce decree was entered, is lacking in merit. The cross-appeal therefore cannot be sustained.

The judgment of the district court is affirmed as modified with directions to increase the division of property award to the wife to $32,000, including the $5,000 paid before the divorce was granted, and to fix the terms of its payment in accordance with the best interests of both parties to the extent possible. The costs of this appeal, including an attorney's fee of $750, are taxed to the husband.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS A. ALVAREZ, APPELLANT.

177 N. W. 2d 591

Filed May 22, 1970. No. 37435.

1. **Criminal Law: Constitutional Law: Homicide: Sentences.** Where there are two possible statutory penalties for first degree murder, one of which is the death penalty, and the penalties may be applied either by the court or by the jury, whichever determines guilt, the statute does not unconstitutionally discourage the assertion of Fifth or Sixth Amendment rights.
2. **Criminal Law: Guilty Plea: Sentences.** Although an otherwise voluntary plea of guilty may have been partially motivated by the expectation that the penalty imposed by the court on such

a plea would be less than, or different from, the penalty imposed by a jury upon conviction, the guilty plea does not become involuntary solely because the sentence of the court is not the one expected.

3. ———: ———: ———. Plea discussions and agreements in criminal cases, under proper and appropriate conditions, are not objectionable. Proper plea negotiations and agreements which are fully carried out do not ordinarily render a plea of guilty involuntary merely because the sentence is not the one anticipated by the defendant.
4. **Criminal Law: Constitutional Law: Sentences.** The lack of specific statutory standards by which a jury may determine the choice of penalty between death and life imprisonment does not violate due process.
5. **Criminal Law: Guilty Plea.** The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision.
6. ———: ———. A voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.

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

T. Clement Gaughan, Richard L. Goos, A. Michael Alesio, Jack Himmelstein, and Anthony G. Amsterdam, for appellant.

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

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

MCCOWN, J.

This is a post conviction proceeding in which the defendant seeks to have his death sentence vacated and to withdraw his plea of guilty. Following a full evidentiary hearing, the trial court determined all issues against the defendant and dismissed the proceeding.

The defendant pleaded guilty to a charge of first degree murder. Two additional counts were dismissed. The

county attorney made no recommendation as to the penalty. After a thorough presentence investigation, the trial court sentenced the defendant to death. A full factual statement will be found in the decision on direct appeal. See State v. Alvarez, 182 Neb. 358, 154 N. W. 2d 746 (1967).

Essentially, the defendant's position in the present proceeding is that the death penalty is unconstitutional. He also asserts that his guilty plea was motivated by his understanding that in the event of a jury trial, jurors who were generally opposed to capital punishment, or had conscientious scruples against inflicting it, would be excused for cause. Such a jury selection technique has since been determined to be unconstitutional where a death penalty was imposed by the jury. The defendant now contends that this threat of what is now termed a "hanging jury" dictated his guilty plea and made it involuntary.

Defendant relies primarily on United States v. Jackson, 390 U. S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), and Witherspoon v. Illinois, 391 U. S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).

In Jackson, the Federal Kidnaping Act authorized only the jury to return a verdict of death. The alternative, when a jury did not recommend the death penalty, was imprisonment for any term of years or for life. A plea of guilty or a waiver of a jury trial automatically insured a defendant that the death penalty would not be imposed. The Supreme Court held that the establishment of a death penalty, which applies only to those defendants who assert their rights to contest their guilt before a jury, is unconstitutional. The court said: "The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." Neither the statute nor the procedure in Nebraska fit the mold of the Jackson case.

Section 28-401, R. R. S. 1943, in effect at the time of the crime involved here provided that upon conviction of first degree murder, the penalty was death or life imprisonment and then provided: "If the accused is found guilty by a jury, they shall fix the punishment by their verdict; upon a plea of guilty, after the defendant has been fully informed of his constitutional rights, the punishment shall be fixed by the court."

The statute thus authorized the imposition of the death penalty either by the court upon a plea of guilty, or by a jury upon trial before a jury. Section 28-401, R. R. S. 1943, at the time involved here, did not specify who fixed the penalty on a trial to the court without a jury. The 1969 Legislature added a provision specifying the fixing of punishment by the court in the case of a finding of guilt by the court sitting without a jury. The defendant relies upon the later statutory addition as proof of a fatal omission in the prior statute and asserts that because of that omission, the principles of Jackson apply and a jury trial was unconstitutionally discouraged. This is an ingenious effort to find comfort and support in Jackson. If defendant's contention were correct, on a finding of guilt by the court after waiver of a trial by jury, the court would have had no power to impose any penalty. This obviously overextends any possible rule of statutory construction. Here also the defendant neither elected to be tried by a jury nor did he elect to be tried by a court without a jury. Instead, he elected to plead guilty and upon such a plea, the authorized penalties were exactly the same as those which applied in the event he had exercised his constitutional right to trial by jury. Under such circumstances, this case does not come within the framework of Jackson.

Where there are two possible statutory penalties for first degree murder, one of which is the death penalty, and the penalties may be applied either by the court or by the jury, whichever determines guilt, the statute

does not unconstitutionally discourage the assertion of Fifth or Sixth Amendment rights.

In Witherspoon v. Illinois, 391 U. S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), the Supreme Court held that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. The court determined that no defendant can constitutionally be put to death at the hands of a tribunal so selected. It should be particularly noted that the Supreme Court specifically refused to rule that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. Its ruling was limited to the imposition of the death penalty by a jury chosen or organized to return a verdict of death.

In an effort to establish the direct relevance of Witherspoon, the defendant introduced evidence to establish that the practice and procedure in Nebraska has been and was the technique prohibited by Witherspoon. It may be that the jury selection technique authorized by statute and judicial decision in Nebraska, and followed as a matter of practice, came within the classification interdicted by Witherspoon. See, § 29-2006(3), R. R. S. 1943, in effect since 1873, G. S. 1873, p. 826; Rhea v. State, 63 Neb. 461, 88 N. W. 789 (1902); Sharp v. State, 117 Neb. 304, 220 N. W. 292 (1928). Nevertheless, the difficulty with defendant's claim based on Witherspoon is simply that the defendant here was not tried by a jury so picked, nor is this appeal from a sentence determined by any such jury. The evidence does indicate that in some unknown degree the defendant may have been motivated to plead guilty because of his belief that a jury would not only convict him, but would impose the death penalty. It does not follow that his informed de-

cision to plead guilty became involuntary because the anticipated sentence did not follow.

Although an otherwise voluntary plea of guilty may have been partially motivated by the expectation that the penalty imposed by the court on such a plea would be less than, or different from, the penalty imposed by a jury upon conviction, the guilty plea does not become involuntary solely because the sentence of the court is not the one expected.

The defendant also urges that his guilty plea here was invalid because of plea negotiations and agreements. The evidence is clear that any and every commitment made was kept and performed. The trial court had no part in any plea negotiations or agreement. It is likewise clear from the record that the defendant was specifically aware that if he entered a plea of guilty, the court had the authority and the power to sentence him to death or to life imprisonment, and was free of any limitation on that power. We have held that plea discussions and agreements in criminal cases, under proper and appropriate conditions, are not objectionable. See, State v. Tunender, 182 Neb. 701, 157 N. W. 2d 165 (1968); State v. Crenshaw, 183 Neb. 449, 161 N. W. 2d 502 (1968); State v. Nicholson, 183 Neb. 834, 164 N. W. 2d 652 (1969). Proper plea negotiations and agreements which are fully carried out do not ordinarily render a plea of guilty involuntary merely because the sentence is not the one anticipated by the defendant.

The defendant also contends that the statute under which he was given a death sentence is unconstitutional for lack of standards. The lack of specific statutory standards by which a jury may determine the choice of penalty between death and life imprisonment does not violate due process. See, Maxwell v. Bishop, 398 F. 2d 138 (1968); In re Anderson, 73 Cal. Rptr. 21, 447 P. 2d 117 (1968).

One fundamental fact stands out. The defendant here, with competent counsel, freely and voluntarily entered

his plea of guilty. His present contention that his plea was involuntary rests entirely on the fact that later decisions of the United States Supreme Court changed some of the legal premises that entered into and motivated his decision to plead guilty.

The Supreme Court of the United States, on May 4, 1970, answered defendant's contentions in that respect in a series of three cases. Brady v. United States, 397 U. S. ——, 90 S. Ct. 1436, 25 L. Ed. 2d 747; Parker v. State of North Carolina, 397 U. S. ——, 90 S. Ct. 1458, 25 L. Ed. 2d 785; and McMann v. Richardson, 397 U. S. ——, 90 S. Ct. 1441, 25 L. Ed. 2d 763.

Brady involved a plea of guilty under the identical Federal Kidnaping Act involved in United States v. Jackson, *supra*. The contention was that because of the later decision in Jackson, the plea of guilty in Brady was involuntary. The Supreme Court, in rejecting the contention, said: "The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation, or other impermissible conduct by state agents, cf. Von Moltke v. Gillies, 332 U. S. 708 (1948), a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise."

McMann v. Richardson, *supra,* in the May 4, 1970, trilogy of cases, involved issues of whether and to what extent an otherwise valid guilty plea may be impeached in collateral proceedings by assertions or proof that the plea was motivated by a prior coerced confession. There the United States Supreme Court said: "It is no deni-

gration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act." The evidence before us establishes that Thomas Alvarez had competent counsel.

The defendant's basic objections here, in reality, do not rest on technical legal theories. Instead, his challenges rest upon the awesome fact that he received the death penalty rather than life imprisonment. Questions going to the constitutionality of the death penalty itself were considered by this court in the original appeal. There have been no controlling changes since that time which would alter the conclusions reached. While this court may have varying views as to the advisability of capital punishment in various situations, the death penalty is and has been a part of the criminal law of this state for more than a century. The Supreme Court of the United States has not yet held that imposition of the death penalty offends the Eighth Amendment. Neither has it held that a state may not specify a mandatory death penalty for certain crimes. If the death penalty is to be nullified on constitutional grounds, that decision should rest with the Supreme Court of the United States. If capital punishment, as a policy, is no longer approved by the people of this state, then it is for the people, by the initiative, or through the Legislature, to change that policy.

The judgment of the district court is affirmed.

AFFIRMED.

EMERY C. HANSEN ET AL., APPELLANTS, V. COUNTY OF CASS, A MUNICIPAL CORPORATION, APPELLEE.

177 N. W. 2d 568

Filed May 22, 1970. No. 37459.

1. **Eminent Domain: Damages.** In eminent domain proceedings for all damage to the remainder on account of proper construction or operation the landowner must obtain compensation in the first proceeding.
2. ———: ———. The final condemnation award is conclusive both on questions actually litigated and on questions necessarily within the issues.
3. ———: ———. A condemnation award is not conclusive in a subsequent action as to remainder damage that was caused by improper construction or operation and that was not actually litigated in the first proceeding.

Appeal from the district court for Cass County: VICTOR H. SCHMIDT, Judge. Reversed and remanded for further proceedings.

Burbridge & Burbridge and Ronald D. Svoboda, for appellants.

James F. Begley, for appellee.

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

SMITH, J.

Plaintiffs alleged that defendant's project to improve a highway and straighten a creek had caused overflow damage to their farm and personal property. The district court on defendant's motion for summary judgment dismissed the petition. Plaintiffs appeal. Defendant argues claim preclusion by the final award of compensation to plaintiffs in a previous eminent domain proceeding relating to the project.

In 1959 defendant by eminent domain acquired the fee in a strip 7 feet wide along the south side of plaintiffs' farm. On the profile-plat filed in the proceeding the strip, as right-of-way for defendant's abutting east-

west highway, extended from station 97+66 to station 110+82. In the same proceeding defendant also acquired a permanent easement to straighten the creek which crossed plaintiffs' farm. The easement, 100 feet wide, extended approximately 600 feet northwest from the north side of the highway at station 100+50. The appraisers' award to plaintiffs was paid, no appeal having been taken.

The profile-plat of the project on file in the condemnation proceeding imparted little to an untrained eye. Its author in an affidavit for the present suit stated: "The project was constructed . . . in 1960 in accordance with the plans; a new creek channel was constructed on . . . (plaintiffs') land 50 feet wide at the top, 12 to 15 feet deep, replacing the old channel which was approximately 12 feet deep and 25 to 30 feet wide at the top, which increased to 40 feet under the old bridge at station 101+45, then narrowed to 25 to 30 feet south of the bridge; the channel south of the bridge was widened and straightened for a distance of about 500 feet; a new bridge was erected and the old one removed at station 101+45, increasing the span length from 46 feet to 60 feet, and raising it approximately 6 feet. . . ."

Plaintiffs retained William H. Scott, an engineer, who concluded: "The channel constructed by (defendant) . . . reduced the channel area by 50%; reduced the capacity of the channel by 60%; and the new road fill, bridge, and channel reduced the area for water flow at station 101+45 by 45%. . . . (The) area flooded as the result of the new channel, bridge, and fill exceeded 17 acres and involved an area more than 11 times larger than the area condemned by . . . (defendant) prior to the project."

According to plaintiffs' petition: (1) Construction of the bridge and embankment obstructed and narrowed the opening for carriage of waters in the natural flood plain south of the highway; (2) impounding of natural floodwaters damaged the farm in 1964 and 1965; and

(3) negligence of defendant in constructing the embankment and in altering the creek channel were the sole proximate cause of the damage.

In an eminent domain proceeding the principle of just compensation for damage to the remainder excludes conjectural items. Yet for all damage to the remainder on account of proper construction or operation the landowner must obtain compensation in the first proceeding. See, State v. Dillon, 175 Neb. 444, 122 N. W. 2d 223 (1963); McGree v. Stanton-Pilger Drainage Dist., 164 Neb. 552, 82 N. W. 2d 798 (1957). The final condemnation award is conclusive both on questions actually litigated and on questions necessarily within the issues. It is not conclusive in a subsequent action as to remainder damage that was caused by improper construction or operation and that was not actually litigated in the first proceeding. Liability rests upon the original taking or damaging for public use. Recovery is permitted because the new element was not contemplated or determined at the time of the taking or damaging. Schmutte v. State, 147 Neb. 193, 22 N. W. 2d 691 (1946); Snyder v. Platte Valley Public Power & Irr. Dist., 140 Neb. 897, 2 N. W. 2d 327 (1942); Bunting v. Oak Creek Drainage Dist., 99 Neb. 843, 157 N. W. 1028 (1916). See generally Van Alstyne, "Inverse Condemnation: Unintended Physical Damage," 20 Hastings L. J. 431 (1969); McCormick, "The Measure of Compensation in Eminent Domain," 17 Minn. L. Rev. 461 at 482 to 487 (1933); Mandelker, "Inverse Condemnation: The Constitutional Limits of Public Responsibility," 1966 Wis. L. Rev. 3.

The record in the present case fails to show that there was no genuine issue of material fact. The summary judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SARAH ANN PIPER, EXECUTRIX OF THE ESTATE OF RAY C. PIPER, ALSO KNOWN AS RAY PIPER, DECEASED, APPELLANT, V. MORRIS HILL, APPELLEE.

177 N. W. 2d 509

Filed May 22, 1970. No. 37490.

1. **Judgments: Trial.** The issue to be tried on motion for summary judgment is whether there is any genuine issue of material fact, and not how that issue should be decided.
2. ———: ———. In a summary judgment proceeding, the burden is upon the movant to show that no genuine issue of fact exists.
3. ———: ———. The purpose of a summary judgment is not to serve as a substitute for trial, but is only a proper remedy when the movant is entitled to judgment as a matter of law.
4. **Negligence: Statutes: Evidence.** In Nebraska the violation of a statute is not negligence per se but is evidence for the jury to consider in the determination of the ultimate issues of negligence or contributory negligence.
5. **Automobiles: Negligence.** The mere stalling of a motor vehicle temporarily on a highway caused by some disablement, does not ipso facto constitute negligence as a matter of law, but the failure to remove the stalled vehicle within a reasonable time may constitute negligence.
6. **Trial.** Any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party.

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

Mingus & Mingus, Luebs, Tracy, Huebner & Dowding, and James A. Beltzer, for appellant.

Tye, Worlock, Tye, Jacobsen & Orr, for appellee.

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

WHITE, C. J.

In this wrongful death action, arising out of an accident when the defendant's car struck the deceased, the plaintiff widow's petition was dismissed by the district

court on motion for summary judgment. We reverse the judgment and remand the cause to the district court for trial on the merits.

The decedent owned two cars at the time of his death, one of which was for the use of his grandson; the other was used by the deceased and his wife. The grandson's car, because of electrical failure the night of November 24, 1967, was stalled on a graveled country road. The next day decedent and his grandson went to where the stalled car was located to recover the vehicle. With a chain they started to tow it home.

The towed car struck some loose gravel and whipped. The lead car was thrown into the west ditch of graveled State Highway No. 58, while traveling in a northwesterly direction. The towed car was left crosswise in the middle of the graveled highway. The decedent and his grandson with others proceeded to push the stalled auto onto the west shoulder in order to clear the road and remove the road block.

A nearby farmer with his tractor pulled the lead car out of the ditch and it was discovered that the lead car had a flat tire. After repairing the tire the lead car was then driven in front of the towed car, and the chain again attached. By this time it was late dusk, approximately 6 p.m. on November 25, 1967. The headlights of the lead car were turned on and left on. The decedent and his grandson were making final preparations before resuming the towing operation. They observed the defendant's car traveling from the northwest, heading southeast, towards them. As the defendant's car approached the parked vehicles, the deceased jumped into the west ditch from between the two cars.

From this point on the conflicting versions of what happened appear both in the record and in the conflicting contentions of both counsel on the facts in the briefs. There is evidence that as the defendant's car approached the parked vehicles, that the defendant, being of the opinion that the decedent's auto was moving in the

wrong lane of traffic, proceeded to move onto the west side of the road, and when within only 50 feet or 75 feet of the parked vehicles, he realized that the lead vehicle was stationary. In any event, the defendant swerved his automobile to avoid colliding with the stationary vehicles, and, without applying his brakes, lost control and went into the west ditch where he struck the decedent, who had jumped from between the cars into the west ditch to avoid the accident. There were no flares or warning devices placed in front of the decedent's and grandson's cars, but the defendant also testified that he had a clear view of the two cars for approximately 300 yards prior to impact. He did not apply his brakes at any time prior to the impact. There is also testimony as to the defendant being blinded by the headlights on the decedent's car at a distance of some 200 to 300 yards. The defendant estimated his speed at 50 miles per hour, and the decedent's grandson estimated the speed at between 60 and 65 miles per hour. The detailed testimony as to distances, road width, visibility, and the actions of the parties at or near the actual point of impact will not be repeated here. Further exploration as to these details may easily color the inferences to be drawn from all of the circumstances. Suffice it to say conflicting versions of the facts themselves, as recited by counsel in their briefs, reveal, based upon the background testimony given here, a typical conflict of facts and inferences that can be drawn therefrom that must be resolved by a jury.

The issue to be tried on motion for summary judgment is whether there is any genuine issue of material fact, and not how that issue should be decided. Youngs v. Wagner, 172 Neb. 735, 111 N. W. 2d 629; Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244; § 25-1332, R. R. S. 1943. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed. Dennis v. Berens, 156 Neb. 41, 54 N. W. 2d 259; Miller v.

Aitken, 160 Neb. 97, 69 N. W. 2d 290. In a summary judgment proceeding, the burden is upon the movant to show that no genuine issue of facts exists, and the purpose of a summary judgment is not to serve as a substitute for trial, but is only a proper remedy when the movant is entitled to judgment as a matter of law. Berg v. Rasmuss, 176 Neb. 340, 125 N. W. 2d 905.

It appears that it was absolutely necessary for the district court to have found either that the defendant was not guilty of any negligence as a matter of law, or that the decedent was guilty of contributory negligence as a matter of law. Our basic speed law is what is reasonable and prudent under the circumstances. § 39-7,108, R. R. S. 1943. This court can not determine that the defendant was not negligent as a matter of law in light of his own testimony that he had a clear view of the deceased's car for approximately 300 yards prior to the time of the impact and he did not apply his brakes at any time prior to the impact. This evidence alone is sufficient to frame a jury question as to whether the defendant kept a proper lookout under the visibility conditions present, was traveling at reasonable and prudent speed, and had reasonable control of his automobile under all of the circumstances.

A more serious and apparently the main issue upon which the trial court decided this case was whether the decedent was guilty of contributory negligence as a matter of law.

The substance of the defendant's argument is that our statute on parking or leaving standing any vehicle on the improved or maintained traveled portion of a highway (section 39-757, R. R. S. 1943) applies and it is argued that it is conclusively established that the decedent was violating this statute. This same statute, of course, specifically exempts a disabled vehicle. But, even if it did not, in Nebraska the violation of a statute is not negligence per se but is evidence for the jury to consider in the determination of the ultimate issue of

negligence or contributory negligence. Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612. The mere stalling of a motor vehicle temporarily on a highway caused by some disablement, does not ipso facto constitute negligence as a matter of law but the failure to remove the stalled vehicle within a reasonable time may constitute negligence. Plumb v. Burnham, *supra*. It seems quite clear that the actions of the decedent and his grandson in towing the vehicle, in creating the situation that existed at the time of the impact, together with the decedent's sudden jumping into the ditch to the west, as opposed to the defendant's version of the situation, form a typical fact and inference clash to be resolved by a jury. In the present state of the record a jury could reasonably find either way upon the issue of contributory negligence.

We further point out that the location of decedent's vehicle, its relation to the highway's edge, the width of the traveled portion of the highway, and the question of the sufficiency of the room on the highway to the east for the defendant to pass safely are all matters from which this court can not determine negligence as a matter of law under the conflicting inferences that can be drawn from the present status of the record. Any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party. Storz Brewing Co. v. Kuester, 178 Neb. 135, 132 N. W. 2d 341, 21 A. L. R. 3d 476.

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

REVERSED AND REMANDED WITH DIRECTIONS.

DORIS CHRISTO, APPELLEE, V. PENNSYLVANIA LIFE INSURANCE COMPANY, APPELLANT.

177 N. W. 2d 499

Filed May 28, 1970. No. 37383.

Witnesses: Evidence. The necessity and sufficiency of medical opinion to sustain a finding of causation in favor of the proponent of the evidence varies according to circumstances.

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

Walter, Albert, Leininger & Grant and Noyes W. Rogers, for appellant.

McFadden & Kirby, for appellee.

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

SMITH, J.

In an action on an accidental death insurance policy, jury verdict went for the beneficiary. Insurer appeals. The question is sufficiency of the evidence to sustain a finding that the insured died of accident from generation of atmospheric electricity by thunderstorm.

The insured, Jim C. Christo, assisted by his son Tim, age 13, was farming 160 acres on March 30, 1968. At 4:15 p.m. after coffee at home with his daughter and wife, plaintiff herein, he went to a field. He was there situated about ¼ mile from a field that Tim was plowing. Jim began operating a tractor that was towing a harrow in 4 sections, 24 feet wide, and with 300 teeth of steel. At 4:30 p.m. plaintiff and Tim saw the tractor-harrow moving aimlessly without an operator. Jim was found prostrate some distance away.

Plaintiff examined the body at the scene. She saw an unnatural appearance of hair which she then ascribed to dust. There was an abrasion 1½ inches wide with three drops of blood on the left side of the pate. A few

drops of blood were observable in the left ear. Plaintiff found no pulse and no sign of life.

Jim had been working in a storm area. Plaintiff and Tim testified to a sprinkle and loud thunder nearby, but not to lightning flashes. A witness 0.9 miles southeast of the farm had noted loud, crackling thunder and lightning flashes coming from the direction of the farm. A neighbor 2 miles away had heard crackling thunder in that direction, but she had seen no lightning flash.

Plaintiff at the mortuary noted that part of deceased's hair was brown, coarse, straight, and brittle—characteristics not present prior to death. A neighbor described the hair as dry like straw or an "over-processed permanent."

Jim, age 50, had not complained of illness on the day of his death. His medical history was negative.

Dr. Gerald J. Spethman on gross examination of the body at the mortuary noted only solid, dried blood, "not a very large amount at all," in the left ear. A spinal tap was normal. He formed no opinion of cause of death.

A pathologist, Dr. Roderick R. Landers, examined the heart, part of the lungs, aorta, kidneys, liver, and spleen. The heart showed some arteriosclerotic plaqueing and some hardening of the arteries. The disease was normal for a man age 50. Dr. Landers formed no opinion of cause of death, but he could not rule out heart disease. He associated a usual burn with skin probably charring and reddening, and with singed hair changing in color from black to gray and in texture from smooth to coarse. Referring to the deceased's hair, the doctor testified: "Yes . . . it was possible that it was due to a burn."

The necessity and sufficiency of medical opinion to sustain a finding of causation in favor of the proponent of the evidence varies according to circumstances. cf. Yount v. Seager, 181 Neb. 665, 150 N. W. 2d 245 (1967); Clouse v. St. Paul Fire & Marine Ins. Co., 152 Neb. 230, 40 N. W. 2d 820, 15 A. L. R. 2d 1008 (1950). Weak

circumstances may call for strong medical opinion. At the other extreme, circumstances may exempt the proponent from offering medical opinion.

A jury might reasonably find a number of noteworthy circumstances. The age and health of Jim. The width of the harrow. The operating state of the machinery without Jim. The absence of teeth marks on the body. The color and texture of the hair. The medical testimony. The risk of death from the lightning.

The evidence is sufficient to sustain the verdict. The judgment is affirmed. We allow plaintiff $500 for services of her attorneys in this court.

AFFIRMED.

CARTER, J. dissenting.

The plaintiff as beneficiary in a policy of accident insurance brought this action against the defendant insurance company to recover the face amount of such policy because of the death of her insured husband which she alleged was caused by accident. The sole issue on this appeal is whether the evidence sustains the finding of the jury that the deceased met his death by accidental means.

There is little or no dispute in the evidence. On the day of the accident the deceased, a 50-year-old farmer, was apparently in good health. At about 4:15 p.m., he went to the field to harrow some young oats. He was last seen alive on his tractor pulling a 4-section harrow. Both the wife and a 13-year-old son, each approximately a quarter mile distant, were first alerted to the situation when they observed the tractor and harrow aimlessly moving in the oatsfield with no driver in the driver's seat. They hurried to the scene and found the deceased lying on the ground dead. The wife looked for injuries and found a 1½-inch cut on the top of the head and about 3 drops of blood in the shallow wound. She also observed a small amount of blood in the left ear. She also testified that his hair looked a little funny, but concluded that this was probably due to dust and dirt. There

was no evidence to indicate and it is not contended that the deceased had been struck by the 24-foot harrow.

It is contended by plaintiff that the deceased had been killed by lightning. Plaintiff testified the weather had turned stormy, there had been a sprinkle of rain, and there had been some loud thunder and flashes of lightning. There is no evidence that lightning had struck in the area although lightning had been observed in the sky by others. Plaintiff testified that after the body had been prepared by the mortician for burial, his black hair appeared brownish, hard and brittle in texture, and coarser and straighter than in his lifetime. A neighbor testified that the hair after preparation for burial was "more like an over-processed permanent," straw-like and dry.

Dr. Gerald J. Spethman was called to the scene of the death and made an examination in gross at the mortuary. He found some solid, dried blood in the left ear. He made a spinal tap and found a normal condition. He examined the hair and found it to be black. He performed a partial autopsy and sent the heart, a portion of the lungs, aorta, kidneys, liver, and spleen to Dr. Roderick R. Landers, a pathologist, for examination. In answer to a hypothetical question containing the foregoing evidence, Dr. Spethman testified that he was unable to determine the cause of death. Dr. Landers testified that he examined the vital organs sent to him and, in answer to a proper hypothetical question, testified that he was unable to determine the cause of death.

The burden of proof is on the plaintiff to establish death by accidental means. Lebs v. Mutual Benefit Health & Accident Assn., 124 Neb. 491, 247 N. W. 19. A plaintiff in such a case is not required to exclude the possibility of death occurring by some other means, nor is the defendant required to prove that death occurred by some other means. But there must be evidence to support a jury finding that the death was caused by an accident.

There is no such evidence in this record. The death is as likely to have been caused by heart failure as by lightning, if not more so. The burden of proof in this case is on the plaintiff to prove by a preponderance of the evidence that the deceased died by being struck by lightning; the theory on which she seeks recovery. There is no such evidence here, the evidence being speculative and conjectural only.

"Plaintiff may establish his case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence is not sufficient to sustain a verdict unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. Popken v. Farmers Mutual Home Ins. Co., 180 Neb. 250, 142 N. W. 2d 309. Or, to phrase it differently, the evidence must be sufficient to make the theory of causation reasonably probable and not merely possible. Conjecture, speculation, or choice of possibilities is not proof. There must be something more which will lead a reasoning mind to one conclusion rather than another." Raff v. Farm Bureau Ins. Co., 181 Neb. 444, 149 N. W. 2d 52. Where several inferences are deducible from the facts presented, which inferences are opposed to each other, but equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inferences which would entitle him to recover. Shamblen v. Great Lakes Pipe Line Co., 158 Neb. 752, 64 N. W. 2d 728.

With reference to the necessity of expert evidence as to the cause of death, the question appears generally to be dependent upon the nature of the incident of death and the surrounding circumstances; that is, if the evidence is of an objective nature, the jurors may draw their conclusions as to the cause of death from such facts alone, but if the evidence is subjective in character, there must be expert evidence as to the cause of death. The plaintiff and one other lay witness testified to the ap-

pearance of the deceased after his death which is subjective evidence only. In such a case, the evidence is subjective and of such a nature that laymen cannot, with reasonable certainty, determine the cause of death. In such a case, there must be offered evidence by expert witnesses, learned in human anatomy and its functions, who can testify, either from a personal examination, or knowledge of the history of the case, or from a hypothetical question based on the facts, that the deceased, with reasonable certainty, met his death as the plaintiff asserts. 32 C. J. S., Evidence, § 569(1)e, p. 612; 100 C. J. S., Workmen's Compensation, § 555(5), p. 672; 22 Am. Jur. 2d, Damages, § 299, p. 399; Oliveira v. Warren, 24 Cal. App. 2d 712, 76 P. 2d 113; City of Pawhuska v. Crutchfield, 155 Okla. 222, 8 P. 2d 685; Shawnee-Tecumseh Traction Co. v. Griggs, 50 Okla. 566, 151 P. 230; Sickmund v. Connecticut Co., 122 Conn. 375, 189 A. 876.

The majority opinion cites but two cases in support of its reasoning, to wit, Yount v. Seager, 181 Neb. 665, 150 N. W. 2d 245, and Clouse v. St. Paul Fire & Marine Ins. Co., 152 Neb. 230, 40 N. W. 2d 820, 15 A. L. R. 2d 1008. Both of these cases are supported by objective evidence and are correct, but they have no application here.

There is no evidence in this record that the change in the hair of the deceased could or did result from lightning, or that it was even an indication of death from that cause. Two physicians testified with this evidence before them that they were unable to determine the cause of death. Both testified that it was possible that death was caused by lightning and they likewise testified that it was possible that death resulted from a heart attack. Both testified that they could not determine the cause of death. It would be an anomaly indeed if a jury should be permitted to speculate on the cause of death without the benefit of any medical evidence and particularly where, as here, the only doctors called testified that they could not determine its cause after considering the subjective evidence in the record. As

stated in Lundrigan v. City of Los Angeles, 82 Cal. App. 2d 238, 186 P. 2d 12: "The existence of a causal relation in cases of this kind is a scientific question requiring expert testimony."

I submit that the verdict of the jury was based on speculation, conjecture, or choice of possibilities which will not support a verdict. It takes more than the finding of a human corpse and lightning in the sky to sustain a verdict of accidental death. The trial court was in error in failing to direct a verdict for the defendant at the close of all the evidence and in failing to sustain defendant's motion for judgment notwithstanding the verdict. I would reverse the judgment and dismiss the action.

WHITE, C. J., and NEWTON, J., concur in this dissent.

LENARD H. WESTRING, SPECIAL ADMINISTRATOR OF THE ESTATE OF RICKY WESTRING, DECEASED, APPELLANT, V. RICHARD L. SCHWANKE ET AL., APPELLEES.

177 N. W. 2d 506

Filed May 28, 1970. No. 37442.

1. **Parent and Child: Damages.** The measure of damages for the wrongful death of a child is the pecuniary loss which the parents sustain by being deprived of the child's services during his minority and the loss of contributions that with reasonable certainty could be expected to have been made by the child after reaching his majority.
2. **Parent and Child.** The legal obligation of an adult child to support his parents is that prescribed by statute and it cannot be enforced in an action against a third person.

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

Richard J. Bruckner, Henry C. Rosenthal, Schrempp, Rosenthal, McLane & Bruckner, and Harry E. Stevens, for appellant.

Ray C. Simmons, for appellees.

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

BOSLAUGH, J.

This is an action by the administrator of the estate of Ricky Westring, deceased, to recover damages for his wrongful death. The deceased, who will be referred to as the plaintiff, died as the result of injuries sustained in an accident on September 28, 1968.

The jury returned a verdict for the administrator in the amount of $50,000. The trial court sustained the defendant's motion for new trial and the administrator has appealed.

The accident happened at about 12:30 a.m. on Twenty-third Street near the intersection of Hancock Street in Fremont, Nebraska. Twenty-third Street is U. S. Highway No. 30 and runs generally east and west. The speed limit is 45 miles per hour. The highway is well lighted by street lights and by light from the businesses located along the highway. The weather was clear and the streets were dry.

The plaintiff was operating a motorcycle and proceeding east on Twenty-third Street. A passenger, Charles L. Hill, was riding on the motorcycle behind the plaintiff. The motorcycle was traveling approximately 30 to 35 miles per hour in about the middle of the eastbound traffic lane. The motorcycle was equipped with a headlight and Hill testified positively that the headlight was lighted.

Richard L. Schwanke, who will be referred to as the defendant, was driving a 1966 Chevrolet automobile, owned by his parents, west on Twenty-third Streets. The defendant passed another automobile operated by Scott Reeves, which was also proceeding west on Twenty-third Street. As the defendant was starting to turn back into the westbound lane, the left front of the defendant's automobile collided with the motorcycle op-

erated by the plaintiff. The plaintiff was fatally injured and died before reaching the hospital.

At the time of the accident, the defendant's automobile was traveling at approximately 35 miles per hour. The headlights of defendant's automobile were on and there was no obstruction to his vision, but neither he nor the passenger in his automobile, Robert Bennett, saw the motorcycle or any light on it before the impact. Reeves and the passenger in his automobile, Fred Placzek, did not see the motorcycle coming from the west before the accident. The evidence presented questions for the jury as to the negligence of the defendant and the contributory negligence of the plaintiff.

The plaintiff was past 17½ years of age at the time of his death. He was unmarried and living at home on his father's farm near Fremont, Nebraska. He was in good health and was employed at a popcorn plant in North Bend, Nebraska. He had completed 3 years of high school and had started to school in the fall of 1968 but dropped out after 1 week. He had been found to be a delinquent child in a juvenile proceeding in Faulk County, South Dakota, on June 3, 1968, and had been "paroled" to his parents for 1 year.

The plaintiff had helped his father with farm work and had worked for other farmers. Several witnesses testified that the plaintiff was a good farm worker and mechanic. The employment supervisor of the State Division of Employment testified that the rate of pay for a single farm laborer was from $135 to $300 per month plus board and room.

There was no direct evidence as to the amount expended by the plaintiff's father for the plaintiff's maintenance or as to any amounts the plaintiff may have contributed to his parents. The plaintiff's father testified that the plaintiff was to receive a half interest in the farm operation when the plaintiff became of age and that the farm operation was then to be a partnership.

The measure of damage in an action for wrongful

death is the pecuniary loss to the statutory beneficiaries. The recovery is limited to the value of the services or the amounts which the beneficiaries would have received from the earnings of the deceased. Darnell v. Panhandle Coop. Assn., 175 Neb. 40, 120 N. W. 2d 278.

In this action the damage which the plaintiff's parents sustained was the pecuniary loss which resulted from their being deprived of the plaintiff's services during the balance of his minority and the loss of the contributions that the plaintiff could with reasonable certainty have been expected to make after reaching his majority. Dorsey v. Yost, 151 Neb. 66, 36 N. W. 2d 574, 14 A. L. R. 2d 544.

If the plaintiff had lived he would have reached his majority in less than 2½ years. Thereafter, his legal obligation to support his parents would have been that prescribed by statute. This obligation cannot be enforced in an action against a third person. Spomer v. Allied Electric Fixture Co., 120 Neb. 399, 232 N. W. 767.

The testimony of plaintiff's father shows that the plaintiff and his father would have been engaged in a partnership operation after the plaintiff reached his majority. This indicates that the plaintiff would have been compensated for his services and is not evidence that the plaintiff would have made substantial contributions of monetary value to his parents after reaching his majority.

The verdict of $50,000 for the wrongful death of the plaintiff was clearly excessive under the evidence. The order of the district court sustaining the defendant's motion for a new trial is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES WAYNE HOWARD, APPELLANT.

177 N. W. 2d 566

Filed May 28, 1970. No. 37474.

1. **Criminal Law: Escape.** Guilt or innocence of the charge for which a person is being held in custody is immaterial to a charge of escape from custody while in jail awaiting trial.
2. **Criminal Law: Bail and Recognizance.** Many things should be taken into consideration in fixing the amount of bail, such as the atrocity of the offense; the penalty which the law authorizes to be inflicted in case of a conviction; the probability of the accused appearing to answer the charge against him, if released on bail; his pecuniary condition; and the nature of the circumstances surrounding the case.

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

Albert T. Reddish and Glen A. Fiebig, for appellant.

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

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

SPENCER, J.

This is a criminal prosecution for escape from custody in violation of section 28-736, R. R. S. 1943. Appellant at the time of the escape was confined in the Box Butte county jail on two counts of a burglary complaint in lieu of a $500 appearance bond.

Appellant, during the trial on the burglary complaint, pled guilty to escape from custody. While the matter was pending on a presentence investigation, the jury found the appellant not guilty on the burglary complaint. Appellant then sought to withdraw his guilty plea to escape from custody on the theory that he couldn't be guilty of escape from a charge which was subsequently dismissed. The motion to withdraw the plea was properly overruled. Appellant was sentenced to the

Division of Corrections of the Department of Public Institutions of the State of Nebraska for a term of not less than 1 year nor more than 3 years.

Section 28-736, R. R. S. 1943, provides as follows: "If any person confined in any Nebraska Penal and Correctional Complex, or Nebraska Penal and Correctional Complex road camp, or any Nebraska Penal and Correctional Complex trusty, or any person in legal custody, or confined in any jail, either awaiting trial on any complaint lodged against him, or upon conviction for any offense, shall break such custody and escape therefrom, or attempt to do so, he shall, upon conviction thereof, be fined not more than five hundred dollars, or be punished by confinement in the Nebraska Penal and Correctional Complex for a period of not less than one year nor more than ten years."

Guilt or innocence of the charge for which a person is being held in custody is immaterial to a charge of escape from custody while in jail awaiting trial. In Goedert v. Jones, 150 Neb. 783, 36 N. W. 2d 119, we held that the offense of breaking custody and escape from jail by a prisoner was complete when he escaped. The disposition made of the complaint on which he is then held is not material nor relevant to the merits of the escape offense. In Stinehagen v. Olson, 145 Neb. 653, 17 N. W. 2d 674, we held: "Under the provisions of section 28-736, R. S. 1943, a sentence committing a person to the penitentiary, even though it might be reversed on appeal or set aside on habeas corpus, would, nevertheless, be effective to sustain a conviction for breaking custody and escaping therefrom while confined under it." These cases are determinative of the appeal herein.

Appellant further alleges that he was an indigent, and being an indigent a $500 appearance bond was excessive and violative of both the Constitution of the United States and the Constitution of Nebraska. There is no merit to appellant's allegation. Apparently it is appellant's contention that for most indigents any bail would be ex-

cessive. When an offense charged is a bailable one, discretion rests with the judge in fixing the amount of the recognizance, but this discretion is a judicial one. The question to be determined in every case that is bailable is not whether the defendant may make bail, but whether or not the bail demanded is unreasonable and disproportionate to the crime charged. The appellant herein was held on two counts of a burglary charge. He had a previous criminal record. The trial judge herein on a previous occasion had sentenced appellant to the Nebraska Penal and Correctional Complex for 1 year on a breaking and entering charge.

While the pecuniary circumstances of a prisoner should be considered in determining the amount of the bail, that in itself is not controlling. If that were determinative of the question, a defendant without means or friends would be entitled to be discharged on his recognizance regardless of the risk involved. As we said in In re Scott, 38 Neb. 502, 56 N. W. 1009: "Many things should be taken into consideration in fixing the amount of bail, such as the atrocity of the offense; the penalty which the law authorizes to be inflicted in case of a conviction; the probability of the accused appearing to answer the charge against him, if released on bail; his pecuniary condition and the nature of the circumstances surrounding the case."

Definitely, a prior criminal record is an important factor to be considered. There is no merit to appellant's claim of the requirement of an excessive bond. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL, RELATOR, V. MURRELL B. MCNEIL, TAX COMMISSIONER, RESPONDENT.

177 N. W. 2d 596

Filed May 28, 1970. No. 37565.

1. **Constitutional Law: Taxation.** Under the provisions of Article VIII, section 1, of the Constitution of Nebraska, the taxation of personal property, except as otherwise authorized by such provision, must be uniform not only as to the rate of taxation, but as to the valuation of the property as well.
2. **Legislature: Constitutional Law: Taxation.** The Legislature has plenary power over taxation and matters incidental to such power within the limits of the Constitution.
3. **Legislature: Constitutional Law: Statutes.** The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class, relative to the subject of legislation, which render appropriate its enactment.
4. **Legislature: Constitutional Law: Taxation.** The Legislature may properly legislate in regard to a class of property, but it may not divide a class of property and enact different rules for the taxation of each segment of the class.
5. **Taxation.** The provision of the act fixing the value of agricultural income-producing machinery and equipment as those used by the taxpayer in determining income under the Internal Revenue Code is not relevant to nor does it afford any basis for fixing actual value. Its purpose is to fix an equitable rate of depreciation during the life use of the property and not to fix the actual value of the property.
6. **Constitutional Law: Statutes: Taxation.** The above act is violative of Article III, section 18, of the Constitution in that it purports to grant special benefits to members of a class and deny such benefits to others of the same class.
7. ———: ———: ———. In the absence of some real and substantial distinction which bears a reasonable, just, and proper relation to the objects sought to be accomplished, a tax levied upon a part of those within the same class cannot be sustained. The classification and the object to be accomplished must be germane.

Original action. Judgment for relator.

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

Cobb, Swartz & Wieland, for respondent.

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

CARTER, J.

This is an original action brought by the State of Nebraska on the relation of Clarence A. H. Meyer, Attorney General, against Murrell B. McNeil, Tax Commissioner, to test the constitutionality of L.B. 1250, Laws 1969, c. 634, p. 2540, enacted by the Eightieth Session of the Legislature and effective on December 25, 1969. The respondent filed his answer and relator thereafter filed a motion for judgment on the pleadings which is hereby presented to the court for determination.

The pertinent part of the act provides: "The values of agricultural income producing machinery and equipment used by any business which is required by law to report taxable income pursuant to the Internal Revenue Code of 1954, and which are required to be assessed by the county assessors for property tax purposes, shall be those values used by the taxpayer in the determination of taxable income; * * * and provided further, that the Tax Commissioner shall establish guidelines as to the minimum values in relation to the cost of the machinery or equipment."

It is the contention of the relator that the act violates the Nebraska Constitution in that it is violative of the uniformity and proportionate requirements of Article VIII, section 1; that it is special legislation contrary to Article III, section 18; that it unlawfully delegates legislative power to the Congress of the United States; and that it is unconstitutionally vague and uncertain. The respondent denies the contentions of the relator and asserts that the act is in all respects constitutional.

It must be conceded at the outset that the Legislature

has plenary power over taxation except as limited by the Constitution. It is not disputed that the assessment of property for tax purposes must be by valuation and in proportion to actual value. Nor is it disputed, and it cannot properly be, that the taxation of property must be uniform, not only as to the rate of taxation, but to the valuation of the property as well. This court has passed on these questions many times and they have become the established law of this state. United States Cold Storage Corp. v. Stolinski, 168 Neb. 513, 96 N. W. 2d 408; Western Union Telegraph Co. v. City of Omaha, 73 Neb. 527, 103 N. W. 84.

It is the province of the Legislature to make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest on real differences of situation and circumstances surrounding the members of the class, relevant to the subject of legislation, which render appropriate its enactment. Blauvelt v. Beck, 162 Neb. 576, 76 N. W. 2d 738. But the establishment of two methods of valuation of property in the same class for taxation purposes results in a want of uniformity within the constitutional prohibition of Article VIII, section 1. First Nat. Bank & Trust Co. v. County of Lancaster, 177 Neb. 390, 128 N. W. 2d 820. This presents the question of whether or not "agricultural income producing machinery and equipment used by any business which is required by law to report taxable income pursuant to the Internal Revenue Code," constitutes a reasonable classification for purposes of taxation. Agricultural machinery and equipment are personal property which must be taxed uniformly both as to valuation and rate of tax. There can be no difference in the method of determining valuation or the rate of tax to be imposed unless the separate classification rests on some reason of public policy, some substantial difference of situation or circumstance that would naturally suggest the justice or expediency of diverse legislation with respect to

the objects to be classified. Safeway Stores, Inc. v. Nebraska Liquor Control Commission, 179 Neb. 817, 140 N. W. 2d 668; United States Cold Storage Corp. v. Stolinski, *supra.*

In the questioned statute, the Legislature has sought to make a separate class for taxation purposes for agricultural income-producing machinery and equipment used by any business which is required by law to report taxable income pursuant to the Internal Revenue Code of 1954. This method would provide a different value of personal property specified in the act from that applied to all other tangible property in the same class. § 77-112, R. S. Supp., 1967. In this connection, we point out that the Internal Revenue Code does not purport to determine the value of agricultural income-producing machinery and equipment. Its purpose is to fix an equitable rate of depreciation of personal property used in a trade or business over the estimated useful life of the property rather than have it fall in a single year. Its purpose is not to fix the actual value of the property at any given time, but to amortize depreciation during its life in determining net annual income. The revenue act therefore does not purport to determine actual value of farm machinery and equipment at any given time and is wholly unrelated to actual value for taxation purposes required by the law of this state. Necessarily it cannot support a classification for tax purposes based thereon. See, Homan v. Board of Equalization, 141 Neb. 400, 3 N. W. 2d 650; First Nat. Bank & Trust Co. v. County of Lancaster, *supra;* Grainger Brothers Co. v. Board of Equalization, 180 Neb. 571, 144 N. W. 2d 161.

We necessarily find that the purported classification of property for tax purposes contained in the act does not rest on reasons of public policy, or any substantial difference of situation or circumstance that naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. It is therefore an at-

tempt to create a classification within a classification without any reasonable grounds for so doing other than to secure advantages for those falling within the purview of the act. It is violative of the uniformity provisions of Article VIII, section 1, of the Constitution. It is in effect special legislation in violation of Article III, section 18, of the Constitution. Continental Ins. Co. v. Smrha, 131 Neb. 791, 270 N. W. 122. For the foregoing reasons, L.B. 1250, Laws 1969, c. 634, p. 2540, is unconstitutional and of no force and effect. The motion of relator for judgment on the pleadings is therefore sustained.

JUDGMENT FOR RELATOR.

STATE OF NEBRASKA, APPELLEE, V. DANIEL JOHNS, APPELLANT.

177 N. W. 2d 580

Filed June 5, 1970. No. 37280.

1. **Criminal Law: Confessions.** Where the police or prosecutors know that a defendant, formally charged with a felony, is represented by counsel who has requested that no statements be taken from the defendant; and where the defendant, after being advised of his Miranda rights, has unequivocally asked for his attorney; statements deliberately elicited from the defendant by custodial interrogation designed to produce incriminating statements, and undertaken before the defendant has been given an opportunity to consult with his lawyer, are inadmissible, in the absence of an effective waiver.
2. **Criminal Law: Constitutional Law: Confessions.** The use of any confession obtained in violation of the due process clause requires reversal of the conviction even though unchallenged evidence adequate to convict remains.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Reversed and remanded for further proceedings.

Marer & Lazer, Michael L. Lazer, and Bennett G. Hornstein, 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.

MCCOWN, J.

The defendant, Daniel Johns, was found guilty of grand larceny by a jury and was sentenced to 3 years in the Nebraska Penal and Correctional Complex. The defendant has appealed, and the crucial issues involve constitutional rights to counsel and against self-incrimination.

On April 1, 1968, merchandise was stolen from a loading dock area in Fremont, Dodge County, Nebraska. On the same day, a complaint and information was filed against the defendant charging him with the felonious theft of three Singer sewing machines. On April 3, 1968, the defendant was arrested in Omaha, Nebraska, by two officers of the Omaha police department on an arrest warrant received from Dodge County, Nebraska. The time of the arrest was about 10:30 a.m. After the officers read the warrant to him, the defendant asked if he could call his lawyer. They advised him that he could and he instructed the woman present to try to get hold of his lawyer. The arresting officers took the defendant to the Omaha police department. At about 1:30 p.m., Sgt. Petersen of the Fremont police department and Trooper Hansen of the Nebraska State Patrol contacted the defendant at the Omaha police department. Both officers were investigators with their respective law enforcement agencies. The defendant was taken to a room in the Omaha police station by the two officers. At 1:45 p.m., Sgt. Petersen read a full rights advisory form to the defendant. The defendant acknowledged that he understood the rights being explained and answered "yes" to the question as to whether he wished to waive his rights and give a statement. In response to the first question asked by Sgt. Petersen after the reading

of the rights advisory form, the dfendant responded: "I would like to have my attorney present." Officers Petersen and Hansen then stopped the interrogation, had the defendant cross out the affirmative answer to the question as to waiver of constitutional rights, and write on the advisory form: "I would like to have my attorney present."

The officers then handcuffed the defendant, placed him in a patrol car, and took him to Fremont, Nebraska. They arrived in Fremont at approximately 2:45 p.m. The defendant was taken to the detective bureau in the Fremont police department. The two officers and the defendant were seated around Sgt. Petersen's desk. The defendant was asked to remove his shoes which were taken out of the room for comparison. Thereafter for 30 minutes to an hour, in the presence of the defendant, the officers examined and discussed between themselves the contents of defendant's wallet and personal belongings but ignored the defendant.

At approximately 3:55 p.m., Sgt. Petersen again read to the defendant the complete rights advisory form. At this time, the defendant responded affirmatively to all questions including the question: "At this time do you wish to waive your right to remain silent and your right to have an attorney here and visit with me and give me a statement about this arrest?"

After he had requested the presence of his attorney in Omaha, the defendant did not say anything to indicate affirmatively that he wished to talk further or wanted to make a statement; nor did he do anything to indicate that he had changed his mind about having an attorney present before the rights advisory form was again read to him at 3:55 p.m. Officer Petersen testified that he thought the defendant might want to change his mind, and in answer to the question: "You were going to keep trying anyway until he did, is that right?" said: "Yes, I kept trying."

The defendant's response to the questions asked at

the interrogation commencing at 3:55 p.m. at first were exculpatory. The officers refused to pay any attention to these statements, told him they were not going to listen to that kind of stuff, and did not write them down. At approximately 4:50 p.m., the defendant began to give his confession, which was completed at approximately 5:40 p.m.

Meanwhile, the defendant's attorney had telephoned to Fremont and advised the county attorney of Dodge County that he was representing the defendant and that he did not wish to have the defendant questioned. The county attorney thought that he received the call sometime between 3 and 4 p.m. The county attorney at that time agreed to call the police department and advise them that defendant's counsel did not wish to have the defendant questioned. The county attorney did not call the police until just after the defendant's statement had been completed at 5:40 p.m. At that time he gave them the message.

At a hearing outside the presence of the jury, the trial court first determined that the Miranda warnings were given; that the defendant voluntarily waived his constitutional rights; and that the confession was voluntarily made. The court overruled defendant's objections and admitted the confession into evidence.

The constitutional problems here involve Fifth and Sixth Amendment issues. They also involve both pre-Miranda and post-Miranda rules. Spano v. New York, 360 U. S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265, was decided in 1959, some 7 years prior to Miranda. In the Spano case, it became settled that a defendant formally charged with a felony is entitled to counsel at every step of the proceedings and that a confession obtained at a secret interrogation is involuntary and inadmissible. The Spano rule was followed by this court in State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66. We said: "A secret interrogation of a defendant charged with a felony, when the accused has asked for and been denied

the presence of his counsel, is a violation of his constitutional rights. A confession obtained in violation of the defendant's constitutional rights is involuntary and inadmissible in evidence."

In May of 1964, another federal landmark case was decided. Massiah v. United States, 377 U. S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246. That case held that incriminating statements deliberately elicited from a defendant after indictment and in the absence of his attorney, deprived the defendant of his right to counsel, and such statements could not constitutionally be used against him at trial. In June 1964, the now famous case of Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, followed. Escobedo extended constitutional rights to counsel to a situation prior to indictment, where the investigation has begun to focus on a particular suspect and he has been taken into custody. The Supreme Court said there: "We hold only that when the process shifts from investigatory to accusatory —when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, was decided in 1966. It continued and expanded these principles in the area of custodial interrogation and the right to counsel. The language of Miranda itself is revealing. "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. * * * If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual

cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent."

The state cases following Spano, all dealing with pre-Miranda trial situations, clearly demonstrate the development and interpretation of the constitutional right to counsel in New York. See, People v. Donovan, 13 N. Y. 2d 148, 193 N. E. 2d 628 (1963); People v. Failla, 14 N. Y. 2d 178, 199 N. E. 2d 366 (1964); People v. Gunner, 15 N. Y. 2d 226, 205 N. E. 2d 852 (1965).

In People v. Arthur, 22 N. Y. 2d 325, 239 N. E. 2d 537 (1968), the New York rule as to pre-Miranda cases was set out. "Once the police know or have been apprised of the fact that the defendant is respresented by counsel, or that an attorney has communicated with the police for the purpose of representing defendant, the accused's right to counsel attaches, and this right is not dependent upon the existence of a formal retainer." The court also said: "There is no requirement that the attorney or the defendant request the police to respect this right of the defendant."

The same principles have been applied to post-Miranda waiver situations. In Commonwealth v. McKenna, 244 N. E. 2d 560 (Mass., 1969), the Massachusetts court held inadmissible any part of the statements obtained by interrogation after the defendant's attorney had called the police station to advise them that the attorney wished to be present at the interrogation of the defendant. In that case, the defendant had asked his aunt to call his lawyer at the time of arrest. He had signed a waiver of rights the evening before which recited: "I do not want a lawyer at this time." He had not accepted the use of the telephone, and had not at any time asked the police for a lawyer, although Miranda warnings were given to him on three occasions, including the one just before interrogation. The court said: "Rights to remain silent and to assistance of counsel may be waived but cannot be forfeited." See, also, People v. Ireland, 75 Cal.

Rptr. 188, 450 P. 2d 580 (1969); United States v. Priest, 409 F. 2d 491 (5th Cir., 1969); State v. Word, 80 N. M. 377, 456 P. 2d 210 (1969); State v. Kelly, 439 S. W. 2d 487 (Mo., 1969).

In the McKenna case, the telephone call was made to the police station, while in the case before us, the telephone call was made to the county attorney. Where a defendant's right to counsel is effectively invoked when his counsel telephones a police officer on the desk, it should, obviously, be invoked as to a defendant formally charged with a felony when his counsel calls the county attorney who is in charge of the entire prosecution. Under the circumstances here, either one has a duty to convey the message immediately to the appropriate police officers.

The defendant not only asked to telephone his lawyer at the time of arrest, he again requested the presence of counsel orally and in writing at the first interrogation in Omaha at 1:45 p.m. Although the defendant did not at any time thereafter say or do anything to indicate affirmatively that he had changed his mind about having his attorney present, and although his attorney had telephoned to assert defendant's rights, nevertheless, the same police officers at 3:55 p.m. repeated the Miranda warnings and recommended the interrogation which ultimately resulted in the confession.

We hold that where the police or prosecutors know that a defendant, formally charged with a felony, is represented by counsel who has requested that no statements be taken from the defendant; and where the defendant, after being advised of his Miranda rights, has unequivocally asked for his attorney; statements deliberately elicited from the defendant by custodial interrogation designed to produce incriminating statements, and undertaken before the defendant has been given an opportunity to consult with his lawyer, are inadmissible, in the absence of an effective waiver.

Where both the defendant and his counsel have previ-

ously attempted to invoke the defendant's constitutional right to counsel; then at the very least, a "heavy burden" rests on the state to demonstrate that the defendant knowingly and intelligently waived his right to counsel. On the facts in this case, that burden was not met.

The Miranda warnings are not intended to be merely rituals to be incanted to a defendant repeatedly until the proper answers are given. Neither does the fact that the proper answers to a rights advisory are ultimately received, automatically constitute a waiver and forfeit all constitutional rights previously invoked. Repetitions of advisory warnings are not a satisfactory substitute for granting an unequivocal request for counsel.

The action of the trial court in overruling the objections to the confession and statements of the defendant was in error and the confession or statements were inadmissible.

The use of any confession obtained in violation of the due process clause requires reversal of the conviction even though unchallenged evidence adequate to convict remains. State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66 (1965); Gallegos v. Nebraska, 342 U. S. 55, 72 S. Ct. 141, 96 L. Ed. 86 (1951).

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

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

NEWTON, J., dissenting.

The facts of this case are set out in the majority opinion. Only two questions are presented, namely: (1) Once a defendant has indicated he wants a lawyer and one is retained, can he waive his lawyer's presence and give a valid statement? (2) Under such circumstances, can law enforcement officers lawfully ask a defendant if he is willing to make such a waiver?

The answer to these propositions must be determined on the basis of rules laid down by the United States

Supreme Court in certain key decisions. The interpretation of these decisions in the federal courts must be accorded primary consideration. The state courts are in conflict on the propositions here presented with a majority answering the two questions mentioned above in the affirmative. This is a case of first impression in Nebraska. Decisions of other states are merely advisory and are not binding in Nebraska, but the federal decisions are of primary importance in arriving at a correct interpretation of the Supreme Court decisions.

Prior to the decision in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, decided in 1966, there were many decisions handed down by the United States Supreme Court regarding various privileges incorporated in the Bill of Rights. Among these earlier decisions are Massiah v. United States, 377 U. S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246, and Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977. It appears to have been the intent of the court in Miranda to clarify some of these earlier decisions as it is therein stated: "We granted certiorari in these cases, * * * in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow." It must be recognized that this is not a case involving a denial of counsel. Defendant was permitted to contact his lawyer and his lawyer was not denied access to defendant. In fact, counsel made no effort to contact his client.

Although Miranda appears to be controlling in the present situation, it seems advisable to consider the Massiah and Escobedo decisions. In Massiah, the defendant was tricked into making a confession by having an accomplice, acting as an agent for law enforcement personnel, elicit statements from defendant which were listened to over a concealed microphone. Although sometimes interpreted as completely barring a confes-

sion made after indictment and retention or request for counsel, the court stated: "We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial." Escobedo lays down the rule that once a defendant requests a lawyer's presence, questioning must cease until the lawyer is present. The case was aggravated by a deliberate refusal by the police to permit counsel to see his client. The court stated: "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." Neither Massiah nor Escobedo go so far as to deny the right of a defendant to waive his constitutional right to counsel.

The constitutional rights discussed in Miranda and other decisions are personal in nature. They are intended to protect individual defendants from coercion and trickery. They can be waived or asserted only by the defendant or his authorized representative. Counsel cannot ordinarily assert or waive them against the will of his client, but the client may do either with or without the consent of counsel. In this regard, so long as he acts knowingly, intelligently, and voluntarily, he is the master of his own fate and may determine the course to be pursued. It is conceded that the right to remain silent may be waived. Is the right to consult counsel any more sacred or important? If a defendant determines it is best to proceed and to give information in the absence of his lawyer, should he not be free to do so? Miranda answers these questions clearly. The court stated:

"Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. * * * the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning *if the defendant so desires.* * * * An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. * * * In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today. * * * He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity

afforded him, *the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement.*" (Emphasis supplied.)

Miranda repeatedly makes it clear that the right to consult counsel may be waived. This is the interpretation placed upon United States Supreme Court decisions governing situations such as the one now before us by the federal courts. In Coughlan v. United States, 391 F. 2d 371 (9th Cir., 1968), the court said: "At the time the confession was obtained, the appellant was represented by court-appointed counsel. This fact was well known to the officers who interrogated the accused. No notice was given by the officers to defendant's counsel of the intended interviews and he was not present when the statement was taken. * * * Under this state of the facts, appellant contends that his constitutionally guaranteed right to counsel was effectively denied. We are asked to rule that any statement, admission or confession secured by peace officers from a defendant represented by an attorney, where the attorney was not timely advised of the proposed interview or interrogation, be rejected as violative of the right to counsel. Appellant recognizes that this Sixth Amendment right may be voluntarily waived, but, at oral argument, it was contended that such a waiver would never be knowing and truly voluntary unless counsel was present to advise the client. * * * It may well be that the day is approaching when the right to counsel may be expanded to the point where an accused may only be interrogated by the police in the presence of his lawyer. However, no persuasive precedent for the holding here sought has come to our attention. Appellant relies heavily on the teaching of Miranda v. State of Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Miranda specifically recognizes prior cases holding that the right to counsel may be waived. Here a clear and knowing waiver was shown. We are unwilling to attempt to ex-

pand the Miranda ruling to the extent sought by appellant."

In United States v. Fellabaum, 408 F. 2d 220 (7th Cir., 1969), it is said: "The issue comes down to this: May a defendant, who has an identified counsel, be questioned when, after adequate constitutional warnings, he has fully, repeatedly, and affirmatively declined the presence of counsel? We conclude, under the circumstances appearing in this case, that such questioning is fully consistent with all constitutional safeguards." To the same effect are the following cases: Arrington v. Maxwell, 409 F. 2d 849 (6th Cir., 1969); Reinke v. United States, 405 F. 2d 228 (9th Cir., 1968); Wilson v. United States, 398 F. 2d 331 (5th Cir., 1968); State v. Lopez, 80 N. M. 130, 452 P. 2d 199 (1969); Commonwealth ex rel. Craig v. Maroney, 352 F. 2d 30 (3d Cir., 1965); Conway v. State, 7 Md. App. 400, 256 A. 2d 178 (1969); People v. Smith, 42 Ill. 2d 479, 248 N. E. 2d 68 (1969); State v. Blanchey, 454 P. 2d 841 (Wash., 1969); Mathies v. United States, 374 F. 2d 312 (D. C. Cir., 1967); Beatty v. United States, 377 F. 2d 181 (5th Cir., 1967). See, also, Shultz v. United States, 351 F. 2d 287 (10th Cir., 1965). In three of these cases, Arrington, Reinke, and Beatty, the defendant solicited the opportunity to speak. In the others he did not.

Can it be truthfully maintained that coercion exists or is present when a law enforcement officer repeats the Miranda warnings and simply inquires of the defendant if he is then willing to waive his constitutional rights? In what manner is the defendant wronged by a simple inquiry as to whether or not he will waive these rights? He is under no compulsion, has a full understanding of the situation, and the decision is his to make. Under the circumstances, it appears that the majority opinion goes far beyond any federal rules now in force and represents a material and unwarranted expansion of the law governing the admissibility of confessions. The opinion holds, in effect, that once a defendant has de-

manded or obtained a lawyer, he cannot thereafter be questioned under any circumstances in the absence of his lawyer and cannot waive the right to have his lawyer present, at least unless such waiver is made in the presence of his lawyer. It is contrary to our holding in State v. Godfrey, 182 Neb. 451, 155 N. W. 2d 438 (1968), wherein in speaking for the court, McCown, J., said: "The fact that a defendant, as a part of the initial procedures at a police station, after full Miranda warnings, is asked whether he desires to make a statement at that time, and answers negatively, does not automatically invoke his right to counsel and render inadmissible any subsequent statement obtained in the absence of counsel. Such a factual circumstance, coupled with other facts present, does not prohibit or invalidate a later waiver voluntarily, knowingly, and intelligently made." It is also contrary to our ruling in State v. Woods, 182 Neb. 668, 156 N. W. 2d 786 (1968), wherein this court held that although the accused had previously requested an attorney, he could thereafter change his mind, waive the right to an attorney, and make a valid statement.

I believe our decision in this case is illogical and incorrect and consequently, I must respectfully dissent.

WHITE, C. J., and CARTER, J., join in this dissent.

CARTER, J., dissenting,

I wholly disagree with the reasoning of the majority opinion for the reasons so aptly set forth in the dissent of Judge Newton. In my judgment, the time has come to clearly set out my concept of the law applicable to the case and the deep-rooted principles which, as I view it, are wholly abandoned by the holdings of this opinion.

In 1865, the Fourteenth Amendment to the Constitution of the United States was enacted. While the validity of its enactment has been and is still questioned in many quarters, its meaning also has become a most serious subject of controversy. The intention of the amendment at the time of its submission was to give to the

recently freed slaves the same rights as other citizens, including equal privileges and immunities guaranteed by the Constitution of the United States. Its purpose was to give slaves the same rights as other free men; not to transfer power from the states to the federal government.

The language of the amendment in accomplishing this intent and purpose contained a provision stating that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *." The purpose of this provision was primarily to prevent the former slave states from defeating the intent of the Fourteenth Amendment by state legislation. Prior to the enactment of the foregoing provision, "due process of law" was determinable under similar provisions of state constitutions and the laws of the state, and was a subject outside the powers granted to the federal government. By a series of decisions by the Supreme Court of the United States, commencing with the Slaughter-House Cases in 1873, the United States Supreme Court swept aside the contention that the reference to due process as used in the Fourteenth Amendment was solely a protection to the newly made free men, that they were entitled to the same existing due process as other citizens, and was held to be a transfer to the federal government of the power of the states to fix and determine what amounted to due process of law in the state courts. The fear that such a result might occur is evidenced by a letter of Senator Orville H. Browning of Illinois, published in The Cincinnati Commercial on October 26, 1866, in which he said: "If the proposed amendments be adopted, they may and certainly will be used substantially to annihilate the State judiciaries. * * * Be assured, if this new provision be engrafted in the Constitution, it will, in time, change the entire texture and structure of our government, and

sweep away all the guarantees of safety devised and provided by our patriotic sires of the revolution." A casual reference to recent cases demonstrates the correctness of Senator Browning's prophecy. The intention and purpose of the amendment is completely ignored in favor of one by which the Supreme Court of the United States seizes power that was intended to remain with the states.

While I am wholly in disagreement with the method employed by the Supreme Court of the United States in determining due process in the state courts by judicial fiat at the expense of the states, this court is required under the supremacy clause to recognize and be bound by the holdings of that court when rooted into the Constitution. But in the absence of specific holdings applicable to factual situations before us, I do not subscribe to the expansion of the ritualist rules of that court which can only serve to strap down and mitigate the efforts of law enforcement officers in the performance of their duties in enforcing the law.

The ritualistic limitations imposed on law enforcement officers by the Supreme Court of the United States are justified by that court on the ground that they are necessary to restrict over zealous officers from exceeding their authority. That some officers occasionally have done so, I do not deny. But instead of providing sanctions, civil or criminal, against officers who abuse their lawful authority, the court burdens all law enforcement officers, the innocent and guilty alike, with ritualistic limitations that hamper all law enforcement officers in the performance of their duty. It is a case of burning the house down to eliminate the invading cockroach. The result is that law enforcement is breaking down, criminals are permitted to continue their nefarious ways, and the certainty of punishment for criminal wrongdoing becomes less and less a deterrent to crime.

In most criminal cases coming before us, including those related to punishment for crime, the guilt or innocence of the defendant is not an issue. Such is the case here.

The issues which confront us are largely whether the constitutional rights of the defendant have been abridged; rights which are such because the Supreme Court of the United States proclaims them to be such, and which then roots them into the due process clause of the Constitution to avoid decisions adverse to their encroachment.

The limitations imposed on law enforcement officers for the purpose of coercing police activities, whether or not they are prejudicial to the rights of the defendant, utterly fail to consider the constitutional rights of the victim of the crime and the right of the public to be safe in their person and property. The public interest is completely ignored in favor of those who willfully violate the law. The result is an ever growing crime rate and a judicially supported inability of law enforcement officers to maintain law and order. Such a failure has precipitated the destruction of every major republican form of government in the past and there is no reason to believe that it will not have the same effect now and in the future.

We as judges are obligated to support the Constitution of the United States and the Constitution of the State of Nebraska, and not to subvert either. This I propose to do within the limits of my ability. This means that we are obligated to follow the Constitution of the United States as interpreted by the Supreme Court of the United States. This I will do whether or not I agree with its holdings. But I do not feel that I am under any obligation to forecast or prophecy what that court may or may not hold in the future, particularly where I am in disagreement with the interpretations it has placed on the plain intent of the Fourteenth Amendment from which it asserts the source of its power.

In the instant case, the majority opinion expands the constitutional meaning of due process far beyond any decision rendered by the Supreme Court of the United States. It is for that court and not this one to expand, limit, or recede from the decisions it has rendered.

With these views on which I hold deep convictions, I cannot join in the majority opinion. I cannot, in good conscience, subscribe to its rationale and thereby participate in the furtherance of a judicial policy that not only offends my sense of justice, but also tends to destroy the maintenance of law and order so essential to the preservation of government by a free people. The drafters of the Constitution placed their full confidence in the Supreme Court of the United States to maintain it in accordance with its meaning when it was adopted and provided no means by which the states could defend themselves against misconstruction and encroachment. Under such circumstances, it is the duty of state courts to defend their jurisdictions within the limits of the oaths of office they have assumed. To do otherwise is to meekly submit to encroachment and concur in the reduction of the power of the state to a condition of vassalage.

In the enforcement of the criminal law, state courts are not devoid of intelligence, integrity, and a proper regard for justice as the Supreme Court of the United States seems to imply. Instead of spending our time in the writing of quibbling opinions concerning the scope of some ritualistic formula imposed upon us, the court should engage itself in determining the guilt or innocence of the defendant. The criminal law has become a labyrinth of ritualistic rules which operate for the benefit of the criminal in escaping just punishment for his crimes. The present case is a glaring example of the misapplication of rules already senseless in their origin and purpose. It is time that we take the handcuffs off law enforcement officers and put them back on the criminal where they belong. The verdict of the jury and the sentence of the learned trial court in this case should be affirmed.

WHITE, C. J., and NEWTON, J., join in this dissent.

SPENCER, J., concurring.

I join in the reversal of the judgment herein and the remand of the cause to district court for further pro-

ceedings because when defendant's counsel called the county attorney from Omaha and advised him that he did not wish to have the defendant questioned until he could visit with him, this request should have been immediately communicated to the police department and respected. The prosecution was under the direction of the county attorney and he was a proper party to contact in this situation. A delay in the transmission of the request for 1 to 2 hours, during which period the police worked on the prisoner to obtain a confession, cannot be condoned. To do so is to adopt a procedure which will effectively deprive a defendant of his constitutional right to counsel.

LARRY E. RASKEY, APPELLANT, V. BASYL HULEWICZ, APPELLEE.

177 N. W. 2d 744

Filed June 5, 1970. No. 37391.

1. **Intoxicating Liquors: Automobiles: Negligence.** A guest may be guilty of contributory negligence, or assumption of risk, by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill.
2. **Intoxicating Liquors: Evidence: Trial.** Where there is no evidence presented as to the effect of intoxicants upon the part of the parties involved, it is not proper to submit that issue directly to the jury.
3. **Intoxicating Liquors: Damages: Trial.** Whether or not the knowledge of a guest, that the host driver of an automobile has been drinking, will operate to prevent a recovery of damages in a particular case depends upon all the facts and circumstances of the case, and is usually a question for the jury.
4. **Intoxicating Liquors: Evidence.** The percentage of the alcohol content of the body fluids of a defendant in a civil case is relevant, in the absence of a presumption, only when accompanied by expert opinion evidence of the effect thereof.

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

Cobb, Swartz & Wieland, for appellant.

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

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

WHITE, C. J.

This is an action for personal injuries arising out of an automobile accident occurring on March 4, 1962. Plaintiff, Larry E. Raskey, was riding as a guest passenger in an automobile driven by the defendant, Basyl Hulewicz. The district court submitted the case to the jury on the issue of the gross negligence of the defendant and it returned a verdict in his favor. Questions of error in instructions and of the admissibility of evidence are raised by the assignments of error. We affirm the judgment of the district court.

The record supports a jury finding of the facts as follows: On Sunday, March 4, 1962, the defendant Hulewicz picked up the plaintiff and a cousin of the plaintiff at the plaintiff's home. It had become quite customary for the plaintiff and the defendant on Sunday afternoons to go riding and drink beer. The plaintiff himself stated that this had occurred on numerous occasions, perhaps up to ten times. On this Sunday afternoon, they picked up a friend, Larry Grady, who was of age, at a bowling alley in Lincoln. He procured a case of beer for them in Emerald and they started driving around. They ran out of beer, and proceeded driving back on U. S. Highway No. 6 to get some more beer, when the weather was becoming snowy and icy, and as a result a head-on accident occurred. The plaintiff himself testified that he was of the opinion that the defendant was a good driver at times, but a reckless driver at other times, and he had ridden with the defendant in drag races on city streets.

There is conflicting testimony as to who furnished the

money for the beer, but the evidence supports the finding that all of the boys contributed. On the way back to get more beer, they were driving on highway 6 east of Emerald. The road became icy and slippery. The defendant lost control of his car, crossed the centerline of the highway and hit a truck on the opposite shoulder of the highway, resulting in serious injury to the plaintiff. The driver of the truck had seen the car veering across the centerline and had driven onto the shoulder of the road at the time it was hit. The evidence as to the occurrence of the accident is undisputed. The recollection of both the plaintiff and the defendant is hazy and vague and there is no dispute as to the truck driver's testimony. It appears that the defendant's car was fishtailing for some time before the accident and the evidence supports the finding that there were no warnings or cautionary statements or protestation on the part of the plaintiff or any other passenger in the automobile during the period immediately preceding the accident. The defendant's explanation of his action in crossing the centerline was that he unexpectedly struck a patch of ice on the road, which together with a strong wind blowing, caused him to lose control of his car and it slid across the road into the oncoming truck.

The plaintiff's first contention is that the court erred in submitting the issues of contributory negligence and assumption of risk to the jury in instruction No. 2. In this case there was ample evidence that the parties had pursued this same course of action on previous occasions of driving and drinking beer and that the actions on this particular day were by mutual agreement and contemplated by both the plaintiff and the defendant. The record also reveals that the plaintiff had knowledge of the fact that there was risk involved in the drinking of beer while driving, even though he did not anticipate this particular accident. This case is closely parallel, if not directly in point, with our recent pronouncement in Schaffer v. Bolz, 181 Neb. 509, 149 N. W. 2d 334. There,

as here, there was evidence as to the extent of consumption of alcoholic beverages by both parties but no direct evidence as to the effect this would have on the defendant's driving ability. It was there stated: "A guest may be guilty of contributory negligence, or assumption of risk, by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill. * * * The defendants did not allege that Farrell was intoxicated; no witness testified that he was intoxicated; and the plaintiff testified that Farrell was not intoxicated. Whether Farrell was intoxicated and the extent to which his condition was apparent were inferences to be drawn from all of the evidence in the case. We think the trial court was correct in holding that these were questions for the jury."

The evidence introduced was clearly sufficient to warrant the submission of the issues of assumption of risk and contributory negligence to the jury. Under the brief statement of facts previously given the jury could reasonably infer that the defendant was intoxicated as the result of the concerted and continued drinking of the parties. From all of the circumstances it could have inferred that the plaintiff knew, or in the exercise of ordinary care and diligence should have known, that the defendant was so intoxicated that he was unable to operate his motor vehicle with proper prudence and skill. In Kaufman v. Tripple, 180 Neb. 593, 144 N. W. 2d 201, a quite similar case, our court said as follows: "Whether or not the knowledge of a guest, that the host driver of an automobile has been drinking, will operate to prevent a recovery of damages in a particular case depends upon all the facts and circumstances of the case, and is usually a question for the jury. Landrum v. Roddy, supra." We have examined jury instruction No 2 and it carefully and adequately submitted the defenses of contributory negligence and assumption of risk to the jury.

Plaintiff next contends that the district court erred in submitting the defense of contributory negligence without a sufficient explanation of the duty owed by a guest to his driver. The plaintiff's position in the district court and his assignment of error in this court is to the *fact* of the submission of the issue of contributory negligence, rather than as to the method of submission to the jury. Although assigned as error in this court now, it is not properly before this court for consideration because it was not specifically assigned as error in plaintiff's motion for a new trial. Jones v. Peterson, 184 Neb. 141, 165 N. W. 2d 713. As we point out in this opinion there was no error in the instructions on the issues, instructions Nos. 2 and 8, as the trial court gave them. The plaintiff, although requesting instructions in other areas, made no request to the trial court for such instruction as to the duty of the plaintiff prior to the submission of the case to the jury. It appears now as an afterthought without any opportunity for the trial judge to pass upon it. Throughout the trial plaintiff consistently contended that it is error to submit the issue of contributory negligence to the jury.

The district court in instructions Nos. 2 and 8 closely followed our previous holdings in this respect. See, Kaufman v. Tripple, *supra;* Schaffer v. Bolz, *supra.* The trial court confined the consideration of the jury to intoxication as a circumstance to be considered with all of the other evidence in relation to the allegation of gross negligence. It is true that plaintiff gave no warning to the defendant immediately prior to the accident but, according to the plaintiff's own evidence, there was no reason therefor because the automobile suddenly hit an icy patch, which together with the wind, caused him to slide across the road. In light of this situation, consequently, there was nothing before the court on which to warrant the customary instruction as to the conduct of a guest while riding in an automobile as outlined in the cited cases of Pankonin v. Borowski, 167 Neb. 382, 93

N. W. 2d 41, and Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682. The court carefully confined submission of this issue to the parties' conduct in their consumption of alcoholic beverage and its effect upon the driving of the automobile as related to the issues of assumption of risk and contributory negligence. There is no merit in the plaintiff's contention that the district court failed to properly submit these issues under the evidence in this case.

Plaintiff alleges error in instruction No. 8 which reads as follows: "Any evidence you find of the drinking of intoxicants by either the plaintiff or the defendant shall not, by itself, be considered as negligence or gross negligence, but is a circumstance which may be considered by you together with all other facts and circumstances in the case in determining the existence or nonexistence of negligence or gross negligence." The plaintiff argues that since the trial court did not directly submit the issue of defendant's intoxication or being under the influence of intoxicating liquor, this instruction has no place in the case. We first note that the plaintiff originally alleged intoxication in his petition as a specific item of negligence of the defendant. However, the record shows that he later amended his allegation and in the specific allegations of negligence, which the court did actually submit to the jury, there is no mention of the defendant's intoxication or being under the influence of intoxicating liquor. The instruction was correct. We have held that where there is no evidence presented as to the effect of intoxicants upon the part of the parties involved, it is not proper to submit that issue directly to the jury. Rather, as pointed out by Kaufman v. Tripple, *supra,* Langford v. Ritz Taxicab Co., 172 Neb. 153, 109 N. W. 2d 120, and Schaffer v. Bolz, *supra,* the proper instruction in such a case is to point out to the jury that evidence of the odor of liquor on one's breath or the consumption of alcoholic beverages is not, standing alone, evidence of negligence but may be considered

together with all other facts and circumstances of the case. In Gilliland v. Wood, 158 Neb. 286, 63 N. W. 2d 147, this court held: "There is evidence by three witnesses that there was a strong odor of intoxicating liquor on defendant's breath immediately following the accident. The instruction as given stated: 'With reference to the allegation of plaintiff's petition that the defendant, Fred Wood, was under the influence of intoxicating liquor at the time of the accident in question, you are instructed that if you find from a preponderance of the evidence *that said allegation is true, that, in and of itself, and standing alone, would not be proof of negligence;* and before you would be justified in finding against the defendant because of intoxication you must further find by a preponderance of the evidence, from all the facts and circumstances shown by the evidence, that his condition of intoxication manifested itself in physical acts or omissions in the operation of his automobile which would constitute negligence, and that said physical acts or omissions in the operation of his automobile, caused by such alleged intoxication, were negligent and were proximate causes of the injury to and death of Marian Elaine Gilliland.' * * * We think the instruction was properly given. It was made clear that the evidence of intoxication standing alone was insufficient upon which to find a verdict for the defendant. *The jury was told that this evidence, when taken in connection with other manifestations of acts or omissions constituting negligence, was proper to be considered in determining whether the defendant was negligent. This, we think, correctly states the rule applicable to a situation of this kind.*" (Emphasis supplied.) We see no merit in plaintiff's contention that the jury was improperly instructed or that there was anything misleading in the instruction given.

Plaintiff alleges further error in the trial court's refusal to admit evidence as to the result of a urine test. The foundational evidence was clearly insufficient and

the trial court was correct in rejecting, on this ground alone, the proffered evidence of the chemical analysis of a urine sample. It appears that the defendant was taken to a hospital immediately after the accident. The recital of the different witnesses of what happened on that date, March 4, 1962, is vague, inconsistent, and inconclusive. None of them were aided by refreshing memoranda. The patrolman did not remember by whom or in what manner the urine sample was taken. He testified that he remembers an "empty" bottle but he could not recall what he had done with it. He did not remember whether he or a nurse had given the bottle to the defendant or whether Ronald Lahners, a deputy county attorney, did so. He "assumes" that he put his signature on the sealing label but he testified several times that his "testimony" is based upon what he usually did, rather than what he specifically recalled doing in this instance. The point is there was no evidence that what he usually did is what he did in this particular case. In fact, the testimony by the chemist refutes that what the patrolman usually did or what he "assumed" he did was what happened. The chemist testified that when he got the bottle it said "collected by Ronald Lahners" on it and that it *did not* have the patrolman's name on it. The testimony of Lahners further supports the trial judge's finding of an almost entire absence of foundational testimony as to this urine specimen. Lahners testified that he does not assist in the collection of urine specimens, and that he did not even recall telling anyone to do so in this case. He stated that he could not recall anything that occurred in the emergency room at the hospital and if that was the room involved he could not relate the procedure that was followed there. On the other hand, the patrolman's recollection is that the urine sample was taken in the emergency room. In any event, the authenticity of the urine sample must be unequivocally established before its admission into evidence, as an elementary safeguard of a defendant's

rights. The testimony as to the identification of the person responsible for and taking the urine sample in this case is equivocal at best. The customary procedure of written identification by signature of a directing and controlling officer who took it is not present. Considerable discretion is vested in the trial judge, who saw and observed the witnesses and evaluated this testimony, in determining the sufficiency of foundation for the admission of exhibits in evidence. We can find no abuse of discretion under the circumstances of this case. It rests on suspicion and conjecture. We find no abuse in the trial court's discretion especially in light of the fact that the authenticating procedure followed by the state Safety Patrol and the authorities generally was neither followed nor established according to the officers' own testimony.

In any event this evidence was inadmissible even if the identification testimony had the required factual foundation. The presumption of intoxication flowing from an alcoholic content of a fixed percentage contained in section 39-727.01, R. R. S. 1943, has no application in a civil case. Hoffman v. State, 160 Neb. 375, 70 N. W. 2d 314; Fossum v. Zurn, 78 S. D. 260, 100 N. W. 2d 805. The percentage of the alcohol content of the body fluids of a defendant in a civil matter is relevant, in the absence of a presumption, only when accompanied by expert opinion evidence of the effect thereof. Vore v. State, 158 Neb. 222, 63 N. W. 2d 141; Nisi v. Checker Cab Co, 171 Neb. 49, 105 N. W. 2d 523, Fossum v. Zurn, *supra;* Mattingly v. Eisenberg, 79 Ariz. 135, 285 P. 2d 174.

Other assigned errors as to admission of evidence to the measure of damages will not be considered as they are unnecessary in light of the jury's finding for the defendant on the issue of liability. Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677.

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

AFFIRMED.

CITY OF MILLARD, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
CITY OF MILLARD, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

177 N. W. 2d 576

Filed June 5, 1970. Nos. 37430, 37431.

1. **Constitutional Law: Municipal Corporations.** Under the provisions of Article XI, section 2, of the Constitution, a home rule charter must be consistent with and subject to the Constitution and laws of this state.
2. **Municipal Corporations.** The powers conferred under a home rule charter are effective only as to matters of purely municipal concern and are ineffective as to matters of concern to others or to the state generally.
3. ———. Municipal corporations are legislative creations and as such, subject to dissolution by legislative action.
4. **Constitutional Law: Legislature: Municipal Corporations: Annexation.** The constitutional provision prohibiting the amendment or repeal of a home rule charter except by electoral vote is intended as a restriction on the powers of the municipality, but not as a restriction on the powers of the Legislature in matters pertaining to annexation.
5. ———: ———: ———: ———. To construe Article XI of the Constitution otherwise would conflict with constitutional provisions prohibiting local or special legislation and laws denying the equal protection of the laws.
6. **Constitutional Law: Municipal Corporations: Annexation.** The annexation of one city by another in the manner provided by law is not a denial of the equal protection of the law or of due process of law although it be effected without the consent of the inhabitants of the annexed city.

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

Stephen T. McGill and Lyle E. Strom of Fitzgerald, Brown, Leahy, McGill & Strom, for appellants.

Herbert M. Fitle, Seymour L. Smith, and Clarence A. H. Meyer, Attorney General, for appellees.

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

NEWTON, J.

In this action the city of Millard, Nebraska, a city of the first class, challenges proceedings for its annexation by the city of Omaha, Nebraska, a city of the metropolitan class. Omaha has a home rule charter and Millard was in the process of adopting such a charter when annexation proceedings were completed. The district court ruled the annexation was valid. We affirm the judgment of the trial court.

Four principal questions are presented. First, does the Constitution of Nebraska prohibit the annexation of a city having, or in the process of adopting, a home rule charter, without a vote of its citizens approving the annexation? Second, does the annexation of Millard, without the consent of its residents, deny to them the equal protection of the law? Third, is such action a denial of due process of law? Fourth, is it unreasonable in the present instance?

Article XI, section 2, of the Constitution of Nebraska, provides: "Any city having a population of more than five thousand (5,000) inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state * * *." Article XI, section 4, provides in part: "No charter or charter amendment adopted under the provisions of this amendment shall be amended or repealed except by electoral vote." Section 14-117, R. R. S. 1943, provides: "The corporate limits of any city of the metropolitan class shall be fixed and determined by the council of such city by ordinance. The city council of any metropolitan

city may at any time extend the corporate limits of such city over any lands, lots, tracts, street or highway, such distance as may be deemed proper in any direction, and may include, annex, merge or consolidate with such metropolitan city, by such extension of its limits, any adjoining city of the first class having less than 10,000 population or any adjoining city of the second class or village; * * *."

It is asserted that the constitutional provision prohibiting repeal of a home rule charter, except by electoral vote, prevents the setting aside of the charter by annexation proceedings. Such an assertion ignores not only the requirement that the charter must be "consistent with and subject to the constitution and laws of this state," but also the basic purpose and nature of a home rule charter. It is evident that on adoption of a home rule charter, the inhabitants of the city may amend or repeal it only by electoral vote. This does not mean that it may not be rendered nugatory by the exercise of state law dealing with other than strictly municipal concerns. In Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643, it is said: " 'I am thoroughly persuaded that it never was within the contemplation of the framers of our system of government, or of our Constitution, that any city, whether organized under the general laws of this state, or under the provisions of the Constitution which allow cities to frame their own charter, to confer upon cities anything more than a *police power, and a strictly municipal power.* And that the power to enact all laws of civil conduct, and to prescribe all civil remedies among citizens, in short, to enact laws as distinguished from municipal regulations, is expressly reserved to the legislature of this state, and cannot be delegated by it.' "

In Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894, the court stated: "The purpose of the home rule charter provision of the Constitution was to render the cities adopting such charter provisions as

nearly independent of state legislation as was possible. Under it a city may provide for the exercise of every power connected with the proper and efficient government of the municipality where the legislature has not entered the field. Where the legislature has enacted a law affecting municipal affairs, but which is also of state concern, the law takes precedence over any municipal action taken under the home rule charter. But where the legislative act deals with a strictly local municipal concern, it can have no application to a city which has adopted a home rule charter. Whether or not an act of the legislature pertains to a matter of local or state-wide concern becomes a question for the courts when a conflict of authority arises." It was there held that a statute exempting first class cities with home rule charters from the payment of firemen's pensions required of other first class cities was unconstitutional and void as local and special legislation and as lacking in uniformity as to class.

In Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N. W. 2d 862, it was held that the alleviation of congested streets and highways in a city of the metropolitan class by subway and off-street parking is a matter of state concern and not a matter of exclusive local concern. The court stated: "The constitutional limitation that a home rule charter must be consistent with and subject to the laws of the state means that on matters of state-wide concern to the people of the state involving a public need or policy, the charter must yield to state law."

The constitutional limitation on the powers of a city acting under a home rule charter has been consistently construed by this court. The charter powers are effective only as to matters of purely municipal concern and are ineffective as to matters of concern to others or to the state generally. No other logical construction can be given to Article XI, of the Constitution of Nebraska, if it is not to conflict with other constitutional provisions

and principles such as those guaranteeing equal rights and due process of law, and prohibiting special or local laws. The determination by the city of Omaha to annex or not to annex outlying property is a purely municipal concern, but this is not true of the annexation process which necessarily affects property outside the municipality and persons who are not inhabitants of the city. The protection of such persons and property is a matter of state concern and in fulfillment of its duties in this respect, the state must fix the rules and regulations pertaining to annexation procedures. " 'Municipal corporations are purely entities of legislative creation. They do not exist independent of some action of the legislative department of government bringing them into being. All the powers which they can possess are derived from the creator. Unlike natural persons they can exercise no power except such as has been expressly delegated to them, or such as may be inferred from some express delegated power essential to give effect to that power.' " Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N. W. 2d 397.

Municipal corporations are legislative creations and as such, subject to dissolution by legislative action. See Burger v. City of Beatrice, 181 Neb. 213, 147 N. W. 2d 784. The adoption of a home rule charter does not alter or diminish this basic power of control vested in the Legislature with the exception that such municipalities are placed in control of strictly municipal affairs. The amendment or repeal of a city charter is a municipal matter and can constitutionally be accomplished only by electoral vote of the inhabitants. The dissolution of the corporation is a matter of state, as distinguished from purely local municipal, interest. The fact that such dissolution is necessarily accompanied by the setting aside of a home rule charter does not change the situation. The life of the city is not guaranteed or insured unless and until it is terminated by constitutional amendment. To hold that the life of a city of the first class

without a home rule charter may be terminated by annexation, but that one having a home rule charter could not be so dissolved would violate Article III, section 18, of the Constitution of Nebraska, forbidding local or special legislation and the Fourteenth Amendment to the Constitution of the United States which provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See, also, Axberg v. City of Lincoln, *supra*.

Questions pertaining to a denial of the equal protection of the law and of due process of law are in some measure dealt with above. As pointed out, the annexation laws deal on an equal basis with first class cities whether or not they have home rule charters and the laws controlling the annexation of one city by another are simply an exercise of the plenary powers vested in the Legislature over municipal corporations. In Campbell v. City of Lincoln, 182 Neb. 459, 155 N. W. 2d 444, this court quoted, with approval, the following statement from Hunter v. City of Pittsburgh, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151: " 'Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempt-

ing them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.' " This language was reaffirmed in Sailors v. Board of Education, 387 U. S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d 650.

We are not convinced that the annexation under consideration is an unreasonable one. The Legislature has clearly defined limits restricting the power of annexation. It does not appear to be seriously contended that any of these statutory limitations have been violated and under such circumstances, the contention of unreasonableness is devoid of merit.

The judgment of the district court is affirmed.

AFFIRMED.

AIRPORT AUTHORITY OF THE CITY OF MILLARD ET AL., APPELLANTS, V. CITY OF OMAHA, NEBRASKA, ET AL., APPELLEES, JOSEPHINE M. COLTON, INTERVENER-APPELLANT.

177 N. W. 2d 603

Filed June 5, 1970. No. 37437.

1. **Municipal Corporations: Annexation.** Generally, a city may annex territory that is also part of territory of a district or public corporation formed for a limited purpose.

2. **Legislature: Statutes.** In enacting a statute, the Legislature must be presumed to have had in mind all previous legislation upon the subject. In the construction of a statute, courts must consider the preexisting law together with any other laws relating to the same subject, which, although enacted at different times, are in pari materia therewith.
3. ———: ———. When the Legislature subsequently enacts legislation making related preexisting laws applicable thereto, it will be presumed that it did so with full knowledge of such preexisting legislation and the judicial decisions of this court construing and applying it.
4. **Municipal Corporations: Annexation.** The annexation of a city which has established an airport authority includes the authority.
5. ———: ———. When a city which has established an airport authority is annexed by a metropolitan city, by operation of law the debts and obligations of the authority become the debts and obligations of the metropolitan city.
6. **Annexation: Parties.** A taxpayer of a metropolitan city has no right to intervene in annexation proceedings when proper procedures are followed.

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

Stephen T. McGill and Lyle E. Strom of Fitzgerald, Brown, Leahy, McGill & Strom, for appellants.

Clayton H. Shrout of Shrout, Lindquist, Caporale, Brodkey & Nestle, for intervener-appellant.

Herbert M. Fitle, Seymour L. Smith, and Clarence A. H. Meyer, Attorney General, for appellees.

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

SPENCER, J.

This is an action brought by the Airport Authority of the city of Millard, hereinafter called Authority, and William A. Nelson, a bondholder of the Authority, to have an ordinance of the city of Omaha annexing the city of Millard to the city of Omaha declared invalid and unconstitutional as impairing the obligations of Authority's contracts. The district court rejected the

contentions of plaintiffs, and they have perfected an appeal to this court.

This case was consolidated for trial with two other cases involving the annexation, but was briefed and argued separately in this court. The question of the right of the city of Omaha to annex the city of Millard, hereinafter called Millard, has been determined by the opinion in City of Millard v. City of Omaha, *ante* p. 617, 177 N. W. 2d 576, filed with this opinion. By virtue of that opinion, the annexation of Millard has been upheld and is no longer an issue herein. We are here concerned only with the effect the annexation of Millard has on Authority, and specifically whether it constitutes an impairment of the obligations and contracts of Authority.

It is appellants' position that Millard and Authority are separate public entities and that the annexation statutes are not broad enough to include Authority. In Lock v. City of Imperial, 182 Neb. 526, 155 N. W. 2d 924, we held: "An airport authority, duly created by a city under the Cities Airport Authorities Act, is a supplementary, separate, and independent public corporation, and the parent municipal corporation is not liable for the torts of the authority." The statute creating Authority, section 3-502, R. S. Supp., 1967, provides in part: "Each such board shall be a body corporate and politic, constituting a public corporation and an agency of the city for which such board is established." As is apparent from the statute creating Authority, while it is a separate public corporation it is also an agency of the city by which it is established. Authority has existence only because it was created by Millard. It is an agency of that city and the title to its real property is held in the name of Millard. The city of Omaha, by virtue of the annexation, succeeds to all rights and property of every kind, as well as all obligations of Millard. § 14-118, R. R. S. 1943.

The power of annexation is not thwarted because a

part of the territory annexed is also a part of the territory of a public corporation formed for a limited purpose. In City of Bellevue v. Eastern Sarpy County Suburban Fire Protection Dist., 180 Neb. 340, 143 N. W. 2d 62, we held: "Generally, a city may annex territory that is also a part of the territory of a district or public corporation formed for a limited purpose." Definitely, Authority is organized for a limited purpose. It was organized for the specific purpose of developing an airport facility. The statute, section 3-502, R. S. Supp., 1967, gives it a limited existence of 20 years or thereafter until its obligations are paid, after which it ceases to exist, and its property passes to the city by which it was established.

Obviously, the intent of the Cities Airport Authorities Act is to permit a city to acquire airport facilities without obligating the city beyond the extent provided by the act, which was a maximum levy of 1 mill annually. It clearly was not the intent to permit a city under 10,000 population to avoid annexation by creating an airport authority. We must resolve the questions herein in the light of the fact that Authority has existence only because it was created by Millard and is an agency of that city. Its existence is dependent upon Millard, and not vice versa.

We should not give an interpretation to a statute which would have the effect of nullifying another statute when obviously that was not the clear legislative intent. As we said in Lang v. Sanitary Dist., 160 Neb. 754, 71 N. W. 2d 608: "In enacting a statute, the Legislature must be presumed to have had in mind all previous legislation upon the subject. In the construction of a statute, courts must consider the preexisting law together with any other laws relating to the same subject, which, although enacted at different times, are in pari materia therewith.

"When the Legislature subsequently enacts legislation making related preexisting laws applicable thereto,

it will be presumed that it did so with full knowledge of such preexisting legislation and the judicial decisions of this court construing and applying it."

Section 14-118, R. R. S. 1943, so far as material herein, provides: "The date of annexation or merger shall be set forth in the ordinance providing for the same, and after said date the metropolitan city shall succeed to all the property and property rights of every kind, contracts, obligations, and choses in action of every kind held by or belonging to the city or village annexed or merged with it, and the metropolitan city shall be liable for and recognize, assume, and carry out all valid contracts, obligations and licenses of any city or village so annexed or merged with the metropolitan city. Any city or village so merged or annexed with the metropolitan city shall be deemed fully compensated by virtue of such annexation or merger and assumption of its obligations and contracts, for all its properties and property rights of every kind acquired as aforesaid by the metropolitan city; * * *."

Appellants argue that section 14-118, R. R. S. 1943, applies specifically to cities or villages, and that Authority, not being mentioned, is not included within the ambit of said section. As suggested before, the annexation of Millard included the annexation of Authority.

We determine that the existence of Authority had no effect on the annexation of Millard, nor do we find any impairment of the obligations and contracts of Authority by such annexation. Without question, by section 3-509, R. R. S. 1943, the Legislature intended that an airport authority would be a separate entity financially independent of the city creating it. This, however, was done to avoid liability on the part of the city, and was premised on the continued existence of the authority until all its debts were paid and its property passed to the city creating it. It is also evident that the sole purpose of section 3-508, R. R. S. 1943, was to protect the sources of income of an authority, to insure the

eventual payment of outstanding bonds. It is a covenant by the state attempting to guarantee the authority bondholders that their rights would be protected.

Just as obviously, the legislative intent was that the debts of Authority were not and could not become the debts of Millard. Those debts were to be paid by the method provided by the Cities Airport Authorities Act. The annexation of Millard eliminated the city which brought Authority into existence. However, the annexation of Millard also included Authority, so section 14-118, R. R. S. 1943, is effective to carry out the legislative intent. By operation of law then, the debts of Millard and Authority became the debts of the city of Omaha. This effectuates the intent of section 3-508, R. R. S. 1943, to protect the rights of the holders of Authority's bonds. By virtue of section 14-118, R. R. S. 1943, property of as well as the obligations of Authority became and now are the property and the obligations of the city of Omaha. This result eliminates any possibility of an impairment of contractual obligations.

What we said in State ex rel. Parks Co. v. Dahlman, 100 Neb. 416, 160 N. W. 117, is pertinent herein: " 'And the metropolitan city shall succeed to all the property and property rights of every kind, contracts, obligations and choses in action of every kind held by or belonging to the city or village consolidated with it, and the metropolitan city shall be liable for and recognize, assume and carry out all valid contracts, obligations, franchises and licenses of any such city or village so consolidated with it.'

"The foregoing language indicates very clearly that the consolidated city receives the property, property rights, and every kind of contract or obligation or chose in action held by the city or village consolidated with the metropolitan city. It also clearly shows that the metropolitan city, in addition to receiving the property of the village or city incorporated with it, assumes to carry out all valid contracts, obligations, franchises and

licenses of the city or village consolidated with it. If the city of South Omaha had incurred an obligation by reason of what it did, then it is incumbent upon the city of Omaha to carry out the contract or obligation, whatever it may have been."

This now presents the question raised by intervener, Josephine M. Colton, who is also an appellant herein. We agree with her that as a taxpayer in the city of Omaha, in common with other taxpayers, she will bear some of the burden of retiring the indebtedness of Authority. That fact, however, is not sufficient to permit intervention herein. Section 14-117, R. R. S. 1943, provides that the city council may at any time extend the corporate limits of a metropolitan city. There is no restriction on this right when properly exercised. When proper procedures are followed, taxpayers have no right to intervene in legal actions involved by annexation proceedings.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, BOARD OF EDUCATIONAL LANDS AND FUNDS, APPELLANT, V. RICHARD W. BARDSLEY, APPELLEE.

177 N. W. 2d 599

Filed June 5, 1970. No. 37472.

1. **Public Lands: Landlord and Tenant.** The rights of a lessee of school land are determined by the law as it was at the time the lease was made and the lessee may not be deprived of any substantial right resulting from the lease in his favor by subsequent legislation. Likewise, the trustee of public school lands may not convey any interest in such lands without adequate compensation.
2. **Statutes: Constitutional Law.** An unconstitutional statute is a nullity, is void from its enactment, and is incapable of creating any rights or obligations.
3. **Property: Landlord and Tenant.** Improvements which become a part of the real estate may not be removed and do not become the property of the lessee in the absence of agreement,

express or implied, or a valid statute granting such right.

4. **Estoppel: Actions.** An estoppel may be urged for the protection of a right, but it can never properly be urged to create a right.

Appeal from the district court for Chase County: JACK H. HENDRIX, Judge. Reversed and remanded with directions.

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

Russell & Colfer, for appellee.

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

CARTER, J.

This is an action for a declaratory judgment to determine the ownership of a quonset metal building located on state school land under the management and control of the Board of Educational Lands and Funds of the State of Nebraska and leased to the defendant. The trial court held that the building was owned by the defendant and the plaintiff board has appealed.

On October 18, 1943, the board executed a written lease to Section 36, Township 5 North, Range 36 West of the 6th P.M., in Chase County, Nebraska, to William O. Bardsley for a term of 25 years commencing on January 1, 1944. Upon the death of William O. Bardsley, his widow, Mary Bardsley, became the owner of the lease. Upon the death of the widow, her son, the defendant, became its owner and occupied the school land covered by the lease to the time of the trial of the case. No question is raised as to the validity of defendant's present ownership of the lease.

On or about October 25, 1954, during the period that Mary Bardsley was the owner of the lease, she constructed the quonset building on the school land covered by the lease at a cost of $3,136.55. No permission was asked for or obtained from the board to place the

quonset building on the leased school land; nor was there any contractual provision protecting the ownership of the building in the lessee.

The defendant here claims to be the owner of the quonset building. The board asserts that the building was placed on the school land without permission or agreement and that by its permanent attachment to the land it is a part of the school land and owned by the board as trustee of school lands. It is fundamental that the rights of a lessee of school lands are to be determined by the law in effect at the time the lease was made. Pfeifer v. Ableidinger, 166 Neb. 464, 89 N. W. 2d 568. A lease between the board and a lessee is property and such a lessee may not be deprived of any substantial right arising from it. Nor may the board as trustee be deprived of its property by subsequent legislation placing burdens upon it which deplete its value.

At the time the school land lease was entered into upon which the quonset building was constructed on the leased school land, section 72-240, R. S. 1943, provided in part: "* * * If the highest bid received shall be made by a person other than the lessee, the value of all the improvements on the land shall be appraised * * *. Improvements to be included in such appraisement shall be all buildings, * * *. The successful bidder, if he be other than the former lessee, shall within thirty days after the filing of the appraisement, pay to the county treasurer the amount of the appraisement." In 1947, section 72-240, R. S. 1943, was amended and the foregoing section carried into section 72-240.06, R. R. S. 1943, in language of the same meaning. In Watkins v. Dodson, 159 Neb. 745, 68 N. W. 2d 508, this court determined that section 72-240.06, R. R. S. 1943, was unconstitutional and void for failure to provide due process. It was stated in the opinion: "An unconstitutional statute is a nullity, is void from its enactment, and is incapable of creating any rights or obligations."

It is plain that on the finding of the unconstitutionality of section 72-240.06, R. R. S. 1943, the antecedents of this statute containing the same provisions were also unconstitutional. As a result there was no statute in existence granting an interest in the improvements to the lessee at the time the school land lease was made. Under these circumstances, the rules of the common law apply. § 49-101, R. R. S. 1943. "The general rule that improvements which become a part of the real estate may not be removed and do not become the property of the lessee is applicable in the absence of agreement, express or implied, or a statute indicating otherwise." Blomquist v. Board of Educational Lands & Funds, 170 Neb. 741, 104 N. W. 2d 264. This is the common law rule.

In Jessen v. Blackard, 160 Neb. 557, 71 N. W. 2d 100, this court said: "Under these authorities it is clear that the court has a duty of its own to perform. It may not properly grant relief based upon a statute which is nonexistent or one which has become nonexistent by reason of judicial declaration of unconstitutionality by this court whether the question has been raised by the parties or not."

In 1953, section 72-240.07, R. R. S. 1943, was enacted which stated in part: "Before any buildings, * * * are placed upon school lands by a lessee, written approval must be obtained from the Board * * *. Any such improvements placed upon school lands after September 14, 1953, where written approval for such improvements was not obtained from the board shall be considered improvements of the land and the lessee shall not be entitled to reimbursement therefor." Assuming that this statute has application to the case before us, it can afford no comfort to the defendant for the reason that no written approval was obtained from the board by the lessee before placing the quonset building on the school land as the statute requires.

As a consequence of these holdings, the lessee obtained

no interest in the quonset building under section 72-240, R. S. 1943, because of its unconstitutionality. Nor could the lessee gain any interest in the quonset building under section 72-240.07, R. R. S. 1943, for failure to comply with the conditions precedent contained in the act purporting to grant such an interest. The trial court was in error in declaring the lessee to be the owner of the quonset building.

While the question of estoppel is not a direct issue in this case, we can find no basis for it under the facts shown by this record. "While the trial court based its holding on estoppel and appellee urges quasi estoppel is here controlling, it should be remembered that while estoppel may be urged for the protection of a right, it can never create a right." Mara v. Norman, 162 Neb. 845, 77 N. W. 2d 569.

For the foregoing reasons, the judgment of the district court is reversed. We remand the cause to the district court with directions to enter a declaratory judgment for the plaintiff in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

The parties stipulated that the defendant was the owner of all the improvements on the land listed in an inventory dated October 9, 1968, except the quonset building that was placed on the land in 1954. As I view the record, the question presented is whether the 1953 statute is applicable in this case so that the defendant's failure to obtain permission from the plaintiff results in the quonset building being considered an improvement to the land with the defendant having no right to reimbursement for the building.

In Todd v. Board of Educational Lands & Funds, 154 Neb. 606, 48 N. W. 2d 706, a statute requiring the written approval of the board to an assignment of the lease was held not applicable to existing leases. This court said: "The Board of Educational Lands and Funds in leasing school land is limited by the authority granted

it by the Legislature. It has no other power. The law on the subject in force at the time of the execution of a lease is a part thereof and determines the rights of the lessee. A lease made in compliance with the direction and permission of the Legislature between the state and the lessee is a contract and is property. The rights resulting from the contract vest on its execution and delivery. The state may not subsequently by legislation deprive the lessee of any substantial right secured to him by the lease. Constitutional guaranties and prohibitions safeguard it. These include the mandate that no state shall deprive any person of property without due process of law; no state shall enact any law impairing the obligations of a contract; and the property of no person shall be taken or damaged for public use without compensation. State v. Platte Valley Public Power & Irrigation Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196; Reavis v. State, 140 Neb. 442, 300 N. W. 344; Stanser v. Cather, 85 Neb. 305, 123 N. W. 316; Hile v. Troupe, supra; State ex rel. Patterson v. Wenzel, 55 Neb. 210, 75 N. W. 579; State ex rel. Beer v. Thayer, 46 Neb. 137, 64 N. W. 700; State ex rel. Brown v. McPeak, 31 Neb. 139, 47 N. W. 691."

In my opinion the right to construct improvements on the leasehold, without the permission of the board, and to receive reimbursement at the expiration of the lease was a substantial right of which the defendant could not be deprived without his consent.

McCOWN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. ALBERT G. WAGNER, APPELLANT.

177 N. W. 2d 743

Filed June 5, 1970. No. 37475.

Criminal Law: Attorneys at Law: Judges. A substitute county judge is not disqualified from serving as defense counsel for

an indigent defendant where he has no connection with the case in his capacity as substitute county judge.

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

Glen A. Fiebig, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

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

BOSLAUGH, J.

The defendant pleaded guilty to grand larceny and was sentenced to imprisonment for 1 to 3 years. The defendant has appealed and contends that he did not have the effective assistance of counsel in the district court.

The defendant was represented in the district court by a lawyer who was the substitute county judge in that county. There is no contention that this lawyer had any connection with the case in his capacity as substitute county judge.

The defendant argues that a substitute county judge is disqualified from acting as defense counsel because of the conflict of interest that exists due to the fact that he is a substitute county judge. It is well recognized that lawyers who also serve as prosecutors or judicial officers should not be appointed as defense counsel where there are other lawyers available to represent the accused. However, the practice has been tolerated where there are not sufficient members of the bar available locally to do otherwise. A substitute county judge is not disqualified as a matter of law from serving as defense counsel for an indigent defendant. See, Goodson v. Peyton, 351 F. 2d 905; Jones v. Baker, 406 F. 2d 739.

The record shows that a cashier's check in the amount of $2,180.90 was stolen from the mobile home of Joe

Edward Crawford in Box Butte County. The defendant had been in the vicinity of the mobile home shortly before the check was stolen. The check was in the defendant's possession when he was arrested at Ogallala that evening on a burglary warrant. The defendant admitted in open court that he had taken the check but denied taking three $100 bills that had been stolen at the same time.

The defendant's counsel obtained a reduction in the charge from burglary to grand larceny. The trial court carefully explained the rights of the defendant to him and the defendant stated that he had not been mistreated and that no threats or promises had been made to him. The record clearly establishes that the defendant voluntarily pleaded guilty with full knowledge of his rights and the consequences of the plea. There is no basis in this case upon which a claim of ineffective assistance of counsel can be sustained. See State v. Kennedy, *ante* p. 415, 176 N. W. 2d 12.

The defendant stated that he was an alcoholic and suffered from "ulcers" and "heart trouble." After accepting the plea of guilty the trial court continued the matter for pre-sentence investigation and the defendant was committed to the Hastings State Hospital for psychiatric examination and evaluation. The hospital report recommended that the defendant "be dealt with according to the usual provisions of the law" inasmuch as he was accountable for his actions, knew right from wrong, and was competent to stand trial.

The record indicates that the defendant had seven prior felony convictions and that there were detainers from Colorado and Wisconsin lodged against him. The sentence imposed was not excessive.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. ARTHUR GENZ, APPELLEE, V. CARL THOMAS, APPELLANT.
177 N. W. 2d 607

Filed June 5, 1970. No. 37489.

Elections. A private relator in statutory quo warranto contesting a public irrigation district election and participating or acquiescing with knowledge of an election irregularity may not be entitled to relief for that reason in certain circumstances.

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

R. L. Gilbert, for appellant.

Van Steenberg, Winner & Wood, for appellee.

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

SMITH, J.

A public election contest between condidates Arthur Genz and Carl Thomas took the form of quo warranto on private relation of Genz. Both parties having moved for summary judgment, the district court rendered summary judgment for Genz. Thomas appeals. The main question concerns the effect of participation by Genz in establishing illegal procedure for absentee voting.

At the disputed election, held by Pathfinder Irrigation District in February 1969, for a 3-year directorship, the four absentee ballots that were cast were counted for Thomas. He won, defeating Genz by a single vote.

Genz had served on the district's board of directors from 1966 to 1969. Shortly before the election in February 1968, the board with Genz' approval adopted the illegal procedure. The method was simple. The statutory violations were serious enough to be conceded freely by the parties.

Genz contends that his conduct has not militated against the quo warranto remedy. Section 25-21,146,

R. R. S. 1943, in effect since 1858, reads: "When any citizen . . . shall claim any office . . . unlawfully held and exercised by another, the person so claiming such office shall have the right to file . . . an information in the nature of a quo warranto, upon his own relation, and . . . to prosecute said information to final judgment; Provided, he shall have first applied to the prosecuting attorney . . . , and the prosecuting attorney shall have refused or neglected to file the . . . (information)."

We sketch antecedents of the statute. At common law the quo warranto writ and information were proceedings which a private relator could not commence. Ferris, The Law of Extraordinary Legal Remedies, 127 (1926). The 9th Anne, c. 20 (1710), authorized quo warranto to determine rights of parties to certain municipal offices on relation of private individuals. Newman v. Frizzell, 238 U. S. 537, 35 S. Ct. 881, 59 L. Ed. 1446 (1915). Leave to file the information was discretionary. Denial might result from participation, concurrence, or acquiescence of relator with knowledge of the irregularity. Constantineau, Public Officers and the De Facto Doctrine, 659 to 662 (1910).

The English experience and problems concerning public and private interests contributed to diversity of opinion in the United States. ". . . where there are special proceedings authorized by statute, they partake of the nature and retain most of the substance of the common law procedure by quo warranto." McCrary, American Law of Elections, 294 (4th Ed., 1897). In some states a private relator might be vulnerable because of his conduct in all the circumstances. See, Constantineau, *supra,* 659 to 662; Ferris, *supra,* 129, 130.

We approve this rule. A private relator in statutory quo warranto contesting a public irrigation district election and participating or acquiescing with knowledge of an election irregularity may not be entitled to relief for that reason in certain circumstances. Cf. State ex rel. Stulp v. Muscheites, 179 Neb. 674, 139 N. W. 2d 887

(1966); State v. Broatch, 68 Neb. 687, 94 N. W. 1016 (1903). See, generally, Annotation, 51 A. L. R. 2d 1306 (1957). His right may depend upon balancing his conduct against the following interests: (1) Nature of the office and degree of public interest in the result of the contest. (2) Desirability of protecting public officers from repeated attacks. (3) Desirability of reasonable limits upon judicial intervention. (4) Protection of voters from disfranchisement. (5) Preservation of integrity of the electoral process.

Weighing the conduct of Genz and those circumstances, we conclude that the district court ought to have rendered summary judgment for Thomas. The judgment is reversed and the cause remanded with directions to render judgment accordingly.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. CHARLEY WASHA, APPELLANT.

177 N. W. 2d 740

Filed June 5, 1970. No. 37493.

1. **Criminal Law: Constitutional Law: Trial.** When an accused, presently confined in a penal institution, demands that he be tried promptly on other charges outstanding against him, it is the constitutional duty of the authorities to make a diligent, good-faith effort to bring him to trial without undue delay.
2. ———: ———: ———. It is necessary to show prejudice to establish a violation of the Sixth Amendment right to a speedy trial.
3. **Criminal Law: Probation and Parole.** A proceeding for revocation of an order of probation may be instituted by the filing of a proper motion and affidavit, and the issuance of a warrant.
4. ———: ———. The period during which a probationer remains away from the jurisdiction of the court may be added to the period of probation.

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

Daniel Stubbs, 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.

NEWTON, J.

This is an appeal from a revocation of probation. Defendant, represented by counsel, pleaded guilty in the district court in and for Box Butte County, Nebraska, on January 27, 1961, to a charge of issuing a check on a bank in which he did not have an account. He was placed on probation for a period of 2 years. He was given permission to leave the state and was, on June 20, 1961, convicted in Maricopa County, Arizona, of passing a bogus check. He was sentenced to serve 5 years on this charge and subsequently received a life sentence in Arizona on conviction of murder in the first degree.

On July 24, 1961, the county attorney of Box Butte County filed a motion and affidavit asking revocation of the order of probation on the ground that the Arizona offenses were a violation of the conditions of defendant's probation. On August 5, 1968, defendant filed a habeas corpus action in the district court claiming that the court had lost jurisdiction of the case because he was given permission to leave the state. The relief requested was the dismissal of a detainer filed with the Arizona authorities. The writ was denied. On January 2, 1969, defendant moved for immediate prosecution on the charge of violation of the order of probation. On March 18, 1969, the Governor of Nebraska made requisition for extradition of defendant on the Governor of Arizona. The Governor of Arizona on August 12, 1969, executed an agreement for defendant's extradition to stand trial on the pending Nebraska charge on condition that defendant should thereafter be returned to Ari-

zona to complete his sentence. On September 2, 1969, defendant appeared in the district court for Box Butte County and counsel was appointed to represent him. Trial was had on October 17, 1969. Defendant was found guilty of violating the order of probation, the order revoked, and he was sentenced to 2 years penal servitude.

Defendant asserts that he is entitled to a dismissal of the Nebraska charge because of a violation of his right to a speedy trial. This contention is based on the case of Smith v. Hooey, 393 U. S. 374, 89 S. Ct. 575, 21 L. Ed. 2d 607 (1969), wherein the court held that the fact a defendant was confined in a federal penitentiary did not excuse a delay in his prosecution on a state charge. The court stated that a speedy trial was required to prevent undue and oppressive incarceration prior to trial; to minimize anxiety and concern accompanying public accusation; and to prevent impairment of the ability of an accused to defend himself. It points out the possibility of prejudice to an accused already in prison on other charges in that it may forfeit the possibility of his receiving a concurrent sentence and may result in longer confinement on the charge for which he has been previously imprisoned. In the present instance it does not appear that defendant has been prejudiced. He was already confined in Arizona and was serving a life sentence from which he could not reasonably expect to have been released after the lapse of only 8 years. He had been convicted of several felonies in the past, as well as the two more recent convictions in Arizona, so would not be greatly concerned with a public accusation. He had already been convicted on the Nebraska check charge and no showing is made that the delay impaired any defense he had to the charge of violating the order of probation. In the present instance, the 2 year sentence imposed was not specifically directed to run concurrently with the Arizona term. In fact, in sentencing defendant to a term in a Nebraska

penal institution, it is difficult to see how it could be made concurrent with one in Arizona as the defendant cannot be in both places at once. Under such circumstances, the Nebraska term commences on termination of the Arizona term. See 24B C. J. S., Criminal Law, § 1996 (6), p. 677. It is therefore apparent that defendant will continue to be subject to a detainer filed with the Arizona authorities and that any chance of having the Nebraska term run concurrently with the Arizona term is and has been nonexistent. Furthermore, the case of Smith v. Hooey, *supra,* holds only that: "*Upon the petitioner's demand,* Texas had a constitutional duty to make a diligent, good-faith effort to bring him before the Harris County court for trial." (Emphasis supplied.) This record discloses that upon defendant's demand, proceedings to bring him to trial in Box Butte County were instituted and trial had within a reasonable time. It is necessary to show prejudice to establish a violation of the Sixth Amendment right to a speedy trial. See, United States ex rel. Solomon v. Mancusi, 412 F. 2d 88 (2d Cir., 1969); United States v. McCorkle, 413 F. 2d 307 (7th Cir., 1969).

It is urged that the proceedings are defective in that they were not commenced within the probationary period. Section 29-2219, R. R. S. 1943, specifically provides that in case of a violation of the probationary conditions, a proper method to seek a revocation of the order of probation is by motion and affidavit and the issuance of a warrant. It further provides that the period during which a probationer remains away from the jurisdiction of the court may be added to the period of probation. No specific order so extending the period of probation was entered in this case, but it does not appear that any order terminating the period of probation and discharging the defendant was ever entered. The motion and affidavit were filed within the 2 year probationary period originally fixed and a warrant was

issued September 2, 1969, within the extended probationary period.

Finally, defendant states the evidence is insufficient to establish the Arizona convictions as a basis for a revocation of probation in that the person convicted in Arizona is not sufficiently identified as being the same person convicted on January 27, 1961, in Box Butte County. The contention is without merit. Defendant was convicted in Box Butte County under the name of "Charlie or Charley Washa." He was convicted in Arizona under the name of "Charles Bud Washa." In the habeas corpus proceeding initiated by defendant, he alleges his conviction in Arizona and uses the name "Charley Washa." The envelope in which he mailed the petition had a return address under the name of "Charley Bud Washa." In his motion for immediate prosecution, defendant used the name "Charley B. Washa" and signed the motion as "Charley Washa." In two letters to the Box Butte County attorney, defendant referred to his conviction in Arizona and the detainer lodged against him and signed his name "Charley Washa." Irrespective of the doctrine of idem sonans, there is ample evidence to justify the finding of the court that "Charley Washa, Charlie Washa, Charley B. Washa and Charles Bud Washa" are one and the same person. No doubt regarding identity can exist. In any event, defendant's own statements to the court after conviction and prior to sentence are conclusive.

No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

PAUL J. GARROTTO ET AL., PLAINTIFFS, V. ROBERT D. MCMANUS, DIRECTOR OF ADMINISTRATIVE SERVICES OF THE STATE OF NEBRASKA, ET AL., DEFENDANTS.

177 N. W. 2d 570

Filed June 5, 1970. No. 37575.

1. **Constitutional Law: Judges.** The provisions of Article V, rather than the provisions of Article XVII, Constitution of Nebraska, apply to judges selected and appointed under the merit plan of judicial selection.
2. **Constitutional Law.** In the interpretation of the Constitution, a specific clause will be given effect as against a general clause in such manner as to give meaning to both, and the language of the specific clause will not be restricted by the language of the general clause.
3. **Statutes: Public Officers and Employees.** Where an office is newly created by legislative action, the term begins when the office is first filled.
4. ———: ———. An officer appointed to fill a vacancy created by a legislative act creating a new office takes and enters upon a term of his own.
5. **Statutes: Judges.** The rights of newly appointed judges under the merit plan of judicial selection are governed by the applicable laws in effect at the time of their appointment and qualification.
6. ———: ———. Under the merit plan of judicial selection, a judge is appointed to an independent term of his own, and enters upon a full term of office upon his appointment and qualification.
7. **Constitutional Law: Judges.** Judges of the district court of this state constitute a separate and distinct class for purposes of legislation regarding them. Judges of the district courts of this state are members of "a court" within the meaning of Article III, section 19, Constitution of Nebraska.

Original action. Judgment for plaintiffs.

Herman Ginsburg, for plaintiffs.

Clarence A. H. Meyer, Attorney General, and Gerald S. Vitamvas, for defendants.

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

MCCOWN, J.

This is an original action brought by the plaintiffs, on

their own behalf and on behalf of all other district judges, for a declaratory judgment to determine the amount of salary payable by the State of Nebraska to the judges of the district court of this state on and after January 16, 1970. The basis of the original jurisdiction rests in Article V, section 2, Constitution of the State of Nebraska.

The litigation here arises out of three legislative bills enacted by the 1969 session of the Nebraska Legislature.

L.B. 150, section 2, provided in part: "As soon as the same may be legally paid under the Constitution of Nebraska, each judge of the district court * * * shall be paid a salary of twenty-two thousand dollars per annum; * * *."

L.B. 916 increased the number of district judges in Douglas County from 9 to 11 and provided: "* * * The Governor shall, on the effective date of this act, appoint two district judges to fill the vacancies by creation of two additional judges for District No. 4. Such appointments shall be made as provided by the provisions of Chapter 24, article 8."

L.B. 1070, section 8, provided: "The full term of office of each judge shall commence: (1) On the first Thursday after the first Tuesday in January next succeeding the election referred to in sections 24-813 to 24-818, or (2) if appointed pursuant to Article V of the Constitution of the State of Nebraska, on the date of his appointment, as the case may be."

All of the above legislative bills became effective on December 25, 1969.

Pursuant to L.B. 916, and in accordance with the provisions of Article V, section 21, Constitution of Nebraska (the merit plan of judicial selection), the Governor appointed the plaintiffs, Richling and Buckley to fill the two vacancies created. They qualified on January 16, 1970, and are now serving as such district judges.

The plaintiffs assert that Judges Buckley and Richling are entitled to receive a salary of $22,000 per annum

from the State of Nebraska. They also assert that because of the provisions of Article III, section 19, of the Constitution, when Judges Richling and Buckley qualified and commenced their service as district judges, then all other judges of the district court in Nebraska also became entitled to receive the same salary.

Article III, section 19, Constitution of Nebraska, provides in part as follows: "* * * nor shall the compensation of any public officer, including any officer whose compensation is fixed by the Legislature, be increased or diminished during his term of office except that, when there are members elected or appointed to the Legislature or officers elected or appointed to a court, board, or commission having more than one member and the terms of one or more members commence and end at different times, the compensation of all members of the Legislature or of such court, board, or commission may be increased or diminished at the beginning of the full term of any member thereof." This section as to officers elected or appointed to a court, board, or commission was adopted in 1952.

The merit plan of judicial selection was adopted by the electorate in 1962 by constitutional amendment and appears primarily in Article V, section 21, of the Constitution of Nebraska. Subsection (1) of that section provides in part: "In the case of any vacancy in * * * any district court * * *, such vacancy shall be filled by the Governor from a list of at least two nominees presented to him by the appropriate judicial nominating commission."

Subparagraph (3) of section 21, contains the following provision: "At the next general election following the expiration of three years from the date of appointment of any judge under the provisions of subsection (1) of this section and every six years thereafter as long as such judge retains office, each Justice or Judge of the Supreme Court or district court or such other court or courts as the Legislature shall provide shall

have his right to remain in office subject to approval or rejection by the electorate in such manner as the Legislature shall provide; * * *."

The defendants contend that the provisions of Article XVII, sections 4 and 5, of the Constitution of Nebraska, specify the term of office of judges and apply here, rather than the provisions of Article V. They also contend that the initial appointment of a judge under the merit plan does not begin a full term of office. They also assert that each judicial district constitutes a separate district court, and that the judges of the district courts of Nebraska do not constitute a single separate class for purposes of legislation.

Article XVII, section 4, provides that judges "and all other elective officers" shall be elected at the general election "next preceding the time of the termination of their respective terms of office." Article XVII, section 5, provides in part: "The terms of office of all state and county officers, of judges of the supreme, district and county courts, and regents of the University, shall begin on the first Thursday after the first Tuesday in January next succeeding their election * * *."

It is clear that sections 4 and 5 of Article XVII, of the Constitution of Nebraska apply only to elective officers and not to appointive officers. It is also clear that those sections apply to those judges who are still elected. They do not apply to judges who are selected and appointed under the merit plan.

The provisions of Article V, section 21, of the Constitution, apply specifically to judges selected and appointed under the merit plan of judicial selection. Under those provisions, judges are no longer elected to office. They are appointed. Periodic elections are specified at which the electorate may express its approval or rejection of a judge appointed under the merit plan. Such an election is only for the purpose of determining a judge's right to remain or continue in the judicial office to which he was initially appointed.

It is clear that Article V of the Constitution rather than Article XVII is applicable here. Article V is a specific provision dealing only with judges selected under the merit plan, while Article XVII is a general provision applying to all elective officers and judges. Even if both Articles were applicable, the specific provision would control the general. In the interpretation of the Constitution, a specific clause will be given effect as against a general clause in such manner as to give meaning to both and the language of the specific clause will not be restricted by the language of the general clause. State ex rel. Johnson v. Marsh, 149 Neb. 1, 29 N. W. 2d 799; Elmen v. State Board of Equalization & Assessment, 120 Neb. 141, 231 N. W. 772.

The plaintiffs Richling and Buckley were selected and appointed as district judges under the merit plan and thereafter qualified. They were also selected and appointed to fill newly created judicial offices. L.B. 916 specifically directed the Governor to appoint two district judges to fill the vacancies created. The elementary rule applicable to such appointment is: "A newly created office which is not filled by the legislative act creating it, and for which no provision is made by the act for filling it, becomes vacant on the instant of its creation, and remains so until it is filled by an incumbent; * * *." 67 C. J. S., Officers, § 50, p. 210. See, also, Reed v. McKeldin, 207 Md. 553, 115 A. 2d 281. The general rule is: "Where the office is newly created, the term begins when the office is first filled." 67 C. J. S., Officers, § 45, p. 199.

In the case of Schaffner v. Shaw, 191 Iowa 1047, 180 N. W. 853, the Iowa Supreme Court said: "The effect of increasing the number of judges in each of these districts created a vacancy in the office of district judge in each. * * *

"Such period was not the filling out of an unexpired term, and for this reason they could not be within the rule of decisions declaring the term a unit, and holding

that, where the incumbent resigns or dies, the appointee for the remainder of the term comes within the prohibition of any increase or diminution of salary."

The cases seem uniform in holding that an officer appointed to fill a vacancy created by an act creating a new office takes and enters upon a term of his own since there is no previously existing term which such party is to fill out. See State ex rel. Sanchez v. Dixon (La. App.), 4 So. 2d 591.

The Legislature recognized that by L.B. 916 it had created vacancies in judicial offices and the act specifically directed the Governor to fill those vacancies. The newly appointed judges took office and qualified on January 16, 1970. Their rights are to be governed by the applicable laws in effect at the time of their appointment and qualification. In Hamilton v. Foster, 155 Neb. 89, 50 N. W. 2d 542, this court said: "Appellee's rights are controlled by the laws in effect at the time he was elected, qualified, and took over the duties of his office."

On January 16, 1970, when Judges Richling and Buckley qualified and took over the duties of their offices, L.B. 150 was in full force and effect and had been since December 25, 1969. Whatever its nature, at the time the term of office of Judges Richling and Buckley began, the statute provided that each judge of the district court be paid a salary of $22,000 per annum. Judges Richling and Buckley became entitled to that salary upon their appointment and qualification.

The defendants next contend that the initial period of time between the date of appointment and qualification of a judge and the time his name is first submitted to the electorate for approval or rejection is some sort of probationary or temporary appointment. It is argued that this initial period is in some sort of limbo, in which no term of office is ever commenced until after the next general election. In any event, they contend that even if a

judge might begin a term upon appointment and qualification, it would not be a full term.

In 1952, when Article III, section 19, Constitution of Nebraska, was amended, district judges were all elected either for a full term of four years or were appointed temporarily to fill out an unexpired term. Article V, section 21, Constitution of Nebraska, establishing the merit plan, was adopted 10 years later in 1962. That section uses the word "term" only in referring to judges who were holding or elected to fixed terms of office on the effective date of the merit plan amendment. Under both constitutional provisions, the "term" referred to had a fixed and definite duration and applied to elective judges only. Ordinarily the word "term" or "term of office," when used in reference to the tenure of office, means a fixed and definite period of time. See State ex rel. Polk v. Galusha, 74 Neb. 188, 104 N. W. 197. Where there are such fixed and definite periods of time, one who fills an unexpired term serves only the remainder of his predecessor's term and not an independent term of his own. See, Suverkrubbe v. Village of Fort Calhoun, 127 Neb. 472, 256 N. W. 47; Rooney v. City of Omaha, 105 Neb. 447, 181 N. W. 143. Conversely, a judge who is appointed to an independent term of his own enters upon a full term commencing with the date of appointment and qualification. See, Schaffner v. Shaw, *supra;* State ex rel. Sanchez v. Dixon, *supra.*

In 1962, as part of the change incorporated by the merit plan, Article IV, section 11, of the Constitution was also amended. That section establishes without dispute that judges appointed under the merit plan do not hold temporary appointments. Reinforcing the conclusion that the regular term of office of a judge commences with his appointment and qualification are the provisions of Article V, section 21, itself. That section specifically provides that the elections at which a judge's right to remain in office is submitted to the electorate,

both initially and subsequently, date "from the date of appointment of any judge."

The entire structure of constitutional and statutory provisions points clearly to the fact that a judge appointed under the merit plan has a term of office or a tenure of office of his own, which neither fills out the balance of any preceding term nor shortens the time of any subsequent term. It does not constitute a partial term nor any temporary or probationary term. Whether it be referred to as an initial term or as the commencement of his term of office, the full term of any judge appointed under the merit plan of judicial selection begins with his appointment and qualification. The term of office of such a judge can never be incomplete, no matter what event terminates his term or tenure. Upon any termination, his term of office is complete and does not become an incomplete term nor less than a full term.

The action of the Legislature in adopting section 8 of L.B. 1070 was simply declaratory of the Constitution. That section specifically provided: "The full term of office of each judge shall commence * * * (2) if appointed pursuant to Article V of the Constitution of the State of Nebraska, on the date of his appointment * * *."

The final issue is whether the judges of each district court judicial district constitute a separate and distinct class, or whether all judges of the district courts in Nebraska constitute a single class within the thrust of Article III, section 19, Constitution of Nebraska. Constitutional references are mixed. References in some instances are to "district courts," in other places to "the district court." References in some instances are to "judges of the district court," in others to "judges of the district courts." We believe, however, that the provisions of Article V, Constitution of Nebraska, clearly contemplate that the district court is one court of general jurisdiction divided into judicial districts for the transaction of judicial business. Section 12 of Article V comes close to a determinative answer for present pur-

poses. It states: "The judges of the district court may hold court for each other and shall do so when required by law or when ordered by the supreme court." The provisions of Article V, section 2, last amended in 1968, authorize "judges of the district court" to sit with this court under specified circumstances. The multiple references in that section are all plural as to judges and all singular as to the district court. It should be noted also that Article V, section 21, which established the merit plan, specifically provides for a judicial nominating commission for "each judicial district of the Supreme Court and of the district court and one for each area or district served by any other court * * *."

In State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835, this court said: "We have no hesitancy in holding that judges of the supreme court, judges of the district court, * * * respectively, constitute separate and distinct classes for purposes of legislation regarding them; * * *."

A district judge is not an officer of the county or counties comprising his judicial district but is an officer of the State. His office is created by the State and in the eyes of the law, each of the judges of the district court is of equal standing. See, Jones v. York County, 26 F. 2d 623; Ruehle v. Ruehle, 161 Neb. 691, 74 N. W. 2d 689.

We conclude that the district court is a court of general jurisdiction of this state which was divided into judicial districts for the transaction of judicial business; but that so far as the creation of a court was concerned, the district court was one court of general jurisdiction with interchangeable judges, all exercising the same jurisdiction. Judges of the district court of this state are members of "a court" within the meaning of Article III, section 19, Constitution of Nebraska.

Newly appointed Judges Richling and Buckley, upon their qualification on January 16, 1970, began a regular full term of office as district judges. On that date, the salary provided by law for judges of the district court

was $22,000 per annum. Judges Richling and Buckley became entitled to that salary upon their appointment and qualification. Under the provisions of Article III, section 19, of the Constitution of Nebraska, all district judges of the district court of Nebraska became entitled to the same salary at the beginning of the full term of office of Judges Richling and Buckley.

Judgment is entered for the plaintiffs and the defendants are directed to proceed accordingly.

JUDGMENT FOR PLAINTIFFS.

STATE OF NEBRASKA, APPELLEE, V. EWATHER HALL, APPELLANT.

178 N. W. 2d 268

June 19, 1970. No. 37365.

Criminal Law: Confessions: Trial. Where petitioner's confessions were admitted in evidence and heard by the jury, petitioner was not prejudiced by admission of his codefendant's substantially similar confession where proper cautionary instructions were given.

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

Fred J. Montag, 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.

McCOWN, J.

Petitioner Ewather Hall and a codefendant, Curtis Rowland, were charged with murder in the first degree while in the perpetration of a robbery. The crime was committed on December 9, 1961. In a joint trial, both defendants were found guilty by a jury and death pen-

alties imposed upon both. The conviction of petitioner was affirmed by this court, but the sentence was modified to life imprisonment. See State v. Hall, 176 Neb. 295, 125 N. W. 2d 918. Petitioner began this proceeding for post conviction relief in 1967, and a full evidentiary hearing was held. The district court denied relief.

The appeal here rests on Bruton v. United States, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). Bruton established the principle that the admission, in a joint trial, of the confession of a codefendant, implicating the defendant in the crime, may be violative of the defendant's right of cross-examination secured by the confrontation clause of the Sixth Amendment, despite the trial court's instructions to the jury that it should disregard the confession in determining the defendant's guilt or innocence. Bruton was made retroactive in Roberts v. Russell, 392 U. S. 293, 88 S. Ct. 1921, 20 L. Ed. 2d 1100 (1968).

In this case, both Hall and his codefendant gave confessions. Each confession established all material elements of the crime charged. The only material difference in the confessions of Hall and his codefendant involved which one struck the victim with a hammer and which one shot him with a gun. Any of the confessions established the guilt of both defendants as principals, regardless of who wielded which weapon.

Hall and his codefendant both refused to testify at the joint trial and the State introduced the confessions of both into evidence over objections. The court submitted the standard cautionary instructions, both orally during the course of the trial and in written form at the conclusion of the trial. The instructions and procedure were consistent with the existing law prior to Bruton.

The Supreme Court in Bruton recognized that there are situations where joint trials will continue to be proper and where an appropriate instruction is sufficiently protective. It said: "Not every admission of

inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. 'A defendant is entitled to a fair trial but not a perfect one.' * * * It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information."

Since Bruton, courts have applied its principles on a case-by-case basis to determine where "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Bruton v. United States, *supra*. See the analysis of federal cases on the issue by Judge Blackmun in Slawek v. United States, 413 F. 2d 957 (8th Cir., 1969).

In United States ex rel. Catanzaro v. Mancusi, 404 F. 2d 296 (2d Cir., 1968), that court pointed out that Bruton involved a defendant who did not confess and who was tried along with a codefendant who did. The defendant Catanzaro had confessed and his confession interlocked with and supported the confession of his codefendant. The court said: "Where the jury has heard not only a codefendant's confession but the defendant's own confession no such 'devastating' risk attends the lack of confrontation as was thought to be involved in Bruton." See, also, State v. Aiken, 452 P. 2d 232 (Wash., 1969), which involves a basic factual situation analogous to the case at bar.

Here the petitioner made not only one confession but two. All confessions of petitioner and his codefendant agreed that the robbery and murder took place entirely in their joint presence and with both actively participating. Petitioner's first confession materially differed from his codefendants only as to which defendant held the gun. Petitioner's second confession corre-

sponded in all material respects with his codefendant's confession. Determination of petitioner's guilt, in any realistic sense, did not turn upon the incriminating statements of his codefendant. The jury had no reason to look beyond petitioner's own statements to reach its conclusion of his individual guilt.

In the context present here, we conclude that the admission of the incriminating statements of a codefendant added no substantial weight to the State's case against the defendant and involved no substantial risk that the jurors could not follow the cautionary and limiting instructions meticulously given by the trial court. Under such circumstances petitioner was not prejudiced.

The judgment is affirmed.

AFFIRMED.

OLGA FOUST, APPELLEE, V. CLIFFORD L. FOUST, APPELLANT.

178 N. W. 2d 284

Filed June 19, 1970. No. 37465.

1. **Divorce.** While proceedings to vacate or modify a divorce decree may be instituted within 6 months after rendition, good reason must be shown for any such action and the control of the decree is within the sound judicial discretion of the trial court.
2. ———. A property settlement agreement will ordinarily be respected by the courts as presumably fair and valid, and a just and equitable adjustment of the matters of which it treats.
3. ———. Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, ordinarily the decree will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity.

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

Vrana & Gless, for appellant.

Harry E. Stevens, for appellee.

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

MCCOWN, J.

The defendant, Clifford L. Foust, filed an application to vacate or modify a decree of divorce as to a property settlement agreement. The agreement had been executed by the parties, approved by the court, and incorporated in the decree. The district court denied the application and the defendant appealed.

On April 19, 1968, the Dodge County district court entered a decree granting a divorce to the plaintiff, Olga Foust, from the defendant, Clifford L. Foust. The decree incorporated and approved a property stipulation and settlement signed by the parties, each of whom was represented by counsel.

Essentially, the property settlement agreement approved by the court assigned all of the real estate owned by the parties to the plaintiff, subject to all existing mortgage indebtedness, and required her to pay to the defendant the sum of $6,937.50. One thousand nine hundred dollars of this amount was to be paid into court immediately upon approval of the agreement and the balance 6 months thereafter. The $1,900 was paid into court as required and was accepted by the defendant.

On October 18, 1968, the defendant, by new counsel, filed his application to set aside or modify the decree as to the property division on the ground that he had not signed the agreement voluntarily, but under duress. He alleged that it was unfair, unjust, unconscionable, and inequitable, and granted to the plaintiff an excessive portion of the property of the parties.

Some additional background may be necessary. There were four houses involved, including the house in which the plaintiff lived. There were also two vacant lots. The plaintiff had inherited from her family prior to 1940, a half interest in one of the four houses, and had also

inherited four lots on which at least two more of the houses were located.

Negotiations for the property settlement were carried out by the parties with their attorneys and completed after at least three separate meetings. In the opinion of defendant's former attorney, the value of all the real estate at the time of the property settlement agreement was $26,500. At the hearing some months later, defendant's evidence placed the value between $31,600 and $36,250. The actual amount of the mortgage indebtedness against the real estate on April 1, 1968, was $11,739.82. Whichever evidence of value may be accepted, the value of the property inherited by the plaintiff was approximately one-third to one-fourth of the total. The parties took into consideration the fact that plaintiff had inherited property, and plaintiff assumed and agreed to pay the mortgage indebtedness of $11,739.82.

In addition to the evidence going to the issue of value, the evidence also showed that the plaintiff had been assisting in the financial support of the defendant for an extensive period of time prior to the divorce, and had operated a cafe and worked full time to contribute to the family property at least since 1949.

The evidence wholly fails to support the defendant's contention that he did not sign the property settlement agreement voluntarily. His contention that the settlement was unjust, unconscionable, or oppressive is destroyed by the evidence. The testimony of counsel who represented the defendant in the divorce and at the time of execution of the property settlement agreement was specific and unqualified that the property settlement was not only fair and reasonable, but that it was voluntarily executed by the defendant.

While proceedings to vacate or modify a divorce decree may be instituted within 6 months after rendition, good reason must be shown for any such action and the control of the decree is within the sound judicial discretion of the trial court. See, Colick v. Colick, 148 Neb.

201, 26 N. W. 2d 820; Carpenter v. Carpenter, 146 Neb. 140, 18 N. W. 2d 737.

A property settlement agreement will ordinarily be respected by the courts as presumably fair and valid, and a just and equitable adjustment of the matters of which it treats. See, Clatterbaugh v. Clatterbaugh, 182 Neb. 160, 153 N. W. 2d 749; Pittman v. Pittman, 148 Neb. 864, 29 N. W. 2d 790.

Here the evidence is convincing that there was no fraud or inequity. The evidence is also convincing that the property settlement agreement was fair and reasonable. Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, ordinarily the decree will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity.

The decree of the district court was correct and is affirmed. An attorney's fee of $250 is allowed to plaintiff's attorney for services in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY BARKER, APPELLANT.

178 N. W. 2d 270

Filed June 19, 1970. No. 37482.

Criminal Law: Appeal and Error: Sentences. In the absence of an abuse of discretion, a sentence within statutory limits will not be disturbed.

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

Yost, Schafersman, Yost & Lamme, for appellant.

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

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

BOSLAUGH, J.

The defendant appeals from a sentence of 3 years' imprisonment after conviction upon his plea of guilty to malicious destruction of property. The assignments of error allege that the sentence was excessive.

The record shows that following the arraignment, the matter was continued for pre-sentence investigation. The pre-sentence report does not appear in the record. The record does indicate that other charges pending against the defendant were dismissed as a result of the defendant's plea of guilty to the charge of malicious destruction of property.

The sentence imposed in this state was within the limits prescribed by the statute. § 28-572, R. R. S. 1943. There is no evidence to support the defendant's contention that the sentence was excessive. A sentence within the limits prescribed by statute will not be disturbed in the absence of a showing of an abuse of discretion. State v. Sheldon, 179 Neb. 377, 138 N. W. 2d 428.

The judgment of the district court is affirmed.

AFFIRMED.

ARDEN J. WESTBROOK, APPELLEE, V. MASONIC MANOR, A NEBRASKA CORPORATION, APPELLANT.

178 N. W. 2d 280

Filed June 19, 1970. No. 37509.

1. **Contracts.** The construction of a written contract is ordinarily a question of law.
2. ———. In construing a contract, the entire instrument must be considered and the words used given their ordinary and popularly accepted meaning.
3. ———. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of

the best indications of the true intent of the contract. Ordinarily, such a construction of the contract should be enforced.

4. ———. The modification of a contract which substantially changes the liability of the parties ordinarily requires mutual assent to be effective.

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

Crossman, Barton & Norris, for appellant.

Krause, Inserra, Petersen & Burkhard, for appellee.

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

BOSLAUGH, J.

This appeal involves the interpretation of a residency contract between the plaintiff and the defendant. At the close of the evidence the trial court directed a verdict for the plaintiff. The defendant has appealed.

In 1964 the plaintiff entered into a residency contract for a one-bedroom apartment in the apartment building operated by the defendant in Omaha, Nebraska. The contract provided that upon payment of an entrance fee of $5,000 the plaintiff was entitled to live in an assigned apartment for life, subject to the monthly payment of "a proportionate share of expenses, maintenance and amortization of loan," and subject to "the rules and regulations which will be adopted to govern the Manor." The right to live in the apartment was not assignable.

The contract further provided that "upon relinquishment of the apartment provided for herein and upon written demand of applicant * * *, ninety per cent of any payment on entrance fees is refundable as soon as the Masonic Manor secures another applicant for the apartment being released."

The plaintiff paid the entrance fee and moved into the apartment in 1964. On March 1, 1967, the plaintiff notified the defendant that the apartment would be vacated April 1, 1967, and demanded a refund of 90

percent of the entrance fee paid. The apartment was "resold" on September 15, 1968. The controversy is whether the plaintiff is liable for the monthly maintenance fees after he relinquished the apartment and before it was resold.

On March 19, 1967, after the plaintiff had notified the defendant that the apartment would be relinquished but before it had been vacated, the defendant's board of directors adopted a resolution providing that owners of resident tenancy contracts would be responsible for the monthly prorata payment whether the apartment was occupied or not. The directors also provided that a bulletin be sent to each tenant setting forth the action of the board and stating that a new contract was being prepared.

The entrance fee on the plaintiff's apartment was increased to $6,000 on October 1, 1965. The monthly maintenance fees were increased twice during the time that the plaintiff occupied the apartment. The plaintiff paid the monthly maintenance fees during the time that he occupied the apartment but the record does not show that he paid the increase in the entrance fee or that he was asked to do so by the defendant.

The plaintiff contends that he is entitled to $4,500 which is 90 percent of the entrance fee paid. The defendant contends that the plaintiff should receive 90 percent of $6,000 less $3,001.25 for the monthly maintenance fees charged between April 1, 1967, and September 15, 1968. The plaintiff recovered judgment for $4,500 in the trial court.

The construction of a written contract is ordinarily a question of law. Omaha Public Power Dist. v. Traveler's Indemnity Co., 178 Neb. 709, 135 N. W. 2d 1. In construing a contract, the entire instrument must be considered and the words used given their ordinary and popularly accepted meaning. Long v. Magnolia Petroleum Co., 166 Neb. 410, 89 N. W. 2d 245.

The defendant argues that the plaintiff was liable for

the monthly maintenance fees until the apartment was resold because the plaintiff was entitled to live in the apartment during this time. The argument disregards the provision requiring relinquishment. Before the plaintiff was entitled to a refund of the entrance fee, he was required to relinquish the apartment and a new applicant was to be secured. The relinquishment was a surrender of the right to live in the apartment, and the plaintiff should not be liable for the monthly maintenance fees thereafter.

It is apparent that, prior to March 19, 1967, the defendant did not consider the owner of a residency contract liable for payment of the monthly maintenance fees if the apartment was not occupied. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract. Ordinarily, such a construction of the contract should be enforced. Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448.

The action of the defendant's board on March 19, 1967, was a modification of the contract which was not binding on the plaintiff without his consent. It was a modification that could not be effected by a rule or regulation solely within the control of the defendant. See Urick v. Western Travelers Accident Assn., 81 Neb. 327, 116 N. W. 48.

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

AFFIRMED.

WHITE, C. J., dissenting.

I cannot agree with the majority opinion's disposition of this case, which, in purporting to give effect to a rule of construction, substantially alters the basic agreement of the parties. The rule relied upon is predicated upon an ambiguity in the contract. I submit that the contract is not ambiguous and is in no need of judicial interpretation.

Under the terms of the contract, plaintiff was entitled

to live in the apartment after having paid an initial entrance fee of $5,000, subject to a monthly payment of a proportionate share of the expenses. To "entitle to" means to give a right to something, or to qualify for that right. 14A Words and Phrases (Perm. Ed.), p. 389 (1952). The majority opinion asserts that by relinquishing his apartment, plaintiff surrendered his right to live in that apartment; therefore, he should not be required to pay the monthly maintenance fees after surrendering that right. This line of reasoning flies in the face of the fundamental principle of mutuality. Surrender of the apartment did not terminate plaintiff's rights to that apartment under the terms of the contract; it merely meant that plaintiff would be entitled to a ninety percent refund of any payment on entrance fees, as soon as another applicant was secured for the released apartment. The refund clause is not concerned with the controlling issue in this case, that is, when did the plaintiff's right to the apartment, and corresponding obligation to pay the monthly fees, terminate? I submit that plaintiff had the obligation to pay the monthly fees as long as he was entitled to the apartment, or as long as he had a right to live in the apartment. That right terminated when the apartment was sold and transferred to a prospective resident. Plaintiff himself chose not to remain in the Manor even though he was entitled to do so under the express terms of the contract. If plaintiff was allowed to terminate his residence and thereby terminate his concomitant obligations as of that time, more than the principle of mutuality has been undermined. The security for the amortization of the substantial loan involved in a mutual rental scheme such as that present in this case, does not permit a unilateral or whimsical termination of the rental payments by one of the tenants. To allow this arbitrary termination would destroy the security of such a scheme, subjecting the remaining tenants to the increasing burden of continuing on without the necessary funds. Such action

on the part of a few tenants could create a momentum that would be destructive of the whole scheme. While not legally determinative of the issues, these observations clearly demonstrate the reasonableness of the terms of the contract under these circumstances. The purpose of the contract is to preserve the interim continuity of the payments, a condition consistent with the taxes, maintenance, and amortization requirements and other burdens of tenancy and ownership.

It is hornbook law that in construing a written contract for the purpose of ascertaining the intention of the parties, the instrument must be considered as a whole, and the intent of the parties must be derived from the four corners of the instrument. See, Mills v. Aetna Ins. Co., 168 Neb. 612, 96 N. W. 2d 721 (1959); Mid States Engineering v. Rohde, 182 Neb. 590, 156 N. W. 2d 149 (1968); Inland Drilling Co. v. Davis Oil Co., 183 Neb. 116, 158 N. W. 2d 536 (1968). A corollary rule is that in construing a contract, the court must give meaning to all of its parts, and any interpretation which renders meaningless any part of the contract must be avoided. The reason is self-evident: If a particular construction renders part of a contract meaningless, it is indicative that the construction is not in accord with the parties' intentions. Beister v. John Hancock Mut. Life Ins. Co., 356 F. 2d 634 (8th Cir., 1966). The majority opinion focuses upon the refund clause of this contract to justify its decision without considering the meaning of the clause which, in my view, is determinative of this case, thereby violating the rule set out above.

It is not within the province, function, or duty of the court to alter, revise, or modify any contract by construction, or to make a new or different contract from that for which the parties bargained, regardless of whether the result superficially seems to be harsh. The court's duty is confined to the construction of the contract the parties have made for themselves. Preferred

Risk Mut. Ins. Co. v. Continental Ins. Co., 172 Neb. 179, 109 N. W. 2d 126 (1961); Richardson v. Waterite Co., 169 Neb. 263, 99 N. W. 2d 265 (1959). Principles of contract construction cannot be applied to vary the meaning of that which is otherwise clear and unambiguous. The rule of Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448 (1965), is a sound, viable rule of construction when applied in an appropriate case. But that rule is based upon the assumption that there is some predicate for its use, viz, some ambiguity or uncertainty in the contract. If indeed there is no ambiguity, there is no need for construction, and hence no need to apply the rule.

To be ambiguous the meaning of the contract must be obscure, or doubtful, incapable of ascertainment within the four corners of the instrument. 3 Words and Phrases (Perm. Ed.), p. 440 (1953). Ambiguity should not be created or determined by the use of hindsight, nor after the lawsuit has commenced and the parties have taken polarized positions with respect to their construction of the contract. Whether the terms of the contract could have been more clearly expressed cannot be solely determinative of the question of ambiguity; a contract must be read as a whole and the meaning therein ascertained from the face of the instrument. It seems clear that the meaning of the contract *is* capable of ascertainment within the four corners of the contract in this case. It is patently obvious that resort to extraneous factors is not justified in this case, that the meaning must be deduced from the contract itself, and that the rule of Lortscher v. Winchell, *supra,* is not applicable.

The majority opinion equates surrender of the premises with termination of the monthly payments. This follows, says the majority opinion, because of the rule of Lortscher relating to contemporary interpretations of a contract by acts of the parties. As stated earlier, however, that rule is inapplicable where the language of the contract is not ambiguous. Even assuming ambigu-

ity in the contract, I still cannot agree with the majority opinion. The decision assumes that prior to March 19, 1967, the Manor did not consider plaintiff liable for payment of monthly maintenance fees after having surrendered the apartment. This is a *plausible* assumption only. It is also possible that the action was taken as an attempt to make explicitly clear that which was already inherent in the contract, so that no questions could be raised. Even if the majority opinion is correct in its assumption, it still does not justify application of the rule of Lortscher in this case. Before the rule that contemporary interpretation of a contract by acts of the parties is entitled to great or controlling weight applies, it should appear that they were acts of *both* parties, done with knowledge and in view of a purpose at least consistent with that to which they are sought to be applied. 17 Am. Jur. 2d, Contracts, § 274, p. 687 (1964). Lortscher involved a series of mutual interpretations between the parties in terms of their actions and subsequent agreements, rather than a unilateral act or interpretation as in this case. Mutuality of interpretation, the foundation for the Lortscher rule, is conspicuously absent, with the result that the rule has been severely broadened.

In this case the majority opinion balloons a single unilateral act during the course of performance into a rewriting of the original contract. I fell strongly that no rule of construction should be used to affirmatively destroy the express written provision of a contract. Conduct during the course of performance, unless it constitutes a modification for a consideration, should never apply to action on a single occasion or to action of one party only. Self-serving conduct is not entitled to weight one way or another.

The conduct of the defendant here must be weighed in light of the terms of the agreement and the possible meanings of its conduct. Is the defendant to be penalized because of the security action it took to prevent

further disputes of this nature? Can it reasonably be said that the further strengthening of an already clear contract creats ambiguity?

I point out that we are not dealing here with an executory contract with repeated occasions of performance by the parties. Nor are we dealing here with any course of performance accepted by or acquiesced in without objection by the other party. The rules relating to interpretation by a course of performance relate to an entirely different situation than is present in this case. I submit that the express terms of a contract should receive preferential if not conclusive treatment in the interpretation of the contract unless there is ambiguity. I submit that the purported expansion of the rule in Lortscher v. Winchell, *supra,* leaves the door open for this court to rewrite contracts. It would further appear that the security of a party in his reliance on the clear and express terms of a contract can only be preserved by rigid requirement of performance.

It is my opinion that the judgment of the district court should be reversed.

EMILIA POCEVICIUS, APPELLANT, V. ARMOUR & COMPANY, APPELLEE.

178 N. W. 2d 265

Filed June 19, 1970. No. 37517.

1. **Workmen's Compensation: Evidence.** In a workmen's compensation proceeding, the burden of proof is upon claimant to establish by evidence the facts essential to recovery.
2. **Workmen's Compensation: Appeal and Error.** On appeal to the Supreme Court, a workmen's compensation proceeding will be considered de novo upon the record, but where the evidence is conflicting and cannot be reconciled, the fact that the trial court observed the demeanor of witnesses and gave credence to the testimony of some rather than others will be considered.
3. **Workmen's Compensation: Evidence.** To recover in a workmen's compensation case, a claimant must offer proof which

preponderates in her favor on each of the indispensable elements of her claim.

4. ———: ———. Where the testimony gives rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture, a workmen's compensation award cannot be obtained.

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

John J. Higgins and J. Patrick Green of Eisenstatt, Higgins, Miller & Kinnamon, for appellant.

Edwin Cassem of Cassem, Tierney, Adams & Henatsch, for appellee.

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

NEWTON, J.

This is an action brought under the Workmen's Compensation Act. A piece of metal fell on plaintiff and inflicted a minor cut on her head. She subsequently suffered from an emotional condition that resulted in loss of sensitivity in her left side and restricted use of the muscles and members on her left side. The question presented is whether the head injury was or was not a proximate cause of her emotional condition. The single and three judge compensation courts, and the district court, denied recovery. We affirm the judgment of the district court.

On September 2, 1966, while in the course of her employment by defendant, plaintiff sustained the injury mentioned above. Plaintiff's statement that she lost consciousness for a considerable period of time is flatly contradicted by the doctor and nurse who attended her. The wound bled very little and required four stitches. As a precaution, she was hospitalized for 4 days at which time it was ascertained that she was suffering from a severe anemic condition of long standing. She complained of headaches and dizziness. She

was then referred to her own doctor, Dr. Koszewski, and was again hospitalized on September 13, 1966. Dr. Koszewski attributed her anemia to a loss of blood and treated her for anemia, inflammation of the colon, headaches, and dizziness. The latter ailments he ascribed to a cerebral concussion he felt she sustained from the blow on her head. She was discharged on October 2, 1966, but returned to the hospital on November 16, 1966, and underwent a panhysterectomy or excision of her uterus, uterine cervix, fallopian tubes, ovaries, and also an appendectomy.

Plaintiff returned to work for 5 weeks, from March 20 to April 24, 1967, developed a duodenal ulcer, and was again hospitalized from April 30 to May 13, 1967. She returned to work July 13 or 20, 1967, and worked until October 27, 1967, with the exception of a 3-week vacation. On the latter date defendant closed its plant and her employment was terminated. She was again hospitalized in November 1967, at which time she had a cyst removed from her left shoulder and an abscessed tooth removed.

During the period of her treatment by Dr. Koszewski, she continued to complain of headaches, vertigo or dizziness, and blurred vision. Dr. Ladwig was called in and ascribed these ailments and her emotional condition to a cerebral contusion sustained in the September 2, 1966, accident. All of the medical experts agree that her hysteria and the partial loss of use of her left side is not the result of any physical condition but results from her emotional condition. Plaintiff's doctors ascribe this emotional condition to the supposed cerebral concussion or contusion sustained on September 2, 1966, notwithstanding she had no skull fracture or bleeding from the ears or nose. They were not aware of her past medical history.

Hospital records established that on April 20, 1960, she was hospitalized for tonsillitis and had a tonsillectomy. On August 29, 1960, she was again admitted to a hos-

pital for gastroenteritis and heart trouble and she then complained of headaches of several weeks standing, left shoulder pain, blurred and double vision, and vertigo. She was placed on a high iron diet. In 1964 she was hospitalized for bronchitis and was again placed on a high iron diet. A tranquilizer type of drug was prescribed for her. Plaintiff's medical experts concede that dizziness may result from anemia and that it is not unusual for women to have severe emotional reactions after a hysterectomy.

Dr. Muehlig, a neurological surgeon, examined plaintiff at defendant's request. He also had available all of her past hospital records. He agrees that plaintiff is totally disabled and that her present physical handicaps are the result of her emotional or hysterical condition. He disagrees as to the cause of this emotional disturbance, and denies that she had sustained a cerebral contusion, or that her injury was of a type that could cause a prolonged hysteria or severe neurosis. He attributes her mental or nervous condition to multiple life problems and states that emotional upsets are common following a panhysterectomy. He found inconsistencies in her reactions during the examination. She pretended deafness but understood when spoken to. Her left side was supposed to be numb but when gentle pressure was applied, she complained of pain. He concludes that her accident might cause a temporary hysteria, but that she would have had it anyway and the accident could only have been a temporary aggravating factor.

In recent years the plaintiff has sustained numerous physical difficulties. She had pneumonia on several occasions, a tonsillectomy, anemia, heart trouble, chronic gastroenteritis, bronchitis, diverticulosis, chronic inflammation of the fallopian tubes, a tumor on the uterus, inflammation of the bladder and kidneys, pleurisy, a panhysterectomy, edema, thrombophlebitis, a cyst removed from the left shoulder, and a duodenal ulcer. She appears also to have been susceptible to vertigo, con-

tinuous headaches, and blurred or double vision as early as 1960, and was having tranquilizers prescribed for her use as early as 1964. Her general condition and experience was such as might well render a susceptible person subject to hypochondriasis and the fact that her present physical condition is attributable solely to her mental condition or hysteria indicates that she may well be so classified. It appears that the trial courts found such to be the case and that her condition is not attributable to her accident.

In a workmen's compensation proceeding, the burden of proof is upon claimant to establish by evidence the facts essential to recovery. See, Hardin v. Moorman Manuf. Co., 179 Neb. 869, 140 N. W. 2d 820; Hula v. Soennichsen, 178 Neb. 484, 134 N. W. 2d 47. On appeal to the Supreme Court, a workmen's compensation proceeding will be considered de novo upon the record, but where the evidence is conflicting and cannot be reconciled, the fact that the trial court observed the demeanor of witnesses and gave credence to the testimony of some rather than others will be considered. See Chiles v. Cudahy Packing Co., 158 Neb. 713, 64 N. W. 2d 459.

Plaintiff's condition is not in dispute, but there is an unreconcilable disagreement among the medical experts called as to the cause of that condition. Plaintiff's doctors attribute her condition to her accident but they were unaware of her past medical history. The doctor called by defendant testified that her condition could not have been the result of the accident but rather of multiple life problems and would have resulted regardless of the accident. The fact that plaintiff had had similar difficulties in earlier years, the slightness of her physical injury due to the accident, and her having returned to work for several months until the plant where she was employed closed, all tend to sustain the evidence adduced by defendant and the finding of the trial courts. On this record we are unable to conclude that the trial

courts erroneously gave credence to the expert testimony produced by defendant in preference to that of plaintiff. To recover in a workmen's compensation case, a claimant must offer proof which preponderates in her favor on each of the indispensable elements of her claim. Where the testimony gives rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture, a workmen's compensation award cannot be obtained. See Welke v. City of Ainsworth, 179 Neb. 496, 138 N. W. 2d 808. In view of the conflicting testimony of the medical experts, it is difficult for one not trained in the science of medicine to intelligently resolve the matter before us. We would be compelled to indulge in a certain degree of conjecture were we to reverse the findings of the compensation court. In view of the other factors above mentioned, we are inclined to agree that plaintiff has not proved her claim by a preponderance of the evidence and we affirm the judgment of the district court.

AFFIRMED.

SMITH, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. WALTER ALLEN GREEN, APPELLANT.

178 N. W. 2d 271

Filed June 19, 1970. No. 37543.

Criminal Law: Attorneys at Law. An accused may waive his right to be represented by an attorney if he does so intelligently and understandingly.

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

Albert W. Crites, for appellant.

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

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

CHADDERDON, District Judge.

This is an appeal from a plea of guilty and sentence on the charge of burglary of the American Legion Club in Chadron, Nebraska.

The record shows that the defendant waived a preliminary hearing in county court, after being advised of his right to an attorney, and was bound over to the district court for Dawes County, Nebraska.

On September 8, 1969, he appeared in the district court and was advised of his right to an attorney to represent him "at no expense to you." He waived the right to an attorney. The trial court inquired about his age and his educational background, which showed that he had received a high school diploma and 9 hours of college work. The trial court also asked him if he had been in trouble before, and he stated he had been in Texas and Missouri, and that he had escaped from the Missouri penitentiary; and stated that he was familiar to a considerable extent with court proceedings. The defendant indicated that he intended to plead guilty, and the court explained to him the consequences of a guilty plea, and in detail explained the duty of the State in proving him guilty in the event he entered a plea of not guilty.

The court then asked the county attorney what evidence he had to prove the crime, and the county attorney advised the court of the evidence which if proven would show the defendant guilty, and the defendant admitted that the facts were true and that he did not wish to comment on any of the facts. After this defendant again waived his right to have an attorney and entered a plea of guilty.

The court ordered a pre-sentence investigation, and on October 14, 1969, the defendant again appeared and

the court again asked him if he wanted an attorney appointed at the expense of the county and the defendant again waived the right to an attorney. After questioning him about four previous convictions and two other burglaries in Custer County, defendant was sentenced to a term of not less than 3 nor more than 7 years.

There are two assignments of error but both go to the fact that the court did not appoint an attorney to represent him.

In State v. Brevet, 180 Neb. 616, 144 N. W. 2d 210, this court said: "Defendant appears to be of the opinion that the waiver of legal counsel must be by replies to ritualistic questions,—that the waiver is one of form rather than intent. With this we do not agree. The situation before the court was one which showed that the defendant knew the crime with which he was charged and the extent of the punishment that could follow his guilty plea. He made it clear that he desired to admit his guilt and accept his punishment. Having come to this conclusion the defendant did not want a lawyer of his own choice nor one provided at the expense of the state,—he desired no lawyer at all. Under these circumstances, for this court to say that the failure to advise defendant by a precise ritualistic statement that he could have counsel at the expense of the state reduces the law to form rather than substance. We submit that the defendant was meticulously advised of his rights and the consequences that could follow by their waiver. The defendant does not contend that he was not guilty of the crime charged and asserts only that the failure to follow a prescribed form relieves him of the adverse effect of his conviction, otherwise proper. We do not subscribe to this theory under the facts shown in this record."

Although this court has held that a defendant may not waive his right to an attorney unless he does so intelligently and understandingly, the facts in this case would lead to no other conclusion than that this defend-

ant did waive his right intelligently and understandingly, and that the facts stated by the county attorney to the trial court, which the defendant admitted to be true, showed that he was guilty beyond a reasonable doubt.

We affirm the judgment of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES LEE BIRDWELL, APPELLANT.

178 N. W. 2d 270

Filed June 19, 1970. No. 37544.

Criminal Law: Attorneys at Law. An accused may waive his right to be represented by an attorney if he does so intelligently and understandingly.

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

Albert W. Crites, for appellant.

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

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

CHADDERDON, District Judge.

This is a companion case to State v. Green, *ante* p. 673, 178 N. W. 2d 271, and is the same in all essential details, and the opinion in that case controls this case.

We affirm the judgment of the district court.

AFFIRMED.

MILO J. EMBREE, APPELLANT, V. STERLING ELECTRIC COMPANY, A CORPORATION, APPELLEE.

178 N. W. 2d 275

Filed June 19, 1970. No. 37576.

Statutes: Courts. It is only where no specific provision has been made in the municipal court rules of civil procedure that the district court rules of procedure relating to such matters govern and apply to actions in the municipal courts of metropolitan and primary cities.

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

Charles Ledwith, for appellant.

Robert K. Silverman of Silverman & Silverman, for appellee.

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

MCCOWN, J.

The district court affirmed a final order of the Omaha municipal court denying defendant's motion to vacate and set aside a default judgment against him. The defendant relies on the fact that the clerk of the municipal court did not mail a notice of the rendition of the judgment.

On January 24, 1969, plaintiff filed an action against the defendant on an open account in the municipal court of Omaha. Answer day was February 3, 1969. When the case was called at that time, plaintiff's counsel was advised by the court that the cause had been continued by request of the defendant to February 10, 1969, at 9 a.m. At that time, plaintiff's counsel again appeared, defendant did not appear, and the default judgment was entered against the defendant on February 10, 1969. On February 11, 1969, a motion of the defendant to make more definite and certain was received and filed by the court. Thereafter proceedings for execution and

in aid of execution were taken by plaintiff. On April 29, 1969, the defendant filed a motion for an order vacating and setting aside the judgment. The motion was overruled on May 26, 1969. Thereafter the defendant, as plaintiff in error, filed a petition in error in the district court. After answer and argument, the cause was taken under advisement and on December 5, 1969, the district court entered its judgment affirming the action of the municipal court.

The defendant contends that section 25-1301.01, R. R. S. 1943, which applies to procedure in district courts is also applicable here because of the provisions of section 26-1,201, R. R. S. 1943.

Section 25-1301.01, R. R. S. 1943, as to district courts provides: "Within three days after the rendition of any judgment, the clerk of the court shall send a post card by United States mail to each party who has made an appearance in the action, or to his attorney or attorneys of record, advising that a judgment has been rendered and the date of rendition thereof."

Section 26-1,201, R. R. S. 1943, is a part of the procedure provisions dealing with the municipal court in metropolitan and primary cities. It provides: "All provisions of the district court code of civil procedure, and all other provisions of the statutes of Nebraska not in conflict with the provisions of this article and relating to matters for which no specific provision has been made herein, shall govern and apply to actions in the municipal court."

Section 26-199, R. R. S. 1943, is also a part of the code of civil procedure applicable to metropolitan municipal courts. That section provides: "The case shall stand for trial on the day and hour stated in the summons, or on the day and hour to which the same is continued as provided by law. If either party shall fail to appear at the time set for the trial, the case may proceed to judgment at the request of the party appearing, at any time thereafter, prior to an appearance by the

opposing party, without further notice; Provided, when there has been an appearance in the case and judgment shall not be taken on the day set for trial, either party may call the case up for trial by serving a written notice on adverse parties or their attorneys of record of his intention to call the case up for trial; and provided, further, that the case shall not be set for trial at any time prior to five days from the service of the notice."

The Legislature has specifically set out the procedure for the entry of default judgments in the municipal court. That procedure also provides that under the circumstances here, such a judgment may be entered "without further notice." It is only where no specific provision has been made in the municipal court rules of civil procedure that the district court rules of procedure relating to such matters govern and apply to actions in the municipal courts of metropolitan and primary cities. It should also be noted that the purpose of section 25-1301.01, R. R. S. 1943, was to require the mailing of a notice of the rendition of a judgment after a case had been taken under submission by the court. See Simmons v. Lincoln, 176 Neb. 71, 125 N. W. 2d 63.

The specific provisions of section 26-199, R. R. S. 1943, leave no vacuum to be filled by the general provisions of section 26-1,201, R. R. S. 1943, as to default judgments entered at the time set for trial in the municipal court.

The action of the district court was correct and is affirmed.

AFFIRMED.

R. D. LOWRANCE, INC., A CORPORATION, APPELLEE, V. JAMES E. PETERSON, APPELLANT.

178 N. W. 2d 277

Filed June 26, 1970. No. 37389.

1. **Words and Phrases.** The meaning of the word "knowingly" in

a criminal statute varies in the context. It commonly imports a perception of facts requisite to make up crime.

2. **Warranty.** An implied warranty can be excluded or modified by usage of the trade.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

McGinley, Lane, Mueller, Shanahan & McQuillan, for appellant.

Gregory J. Beal and Frederick E. Wanek, for appellee.

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

SMITH, J.

Defendant James E. Peterson purchased from plaintiff feeder heifers that developed infectious bovine rhinotracheitis ("IBR" or red nose) at some time. Peterson counterclaimed for breach of implied warranties of merchantability and fitness. Plaintiff contended that Peterson, having accepted the heifers after inspection, had excluded the warranties under a usage of the trade.

On the counterclaim a jury allowed only $526.40, the value of four head that Peterson had refused to accept. Peterson appeals. He attacks chiefly jury instructions and evidentiary rulings concerning trade usage on the ground it violated public health regulations.

Peterson, a North Platte pharmacist, owned and operated a commercial feedlot at Big Springs. He authorized William Shannon, head cattle buyer for John Morrell and Company at Ottumwa, Iowa, to purchase for Peterson cattle suitable for the feedlot. Shannon placed the order orally with Robert D. Lowrance, president of plaintiff. Lowrance filled the order by purchasing yearling heifers at sale barns in Maryville, Missouri. The health of each head at the sale was certified by Dr. Edward Powell, deputy state veterinarian of Missouri.

Lowrance hired a trucking company to transport the heifers without rest to Big Springs, 440 miles away. He

watched the loading of the trailers, timely notifying Peterson's agent of each departure. Lowrance's commission charge was $0.25 cwt. Pertinent data are as follows:

Delivery Date (Jan. 1968)	Quantity	Weight	Cost	Commission Charged
7	67	41,665	$ 9,169.50	$104.16
14	140	81,150	17,650.03	202.88
28	141	85,795	19,074.09	214.49

The controversy concerns the heifers delivered in two truck-trailers on January 14. At Big Springs neither trucker noticed a diseased animal. After inspection Joseph Ringleman, manager of the feedlot and accepter of the January 7th delivery, rejected four head. One had lumpy jaw. Three were depressed and feverish. Ringleman within his authority accepted the remainder with the notation "in good order."

On January 15 three head died. Many were sick. Ringleman observed stringing mucus and drooping heads and ears. He administered mostly antibiotics to 60 head. The next day three more head were dead. On January 18 Dr. Darlan Rezac first examined the animals. He approved Ringleman's treatment. His diagnosis of IBR is undisputed. In August the death toll ended with 81 head. IBR ordinarily is not a killer in that proper treatment limits loss to 2 percent.

Clinical signs of IBR are gauntness, fever, cough, polypnea, and mucus stringing from nostrils. Necropses by Dr. Rezac revealed typical lesions of red noses, exudates in tracheae, and lesions in upper respiratory tracts.

In Dr. Powell's opinion the incidence of IBR was high in the Middle West and higher in Maryville than in localities farther north. No clinical signs of IBR appeared during his inspections at Maryville. One day to several months after exposure may elapse before clinical signs develop. Dr. Rezac, on the other hand, estimated the period to be within a few days or a week, depending

on stress. In normal practice the cattle are vaccinated at the feedlot at once, according to Dr. Powell, or after a rest, according to Dr. Rezac.

There is sufficient evidence of this usage in the trade: The buyer after inspection cuts out cattle that do not suit him, and his acceptance of cattle is irrevocable and without recourse.

Health regulations promulgated by the Nebraska Department of Agriculture provide: "No animal . . . that is affected with or exposed to any infectious . . . disease . . . shall be . . . transported into . . . Nebraska." Statutes provide: "It shall be unlawful for any person to knowingly . . . sell . . . any domestic animal . . . affected with an infectious . . . disease, except as provided by sections 54-701 to 54-753, and the . . . regulations prescribed by the Department of Agriculture. . . . Any person so offending shall be deemed guilty of a misdemeanor . . . ." § 54-750, R. R. S. 1943. "It shall be unlawful for any person to violate any . . . regulation . . . promulgated by the Department . . . pursuant to authority granted by sections 54-701 to 54-753, and any person so offending shall be deemed guilty of a misdemeanor . . . ." § 54-751, R. R. S. 1943. The statute in our opinion requires interpolation of the word "knowingly" into the administrative regulation.

The meaning of the word "knowingly" in a criminal statute varies in the context. It commonly imports a perception of facts requisite to make up crime. See Johnson v. Chilson, 29 Neb. 301, 45 N. W. 462 (1890). See, also, Black's Law Dictionary, "Knowingly," p. 1012 (4th Ed., 1951); cf. A. L. I. Model Penal Code, §§ 2.02 (2) (b) and 2.02 (7), pp. 25 and 27 (Proposed Off. Dr., 1962). That meaning applies here. The district court correctly refused Peterson's requested instruction No. 9 relating to exercise of reasonable care and knowledge.

Peterson contends that the usage violated the Uniform Commercial Code without reference to section 2-302, U. C. C., on unconscionability. The contention is without

merit. ". . . an implied warranty can . . . be excluded or modified by . . . usage of trade." § 2-316 (3) (c), U. C. C.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES TINDELL, APPELLANT.

178 N. W. 2d 571

Filed June 26, 1970. No. 37492.

1. **Criminal Law: Evidence: Trial.** Weapons or other instruments of crime which are so connected with the crime charged as to throw light thereon, or which it is reasonable to infer were used in committing it, are admissible even though not shown to be connected with the accused, as where they tend to throw light on issues other than defendant's connection with the crime.
2. **Criminal Law: Evidence: Appeal and Error.** It is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence, unless it is so lacking in probative force that it is insufficient to support, as a matter of law, a finding of guilt beyond a reasonable doubt.

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

Albert W. Crites, for appellant.

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

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

NEWTON, J.

The defendant James Tindell was charged with burglary in respect to the entering of the American Legion Club in Chadron, Nebraska, during the early morning hours of August 2, 1969. A jury was waived and trial

had to the court. Defendant was found guilty and judgment entered against him.

Defendant was occupying a room in a Lusk, Wyoming, hotel with Walter Allen Green and James Lee Birdwell. The latter two pleaded guilty to the same offense as that with which defendant was charged. On the evening of August 1, 1969, the three of them drove to Chadron, Nebraska, visited two bars and went to the Legion Club. There they had some drinks in the bar where they were served by the manager Richard Chappell to whom Birdwell spoke about a wall switch in the barroom. They then entered the dining room and had dinner during which time they were under Mr. Chappell's observation for 5 or 10 minutes. On leaving the Legion Club they visited several other bars. Mr. Chappell closed the club that evening, locked all doors, and drove a waitress home. He then returned to the club to take care of the day's receipts and entered the kitchen to get a sandwich. The only lights on were a small one under the back bar in the barroom and the kitchen light. A $100 bill, to be raffled off, was hanging on a wall in the barroom stapled to a sheet of paper. Shortly after 1 a.m. on August 2, 1969, Mr. Chappell heard a noise and opened the kitchen door. He was threatened and ordered to withdraw back into the kitchen. This he did, but testified he saw the defendant, Green, and Birdwell in the barroom. He identified defendant by his blue suit and blonde hair. The $100 bill and a little other money were taken.

When the police investigated, they found entry had been effected by removing screws from a window screen and bending it up. A footprint found under the window was photographed. Two screwdrivers were found, one under the window and one on the bar. The three men were arrested in Lusk, Wyoming, on August 2, 1969, and the $100 bill was found in the back of a clock in their hotel room.

Defendant testified he was intoxicated, went to sleep

in the back of the car, did not participate in the crime, and knew nothing of it until told about it the following day. Birdwell and Green corroborated defendant's story saying that they entered the Legion Club in the absence of defendant. They admitted the screwdrivers belonged to Green and were used to effect entrance through the window, being interrupted by Mr. Chappell, and taking the $100 bill and hiding it in the clock.

Defendant contends the evidence is insufficient to sustain the charge that he participated in the crime; that he was too intoxicated to formulate an intent to steal; and that the two screwdrivers and the picture of the footprint were erroneously admitted in evidence.

The evidence clearly establishes that the two screwdrivers were used to gain entrance to the Legion Club through a window. This evidence, together with that regarding the footprint, simply serves to prove the unlawful and forceful breaking and entering, a fact admitted by defendant. It could not be detrimental or prejudicial to defendant in any conceivable manner. It was admissible in any event as it tended to prove an essential element of the crime, an unlawful entry. Weapons or other instruments of crime which are so connected with the crime charged as to throw light thereon, or which it is reasonable to infer were used in committing it, are admissible even though not shown to be connected with the accused, as where they tend to throw light on issues other than defendant's connection with the crime. See, 22A C. J. S., Criminal Law, § 712a, p. 956, § 712b, p. 964; State v. Stroh, 181 Neb. 24, 146 N. W. 2d 756. In any event, there was evidence placing defendant at the scene of the crime and actively participating in it. This, in view of the evidence of his companions, directly connects him with the items of evidence to which he now objects.

The evidence is conflicting in regard to defendant's participation in the crime. He and his friends contend he was not present, but he was positively identified by

Mr. Chappell as a participant. The three men had been drinking together throughout the evening. Neither Birdwell nor Green testified that defendant was in such a state of intoxication as to be unaware of his actions and defendant concedes he had still been able to walk a considerable distance a short time before the offense was committed. According to Mr. Chappell, defendant had been able to enter the Legion Club through the window and take part in the theft. In fact, the defendant himself has not stated he was in such a mental state, due to intoxication, as to be unaware of his actions. He says only that he was intoxicated, was asleep in the car, and a nonparticipant. These are factual questions to be resolved primarily by the trial court. It is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence, unless it is so lacking in probative force that it is insufficient to support, as a matter of law, a finding of guilt beyond a reasonable doubt. See, State v. Brown, 174 Neb. 387, 118 N. W. 2d 328; State v. Wilson, 174 Neb. 86, 115 N. W. 2d 794. We find the evidence of defendant's guilt to be sufficient to merit our sustaining his conviction.

The judgment of the district court is affirmed.

AFFIRMED.

JAMES A. MATSON, APPELLEE, V. JOHN D. DAWSON, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF DIANA DAWSON, A MINOR, APPELLEE, IMPLEADED WITH DIANA DAWSON, A MINOR, APPELLANT.

178 N. W. 2d 588

Filed June 26, 1970. No. 37500.

1. **Highways: Words and Phrases.** An intersection is the area embraced within the lateral curb lines or, if none, then the lateral boundary lines of two or more highways, which join one another at an angle.

2. **Statutes: Highways: Animals.** Statutory traffic rules have not been made applicable to horseback riders, but they are bound by common law rules.
3. **Highways: Automobiles: Animals.** All travelers upon the highways, regardless of their means of travel, must use reasonable care for their own safety and the safety of others.
4. **Highways: Automobiles.** A left-hand turn across a highway between intersections is fraught with danger and a party making such a turn is required to exercise a degree of care commensurate with the danger.
5. ———: ———. The giving of the statutory signal for a left turn under such circumstances will not absolve the driver from negligence where he fails to exercise care for his own safety, and that of others, by looking to the front and rear for the approach of other vehicles using the highway.
6. **Highways: Negligence.** One who attempts to cross a street between intersections without looking for approaching traffic is guilty of such negligence as will bar a recovery as a matter of law.
7. ———: ———. When one in a place of safety sees or could have seen the approach of a moving vehicle in close proximity and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence of such degree as to preclude recovery.
8. **Words and Phrases.** The requirement "to look" means to look at a time and place when to look would be effective.

Appeal from the district court for Red Willow County: JACK H. HENDRIX, Judge. Reversed and remanded with directions to dismiss.

Maupin, Dent, Kay, Satterfield & Gatz, Donald E. Girard, and Gary L. Scritsmier, for appellant.

Lyons, Wood & Carroll, for appellee Matson.

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

NEWTON, J.

This case involves a collision between a horse ridden by plaintiff and an automobile operated by Diana Dawson, hereinafter called defendant. Plaintiff was injured and the verdict and judgment in the trial court were in plaintiff's favor. Questions presented are whether or

not defendant was guilty of negligence which was a proximate cause of the accident and whether or not plaintiff was guilty of contributory negligence sufficient to bar recovery. We reverse the judgment of the district court and dismiss the case.

The following facts are undisputed. The accident occurred on B Street in McCook, Nebraska, at approximately 6:30 p.m., central standard time, on December 23, 1967. B Street is also the route of U. S. Highways Nos. 6 and 34 and runs in an east-west direction. It is a four lane paved highway with a narrow median separating the east and west bound lanes. At the scene of the accident, there is a private road running into a motel on the north side of the street and a short break in the median to facilitate ingress to and egress from the motel. Plaintiff had ridden his horse a considerable distance down B Street in an easterly direction and at a point about 3 blocks west of the motel moved from the south side of the outside lane to the north side of the inside lane. In doing so, he crossed immediately in front of an east bound car which slowed down to 5 miles per hour. At this point the horse broke into a lope and the east bound car followed to the break in the median at the motel where plaintiff crossed into the west bound traffic lane. As plaintiff approached the median break, he signaled a left turn, a car passed and some children in the car shouted which "spooked" the horse and compelled him to hang on to the saddle horn with his free hand. Defendant was driving west at 20 to 25 miles per hour. She first saw the horse as it was about at the median and starting across into the west bound lanes. Plaintiff had seen the car approaching when it was 100 to 200 feet away. Plaintiff in describing what occurred after his horse was spooked, said: "He jumped and I got to goin' down that way, and *about that time I looked up and there was another car comin'*—oh, it's, I couldn't see what color of car it was. I was in this here (indicating) darn near in that turn there (indicat-

ing). I was out in—already startin' to make that turn, *then all at once I got hit.*" (Emphasis supplied.) It was plaintiff's intention to cross to the north side of B Street and continue east on the highway shoulder. The accident occurred at a point a short distance east of the motel driveway and the defendant's car stopped just to the east of the driveway. Contact with the car was made, as evidenced by a dent, at a point just above the left rear wheel. The horse spun around and fell, with plaintiff still in the saddle, adjacent to the north curb.

There is some dispute as to the degree of darkness. Plaintiff says when he first saw defendant's car it was in the north or outside west bound traffic lane, but the second time he saw it, it was in the inside lane and that the accident occurred in the inside lane. Defendant's evidence is that the car was in the outside lane at all times. Both agree it veered slightly to the right just before the collision. Defendant maintains the horse crossed to the west bound lanes at a gallop. Plaintiff testified the horse was in a fast walk and under control at all times, but the driver of the car that followed plaintiff east on the highway was called as a witness by plaintiff and testified the horse was still in a lope when it crossed the median.

Are the facts sufficient to sustain the verdict for plaintiff? There is no evidence that defendant's brakes were applied prior to the collision or that the car skidded when it veered slightly to the right. In the absence of a skid, it is apparent that the rear wheels necessarily followed the front ones. The front end of the car did not strike the horse and it is evident that the only manner in which contact could be made with the left rear portion of the car was for the horse to run into the automobile. Plaintiff had been paralleling the median just to the south and traveling east. His attention was diverted from approaching traffic by the actions of the horse at the time he turned left through the median and when he looked up, it was too late to avoid the collision.

Defendant did not see the horse in the east bound lane until it was crossing the median at a comparatively rapid pace. She was proceeding in a west bound lane which was free of traffic and could not be legally charged with the necessity of observing plaintiff in the east bound lane until he began a left turn. The area was not an intersection where a left turn might be anticipated and although plaintiff says he gave a hand and arm signal for a left-hand turn prior to reaching the end of the median, he concedes that when the horse acted up, he seized the saddle horn and ceased to signal.

An intersection is the area embraced within the lateral curb lines or, if none, then the lateral boundary lines of two or more highways, which join one another at an angle. See § 39-741, R. R. S. 1943. There was not a junction of two or more highways at the scene of this accident, but only a private road branching off the highway. Plaintiff was making a left-hand turn between intersections on a heavily traveled thoroughfare. Visibility was somewhat impaired by darkness, although there were street lights in the area, and plaintiff was aboard an unlighted means of conveyance.

A horse-drawn carriage, a horseback rider, a cyclist, or a pedestrian are equally entitled to the use of the highways with motor vehicles. See, Tyler v. Hoover, 92 Neb. 221, 138 N. W. 128; Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N. W. 2d 114.

The statutes of this state setting out the rules of the road appear to be limited in effect to vehicular traffic and inapplicable to horseback riders. Such riders are nevertheless bound by common law rules. See Guynan v. Olson, 178 Neb. 335, 133 N. W. 2d 571; Tyler v. Hoover, *supra*. All travelers upon the highways, regardless of their means of travel, must use reasonable care for their own safety and the safety of others. A left-hand turn across a highway between intersections, particularly under the circumstances existing here, is fraught with danger and a party making such a turn is required to

exercise a degree of care commensurate with the danger. See Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355. "The giving of the statutory signal for a left turn under such circumstances will not absolve the driver from negligence where he fails to exercise care for his own safety, and that of others, by looking to the front and rear for the approach of other vehicles using the highway." Petersen v. Schneider, *supra*. The same rule is applicable to a pedestrian crossing a street between intersections. One who attempts to cross a street between intersections without looking for approaching traffic is guilty of such negligence as will bar a recovery as a matter of law. See, Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436; Palmer v. McDonald, 171 Neb. 727, 107 N. W. 2d 655. Of similar import is the rule that when one in a place of safety sees or could have seen the approach of a moving vehicle in close proximity and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence of such degree as to preclude recovery. See Palmer v. McDonald, *supra*.

Prior to the accident, plaintiff was in a place of safety either in the east bound traffic lane or on the median. As he approached the break in the median, he saw the defendant's automobile approaching at a distance of 100 to 200 feet. He did not look again prior to crossing into its path but states that he started to turn and "got hit" just as he looked up. He insists that he had his horse under control at all times and if so, his actions were willful and not due to any unexpected action of the horse. The requirement "to look" means to look at a time and place when to look would be effective. See Petersen v. Schneider, *supra*. We can only conclude that plaintiff's own negligence was sufficient to bar recovery.

Furthermore, we are unable to find negligence on the part of defendant. The highway ahead of her was clear and she was proceeding at a reasonable rate of speed.

She did not strike plaintiff's horse, but on the contrary, the horse ran into the side of her automobile. In any event, she was not required to anticipate that plaintiff, who was proceeding in the opposite direction, would attempt to cross the street as she approached. A person has no duty to anticipate negligence on the part of others, and, in the absence of notice or knowledge to the contrary, is entitled to assume, and to act on the assumption, that others will exercise ordinary care. Good v. Jones, 184 Neb. 454, 168 N. W. 2d 520. By the time it became apparent to defendant that a crossing was being undertaken by plaintiff, her efforts to avoid the horse had become unavailing. "* * * if a motorist is, in other respects, driving with due care and a horse turns suddenly into the path of the motor vehicle so quickly that the motorist cannot avoid striking it, he is absolved from negligence as a matter of law." 7 Am. Jur. 2d, Automobiles and Highway Traffic, § 392, p. 942. See, also, Mortenson v. Hindahl, 247 Minn. 356, 77 N. W. 2d 185.

The judgment of the district court is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

HEZIKIAH D. STEWART, APPELLEE, V. RITZ CAB COMPANY, APPELLANT.

178 N. W. 2d 577

Filed June 26, 1970. No. 37520.

1. **Trial: Negligence.** Where the facts adduced to sustain the issue of negligence are such that reasonable minds can draw but one conclusion therefrom, it is the court's duty to decide the question as a matter of law, rather than submit it to a jury for determination.
2. **Trial.** A verdict should be directed if the evidence is undisputed or if the evidence, even though conflicting, is so conclusive that

it is insufficient to justify a verdict or sustain the judgment.

3. **Damages: Appeal and Error.** Where recovery is not a mere matter of computation and depends upon the intangible and quite subjective elements of pain and suffering and future disability, it will not be interfered with unless it is so excessive and so grossly unresponsive to the evidence as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury.
4. **Damages.** There is no mathematical formula for the translation of pain and suffering and permanent disability in the terms of dollars and cents.

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

Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellant.

Warren C. Schrempp and Henry Rosenthal, Jr., of Schrempp, Rosenthal, Bruckner & McLane, and Levin & Gitnick, for appellee.

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

WHITE, C. J.

From a jury verdict and judgment for the plaintiff in the sum of $44,000, arising from a rear-end collision automobile accident, the defendant appeals. The defendant asserts on this appeal, first, that the court erred in directing a verdict for the plaintiff on the issue of liability; and second, that the jury verdict in the sum of $44,000 was excessive. We affirm the judgment of the district court.

The plaintiff's automobile was halted for an intersection traffic light at Twenty-fourth and Binney Streets in Omaha, Nebraska, betwen 5 p.m. and 6 p.m. on June 12, 1966. It was stopped at the time the accident occurred. Plaintiff's automobile was struck from behind by the defendant's taxi cab. The taxi driver testified that as he was approaching the intersection behind the plaintiff that someone yelled "taxi" and that he turned

to see who had requested his services. His own testimony is that without effective application of his brakes, the taxi ran into the plaintiff's stationary automobile at an estimated speed of 25 miles per hour. The collision sent plaintiff's automobile forward where it came into contact with a third automobile, which was also stopped at the traffic light. The road was paved, dry, no other automobile movement was involved in the collision, there was nothing to impede the taxi driver's vision, and it is not asserted that there were any special factors, except the diversion of attention to a possible customer, to serve as an explanation for the accident. The taxi driver testified as follows: "Q. In connection with your operation of that cab, Mr. Gordon, I take it that you didn't see the stopped car ahead of you before you hit it? A. No, I didn't. Q. And so you didn't increase your speed any? A. No. Q. In other words, you felt because of the fact that you say someone shouted, shouted at you, you took your eyes off of the road and the first thing you know was that you had hit the car ahead? A. True. Q. And it was stopped, wasn't it? A. Yes. Q. Now then, I take it then you hadn't put on your brakes at all before the time you hit the car? A. I put on my brakes, I had looked around before I hit him, but it was too late. I was estimating 25 miles per hour. Q. When you hit him? A. Yes. Q. So to sum the thing up, as far as the velocity of your cab, it was going 25 miles per hour when it hit the stopped car? A. Sure. *Q. And had you been looking ahead rather than over at something else, the accident wouldn't have happened, would it? A. That's right.*" (Emphasis supplied.)

It is not asserted or argued that the plaintiff was or could be found guilty of contributory negligence under the facts in this case. He was parked and stopped properly at an intersection traffic light on a paved, dry road with no visibility problems. It appears from the above testimony of the taxi driver himself that it is conclusively

established that the proximate cause of this accident was the failure of the taxi driver to keep a proper lookout and control his automobile in order to avoid the collision. It is not necessary, for a solution of liability in this case, to resort to the application of any special doctrine of automobile negligence law. The evidence is direct, undisputed, coming from the lips of the taxi driver himself and conclusively establishes a set of facts that reasonable minds could not reach a different conclusion with reference to the issue of liability. Where the facts adduced to sustain the issue of negligence are such that reasonable minds can draw but one conclusion therefrom, it is the court's duty to decide the question as a matter of law, rather than submit it to a jury for determination. Lindelow v. Peter Kiewit Sons, Inc., 174 Neb. 1, 115 N. W. 2d 776; Crawford v. Soennichsen, 175 Neb. 87, 120 N. W. 2d 578. A verdict should be directed if the evidence is undisputed or if the evidence, even though conflicting, is so conclusive that it is insufficient to justify a verdict or sustain the judgment. Baxter & Sons v. Sofio, 182 Neb. 599, 156 N. W. 2d 141. The defendant argues that the "momentary" inattention of the taxi driver is sufficient to submit the issue of his negligence to the jury. We do not agree. While the doctrine of momentary inattention or diversion may have some pertinency to the issue of gross negligence in a guest-host relationship, it has no proper application in the circumstances here in a busy city traffic intersection and the close distances and judgments that must be made under crowded traffic conditions. We point out further that by the taxi driver's own admission, he struck the plaintiff's automobile while proceeding at 25 miles per hour into the rear end of a properly stopped automobile. It appears conclusively that the sole proximate cause of this accident was the negligence of the taxi driver under the circumstances and the trial court not only was correct but it was its duty to direct the verdict

for the plaintiff in this situation. There is no merit to this assignment of error.

It appears that the main attack upon the verdict in this case is on the grounds of the excessiveness of the judgment. We approach a discussion of the evidence as to damages in this case with a preliminary observation as to the attitude that this court is required to take in judicially reviewing a damage verdict. It appears from our cases that where the recovery was not a mere matter of computation, and depends upon the intangible and quite subjective elements of pain and suffering and future disability, that it will not be interfered with unless it is so excessive and so grossly unresponsive to the evidence as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury, or unless it appears to be based upon some oversight, mistake, misconception, or misinterpretation, or a consideration of elements not within the scope of the accident. Morford v. Lipsey Meat Co., Inc., 179 Neb. 420, 138 N. W. 2d 653; Zawada v. Anderson, 181 Neb. 467, 149 N. W. 2d 329; Baylor v. Tyrrell, 177 Neb. 812, 131 N. W. 2d 393; Fridley v. Brush, 161 Neb. 318, 73 N. W. 2d 376; Yount v. Seager, 181 Neb. 665, 150 N. W. 2d 245. The evidence discloses that the plaintiff was 57 years of age at the time of the trial, and had been employed with the Omaha Post Office Department for about 20 years. Prior to the accident he was a mail carrier in good health, carrying an average of 35 pounds of mail at the beginning of his 3½ mile route. The evidence discloses that he was struck from the rear and knocked forward by a violent impact, with the taxi driver's automobile striking plaintiff's vehicle at a speed of 25 miles per hour *at the time of the impact.* The crash ripped the seat plaintiff was occupying from its moorings. He was hospitalized for a week in November 1966, after which he attempted to work but it was necessary for him to be hospitalized again in June 1967. His injury was a herniated disc in the fifth lumbar root on the right side, and he was hospitalized

for 21 days for an operation. He had a life expectancy at trial time of 18.23 years and his treatment doctors testified that his permanent disability was between 10 and 15 percent of the body as a whole. It is significant that the plaintiff was examined by the defendant's doctor but he was not called to testify as a witness in the case. These objective facts establish, and the testimony conclusively proves, that pain and suffering during this period of time and in the future will be the companions of his objectively established permanent disability and loss of motion in his back. The plaintiff lost 1,472 hours from his employment due to the injury at $3.41 per hour or a total of $5,019.52. Plaintiff's property damage amounted to $713.57; hospital, medical, and miscellaneous expenses amounted to $2,546.35, or a total in special damages of $8,279.44. The defendant has cited a number of cases in connection with the setting aside of excessive verdicts. We have examined them and none of them is comparable. As we stated in Zawada v. Anderson, *supra,* it is hazardous to attempt to color match cases in this area. In Fridley v. Brush, *supra,* we sustained a $16,500 verdict in favor of a plaintiff with a 15 percent disability of the right leg only, while in this situation the special damages are much greater and common human experience tells us that a disability to the body as a whole, involving the back and the pain and suffering incidental to the use and motion of the back, warrants a higher recovery. In Baylor v. Tyrrell, *supra,* with a left hip and leg injury this court sustained a jury verdict for an elderly man with a 5-year life expectancy, in the sum of $14,200. Almost all of these cases are also subject to the observation that an adjustment must be made in the light of the present inflationary conditions as to the value of money. As we said in Zawada v. Anderson, *supra,* there is no mathematical formula for the translation of pain and suffering and permanent disability in the terms of dollars and cents. It is a matter left largely to the

discretion of the jury which saw the witnesses and heard the evidence. Again, we can find nothing in this record to show that the verdict was the result of passion or prejudice or disregard of the evidence or the controlling rules of law. There is no evidence of misconduct of the jury, or no contention that the jury was improperly instructed with reference to the issue of damages. Yount v. Seager, *supra,* involved an elderly retired plaintiff. The medical special damages amounted to $1,791 and the loss of earnings was minimal to the date of trial because the plaintiff was retired and doing only part-time work, earning $1,200 per year. In affirming a verdict for $48,600 this court said: "The defendant's final contention is that the verdict is excessive. For support he reiterates in his brief the matters considered before in this opinion. The plaintiff suffered severe injuries of a permanently crippling nature. The special damages in comparison were minimal. '* * * where recovery is not a mere matter of computation, it will not be interfered with unless so excessive or so grossly inadequate as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury, or unless it appears to have been based on an oversight, mistake, misconception, or misinterpretation, or on a consideration of elements not within the scope of the action.' 25A C.J . S., Damages, § 196, p. 262. 'The amount of damages in cases of this type is not based on any legal rule or formula for measuring them and rests largely in the sound discretion of the jury.' Zawada v. Anderson, 181 Neb. 467, 149 N. W. 2d 329."

The previously quoted rule of law warranting this court's power on judicial review to set aside a jury verdict, was not designed nor should it ever be determinative to warrant this court to sit as a jury and make its own independent determination of the amount of damages to be awarded in a case of this nature.

The trial court properly directed a verdict on the issue of liability in this case, the issue of damages was

fairly and properly submitted to the jury, and no error appears in the record. The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JACK S. MARTIN, APPELLANT.

178 N. W. 2d 573

Filed June 26, 1970. No. 37526.

1. **Criminal Law: Evidence: Trial.** Failure of the court to caution the jury on evidence given by an accomplice, in the absence of special request, will not ordinarily constitute reversible error.
2. **Criminal Law: Sentences: Appeal and Error.** Where punishment of a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not be disturbed unless an abuse of discretion appears.

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

A. Q. Wolf and Bennett G. Hornstein, for appellant.

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

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

SMITH, J.

A jury found defendant guilty of burglary, and the court sentenced him to imprisonment for 8 to 10 years. Defendant appeals. He complains that the court failed to instruct the jury on testimony of an accomplice and that the sentence was excessive.

No jury instruction on testimony of an accomplice was requested. Failure of the court to caution the jury on evidence given by an accomplice, in the absence of special request, will not ordinarily constitute

reversible error. Cornell v. State, 138 Neb. 708, 294 N. W. 851 (1940), modified on other grounds, 139 Neb. 878, 299 N. W. 231 (1941). Refusal of a requested instruction on the subject distinguishes Jungclaus v. State, 170 Neb. 704, 104 N. W. 2d 327 (1960).

The maximum sentence for burglary is 10 years. § 28-532, R. R. S. 1943. A police officer eyewitness positively identified defendant as a participant in the burglary of the liquor store at 1514 North 24th Street. The adult probation officer reported defendant's age to be 30. Defendant had been sentenced in 1959 to imprisonment for 3 years for assault with intent to commit robbery. He was discharged after having served 25 months. Afterward he received 2 fines and a jail sentence of 15 days for 3 minor misdemeanors.

Where punishment of a statutory offense is left to the discretion of the court, a sentence imposed within the statutory limits will not be disturbed unless an abuse of discretion appears. State v. Burnside, *ante* p. 234, 175 N. W. 2d 1 (1970). No abuse appears here.

The judgment is affirmed.

AFFIRMED.

VELMOR GEIGER, APPELLEE, V. REX GEIGER, EXECUTOR OF THE ESTATE OF JOHN GEIGER, DECEASED, ET AL., APPELLANTS.
178 N. W. 2d 575

Filed June 26, 1970. No. 37546.

1. **Husband and Wife: Wills: Contracts.** An agreement between a husband and wife to execute mutual wills, evidenced by a recital in the wills executed pursuant to the agreement, is valid and enforceable.
2. ———: ———: ———. The mutual promises of the parties to such an agreement are an adequate consideration.

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

Ginsburg, Rosenberg, Ginsburg & Krivosha, Rodney

P. Cathcart, Bernard Wishnow, and Charles J. Knight, for appellants.

John R. Brogan and Baylor, Evnen, Baylor, Curtiss & Grimit, for appellee.

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

BOSLAUGH, J.

John Geiger and Frances Geiger, who were husband and wife and residents of York County, Nebraska, executed reciprocal wills on December 22, 1954. Each will gave all of the property to the surviving spouse and provided that on the death of the surviving spouse, Rex Geiger, a son, was to have an option to purchase the homestead quarter at a price to be determined by appraisal. The residue of the property was then to be divided equally among the testators' three children, Velmor Geiger, Dolores Geiger, and Rex Geiger.

Each of the wills contained the following provision, identical except as to names: "My wife, Frances Geiger, and myself have made these mutual wills as of the date this will bears, after an agreement between us that we would divide our property as hereinbefore provided." The following notation was placed on the will of Frances Geiger and signed by John Geiger: "Dec 22/54. I agree to these mutual wills. John Geiger."

Frances Geiger died on January 8, 1963. On March 30, 1965, John Geiger made a new will with substantial changes in the division of his property among his children. John Geiger died on September 24, 1966, and his will made on March 30, 1965, was admitted to probate. This action was commenced on June 25, 1968, to enforce the agreement between John Geiger and Frances Geiger for mutual wills.

The district court found generally for the plaintiff and directed that the estate of John Geiger, deceased,

be distributed in accordance with the provisions of his December 22, 1954, will. The defendants have appealed.

The defendants' principal contention is that the evidence was not sufficient to establish the agreement between John Geiger and Frances Geiger for mutual wills. The answer to this contention is found in the wills themselves which recited that they were mutual wills made "after an agreement between us that we would divide our property as hereinbefore provided."

The wills constituted a written memorandum of the agreement between the testators for mutual wills. In addition thereto, the will of Frances Geiger contained the notation signed by John Geiger: "I agree to these mutual wills." The mutual promises of the testators were adequate consideration for the agreement. Mack v. Swanson, 140 Neb. 295, 299 N. W. 543. See, also, Brown v. Webster, 90 Neb. 591, 134 N. W. 185.

The defendants argue that the evidence was not sufficient because there was no proof that the wills executed on December 22, 1954, were to be irrevocable. The wills were revocable except for the agreement that they were mutual wills and were executed pursuant to the agreement to divide the property of the testators as provided in the wills. It was the agreement between the testators that was not revocable. See Cox v. Johnston, 139 Neb. 223, 296 N. W. 883.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF ARTHUR W. BERGER, DECEASED.
JACQUES F. BERGER, EXECUTOR OF THE ESTATE OF ARTHUR W. BERGER, DECEASED, APPELLANT, V. LOUISE ACKLEY BERGER ET AL., APPELLEES.
178 N. W. 2d 585

Filed June 26, 1970. No. 37562.

1. **Decedents' Estates: Motions, Rules, and Orders.** A decree of

the county court determining heirs of a decedent and directing distribution to the persons so determined is a final appealable order.

2. **Decedents' Estates: Motions, Rules, and Orders: Statutes.** Unless debts, allowances, expenses, and taxes have been paid or provided for, no heir, devisee, or legatee is entitled to a decree of distribution, partial or complete, unless the bond provided for in section 30-1304, R. R. S. 1943, has been given.

Appeal from the district court for Seward County: JOHN D. ZEILINGER, Judge. Reversed and remanded.

Herman Ginsburg and Russell A. Souchek, for appellant.

Blevens and Bartu, for appellees.

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

MCCOWN, J.

This is an appeal from an order of the district court dismissing an appeal from an order of the county court of Seward County, Nebraska, determining heirship and directing a partial interim distribution of the assets of an estate.

Arthur W. Berger died February 20, 1969, and his will was admitted to probate on March 27, 1969. The appellant here is the duly appointed, qualified, and acting executor of the estate. Arthur Berger's will left all of his property to his wife, Julia May Berger, who had predeceased him. Settlement of her estate was also in process. In the course of the proceedings in Arthur Berger's estate, a petition was filed in the county court by the decedent's sister and a niece praying for a determination of heirship and for the interim distribution of 845 shares of stock of Triangle Industries to the residual heirs-at-law. No bond was filed under the provisions of section 30-1304, R. R. S. 1943.

The petition alleged that there was sufficient property in the estate to pay all legacies, claims, estate and in-

heritance taxes, and expenses and costs of administration, although the time for final settlement of the estate had not yet expired. The executor's answer denied those allegations of the petition and also alleged that the statutes of Nebraska did not authorize distribution of the assets of the estate; and that the shares of stock were personal property and were subject to determination and lien of inheritance and estate taxes and all administration costs in both the estate of Julia Berger and the decedent, none of which had been determined. It was also alleged that appraisement for inheritance tax or other purposes had not been determined or completed, and prayed that the petition for determination of heirs and partial distribution be denied or continued pending completion by the executor of the duties enjoined on him by law.

On September 22, 1969, the county court entered its decree determining heirship and directing the distribution of the Triangle Industries shares to Louise Ackley Berger, Marie Berger Partridge, and William W. Berger, Sr., each one-third. The decree also found that the estate was possessed of sufficient assets, both real and personal, exclusive of such stock, for the payment of legacies, claims, inheritance and estate taxes, and expenses of probate and administration.

The executor, deeming himself aggrieved and prejudiced by the findings and decree, duly perfected his appeal to the district court and certified transcript was filed in the district court. Upon the filing of the transcript in the district court and before any pleadings were filed, a motion to dismiss the appeal was filed by the appellees on the ground that the order appealed from was interlocutory and not a final order. The district court sustained the motion to dismiss on that ground. The executor then perfected his appeal to this court.

There is no bill of exceptions and no question of fact involved here. The sole issue before this court is whether the judgment can be sustained on the face of the record

herein. The only issue is whether the district court had an appealable order before it.

Both parties rely upon the case of In re Estate of Lehman, 135 Neb. 592, 283 N. W. 199. That case involved the question of allowances of fees, costs, and expenses to the executors. It held that such allowances were interlocutory until the final closing of the estate. There was no question about any order of distribution to beneficiaries of the estate, nor was there any decree of heirship. The court in that case referred specifically to section 30-1306, R. R. S. 1943. That section provides: "Any person aggrieved by any order, decree or denial of a court, in pursuance of the provisions of sections 30-1301 to 30-1307, may appeal therefrom as provided for in other cases." The court in the Lehman case said: "Section 30-1306, supra, pertains specifically to decrees and orders of the county court, assigning the estate to persons by law entitled thereto, and directing distribution of the estate to heirs, legatees and devisees of the decedent. This section contemplates appeals from such decrees and orders * * *." A decree determining the heirs and the right of descent of real and personal property is by statute declared to be a final order and, unless appealed from, is binding and conclusive. See § 30-1712, R. R. S. 1943.

The appellees take the position that regardless of the nature of the decree of distribution, the executor is not "aggrieved." We do not agree. It is apparent that the executor will have a substantial tax liability in this case and that the tax can be paid only by disposing of property of the decedent. It is the duty of the executor to determine what property should be disposed of for the purpose of raising the necessary funds. He must exercise his discretion in making that decision. The value of corporate stock, where the company is a small closely held corporation, may be difficult to determine in any event, and particularly so for tax purposes. Even a sale does not necessarily settle the valuation issues.

There may even be tax claims against the decedent or his property which are not barred by notice to creditors. A decree such as that entered here gives the executor no leeway, allows for no judgment, and purports to order the surrender of specific nonfungible personal property which may be irreplaceable. This is done without any guarantee that such persons will, in the event remaining property of the estate is insufficient, pay or provide for the taxes. While such a decree may protect the executor from liability to the petitioning heirs, it does not eliminate the possibility that he may have to sacrifice other property to pay the taxes. Neither does it indemnify him from his possible personal liability for federal taxes. The executor and not the county court bears the possible personal liability for federal taxes.

This record does not establish that payment of taxes has been "provided for" as required by section 30-1304, R. R. S. 1943, but it does establish that no bond to indemnify the executor has been filed as required by that section. The executor should be entitled to a hearing to determine whether there are in fact sufficient assets in the estate to protect the executor from liability for inheritance and estate taxes and to determine whether sound discretion requires that such taxes be paid out of the particular property claimed by the petitioners.

Unless debts, allowances, expenses, and taxes have been paid or provided for, no heir, devisee, or legatee is entitled to a decree of distribution, partial or complete, unless the bond provided for in section 30-1304, R. R. S. 1943, has been given. Markle v. Markle, 120 Neb. 412, 232 N. W. 770. In Zimmer v. Gudmundsen, 142 Neb. 260, 5 N. W. 2d 707, at page 281, this court said: "Likewise a distribution of a portion of a residuary estate, the amount of the residue being dependent upon the expense of estate which has not been fully determined, cannot be sustained until ascertainment of the estate expense.

"It follows that the district court was in error in, in

effect, making distribution of the estate by its decree in absence of evidence of a decree of heirship, and in the absence of a showing of full and final costs and expenses of administration."

Under the circumstances disclosed by this record, we believe that the statutes do not contemplate a partial interim distribution without the filing of the bond required to indemnify the executor or administrator as required by section 30-1304, R. R. S. 1943.

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

REVERSED AND REMANDED.

HELEN H. MOLHOLM, CONSERVATOR OF THE ESTATE OF BRODER PAULSEN, APPELLANT, V. EZRA LYNES ET AL., APPELLEES.

178 N. W. 2d 566

Filed July 2, 1970. No. 37485.

1. **Trial: Evidence.** On a motion to dismiss, made at the close of plaintiff's case, every fact which is alleged and which the evidence tends to support will be considered as proved.
2. **Gifts: Evidence.** Where the validity of an alleged gift between persons occupying a confidential relationship is attacked, the burden of proving that a confidential relationship existed between the parties rests on the one attacking the gift. When this burden is met, the burden then rests on the alleged donee to show the validity of the gift.
3. **Gifts: Evidence: Undue Influence.** The burden of proof is on the person asserting undue influence to prove by a preponderance of the evidence: (1) That the grantor, testator, or donor was a person who would be subject to such influence; (2) that there was an opportunity to exercise such influence; (3) that there was a disposition to exercise such influence; and (4) that the result was the effect of such influence.
4. **Evidence: Undue Influence.** Undue influence is usually surrounded by all possible secrecy. It is largely a matter of inference from facts and circumstances surrounding the individual, his life, character, and mental condition, as shown by the evi-

dence and the opportunity afforded designing persons for the exercise of improper control.

5. **Gifts: Evidence: Undue Influence.** Where the plaintiff has shown the relationship of the parties and that their dealings are such that a presumption of undue influence or a breach of trust arises therefrom, the burden of going forward with the evidence shifts to the party seeking to sustain the conveyance as a gift.

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

Maupin, Dent, Kay, Satterfield & Gatz, Donald E. Girard, and Gary L. Scritsmier, for appellant.

Orie C. Adcock and Robert M. Harris, for appellees.

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

SPENCER, J.

This is an action brought by plaintiff as conservator of the estate of her uncle, Broder Paulsen, to recover $31,100, alleged to have been wrongfully obtained from her ward by the defendants, Ezra Lynes and Larry Lynes. The defendants are father and son, and will be referred to hereafter as Ezra and Larry. Broder Paulsen will be referred to as Paulsen. At the close of plaintiff's evidence, the defendants moved to dismiss plaintiff's petition and enter a verdict for the defendants and each of them. This motion was sustained and the plaintiff has perfected an appeal to this court.

Plaintiff, who is a niece of Paulsen, went to live with Paulsen's parents in 1902. The home was a sod house, approximately 10 miles north and east of Oshkosh, Nebraska. Paulsen was still living in the same house at the time he was hospitalized in 1967. The house had no modern conveniences. Paulsen, who was 83 years of age at the time of the trial, had a congenital deformity. He had no fingers or thumb on his left hand but had some fingernails at what would appear to be the end

of his wrist. He had never owned an automobile nor had a driver's license. He traveled with horse and a wagon until his last team died sometime between 1960 and 1962. After that time he was dependent entirely upon neighbors for transportation.

Ezra, who had rented a part of Paulsen's farm land, lived approximately 9½ miles east of Oshkosh and 2½ miles west of Paulsen. Larry, from 1963 to September 1966, lived in Oshkosh; from September 1966 to January 1967, he lived in Scottsbluff, Nebraska; and from March 1967, to the date of the trial he lived 11½ miles southwest of Oshkosh, and more than 20 miles from the Paulsen ranch.

In August 1967, after an absence of several years from Oshkosh, plaintiff visited Paulsen. At that time she found him very unkempt; looking old and tired; very forgetful; and repetitious. He had grown a long beard and had had no haircut for several months. Plaintiff persuaded him to change into clean clothing, and she took him into Oshkosh where he got a haircut and a shave. At that time he did not appear to be in very good health, had lost much of his strength, walked very slowly, and seemed to be very tired, with very little ambition.

Plaintiff's next visit with Paulsen was in October 1967. He had grown weaker and in walking around he would get out of breath. To her, he seemed more feeble and failing than in August, and his memory was not as good as it had been in August. Again, he had neglected to get a haircut and a shave, and consequently he again had very long hair and a long beard. The home was in very bad condition, and everything was, to use plaintiff's words, "just a mess." On the occasion of her October visit, plaintiff met Ezra. She had gone to Ezra's home to discuss Paulsen's circumstances, told him that Paulsen was not very well, and gave him her name, address, and telephone number in Denver with the request that she be contacted if any emergency should arise. Ezra

telephoned plaintiff on the evening of November 28, 1967, and advised her that her uncle had had a stroke and was in the hospital.

Paulsen's physician, who was called when Ezra brought Paulsen into Oshkosh November 27, 1967, had not seen Paulsen since April 1, 1964, when he treated him for a fungus infection. The physician testified that Paulsen was extremely dirty, was incoherent, and had suffered a cerebral vascular accident. In his opinon, Paulsen's mental condition remained static from November 1967, to the time of the trial. Paulsen was not aware of time or place, and did not comprehend things he was asked to do. He definitely did not have the mental capacity to appear and testify.

Some of the neighbors testified that Paulsen was forgetful in later years. One of them stated he had observed this condition since 1960. This neighbor told of an instance in 1966 when his bull got into Paulsen's pasture, and Paulsen had forgotten it a short time later. Another neighbor, Christensen, testified that Paulsen had been a strong willed individual until the last few years. He observed that Paulsen's health had started deteriorating by 1965, and that Paulsen was forgetful after that time. Another neighbor, Krajewski, testified that he and his brother-in-law, both of whom had helped Paulsen on previous occasions, were hired by Ezra in 1966, to put up hay for Paulsen. After the hay was put up, they allowed it to settle for 60 days and then, in Paulsen's presence, one of them measured the stacks. When they went to see Paulsen on September 18, 1966, for payment for putting up the hay, Paulsen was having one of the bad days they had heard about. He did not know who they were, nor did he know they had put up the hay. After they visited with Paulsen and showed him the hay, Paulsen had the witness make out a check which he signed. About a week later, Paulsen came over to the witness' home to inquire if he had ever settled with him for putting up the hay.

Another neighbor, Miller, testified that he was helping Ezra and Paulsen with cattle in 1963, when Paulsen got overheated. He also testified to taking Paulsen to see Ezra about 7 o'clock on a morning in 1963, because Paulsen told him he was worried about some money. When they arrived, Ezra told them he did not have time to talk. When Ezra left, Paulsen said, "* * * that was a good deal." The witness took Paulsen over to Ezra's again 2 days later, but found no one at home. About 2 days later, another neighbor, Kemmerling, came to Miller's home with Paulsen, and Paulsen said, " 'I want you to go along with I and Mr. Kemmerling to talk to Ezra Lynes.' " When they drove into the yard, Paulsen said to Ezra, " 'I want to talk to you.' " Ezra said, " 'I have got to go to work,' " and then they drove off. As they were driving away, Paulsen said, " 'It looks like I bought another combine.' " Kemmerling testified that on one occasion Paulsen had told him he had to pay Ezra for every little thing he did for him. Paulsen also told this witness that he had to let Ezra have some money. In 1962 or 1963, Paulsen asked Christensen what he thought about loaning money to Ezra, and Christensen told him that personally he would not. In 1966, when Christensen hauled some cattle for Paulsen, Paulsen showed him a check and told him that he would have to see Ezra to get paid, that Ezra would fill out the check.

Plaintiff testified that after she was appointed conservator, she attempted to straighten out her ward's affairs, but was never able to find some of the bank statements or checks for the period after February 1966, nor any of the checks issued to the defendants from December 1965, through November 1967. The November 1967, bank statement at Ezra's direction was supposedly mailed to Paulsen at the hospital but it was never found. Paulsen's banker testified that Ezra in later years usually picked up Paulsen's bank statements and canceled checks. Plaintiff did find a check for $800,

dated August 31, 1965, payable to Ezra Lynes. Because the bank photostated checks charged to its various depositors, plaintiff was able to have reproductions made of those photostats. They indicate that the following checks, in addition to the one for $800, were cleared through the ward's bank account by the defendants:

DATE	NAME	AMOUNT
12-24-1965	Ezra Lynes	$1,000.00
1-22-1966	Ezra Lynes	600.00
2- 4-1966	Ezra Lynes	100.00
2- 4-1966	Ezra Lynes	100.00
2-19-1966	Ezra Lynes	4,000.00
3-11-1966	Ezra Lynes	2,500.00
4-15-1966	Ezra Lynes	3,000.00
10- 8-1966	Ezra Lynes	2,000.00
12-10-1966	Ezra Lynes	3,000.00
2-13-1967	Larry Lynes	6,000.00
2-25-1967	Ezra Lynes	5,000.00
8-26-1967	Ezra Lynes	800.00
10-16-1967	Ezra Lynes	300.00
10-16-1967	Larry Lynes	300.00
10-26-1967	Larry Lynes	600.00
11- 4-1967	Ezra Lynes	800.00
11-26-1967	Ezra Lynes	200.00

Portions of the deposition testimony of the defendants were introduced as admissions against interest. This testimony would indicate that both defendants were present on the occasions when these checks were executed. Their testimony was to the effect that Paulsen signed the checks after they had been made out by Larry, and that Paulsen put his account number on each of the checks. A comparison of writing with other checks in evidence would raise a question as to whether or not Paulsen actually wrote the account number on the checks, or whether it was inserted by one of the defendants. Defendants admit the receipt of the proceeds of the checks. The record indicates the checks

in each instance were deposited in the account of the defendant to whom they were payable.

Two disinterested witnesses, employees of the grocery store in Oshkosh, testified that it was customary procedure for Ezra to bring in blank checks signed by Paulsen to pay for groceries, and these witnesses usually filled in the checks with the date, name of the payee, and the amount of the groceries. On some occasions cash was paid for the groceries. Ezra in his deposition testified he couldn't ever recall going into the grocery store with a blank signed check. The two witnesses were very positive that this happened on several occasions. The testimony is undisputed that during the period in question Ezra got groceries from Oshkosh for Paulsen practically every week. There can be little question but that defendants on several occasions had blank checks with Paulsen's signature in their possession.

Defendants argue that as this was a law action in which a jury was waived, the judgment of the trial court has the effect of a verdict of the jury and should not be set aside unless clearly wrong. We have no quarrel with this general proposition of law. As we said in Riddle v. Erickson, 183 Neb. 122, 158 N. W. 2d 608, the judgment of the trial court in a law action has the effect of a jury verdict where a jury has been waived, and conflicts in the evidence must be resolved in favor of the successful party. This rule, however, has no application in the instant case. Defendants moved for dismissal at the close of plaintiff's case. In that situation, the rule to be applied herein is the reverse of the one contended for by the defendants. All conflicts in evidence must be resolved in favor of the plaintiff, and plaintiff is entitled to every inference which can be adduced from the evidence.

In Johnson v. Francis, 179 Neb. 342, 138 N. W. 2d 27, we said: "On a motion to dismiss, made at the close of plaintiff's case, every fact which is alleged and which the evidence tends to support will be considered as

proved." See, also, Willey v. Parriott, 179 Neb. 828, 140 N. W. 2d 652.

Plaintiff presents two basic contentions: First, the trial court should have placed the burden upon defendants to prove the validity of the checks which passed to them since they occupied a confidential relationship with plaintiff's ward; and second, if the court did not place the burden upon defendants to prove the existence of valid gifts, there was sufficient evidence of undue influence or fraud to make a sufficient prima facie case to shift to defendants the burden of going forward with the evidence.

Where the validity of an alleged gift between persons occupying a confidential relationship is attacked, the burden of proving that a confidential relationship existed between the parties rests on the one attacking the gift. When this burden is met, the burden then rests on the alleged donee to show the validity of the gift. See Krull v. Arman, 110 Neb. 70, 192 N. W. 961.

We have set out sufficient of the evidence to indicate that a confidential or fiduciary relationship did exist between Paulsen and Ezra and Larry. Sufficient certainly to require them to make a satisfactory explanation for the more than $30,000 cleared by them through Paulsen's bank account in a 2-year period. Defendants, when their depositions were taken on some of the checks, were extremely evasive as to the nature of the transaction but were certain Paulsen had given them most of the checks as gifts, usually on occasions when they suggested to him that they needed money for machinery or wanted to secure registered cattle to improve their herd.

It is not necessary to go into detail on all the various transactions, some of which they claimed were settlements for labor performed, such as the two checks for $300 in October 1967. Larry testified that he spoiled the check made payable to Ezra by writing the amount on the line for the payee and that Paulsen signed it and told him to try to clear it because it was the last check

he had. The next day Larry secured another check for the same amount payable to himself, which Paulsen signed after Larry filled it out. It is the testimony of the defendants that although the amount is in excess of the value of any services, that Paulsen wanted to pay them each $300.

Paulsen was not known as a generous man. The testimony would indicate that he was extremely penurious. So much so that he would not spend money even to improve his own living conditions. The alleged gifts were never mentioned to anyone, and apparently they always took place when the defendants had a need for money. The inference from plaintiff's evidence would indicate them at most to have been loans. No gift returns were ever made on any of the items.

Plaintiff claimed a conspiracy on the part of the defendants. This inference could be drawn from the fact that although certain of the checks were alleged gifts to Ezra, the personal property purchased with the checks was put in the name of both Ezra and Larry.

The burden of proof is on the person asserting undue influence to prove by a preponderance of the evidence: (1) That the grantor, testator, or donor was a person who would be subject to such influence; (2) that there was an opportunity to exercise such influence; (3) that there was a disposition to exercise such influence; and (4) that the result was the effect of such influence. Parkening v. Haffke, 153 Neb. 678, 46 N. W. 2d 117. The inferences which must be accorded to plaintiff's evidence herein at the stage of defendants' motion are sufficient to meet that burden.

While great age is an important and pertinent circumstance to be considered in connection with other evidence going to the question of mental competence, it ordinarily cannot be treated as controlling. Parkening v. Haffke, *supra*. Where, however, undue influence or a breach of a confidential relationship may exist, we have a different situation. As we have said many times be-

fore, undue influence is usually surrounded by all possible secrecy. It is largely a matter of inference from facts and circumstances surrounding the individual, his life, character, and mental condition, as shown by the evidence and the opportunity afforded designing persons for the exercise of improper control. In re Estate of Farr, 150 Neb. 615, 35 N. W. 2d 489.

Here, we find a confidential relationship did exist and that defendants had every opportunity either to exert undue influence or to take advantage of a trust relationship. We also find the inferences on the state of the record herein are such that it would be so out of character for Paulsen to have materially reduced his substance by large and frequent gifts that we can reasonably infer that they were either the result of undue influence, a breach of trust, or loans.

Where, as here, the plaintiff has shown the relationship of the parties and that their dealings are such that a presumption of undue influence or a breach of trust arises therefrom, the burden of going forward with the evidence shifts to the party seeking to sustain the checks as gifts. See, Cunningham v. Quinlan, 178 Neb. 687, 134 N. W. 2d 822; Conry v. Langdon, 181 Neb. 53, 146 N. W. 2d 782; Scholting v. Scholting, 183 Neb. 850, 164 N. W. 2d 918.

The motion to dismiss was improperly sustained. The judgment of dismissal is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM E. AGNEW, APPELLANT.

178 N. W. 2d 592

Filed July 2, 1970. No. 37534.

Criminal Law: Post Conviction. Unless a miscarriage of jus-

tice is shown, the post conviction remedy is not available for reconsideration of questions that were determined by this court.

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

Willaim E. Agnew, pro se.

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

Heard before SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and CHADDERDON, District Judge.

SMITH, J.

Defendant appeals from denial of an evidentiary hearing on his motion for post conviction relief from a judgment that we affirmed in State v. Agnew, 184 Neb. 700, 171 N. W. 2d 542 (1969). The motion raises issues which we there necessarily determined. Unless a miscarriage of justice is shown, the post conviction remedy is not available for reconsideration of questions that were determined by this court. State v. O'Kelly, 181 Neb. 618, 150 N. W. 2d 117 (1967). Justice has not miscarried here.

Other issues raised in defendant's motion are without merit. The judgment is affirmed.

AFFIRMED.

LYLE A. LYDICK, APPELLEE, v. L. C. JOHNS, DIRECTOR OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.

178 N. W. 2d 581

Filed July 2, 1970. No. 37590.

1. **Administrative Law: Appeal and Error: Statutes.** 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. If these statutes create such a right, the mode and manner of appeal is statutory and

such jurisdiction can only be conferred in the manner provided by statute.

2. ———: ———: ———. The filing of a bond approved by the Auditor of Public Accounts with the Director of Motor Vehicles of the State of Nebraska is a condition precedent for the initiation of an appeal in an implied consent proceeding.

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

Clarence A. H. Meyer, Attorney General, Herbert T. White, and James J. Duggan, for appellants.

Joseph K. Meusey of Fraser, Stryker, Marshall & Veach, for appellee.

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

SPENCER, J.

This is an appeal in an implied consent proceeding, involving a question of jurisdiction. Appellee appealed from an order of the Director of Motor Vehicles of the State of Nebraska revoking his operator's license and privileges for failure to comply with the Nebraska Implied Consent Law.

The order was entered June 10, 1969. Appellee by letter postmarked June 27, 1969, but received by the director on June 30, 1969, give notice that he intended to appeal to the district court for Douglas County and enclosed a $200 surety bond.

The procedure for appeal from an order of revocation in an implied consent case is statutory. Section 39-727.11, R. R. S. 1943, so far as material herein, provides: "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."

Section 60-420, R. R. S. 1943, so far as material herein,

provides: "Any person who feels himself aggrieved because of any order of the director * * * may appeal therefrom to the district court of the county in which the application for the license was originally made or to the district court of the county wherein such person resides * * *. The * * * licensee * * * shall within twenty days from the date of the final order complained of, execute a bond for costs to the State of Nebraska in the sum of two hundred dollars with sufficient surety to be approved by the Auditor of Public Accounts. The bond shall be filed in the office of the director."

The bond in the instant case was filed with the director but was not approved by the Auditor of Public Accounts. The question involved is whether approval of a bond by the Auditor of Public Accounts within the time limited is a jurisdictional requirement.

The State filed a demurrer raising the jurisdictional question. The trial court overruled the demurrer and permitted the appellee to amend his bond. The State stood on its demurrer and perfected this appeal.

The language of the statute is clear. The bond filed must be approved by the Auditor of Public Accounts. To hold otherwise would constitute an amendment of the statute. We hold that the filing of an approved bond is a jurisdictional requirement. Its filing is a condition precedent to the initiation of the appellate process. In Peck v. Dunlevey, 184 Neb. 812, 172 N. W. 2d 613, we said: "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 statutory and such jurisdiction can only be conferred in the manner provided by statute."

In Radil v. State, 182 Neb. 291, 154 N. W. 2d 466, where plaintiff in a condemnation action failed to serve a copy of the notice of appeal on the defendant, we said: "The right of appeal is statutory and the re-

quirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action. Brown v. City of Omaha, 179 Neb. 224, 137 N. W. 2d 814. It is fundamental that an appellate court cannot pass on the merits of a case falling within its appellate jurisdiction unless its jurisdiction is invoked in the manner prescribed by statute. Barney v. Platte Valley Public Power & Irr. Dist., 144 Neb. 230, 13 N. W. 2d 120. In the instant case, the condemnee failed to serve a copy of the notice of appeal within the time fixed by section 76-715.01, R. R. S. 1943, a mandatory step to invoke the jurisdiction of the district court on appeal. The appeal to the district court was not taken in the manner provided by the statute and, consequently, the district court was without jurisdiction to hear the merits of the purported appeal."

In Reiber v. Harris, 179 Neb. 582, 139 N. W. 2d 353, appellant in an appeal to the district court from the order of a freeholder's board, filed a cash bond with the transcript of the proceedings. Section 23-135, R. R. S. 1943, required approval of the bond by the county clerk. The bond was not so approved. Appellant was not permitted to amend the bond, and a motion to dismiss was sustained. We there said: "The Legislature has prescribed the method by which an appeal from an order of a freeholder's board shall be perfected. Within 20 days after the action of the board has been entered upon the records of the board by the county clerk of the county in which the real estate is located, a notice of appeal must be served upon the county clerk and a bond must be executed and approved by the county clerk. These requirementas are mandatory and jurisdictional. Sommerville v. Board of Commissioners of Douglas County, 116 Neb. 282, 216 N. W. 815, affirmed on rehearing, 117 Neb. 507, 221 N. W. 433; Drier v. Knowles Vans, Inc., 144 Neb. 619, 14 N. W. 2d 222. If the bond is not submitted to the county clerk for approval within

the time required by statute, the appeal should be dismissed. County of Cedar v. McKinney Loan & Investment Co., 1 Neb. (Unoff.) 411, 95 N. W. 605."

Appellee relies on Ballantyne Co. v. City of Omaha, 173 Neb. 229, 113 N. W. 2d 486, in which we permitted the amendment of an appeal bond. That case is distinguishable from the instant one. There an approved bond was filed. It was the wording and amount of the bond which was questioned. Here the law requires the filing of an approved bond within 20 days. This we hold to be a condition precedent to the initiation of the appeal.

We reverse the judgment herein and dismiss the action.

REVERSED AND DISMISSED.

McCOWN, J., dissenting.

Some additional facts should be set out. The bond in this case was executed by the principal and by the Insurance Company of North America, as surety, and was dated three days prior to the expiration of the appeal time. The bond carried on the lower lefthand corner of its face, the following words: "Approved by State Auditor this ____ day of _____, 1969. _____ State Auditor."

On the final day for appeal, plaintiff's attorney called the Department of Motor Vehicles, identified himself, and asked if the bond in this case had been received, accepted, and filed. After checking the file, the employee advised the plaintiff's attorney that the bond had been filed and marked as filed on that day.

It should also be noted that it is undisputed that Insurance Company of North America was "sufficient surety to be approved by the Auditor of Public Accounts."

The trial court granted the oral motion of the plaintiff to amend the cost bond on December 1st. The only thing about the bond which needed amendment was the endorsement of the approval of the Auditor of Public Accounts.

The majority opinion holds that the language of the statute is so clear that, in the face of these facts, this court is required to hold that the approval of the Auditor of Public Accounts must be obtained by the plaintiff, and within the 20-day period for appeal, and that such approval within that time is a jurisdictional requirement precedent to initiation of the appellate process and cannot be amended thereafter.

That conclusion is not required by the statute. It continues a timeworn tendency of appellate courts to rely upon hypertechnical interpretation of appeal statutes to dispose of cases upon procedural grounds. This may be practical, but it is not equitable. Roscoe Pound commented acidly on this tendency of appellate courts more than once.

There is ample authority in this state to reach a different result. Section 25-852, R. R. S. 1943, provides, among other things, that: "* * * Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment." That section has been applied to an appeal bond. Ballantyne Co. v. City of Omaha, 173 Neb. 229, 113 N. W. 2d 486. This court specifically said in that case: "The term 'proceeding' as used in the statute includes filing of appeal bond, and the right to amend such bond is within the purview of the statute. See In re Estate of Kothe, 131 Neb. 780, 270 N. W. 117. In the cited case it was said: 'This court has frequently held that where a bond is given, even if defective, still the court has obtained jurisdiction, and that the proper procedure is for the adverse party to move to compel the appellant to give a proper bond in an amount and condition as required by law; * * *.'" See, also, In re Estate of Hoagland, 128 Neb. 219, 258 N. W. 538.

In State ex rel. Miller v. Cavett, 163 Neb. 584, 80 N. W. 2d 692, this court said with respect to an appeal bond which did not comply with the requirements of

the statute: "While the bond is irregular in form, it is sufficient to lodge jurisdiction of the case in district court. The irregularities of the bond are such that the trial court could properly require the filing of an amended bond to eliminate the irregularities found in the original. It is not an appeal bond which is so fallacious as to be no bond at all."

In the case relied on heavily in the majority opinion, Reiber v. Harris, 179 Neb. 582, 139 N. W. 2d 353, this court specifically said: "A bond which has been filed and approved within the time required by statute is subject to amendment if defective or invalid. * * * In these cases the record does not show that bonds were submitted to the county clerk for approval within the statutory time."

In Jacobitz v. Bussinger, 179 Neb. 524, 138 N. W. 2d 839, this court said as to an appeal bond: "Ordinarily an appellant is not a competent surety for himself, but a bond signed by a principal, who also signs as the only surety, while it may be insufficient or defective or invalid as a bond, is not void for the purpose of determining whether jurisdiction on appeal is acquired."

In State v. Kidder, 169 Neb. 181, 98 N. W. 2d 800, this court said: "We conclude that a defective appeal bond which has been approved by the court rendering the judgment confers jurisdiction on the appellate court to have the defect corrected, and the appellate court is required to permit amendments of the bond or order the filing of a new bond in the furtherance of justice. Where a failure to so do results in prejudice to the complaining party it constitutes prejudicial error. The discretion granted a court in permitting or denying amendments is a legal discretion which is subject to review to determine if its exercise resulted in prejudice to a litigant."

In the case at bar, the plaintiff delivered an appeal bond to the Director of Motor Vehicles in time and in complete and proper form and "with sufficient surety to be approved by the Auditor of Public Accounts." The

trial court in its discretion granted a motion to amend the appeal bond by showing the missing approval and overruled a demurrer based on the procedural jurisdictional grounds previously discussed. That discretion was properly exercised and should have been affirmed.

SMITH, J., joins in this dissent.

JAMES ISKE, APPELLEE, V. OMAHA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLANT.

178 N. W. 2d 633

Filed July 10, 1970. No. 37371.

1. **Eminent Domain: Damages: Evidence.** Compensation for land taken by right of eminent domain is measured by its full market value as of the date of the appropriation, and anything connected with the land that would influence its market value in the mind of a good faith intending purchaser is an element for consideration in awarding damages.
2. ———: ———: ———. In eminent domain proceedings where stone or mineral deposits may have bearing on the market value of the land, evidence as to the extent of those deposits is admissible but the award may not be reached by separately evaluating the land and the deposits. Consideration is given to the quantity and quality of the minerals that can be extracted and to the value thereof, solely as evidence for arriving at the value of the land.
3. **Eminent Domain: Trial: Evidence.** In eminent domain proceedings the resolution of the question as to the presence of minerals and potential recreational development is primarily for the jury under the conflicting issues raised, and the evidence should be decided like any other question of fact at issue in a case. It is not for the court to determine under the guise of a determination of the admissibility of evidence.
4. **Eminent Domain: Trial: Witnesses.** Generally in eminent domain proceedings, an expert witness, otherwise properly qualified, may be permitted to use and to testify concerning the different factors affecting valuation which a well-informed buyer would use in arriving at the price which he would pay for the property at the time of the taking.
5. ———: ———: ———. 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.

6. **Trial: Witnesses.** The weight and credibility of the testimony of either lay or expert witnesses is for the jury.
7. **Eminent Domain: Damages: Appeal and Error.** 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.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

Fraser, Stryker, Marshall & Veach, for appellant.

Dixon G. Adams, for appellee.

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

SPENCER, J.

This is a condemnation action in which the Omaha Public Power District, hereinafter referred to as condemner, condemned a transmission line easement across the plaintiff's property in Sarpy County, Nebraska. The board of appraisers awarded damages in the amount of $94,870. On appeal to the district court the jury made an award of $135,000 and the trial court allowed attorneys' fees of $13,500 and expert witnesses' fees of $1,500. Defendant perfected an appeal to this court.

The easement condemned is a permanent one for a 345,000 kv transmission line or lines. The easement varied in width from 300 feet on the north boundary of the property to 400 feet on the south, and covers 38.3 acres. The taking completely severed a tract containing 3.15 acres on the south end of the property. The easement area is zoned Industrial 2. The witnesses agree the taking was sufficiently broad that no part of the easement area could ever be used for mineral production; that no structure could ever be placed on the easement; and that if a mining operation were conducted adjacent

to the easement it would be necessary to leave protective slopes to protect the easement.

The area condemned is a part of a tract of 340 or more contiguous acres, separated by an east-west county road and bounded on the south by the Platte River. The land south of the east-west county road slopes gently to the river. The land north of the county road gradually rises and as it goes north is wooded and hilly. A graveled county road, which is a projection of Thirty-sixth Street in Omaha, separates the land north of the east-west county road. The county road connects with U. S. Highway No. 73-75 some distance east of the plaintiff's property. The land directly west of the easement area is owned by the Metropolitan Utilities District of Omaha. A large water treatment plant and a well field are located on the Metropolitan Utilities District's tract. Cedar Island, which was the island involved in Iske v. Metropolitan Utilities Dist., 183 Neb. 34, 157 N. W. 2d 887, lies south and west of plaintiff's land. Immediately west of plaintiff's land to the north of the county road there are two operating limestone quarries.

The property north of the county road contains outcropping of limestone, but to the date of the taking had been farmed. The property south of the road to the river is level bottomland, sloping to the river, and was planted in corn at the time of the taking, August 8, 1967.

The easement condemned occupies a strip along the west edge of the plaintiff's land from its north boundary to its south boundary. It crosses the westerly end of a lake extending across the south end of plaintiff's property, which lake lies adjacent to the Platte River. This lake was formed by a 1960 to 1963 gravel pumping operation. Immediately to the east of this lake, on adjoining properties, there are a series of other lakes created by gravel pumping operations which have now been substantially developed as recreational sites.

Plaintiff's evidence indicates that the land north of the county road is suitable and adaptable for a lime-

stone quarrying operation, and the portion south of the county road is adaptable for the production of sand and gravel, with a residual use for recreational cabin sites.

Plaintiff's first expert witness was a geologist employed to make a subsurface investigation. He drilled two holes to study the limestone formation and used core drillings made by others to evaluate the extent of the mineral deposit on the property, including the easement area. He had previously participated in the testing of the land immediately to the west of plaintiff's land and south of the county road. In addition to the drillings he made a visual inspection of the limestone formation being quarried on the adjoining property. He testified that he had sufficient information to make a reasonable projection of the material under plaintiff's land. He testified to the presence of 1,361,111 cubic yards of limestone; 22,000 cubic yards of wall rock; 1,426,660 cubic yards of natural sand and gravel; and 727,905 cubic yards of fine aggregate underlying the easement area and the protective slope.

Plaintiff then produced an owner of a gravel operation who testified that the amount of material underlying plaintiff's property would make it economical to set up a gravel pumping operation. Plaintiff produced witnesses who testified as to the market for wall rock as well as sand and gravel. Plaintiff also produced a number of witnesses as to the recreational potential which existed in the immediate area of the sand and gravel land. One of them had developed such an area directly across the river from plaintiff's land. This witness testified to the demand for recreational lots in the area and stated that plaintiff's land was more favorably situated than his own and could definitely be developed as a recreational area.

Plaintiff produced a civil engineer and land developer who submitted a proposed design as an illustration of one of the possible ways the plaintiff's land could be

developed. He also submitted cost estimates on the proposed development.

Plaintiff's three value experts were licensed real estate brokers who had experience in the appraisal of mineral properties. Their values ranged from $182,600 to $225,000. They all testified to considering the market data or comparable sales approach, but because they could find no comparable sales were forced to use the capitalization of income approach. Both of condemner's appraisers, who fixed plaintiff's damage at $20,115 and $24,257, used the market data approach, but because they could find no comparable sales testified they made necessary adjustments to compensate. Condemner's experts conceded that they knew of no sale of any land that had rock, sand and gravel, and a resort potential all on the same piece of property.

Compensation for land taken by right of eminent domain is measured by its full market value as of the date of the appropriation, and anything connected with the land that would influence its market value in the mind of a good faith intending purchaser is an element for consideration in awarding damages. Lechliter v. State, *ante* p. 527, 176 N. W. 2d 917.

In determining the market value of land condemned, its special adaptability or availability for the highest and best use may be shown and considered. The evidence, while disputed, is fairly conclusive that the highest and best use of the property condemned herein was as part of a limestone and wall rock quarrying operation on the north, and a sand and gravel operation on the south, with a resultant lakeshore recreational facility. This necessarily was one of the fact issues determined by the verdict of the jury. As this adaptability would increase the value in the eyes of prospective purchasers, the plaintiff is entitled to have that fact considered in determining the market value of the land condemned.

Where stone or mineral deposits may have bearing on the market value of the land, evidence as to the ex-

tent of those deposits is admissible but the award may not be reached by separately evaluating the land and the deposits. See, Burlington & M. R. Co. v. White, 28 Neb. 166, 44 N. W. 95; Pieper v. City of Scottsbluff, 176 Neb. 561, 126 N. W. 2d 865. Consideration is given to the quantity and quality of the minerals that can be extracted and to the value thereof solely as evidence for arriving at the value of the land.

The element of speculation in mineral deposits underlying the land condemned does not preclude their consideration in ascertaining the market value of the land. At best, evidence of value with land such as this is largely a matter of opinion. Certainly, condemner should not be permitted to profit from the possible uncertainty of actual market value when it deprives the condemnee of his property. The quality and quantity of the rock which may be quarried, or sand and gravel which may be profitably removed from land being condemned, are admissible to show that they are sufficient for and adaptable to commercial development. If so, they will have an effect on the market value of the lands. However, the market value of the property is the value of the land with the materials in place and not the value of the materials if they were removed. The evidence in this case indicates that plaintiff's expert witnesses did not value the rock, sand, and gravel in place as items separate from the value of the land, but used that information as a factor in arriving at the value of the land.

Condemner devotes 47 pages of its brief to the sufficiency of the evidence to sustain the verdict and attacking the rulings of the trial court on numerous objections to the admission of evidence. Condemner's objections are answered in Iske v. Metropolitan Utilities Dist., 183 Neb. 34, 157 N. W. 2d 887. Condemner, cognizant of that possibility, attempts to distinguish the facts of that case from the instant one because that case involved the presence of Cedar Island, and the taking was a fee simple title, whereas in the instant case an ease-

ment is taken, admittedly, however, with broad rights which would definitely preclude use except for farming. For practical purposes any industrial or recreational use is destroyed. Plaintiff's land is contiguous to recreational developments and between those developments and Cedar Island. That a recreational potential existed and was a present consideration is apparent from the evidence of those interested in the adjoining developments and from the aerial maps of the area. This reasonably prospective recreational development is a factor to be considered in determining market value.

The resolution of the question as to the presence of minerals and potential recreational development is primarily for the jury under the conflicting issues raised, and the evidence should be decided like any other question of fact at issue in a case. As we said in Iske v. Metropolitan Utilities Dist., 183 Neb. 34, 157 N. W. 2d 887: "It is not for the court to determine under the guise of a determination of the admissibility of evidence."

Condemner vigorously assails the foundation for and the testimony of plaintiff's value witnesses. It specifically attacks the reliability of the evidence of plaintiff's geologist in view of evidence produced by it. It further maintains that the rocks underlying the northerly portion of plaintiff's farm are no different in quality or quantity than those which underlie the whole area in adjoining counties. Also, it produced a former manager of the sand and gravel company which had operated on a part of the premises, who testified that further sand and gravel operations on the premises would be economically unfeasible. Condemner argues from this evidence that the land had no value above the market value of comparable farm land. Condemner's experts based their opinions on that premise, but did consider the taking to be the equivalent of a total one.

Plaintiff's value witnesses were shown to be experienced appraisers who had experience with mineral lands as well as some familiarity with the subject prop-

erty. They were furnished with the results of the studies made by plaintiff's other experts. Additionally, they studied the market for minerals, the cost of transportation, the accessibility of a ready market, other sources of supply, and the reasonable potential of a resultant recreational development.

In Iske v. Metropolitan Utilities Dist., 183 Neb. 34, 157 N. W. 2d 887, we held: "Generally, an expert witness, otherwise properly qualified, may be permitted to use and to testify concerning the different factors affecting valuation which a well-informed buyer would use in arriving at the price which he would pay for the property at the time of the taking.

"Generally, an expert witness, when properly qualified, may testify as to the valuation of the property, and the weight and credibility of what the witness considers in coming to his conclusion is for the jury to determine."

In Jensen v. State, 184 Neb. 802, 172 N. W. 2d 607, we said: "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. 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."

Plaintiff's three value appraisers rejected the market data appraisal approach used by condemner's witnesses, because they could find no comparable sales. The method used by them was the capitalization of income approach. This appraisal method was specifically approved in Iske v. Metropolitan Utilities Dist., *supra,* and on the plaintiff's evidence was appropriate herein.

Condemner complains that the verdict herein is ex-

cessive. What we said on this point in Iske v. Metropolitan Utilities Dist., *supra,* is pertinent: "The jury verdict fell in between the two sets of conflicting expert testimony, being $510,150. The above situation is a frequent one in condemnation cases. Our court has often discussed the function of the jury in this kind of a situation. As we have pointed out, there was no error in the trial that could be asserted as properly related to an error in the amount of the verdict. The weight and the credibility of the testimony of either lay or expert witnesses is for the jury. Expert opinion evidence, widely varying in this case, is to be considered and weighed by the triers of fact like any other testimony. The expert witnesses' testimony is purely advisory and is not binding on the triers of fact. The amount of damages sustained 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 was based upon admissible testimony. When the evidence is conflicting the verdict of the jury will not be set aside unless it is clearly wrong. A landowner only has one day in court and he must recover all of his damages in this condemnation proceeding."

The jury had an opportunity to view the property. This factor is of some significance in the determination of the excessiveness of a verdict in an eminent domain case. See Iske v. Metropolitan Utilities Dist., *supra.* It is also to be noted that the board of appraisers in county court allowed almost four times the amount fixed by condemner's value witnesses. Obviously the jury did not accept the conclusions of condemner's value witnesses nor the premise that the highest and best use of the property was for agricultural purposes and that it had no quarrying and recreational potential. While the award is generous, it is well within the range of the valuation evidence. On the record herein we cannot say that the verdict is excessive or the result of passion, prejudice, or mistake.

Condemner argues several other alleged errors. We have examined the assignments made and find none which prejudicially affected the verdict herein.

The judgment of the district court is affirmed. No allowance is made in this court for attorneys' fees.

AFFIRMED.

NEWTON, J., dissenting.

I find I must respectfully dissent from the opinion of Spencer, J. In doing so, I adhere to my dissent in Iske v. Metropolitan Utilities Dist., 183 Neb. 34, 157 N. W. 2d 887, and refer to it as a reference regarding certain legal propositions which I will not here reiterate. The evidence in this case does not sustain the verdict. The Iske land adjoins the Platte River on the north. The southerly portion consists of uncleared timber and accretion lands and a lake left after completion of gravel mining operations. The portion of primary interest lies to the north of this area. It consists of a 60-acre tract on the extreme north which is high or hill ground and to the south of approximately 160 acres of gently sloping bottom ground. The 300-foot easement runs along the extreme west boundary and consists of approximately 38 acres. The area alleged to be suitable for rock mining is in the hills and that alleged to be suitable for gravel removal operations, in the bottom ground.

The undisputed evidence shows that the gravel vein is overlaid with clay to a depth of 6 to 25 feet. The overburden becomes progressively deeper as one progresses to the north from the present lake. Under the clay are several feet of mixed dirt and sand, then several feet of fine sand is encountered, all above the gravel vein, and all unmerchantable. The clay must be stripped off by means of such machinery as bulldozers, turn-a-puls, and drag lines. In all of the bottom land area the clay runs to a depth at least 2 to 3 feet below the water level, a factor which tends to interfere somewhat with stripping operations.

Plaintiff concedes that the clay overburden reaches

a depth of 13 feet at a point approximately one-third of the way north on the bottom ground from the present lake and that beyond that point it would be economically unfeasible to maintain a gravel mining operation. Testimony as to the amount of available sand and gravel is limited to this southerly area. Plaintiff has completely failed to produce any evidence regarding cost of removal of the overburden. The record is likewise barren of *any* evidence tending to prove the economic feasibility of gravel mining operations on the southerly one-third of the bottom ground. On the other hand, defendant produced a witness who, though now retired, was for many years manager and employee of the Lyman-Richey Sand and Gravel Corporation which excavated the present lake on the Iske property while pumping out the gravel on that site. He was in charge of that operation and thoroughly investigated the area adjoining the lake on the north to ascertain the feasibility of extending gravel mining operations into that area. He testified unequivocally that it was not economically feasible to do this primarily because of the heavy overburden and also because clay strata were encountered in the gravel bed. Notwithstanding this situation, evidence was received as to the amount of gravel underlying the land and its royalty value. The entire case, including the verdict, is based on an unproved assumption that the gravel was so situated that mining operations would return a normal profit.

The same situation is found with the rock mining proposition. This area has a 25-foot overburden and there is no evidence to verify the economic feasibility of a mining operation. Plaintiff's only witness along this line said he did not know if it was economically feasible as his only experience was with rock having a 4- to 6-foot overburden. It was also established that this type of limestone rock was very widespread throughout Douglas and Sarpy Counties and the surrounding area.

The proposed lake area which plaintiff alleges could

be improved for recreation purposes covers the entire bottom land area notwithstanding that plaintiff concedes only the south one-third could be economically excavated in a gravel mining operation. Reception of this evidence is patently erroneous. A mere showing of the physical presence of minerals is not sufficient to show that the property was available for use as a source of supply of the minerals. A year before, one of plaintiff's witnesses testified that this same rock land was worth no more than farmland. He based that testimony on a market data approach. This time he used an income capitalization approach and materially altered his testimony.

Plaintiff's expert real estate appraisers testified there had been no other sales of somewhat similar property in the general area and that consequently they could not use the market data approach in determining value, yet a witness for defendant testified there were a very considerable number of such sales.

It is an accepted practice to permit the introduction of evidence relating to quantity of minerals present on the property and the royalty value per cubic yard. It must, however, be borne in mind that the end sought is the actual value of the land with the minerals in place thereon. It is ridiculous to assume that a purchaser would pay the full amount arrived at by multiplying the number of cubic yards of gravel present by the expected royalty rate. The purchaser would be interested only because he hoped to make a profit on his investment, a profit that could not be realized if he paid all that the royalty income would return to him. Such a purchaser would buy only if he could do so on a basis that would preserve for him all or a major portion of the royalty income. It is then evident that the royalty income has very little relationship to actual or market value. Compensation for land taken is measured by the market value at the time taken. See Leffelman v. City of Hartington, 173 Neb. 259, 113 N. W. 2d 107. The income

capitalization method of arriving at value is reasonably accurate where a building is involved. It is a simple matter to determine net rentals and an assured annual rate of income from such rentals over a period of many years. In cases dealing with minerals, the material is sold and disposed of and the mine is constantly subject to a process of depletion. A steady, long-term return on the investment at a readily determined rate is not forthcoming.

The uncertainty of this type of evidence is referred to in 5 Nichols on Eminent Domain (3d Ed.), § 19.3 (3), p. 19-63, wherein it is stated: "Estimation of the amount of material to be mined and testimony of a fixed price per unit, the product of which is to be used as the measure of the income to be derived from the mining or quarrying operation has invariably been rejected in the determination of the market value of the land. Such evidence requires a degree of refinement in the measure of values which seems totally incompatible with the gross estimates involved in ordinary transactions. Though there may be the most accurate calculation of the quantity of material to be mined, yet, without knowing exactly the expense of bringing it to the surface and carrying it to market, and the amount likely to be lost in mining and conveying, and the times in which it would be brought out, and the market prices at those times, the quantity is of no aid in valuing the land. The gross estimates of ordinary business transactions are all that courts and juries have skill enough to use as a measure of value. All other measures are necessarily arbitrary and fanciful."

The distinction between showing the existence of minerals on the land and admitting expert evidence based on the multiplication of cubic yards by royalties is pointed up in State Highway Commission v. Arnold, 218 Ore. 43, 341 P. 2d 1089. It is there stated: "On the other hand Barnes definitely used the multiplication method in his estimate, and as far as we can discern

from the transcript it was the sole method used by him. Whether or not it was the sole method we are of the opinion that its use in this case is ground for reversal. The evil of the method is not simply the danger of leading the appraiser to an inaccurate appraisal but more important, because it has the illusion of scientific certainty and validity, it is too likely to be grasped upon by the jury as the sole criterion of value even though the expert witnesses in making their estimates purport to eliminate from their computation the element of speculation. * * * 'Both (appraisers) appraised the land upon the basis of returns inuring to the defendants out of future sales of the rock material. Both made inquiries and investigations with respect to the production, transportation and sale of rock material. Predicated thereon, they estimated the selling price in the future of the rock material and then made deductions by way of expenses for blasting, trucking, general operating expenses, allowance for risks and other unforeseen business contingencies and then, upon that concept, proffered their opinions as to the market value of the property. *What they really did was to appraise the present value of the anticipated profits from the sale of the rock material and not the market value of the land itself as of the date of the taking.* Such a modus of evaluation is not according to proper standards or criteria legally approved in the determination of market value.' * * * 'Fixing just compensation for land taken by multiplying the number of cubic feet or yards or tons by a given price per unit has met with almost uniform disapproval of the courts. This is true because such valuation involves all of the unknown and uncertain elements which enter into the operation of the business of producing and marketing the product. It assumes not only the existence, but the continued existence of a stable demand at a stable price. It assumes a stable production cost and eliminates the risks all business men know attend the steps essential to the

conduct of a manufacturing enterprise. It eliminates the possible competition of better materials of the same general description and of the possible substitution of other and more desirable materials produced or possible of production by man's ingenuity, even to the extent of rendering the involved material unmarketable. It involves the assumption that human intelligence and business capacity are negligible elements in the successful conduct of business. It would require the enumeration of every cause of business disaster to point out the fallacy of using this method of arriving at just compensation. No man of business experience would buy property on that theory of value. True it is that quality and quantity have a place in the mind of the buyer and the seller, but the product of these multiplied by a price per unit should be rejected as indicating market value when the willing seller meets the willing buyer, assuming both to be intelligent. Values fixed by witnesses on such a basis are practically worthless, and should not be accepted. *To the extent the valuation fixed by any witness contains this speculative element, to the same extent is its value as evidence reduced.'* "

In 5 Nichols on Eminent Domain (3d Ed.), § 18.41 (3), p. 18-154, it is stated: "An expert may be competent for one purpose and not for another. An ordinary real estate agent is not qualified, as such, to testify with respect to construction costs or with respect to the value of a type of property that has no market value by reason of the fact that such type is not commonly bought and sold. Thus, one who is an expert in valuing property for insurance purposes is not necessarily competent to testify in a condemnation proceeding. * * * In the absence of market value, resort may be had to the testimony of more specialized experts. Thus a witness who is an expert on timber may express his views on the value of timber land, and one who has an intimate knowledge of the availability of waterfront property or of property with peculiar subterranean water resources may

testify as to the value of such property by reason of the special use which may be made of the property. The value of property for a special use to which it is adapted or put may be shown by persons familiar with such use, even though they are not familiar with land values generally." Also, in § 18.42, p. 18-168, it is said: "When the property taken is of a character not commonly bought and sold, and differs essentially from other land in the immediate vicinity in the features which affect value, not only is testimony of witnesses familiar with its special value for the use to which it is adapted competent by reason of experience in their own business with similar property, but an expert in real estate generally who has no knowledge of the value of land of this character is incompetent, however much he may know of the prices paid for ordinary land in the immediate neighborhood."

In the present case the three real estate appraisers called by plaintiff all conceded that in using the income capitalization approach they relied primarily on the figures showing the amounts of rock, sand, and gravel estimated to be present and the estimated royalties which might be received by the owner. They also conceded that they had no other knowledge or basis for fixing a value on this type of property as in their words, there were no comparable sales in the area. The following question was asked of one of these experts: "Q. What income did you use in arriving at those figures that you capitalized, what kind of income? A. Well, I used a royalty on the quantities that were given to me."

One need not be a real estate expert to make such a computation. Probably any accountant, banker, or mathematician could do it as well or better. The basic reason for permitting experts to give opinion evidence is that they have peculiar knowledge of the subject not commonly possessed by others. Here the alleged experts were out of their depth or field. They had no special knowledge of the values of rock or gravel quar-

ries but attempted to determine value solely by means of a mathematical exercise based on other evidence in the record. The jurors were themselves capable of making such a computation were it permissible, but as has been seen, this represents an impermissible method of arriving at value. Plaintiff's experts were not qualified to testify in a case of this nature and it was prejudicial error to receive such testimony.

CARTER, J., joins in this dissent.

BOSLAUGH, J., dissenting.

I agree with Judge Newton that the evidence does not sustain the verdict in this case. I would reverse the judgment as excessive. See, Moyer v. Nebraska E. G. & T. Coop., Inc., 171 Neb. 879, 108 N. W. 2d 89; Nielsen v. Tri-State G. & T. Assn., Inc., *ante* p. 219, 174 N. W. 2d 722.

WHITE, C. J., concurring.

I am in full agreement with the majority opinion. The dissent is an able and persuasive argument on the facts that the valuation is too high. We do not sit as a jury in eminent domain cases. A search for true valuation is an elusive quest, and any "formula" is confounded by many variables, which this case demonstrates. As our cases clearly command, a jury award in eminent domain cases is peculiarly of a local nature, and will not be set aside unless it flows from passion, prejudice, or error in instructions as to the law. The dissent reveals that no such error is claimed here. All of the foundational requirements for the expert testimony, admittedly broad, have been met. The doctrine of judicial review does not permit an invasion of the jury prerogative. Judicial restraint commands that we exercise our powers within the limits that we ourselves have fixed for almost 100 years.

IN RE VALUATION AND EQUALIZATION OF REAL ESTATE IN THE STATE OF NEBRASKA FOR 1969.
COUNTY OF SIOUX, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
COUNTY OF BOX BUTTE, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
WESLEY F. HANSEN, COUNTY OF LINCOLN, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

178 N. W. 2d 754

Filed July 17, 1970. Nos. 37414, 37415, 37422.

1. **Taxation: Administrative Law.** The State Tax Commissioner can hold only an administrative hearing, not a discretionary or quasi-judicial one, because the power of the State Board of Equalization and Assessment cannot be delegated to the State Tax Commissioner.
2. **Taxation.** It is the primary duty of the State Board of Equalization and Assessment to equalize or establish uniformity for taxation among the various counties.
3. ———. While absolute uniformity of approach for taxation may not be possible, there must be a reasonable attempt at uniformity.
4. **Taxation: Constitutional Law.** The record made before the State Board of Equalization and Assessment must sustain the action of the board, and in the absence of some satisfactory explanation of divergence and discrepancy in the application of the different methods used and relied upon to achieve uniformity, and of a satisfactory explanation of the correlation between those methods, this court cannot determine if the constitutionally required equalization or uniformity for taxation has been attained between counties.
5. ———: ———. Where the record of the proceedings before the State Board of Equalization and Assessment contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary.

Appeals from the State Board of Equalization and Assessment. Affirmed in part, and in part reversed.

Wendell E. Mumby, Laurice M. Margheim, and McGrath, North, Nelson, Shkolnick & Dwyer, for appellants.

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

Mason, Knudsen, Berkheimer & Endacott, for amicus curiae.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and COLWELL and TESAR, District Judges.

SPENCER, J.

This is an appeal from the action of the State Board of Equalization and Assessment ordering increases of assessed valuations of Box Butte, Lincoln, and Sioux Counties. Appellee will be hereinafter referred to as state board.

The order as to Box Butte County provided for an increase of 52 percent for agricultural lands. The order as to Sioux County provided for a 30 percent increase for agricultural lands. Both of these orders state that the increases are ordered in consideration of a 3-year sales assessment ratio, agricultural statistics, Walters' appraisal study, and testimony of the county officials. The order as to Lincoln County provides for an increase of 50 percent for agricultural lands and 17 percent for urban and suburban real estate. As to agricultural land, the order states that it is made in consideration of the 3-year sales assessment ratio, agricultural statistics, and testimony of the county officials. As to the urban and suburban real estate, the order provides it is made in consideration of a 3-year sales assessment ratio and testimony of the county officials.

Previous to the hearings by the state board, the State Tax Commissioner held regional hearings pursuant to Legislative Bills 390 (Laws 1969, c. 653, p. 2569), 391 (Laws 1969, c. 628, p. 2528), and 406 (Laws 1969, c. 654, p. 2571), to gather information for use in the equalization of value among the 93 counties. Without reference to constitutionality, which has been argued strenuously

herein, we state that the State Tax Commissioner can hold only an administrative hearing, and not a discretionary or a quasi-judicial one, because the power of the state board cannot be delegated to the State Tax Commissioner. Because of the result we reach herein, it is not necessary to discuss the constitutionality of the acts or whether the hearings held by the State Tax Commissioner were quasi-judicial ones.

The testimony at the regional hearing as to Box Butte County is in the record pursuant to the request of the attorney representing that county. The testimony from the regional hearings was not available at the time of the state board hearings because it was still being transcribed, so the counties had no opportunity to meet it. It was not offered in evidence as a part of the state board hearings in any event, so, except as to Box Butte County, the evidence adduced at the regional hearings will not be considered herein. We have heretofore determined that the Administrative Procedures Act applies to hearings conducted by the state board. Section 84-914 (3), R. R. S. 1943, of that act, provides: "All evidence including records and documents in the possession of the agency of which it desires to avail itself shall be offered and made a part of the record in the case. No other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference."

For purposes of comparison with regard to whether or not equalization was achieved, we set out the following 3-year sales assessment ratios used by the state board and the action taken by it for the counties involved herein and for surrounding or comparable counties:

COUNTIES	3-YEAR SALES ASSESSMENT RATIO	STATE BOARD ACTION
	BOX BUTTE COUNTY	
Box Butte	19.38	Increase - 52%

Banner	21.24	Increase - None
Keith	23.49	Increase - None
Sioux	24.11	Increase - 30%
Morrill	26.60	Increase - None
Cheyenne	26.90	Increase - None
	SIOUX COUNTY	
Sioux	24.11	Increase - 30%
Box Butte	19.38	Increase - 52%
Scotts Bluff	24.87	Increase - 15%
Morrill	26.60	Increase - None
Dawes	29.38	Increase - None
	LINCOLN COUNTY	
Lincoln	20.25	Increase - 50%
Logan	18.00	Increase - 33%
Dawson	19.60	Increase - 40%
McPherson	20.99	Increase - 33%
Keith	23.49	Increase - None
Perkins	23.58	Increase - 17%
Cheyenne	26.90	Increase - None
Frontier	27.26	Increase - None
Hayes	28.19	Increase - None

Most of the above counties which received no increase had had a reappraisal within the last 2 years. In some of them, however, this was not the case. The record is void of any explanation of the correlation between the different methods used. One of the experts for the State Tax Commissioner as well as the Governor stated that it was impossible to correlate reappraisals and the sales assessment ratios. We do not accept that premise, but believe that it is possible, with proper analysis and the adoption of uniform rules and procedures, to correlate the various methods used.

The orders in each of the counties involved herein state that agricultural statistics were considered in determining the increase for agricultural lands. An examination of the record discloses a complete absence of any state-federal agricultural statistics. Exhibit 5, denominated "Indicators of Value of Land and Improve-

ments, By Counties in Nebraska," is in evidence. It is a discussion of the method used to determine the value of the land, based upon productivity and other factors. The exhibit, however, does not contain any statistics or any specific values for any county. It is merely a discussion of the method or the process used. The record would indicate that the exhibit, which contained the information on which the state board acted, was a map of the state on which the statistician had entered his estimate of values for the various counties. This map was properly excluded and is not a part of this record. The representative of the State Tax Commissioner's office, who attempted to justify the use of the statistics, testified that the federal agricultural statistician was responsible for the judgment decisions which went into the study. The chief statistician who compiled the report was called as a witness. His testimony would indicate that much of the information is compiled from voluntary unsworn statements and involves many judgment decisions. He was asked if the basic data upon which he based his judgment decisions was available. He stated that the decisions involved a tremendous amount of material, and that he did not have the material with him. There would be absolutely no way in this record to determine the basis on which those decisions were made. Clearly, none of this evidence can be used to sustain the action of the state board. To do so would be a clear violation of the Nebraska Administrative Procedures Act, section 84-914 (3), R. R. S. 1943, set out heretofore.

Mr. R. C. Walters who made several appraisal studies for the State, was asked if the sales assessment ratio is completely inconsistent with an appraisal system. He testified in effect that the sales assessment ratio had no bearing in the estimate he made as an appraiser although he did use a quality analysis and used a procedure comparable to the sales assessment ratio as a check, but he did not use a sales assessment ratio to arrive at his

original conclusion. He was then asked if in his judgment a sales assessment ratio study is valid for equalization purposes. His answer was that he thought it could be refined to the point where it would be, but that as presently used it had a lot of inequities built into it because the system being used is not refined enough. He did think that it could be developed so that it could be used uniformly across the state, but a lot of refinement would need to be made before it could be equitably so used.

We made no attempt to cross-check each of the sales assessment ratios used for the counties herein. We do note, however, that as to the 1968 sales assessment ratio for rural property in Sioux County, which the State calculated to be 23.00, we would arrive at a different figure considering the property involved on an acreage basis. There were three rural sales for that year, involving 1,169 acres, admittedly too few to establish actual value for a county with 1,226,000 acres. The first involved 360 acres; the second, 169 acres; and the third, 640 acres. The sales assessment ratios were respectively 18.32; 22.57; and 37.33. As we calculate the sales assessment ratio on the basis of the acreage involved, we would have a figure of 29.34 rather than 23. It is of interest that the larger parcel was overassessed on the basis of the sale.

The sales used in the sales assessment ratio covered both land and the improvements thereon. It is a matter of common knowledge that good improvements will influence the sale price of land. In the county records, land and improvements are given separate valuations. The increases provided for herein, however, apply only to the land and not to the improvements, which could be a factor in a low sales assessment ratio. It is obvious that this would create a disparity between agricultural lands with improvements and those with no improvements.

The orders in each instance state that consideration

was given to the testimony of county officials. There is nothing in the testimony by the county officials of the counties herein which would even remotely support any of the increases as to agricultural lands. If it refers to the testimony at the regional hearings, except as to Box Butte County, it is not a part of the record. The testimony of Sioux County at the regional hearing is included with the Box Butte County testimony, and if considered would definitely negative any increase for that county. We can act only on the record presented to us, and that record must sustain the action taken by the state board. It is possible, and probably necessary, to use different methods for some of the counties, but the record must show the correlation between the various methods used in the attempt to achieve a reasonable degree of uniformity.

It is the primary duty of the state board to equalize or establish uniformity between the various counties. It is evident from what has been set out heretofore that this has not been done. We realize that absolute uniformity of approach is impossible, but there certainly must be a reasonable attempt at uniformity. As we have said before, the record must sustain the action of the state board, and in the absence of some satisfactory explanation of the divergencies and discrepancies in the application of the different methods used and relied upon, and of a satisfactory explanation of the correlation between the different methods, this court cannot determine if the constitutionally required equalization or uniformity has been attained between counties. See Hanna v. State Board of Equalization & Assessment, 181 Neb. 725, 150 N. W. 2d 878. Where the record of the proceedings before the State Board of Equalization and Assessment contains no evidence to justify an order, the action must be held to be unreasonable or arbitrary. Brandeis Investment Co. v. State Board of Equalization & Assessment, 181 Neb. 750, 150 N. W. 2d 893.

We have not discussed the increase as to urban and

suburban real estate in Lincoln County. That increase was not seriously questioned by the Lincoln County officials. The appeal for Lincoln County was prosecuted by Wesley Hansen, a rural landowner, as to the increase for all property in the county. However, the thrust of the briefs and the argument was as to the increases given the agricultural lands. We see no reason to disturb the order as to the urban and suburban real estate for Lincoln County.

For the reasons given above, we reverse the order of the State Board of Equalization and Assessment increasing the assessment for agricultural lands in each of the counties herein. That part of the order providing an increase for Lincoln County urban and suburban real estate is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

WHITE, C. J., and CARTER, J., took no part in the consideration of or decision in these cases.

IN RE VALUATION AND EQUALIZATION OF REAL ESTATE IN THE STATE OF NEBRASKA FOR 1969.
COUNTY OF GAGE, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
COUNTY OF ADAMS, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
COUNTY OF PHELPS, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
COUNTY OF BUFFALO, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
COUNTY OF CLAY, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
COUNTY OF SALINE, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
COUNTY OF JEFFERSON, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
COUNTY OF HITCHCOCK, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

178 N. W. 2d 759

Filed July 17, 1970. Nos. 37399, 37401, 37402, 37403, 37404, 37405, 37406, 37411.

1. **Taxation: Words and Phrases.** For the purposes of taxation, the terms "actual value," "market value," and "fair market value" mean exactly the same thing.
2. **Taxation: Administrative Law.** The record of the proceedings before the State Board of Equalization and Assessment must be sufficient to sustain the action taken by that board.
3. ———: ———. The State Board of Equalization and Assessment may adopt any reasonable method of equalization for taxation, including the use of reasonably reliable assessment sales ratios.
4. **Taxation: Constitutional Law.** The object of constitutionally required uniformity in the taxation of real property is accomplished if all of the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value.
5. **Taxation: Administrative Law.** Where the record on appeal from an order of the State Board of Equalization and Assessment establishes an arbitrary adjustment, the order must be reversed.
6. **Taxation: Constitutional Law.** Constitutionally required equal-

ity or uniformity for taxation cannot be achieved except in relationship to a uniform standard of value.

Appeals from the State Board of Equalization and Assessment. Affirmed in part, and in part reversed.

Kenneth E. Mahlin, William M. Connolly, J. Clark Noble, Andrew J. McMullen, J. Jay Sullivan, Bernard J. Ach, Robert F. Lammers, Joseph F. Chilen, Robert C. Bosley, and McGrath, North, Nelson, Shkolnick & Dwyer, for appellants.

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

Mason, Knudsen, Berkheimer & Endacott, for amicus curiae.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and COLWELL and TESAR, District Judges.

MCCOWN, J.

This case involves the appeals of eight counties of the State of Nebraska from orders entered by the State Board of Equalization and Assessment increasing the 1969 assessed value of real estate in the respective counties for property tax purposes. The cases were consolidated for briefing and argument. The basic questions involved are whether or not a constitutionally uniform standard of valuation was used; whether that standard was uniformly applied; and whether or not the appellant counties were properly equalized in relationship to each other and to other counties within the state.

At the outset, we think some general observations are appropriate. The taxes involved are ad valorem taxes on real property, levied and assessed by local governmental units. The state itself may not levy such taxes for state purposes. The Constitution requires that such a property tax be "* * * levied by valuation uniformly and proportionately upon all tangible property * * *."

Examination of the record discloses extensive divergence among witnesses of all categories in their understanding of the meaning of uniform values in the constitutional tax context. Many witnesses seem to assume that real property taxes may be equalized if property is classified, and the same values applied to the same classifications of property in all counties. The Constitution itself flatly contradicts such a conclusion. Art. VIII, § 1, Constitution of Nebraska.

The Legislature has attempted to define "actual value" for purposes of taxation by application of a formula "where applicable." § 77-112, R. R. S. 1943. While the items of the formula are all related to value, those which are factors in determining value are by no means the only factors which enter into the valuation of property for taxation. As this court said in Richards v. Board of Equalization, 178 Neb. 537, 134 N. W. 2d 56: "For purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same thing. Many elements enter into a determination of actual value, some of which are set out in the statute."

We suspect that the legislative attempt to define value for purposes of taxation has distorted the relationships of many elements of value, and has intermixed methods of measuring value with elements and factors entering into any proper determination of value. The term "fair market value," while it is an intangible concept, has had a definite and well understood legal meaning over a very long period of years. The attempt to define that concept of value as being readily ascertainable by means of a formula "where applicable," has added to the misunderstanding.

We should note also that so far as we are able to determine, Nebraska is the only state which provides by statute that equalization of the assessment of real property shall be done by each local county board of equalization; then by a state board as to all counties; and that in the event of disagreement between them, the

matter may be settled by litigation between the two in this court. To say the least, it is a somewhat unusual procedure. The determination of both county and state boards of equalization is clothed with a presumption of validity. Nevertheless, as a practical matter, the problem has been further complicated by the fact that the state board, by statute, is subject to the requirements of the Administrative Procedures Act. See § 84-901, R. R. S. 1943. The county board of equalization is not. It has, therefore, been necessary for this court to require and hold that the record of the proceedings before the state board must be sufficient to sustain the action taken by that board. See, Hanna v. State Board of Equalization & Assessment, 181 Neb. 725, 150 N. W. 2d 878; City of Omaha v. State Board of Equalization & Assessment, 181 Neb. 734, 150 N. W. 2d 888.

We proceed with a consideration of the facts relative to the appeal of Gage County separately from the remaining counties since its treatment was distinct. Gage County had a statutory scientific reappraisal of its real property which was completed in 1968 and approved by the State Tax Commssioner as provided by statute. Gage County rolled back the valuations set by the scientific appraisal by 20 percent and placed the appraisal in effect for the first time in 1969 at the reduced valuations. The order of the state board simply restored the reappraisal values for Gage County to their original level.

The record is clear that all scientific reappraisals conducted in accordance with the statute and approved by the State Tax Commissioner, completed and placed in effect within two or three years prior to 1969, were accepted and approved as filed by the state board. Approximately 30 such appraisals were accepted and approved without change by the state board. The use of such scientific appraisals has long been approved and, in fact, is the traditional method of valuation in this state. The action of the state board was consistent with

its procedure in connection with all such appraisals. There is likewise no contention on the part of Gage County that the original full appraisal values exceeded actual value. We think it clear that where the evidence discloses the consistent use of reasonably current reappraisals, done under uniform conditions and regulations and approved by the State Tax Commissioner, such procedures meet the constitutional test of uniformity. We, therefore, approve the order of the state board as applied to Gage County.

The following statistical information sets out the relevant findings and orders of the state board, with respect to the remaining seven counties involved here.

	Agricultural Land		Urban and Suburban Property	
County	Assessment Sales Ratio	Assessment Increase Percent ordered	Assessment Sales Ratio	Assessment Increase Percent ordered
Adams	20	75	28	20
Buffalo	20	75	28	10
Clay	22	59	28	15
Hitchcock	25	40	28	0
Jefferson	25	40	30	15
Phelps	20	75	29	15
Saline	25	40	28	15

It should be noted here that the assessment sales ratios shown above are the specific findings of the state board as to these counties. Five of the counties had assessment sales figures for each of the three preceding years. One county had two-year figures, and one had only the last year. Where there were assessment sales figures for three years, however, the state board followed no consistent procedure in making its findings. In some instances, perhaps most, the board used an average of the three years assessment sales figures. In some, it

was the latest year (1968). In one or two others, it was neither an average nor the last year.

In some instances, the treatment was different in the same county between agricultural and urban property. For example, in Saline County, the assessment sales ratio figure for agricultural land in 1968 was 25. The figure for 1967 was 26, and for 1966 was 28. The average was 26.3, but the 1968 figure of 25 was used. For urban property in Saline County, the 1968 assessment sales ratio figure was 27, the 1967 figure was 30, and the 1966 figure was 29. The average was 28.6, and 28 was the finding.

In Jefferson County, an average of the assessment sales ratios for three years was used to find the agricultural assessment sales ratio, while only 1968 was used to determine the urban assessment sales ratio, although the two preceding years were each higher.

In each instance, the order of the state board as to the counties involved here, except Gage County, shows that the assessment increases ordered, at least as to all urban and suburban property, were based upon the assessment sales ratios and "testimony of county officials." The testimony of county officials directly opposed any increases by the state board except in the case of agricultural land in Hitchcock County. It is quite apparent that the ordered increases in the seven counties stem directly from the assessment sales ratio figures determined by the state board. With respect to agricultural land, the increases ordered in each instance fit the assessment sales ratio figures exactly. With respect to urban and suburban property, however, it is equally apparent that the assessment sales ratio figures were not followed. It will be noted that the state board findings show that five of the seven counties had assessment sales ratios of 28 for urban and suburban property. The state board increased the assessment of one of the five counties by 20 percent; two by 15 percent; one by 10 percent; and one nothing. There is no evidence in the

record which will explain or support that disparity in treatment.

In 1966, this court held that the state board may adopt any reasonable method of equalization, including the use of reasonably reliable assessment sales ratios. County of Lancaster v. State Board of Equalization & Assessment, 180 Neb. 497, 143 N. W. 2d 885.

Later, we reversed state board action where "the record does not reveal the basis of correlation, or the basis of application, of the methods used for measuring and testing uniformity." See City of Omaha v. State Board of Equalization & Assessment, 181 Neb. 734, 150 N. W. 2d 888.

The object of constitutionally required uniformity in the taxation of real property is accomplished if all of the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value. See Carpenter v. State Board of Equalization & Assessment, 178 Neb. 611, 134 N. W. 2d 272.

It is apparent from the record here that the state board has applied assessment sales ratios on the one hand, and recent reappraisals approved by the State Tax Commissioner on the other, as precisely equal methods of measuring and applying uniform values. Yet the record itself overwhelmingly demonstrates that these two methods, as presently applied, do not produce an equal or uniform level of value. In the 1969 year involved here, approximately 30 counties had used reappraisals, approved by the State Tax Commissioner, which were accepted without change by the state board. Of those counties, 19 of them also had assessment sales ratio figures for the same year in which the appraisal first went into effect. This represents 20 percent of the counties in this state. Mean and average figures coincide. For agricultural land, these statistics for 19 counties show an average difference of more than 25 percent in the values reflected by recent approved appraisals and values reflected by assessment sales ratios in the same

county and for the same year. Such differences are in no way correlated by the state board, and either or both methods have been used as though they each reflected exactly the same level of value. The evidence contradicts that assumption. Necessary correlation could have been made, but it would not have supported the percentages of increase ordered in these cases.

The difference between the values reflected by the two methods when applied to urban and suburban property is much less. Both mean and average differences here approximate 12 percent. While such differences might be within reasonable practical limits if they had been applied consistently by the state board, it is apparent that this was not done as to the seven counties involved here. The percentage increases in urban property ordered by the board in five of the counties involved here varied from 0 to 20 percent, yet they were based on identical assessment sales ratios. We find nothing in the record to justify this lack of uniformity.

Where the record on appeal from an order of the state board establishes an arbitrary adjustment, the order must be reversed. See County of Keith v. State Board of Equalization & Assessment, 180 Neb. 494, 143 N. W. 2d 902. The record here with respect to the seven counties under consideration fails to support the orders entered. A uniform and proportionate standard of value was not used or applied to all counties alike. The constitutionally required equality or uniformity cannot be achieved except in relationship to a uniform standard of value.

In dealing with the intangible concepts of valuation and uniformity, a mathematically precise result can never be achieved. Neither mathematical exactness nor precise uniformity is possible in the complex task of equalization. Nevertheless, the bounds of reasonable uniformity do not stretch to the scope given them here by the state board. This court cannot act as a super-board of equalization, nor substitute its judgment for that of the

state board. We cannot escape the conclusion that constitutional and statutory requirements were not met as to the seven counties involved here. The state board still has the opportunity to rectify the situation.

The order of the State Board of Equalization and Assessment as to Gage County real property is affirmed. The orders of the State Board of Equalization and Assessment as to the remaining counties herein are reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

WHITE, C. J., and CARTER, J., took no part in the consideration of or decision in these cases.

IN RE VALUATION AND EQUALIZATION OF REAL ESTATE IN THE STATE OF NEBRASKA FOR 1969.
COUNTY OF LANCASTER, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

178 N. W. 2d 772

Filed July 17, 1970. No. 37398.

Taxation: Administrative Law. Where the record of the proceedings before the State Board of Equalization and Assessment shows that the order of the board was unreasonable and arbitrary, it will be reversed.

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

Paul L. Douglas, William D. Blue, Ronald D. Lahners, Floyd A. Sterns, Janice L. Gradwohl, Robert R. Gibson, and Bernard J. McGinn, for appellant.

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

Mason, Knudsen, Berkheimer & Endacott, for amicus curiae.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN,

and NEWTON, JJ., and COLWELL and TESAR, District Judges.

BOSLAUGH, J.

The County of Lancaster, Nebraska, has appealed from an order of the State Board of Equalization and Assessment directing that the valuation of agricultural land in Lancaster County for 1969 be increased 29 percent over the valuation returned by the county. This appeal is one of twenty-eight which were taken from the 1969 action of the state board.

The order appealed from was made following notice and a hearing before the state board on August 7, 1969. The order found that the indicated ratio of assessment to sales was 27 percent for agricultural land and 29 percent for urban and suburban property within Lancaster County, and that an increase of 29 percent in the valuation of agricultural land was necessary but that no increase in the valuation of urban and suburban real estate was necessary to equalize with real and personal property of other counties of the state.

The issue upon an appeal to this court from the State Board of Equalization and Assessment is whether the record of the proceedings before the state board shows that the order of the board was unreasonable and arbitrary. County of Blaine v. State Board of Equalization & Assessment, 180 Neb. 471, 143 N. W. 2d 880. If the record shows that the order of the state board was unreasonable and arbitrary, it will be reversed.

The record shows that the order of the state board increasing the valuation of agricultural land in Lancaster County by 29 percent for 1969 was based upon the sales-assessment ratio. The record further shows that the state board made no change in the valuation of many counties which had sales-assessment ratios equal to or lower than Lancaster County.

The testimony shows that no changes were made in Antelope County which had a sales-assessment ratio of

24 percent for agricultural land; Cedar County which had a ratio of 27 percent; Dakota County which had a ratio of 22 percent; Fillmore County which had a ratio of 29 percent; and Thurston County which had a ratio of 27 percent. In these counties the state board accepted a reappraisal as a basis for concluding that no increase or decrease in valuation was required.

The difficulty lies in the fact that the state board made no effort to correlate the reappraisals with the sales-assessment ratios or any other uniform standard of value. The result is that in counties which were equalized on the basis of sales-assessment ratios, the valuations of agricultural land were increased substantially more than in counties which were equalized upon the basis of reappraisals. There is nothing in the record which sustains or justifies the disparity of treatment.

It is unnecessary to consider the other assignments of error.

The order of the State Board of Equalization and Assessment increasing the valuation of agricultural land in Lancaster County by 29 percent for 1969 is reversed.

REVERSED.

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

IN RE VALUATION AND EQUALIZATION OF REAL ESTATE IN THE STATE OF NEBRASKA FOR 1969.
COUNTY OF SARPY, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
COUNTY OF WHEELER, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
COUNTY OF BOONE, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
COUNTY OF NANCE, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
COUNTY OF LOUP, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
LARRY SCHAFFER ET AL., COUNTY OF HOLT, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
JAMES H. CULLINANE, COUNTY OF CASS, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
JAMES H. CULLINANE, COUNTY OF POLK, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

178 N. W. 2d 765

Filed July 17, 1970. Nos. 37400, 37408, 37409, 37410, 37418, 37423, 37427, 37428.

1. **Taxation.** It is the primary duty of the State Board of Equalization and Assessment to equalize or establish uniformity for taxation among the various counties.
2. ———. While absolute uniformity of approach for taxation may not be possible, there must be a reasonable attempt at uniformity.
3. **Taxation: Administrative Law.** Where the record of the proceedings before the State Board of Equalization and Assessment contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary.

Appeals from the State Board of Equalization and Assessment. Reversed.

Dixon G. Adams, James J. McNally, Raymond P. Medlin, Jr., Donald R. Treadway, A. F. Adler, August Ross,

and McGrath, North, Nelson, Shkolnick & Dwyer, for appellants.

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

Mason, Knudsen, Berkheimer & Endacott, for amicus curiae.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and COLWELL and TESAR, District Judges.

SPENCER, J.

This is an appeal from the action of the State Board of Equalization and Assessment, hereinafter referred to as state board, ordering increases of assessed valuations. The counties involved herein, and the percentage increases, are as follows:

COUNTY	RURAL	URBAN-SUBURBAN
Boone	60	20
Cass	75	9
Holt	35	0
Loup	70	0
Nance	60	0
Polk	40	21
Sarpy	15	0
Wheeler	25	0

For all of the counties herein except Wheeler, the orders of the state board indicate the rural increases were predicated upon a 3-year sales assessment ratio, agricultural statistics, and the testimony of the county officials. In addition, Holt and Wheeler Counties had appraisal studies by Justin H. Haynes & Company, and Loup County had an appraisal study by R. C. Walters Company, Inc. The order as to Wheeler County, in addition to the Haynes appraisal study, specified that it was predicated on a 2-year sales assessment ratio and agricultural statistics.

Many of the questions raised herein are discussed in

County of Sioux v. State Board of Equalization & Assessment, *ante* p. 741, 178 N. W. 2d 754. Reference is hereby made to that opinion for questions raised concerning the regional hearings. Also, because of the result we reach herein, we do not discuss the constitutionality of the legislative acts more specifically referred to in that opinion. Reference is also made to that opinion for the discussion as to the use of state agricultural statistics, which were considered as to agricultural land for all of the counties involved herein. As there found, the consideration of agricultural statistics was a clear violation of the Nebraska Administrative Procedures Act, section 84-914 (3), R. R. S. 1943, set out therein. Reference is also made to that opinion for the discussion concerning the fact that the sales assessment ratio covered both the land and the improvements thereon. The rural increases made herein are for the land only and not the improvements. This creates a disparity between agricultural lands with improvements and those with no improvements, and puts an undue share of the tax burden on the latter.

Reference is made in each of the orders to the testimony of county officials. There is nothing in the testimony of the county officials of the counties involved herein which would even remotely support any of the increases made. Actually, the testimony of the county officials would in most instances definitely negative any increase for the particular county involved.

As noted in County of Gage v. State Board of Equalization & Assessment, *ante* p. 749, 178 N. W. 2d 759, scientific reappraisals approved by the State Tax Commissioner, completed and placed in effect within 2 or 3 years prior to 1969, were accepted and approved without change by the state board. Of the counties involved herein, Wheeler had such a reappraisal which was used for the first time in 1967. Yet, that reappraisal was ignored and Wheeler was given a 25 percent increase for its rural lands. An adjoining county, Antelope, also

had an appraisal used for the first time in 1967, but no increase was made for that county. The 3-year sales assessment ratio for Wheeler was 22.75 percent. For Antelope it was 23.47 percent. Harlan County, with a 3-year sales assessment ratio of 23.06 and a 1967 reappraisal, was given no increase, nor was Keith County with a 23.49 3-year sales assessment ratio and a 1968 reappraisal. For some reason not apparent from the record, there is a purported appraisal study made for Wheeler which suggests an indicated ratio of 28 percent. There is no showing in this record as to why the reappraisal should be used for approximately 30 other counties where made within the last 2 or 3 years, and ignored for Wheeler.

The record indicates that a reappraisal for Sarpy County was accepted in 1966, and has been continually updated. The undisputed testimony is that the assessor adjusts after every sale, not only on the sale property but also on adjacent property. To apply an increase to this county, based on a sales assessment ratio for sales where the valuations have already been corrected on the county's records, would double the increase as to these properties.

A comparison is made between comparable farm land along the border between Douglas and Sarpy Counties. The highest value for Douglas County was $374 per acre and the lowest was $167 per acre. The comparable land across the road in Sarpy County is assessed at considerably higher figures, so that any increase for Sarpy County would increase the value disparity between Sarpy and Douglas Counties. Because of overlapping school districts between the two counties, this would result in Sarpy County rural taxpayers bearing an undue portion of school taxes compared with the Douglas County taxpayers in those same school districts.

Cass County has overlapping school districts with Lancaster and Otoe Counties. The proposed increase for Cass County is 75 percent; for Lancaster, 29 percent;

and for Otoe, 40 percent. For reasons set out in County of Lancaster v. State Board of Equalization & Assessment, *ante* p. 757, 178 N. W. 2d 772, the increase has been voided as to Lancaster County. There is a difference of only .46 percent in the 3-year sales assessment ratio between Lancaster and Cass Counties. Despite the fact that the state board order recites consideration of a 3-year sales assessment ratio based upon its conclusion as to the indicated ratio, only the year 1968 was considered.

In 1968, 49 rural sales were submitted for Loup County, but only 2 of the 49 submitted were used to arrive at a sales assessment ratio of 15 percent. Two sales are too few for sales assessment ratio purposes. What has been said as to agricultural statistics is pertinent here, because with the appraisal study it was a factor in the assessment of the increase.

Nance County had a reappraisal in 1966. The 3-year sales assessment ratio percentages are as follows:

1966	29
1967	25
1968	21

The conclusion reached by the state board as to the indicated ratio for Nance County is 21, so it is obvious that although the order suggests consideration of a 3-year sales assessment ratio, of agricultural statistics, and of the testimony of the county officials, the indicated ratio is exactly the same as the 1968 sales assessment ratio.

In Boone County the 3-year sales assessment ratio percentages are as follows:

1966	28
1967	27
1968	21

Here again, although the order refers to a 3-year sales assessment ratio, agricultural statistics, and the testimony of county officials, the indicated ratio is the same as the 1968 sales assessment ratio.

Only three of the counties, Boone, Cass, and Polk, are

given urban and suburban increases. In all three, the orders state that the increase is predicated upon a 3-year sales assessment ratio and the testimony of the county officials. In Boone and Cass Counties, the testimony indicates that the town property is already overvalued, and that the increase would further overvalue it. The conclusion of the state board as to their indicated ratio is 26 for Boone and 29 for Cass and Polk Counties. In addition to Boone County, Thayer and Wheeler also had an indicated ratio of 26. Thayer was given a 15 percent increase and Wheeler none. Loup County, with an indicated ratio of 22, was given no increase. Grant County, with an indicated ratio of 24, was given no increase. Grant County had a reappraisal in 1966 and Loup had one in 1967. Sioux, Boyd, and Dawes Counties, all with an indicated urban ratio of 25, were given no increases. It is impossible to reconcile these discrepancies from the record.

Cass County, with an indicated ratio of 29, was given a 9 percent increase. Polk and Merrick Counties, with an indicated ratio of 29, were given a 21 percent increase. Cedar and Dixon Counties, which had had recent reappraisals but also had an indicated ratio of 29, were given no increases. Holt and Lancaster Counties, with an indicated urban ratio of 29, were given no increases.

Upon consideration of the record herein, we cannot escape the conclusion that the state board used completely different and uncorrelated methods to support its ultimate conclusions, and that no reasonable approach was made to achieve uniformity among the counties. As we said in County of Sioux v. State Board of Equalization & Assessment, *ante* p. 741, 178 N. W. 2d 754, it is the primary duty of the State Board of Equalization and Assessment to equalize or establish uniformity among the various counties, and, while absolute uniformity of approach may not be possible, there must be a reasonable attempt at uniformity.

Where the record of the proceedings before the State

Board of Equalization and Assessment contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary.

For the reasons given, we reverse the order of the State Board of Equalization and Assessment increasing the assessments herein.

REVERSED.

WHITE, C. J., and CARTER, J., took no part in the consideration of or decision in these cases.

SMITH, J., dissenting.

Neither the court nor the board has developed a practicable model for statewide equalization. Difficulties besetting the board are inferable from a model proposed by Pao Lun Cheng, "The Common Level of Assessment in Property Taxation," 23 National Tax Journal 50 (1970). "As the secretary of one equalization board has said, 'inter-county equalization is like a mule—no hope of progeny and no pride in ancestry.'" Hellerstein, State and Local Taxation 139 (1969).

In this state of affairs I would try to maintain some balance between data and intuition. "But the action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sum up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth." Chicago, B. & Q. Ry. Co. v. Babcock, 204 U. S. 585, 27 S. Ct. 326, 51 L. Ed. 636 (1907) (Holmes, J.).

I would affirm the orders of the board.

NEWTON, J., dissenting.

I respectfully dissent from the decision of the majority. This is an appeal from the State Board of Equalization and Assessment hereinafter referred to as Board. The counties of Boone, Cass, Holt, Loup, Nance, Polk, Sarpy, and Wheeler briefed and presented their cases together and have been so considered. The question presented is whether or not Article VIII, section 1, Consti-

tution of Nebraska, has been complied with. That section states: "Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, * * *." Formerly, when the state levied property taxes, this provision required uniformity and equalization of assessments between counties throughout the state. With the abolition of the state property tax, uniformity between western and eastern Nebraska counties is no longer mandatory as neither is subject to taxes levied in the other. If Scotts Bluff County were assessed at 50 percent of actual value and Douglas County at 25 percent, no prejudice would result to Scotts Bluff County because there are no overlapping taxing districts between the two counties.

The record before us is absolutely barren of any evidence regarding overlapping taxing districts. I would nevertheless take judicial notice that such overlapping occurs *as between adjoining counties.* In the absence of such overlapping districts, any inequalities appearing in county assessments is nonprejudicial, as to such counties, or to put it another way, error without prejudice and does not merit consideration.

In preparing for the task of equalizing between counties, the Board held regional hearings at which a large volume of evidence was adduced. The transcript of this evidence was not introduced in evidence and, therefore, cannot be considered here. See Chapter 84, article 9, R. R. S. 1943. The record is also deficient in another respect. Property sales used in arriving at sales-assessment ratios were not considered at the hearing before the Board. It was understood that any party interested could go into this matter after the hearing with a representative of the Board and that information acquired would be considered. Whether or not this was done does not appear in the record. If it was done, appellants have failed to include in the record the results of these supplemental fact-finding sessions or any evidence pertaining thereto. I must, therefore, assume that the data

upon which the Board computed sales-assessment ratios is satisfactory and correct.

Also, as part of its basic preparation, the Board employed competent appraisers to make spot checks of certain representative counties. These studies were rather exhaustive in nature and definitely tend to throw light upon the actual value of the various classes of real property within the county as compared with actual values adopted by the assessor for assessment purposes. For instance, in Boyd, Holt, Garfield, Wheeler, and Greeley Counties, three classes of irrigated land, four of dry land (cultivated), two of meadow land, and three of grazing land were considered. Two approaches to actual value were used, a market-data approach and a capitalization of income approach. Results were as follows:

CLASS	Market Data Valuation	Income Leased Valuation	Correlated Results
Irrigated I	$ 545	$ 479	$ 480
II	400	357	360
III	235	218	215
Dry land I	400	359	360
II	270	236	240
III	185	164	165
IV	85	73	75
Meadow V	225	208	210
V-	130	125	125
Grazing VI	65	60	60
VI-	55	50	50
VII	35	30	30

The appraisal indicates that actual values as found by county assessors and used for assessment purposes were, without exception, considerably lower than values arrived at by the market-data and income approaches.

The record presents three different methods of determining values as a prerequisite to ascertaining if adjoining counties with overlapping taxing districts are properly equalized for taxation purposes. These methods are

official county appraisals or reappraisals, sales-assessment ratios, and spot appraisal studies.

Boone, Cass, and Polk Counties are concerned with the assessment of farmlands and urban property: Holt, Loup, Nance, Sarpy, and Wheeler Counties only with farmlands. None of these counties have had official reappraisals and the other criteria were necessarily relied on in regard to them. Much is said in the record and briefs before us regarding the desirability of correlating the three different criteria of value. This cannot be done any more than it is possible to correlate value on the basis of market data and capitalization of income. Two farm or ranch units may have identical income capabilities, yet one may have a greater fair market value than the other due to location, improvements, etc. Different appraisers of the same unit will arrive at different results. Sales of property within a county may not represent a correct picture of value for a multitude of reasons. There may be an insufficient number of sales and many of them may not represent true open-market transactions. No one of the three criteria available are perfect and, as a result, an element of judgment enters into this matter and must be exercised by assessing and equalizing authorities. This factor is illustrated in the case of Boone County and its neighbors. Sales-assessment ratios for these counties show the following:

	1968 Sales Assessment Ratios		Changed to	
County	Urban	Rural	Urban	Rural
Boone	26	21	31.2	33.6
Greeley	25	25	29.25	29.25
Nance	32	21	32	33.6
Platte	25	21	32.25	34.86
Madison	26	21	34.84	31.92
Antelope	31	24	31	24
Wheeler	26	28	26	35

It will be noted that after adjustment by the Board, there is little material difference in assessed values be-

tween the counties with the following exceptions. Greeley still appears a bit low on the basis of sales-assessment ratios, yet on the basis of a 1969 spot study of this county, it is deemed to be equitably assessed with the others. In other words, despite the conflict with the sales-assessment approach, the study made shows the county to now be assessed at approximately 35 percent of actual value. The appraisal study indicates that land in Greeley County is valued for assessment purposes at supposed actual values ranging from 48 percent to 79 percent of true market or actual values depending on the various classifications of land. These percentages average out to 23.73 percent and a 17 percent increase brings the average to 27.76 percent. The figures are not strictly accurate as allowance has not been here made for the variation in acreages of the several land classifications. It is obvious from the appraisal study that if this were done the figure of 27.76 percent would much more nearly approach the statutory 35 percent of actual value figure and would present a minimal variance therefrom. The same is true regarding rural property in Antelope County and urban property in Wheeler County where recent official reappraisals were had. The question presented under such circumstances is that always confronted in cases of conflicting evidence. In a jury trial, the jury must determine which evidence is reliable; here the Board must make this determination. In any event, no material variations appear.

Generally speaking, with reference to the counties involved in this action, the Board appears in each instance to have relied primarily on the best evidence available and in each instance, there is evidence in the record to sustain its action. Appellants criticize the use of appraisal studies on the ground that L.B. 391 (Laws 1969, c. 628, p. 2528) is unconstitutional. That point does not require decision. The appraisals were made primarily on the basis set out in section 77-112, R. R. S. 1943. That statute does not appear to exclude other criteria

of "actual value." It states the formula therein contained is to be used only "where applicable." Other means, when required to determine actual value, are not excluded.

This court will not substitute its judgment for that of the State Board of Equalization and Assessment if the action of the Board is not illegal, arbitrary, and capricious. See Carpenter v. State Board of Equalization & Assessment, 178 Neb. 611, 134 N. W. 2d 272. Neither will this court interfere with the discretion of the Board when discrepancies are slight and substantial equality and uniformity are attained. County of Kimball v. State Board of Equalization & Assessment, 180 Neb. 482, 143 N. W. 2d 893. The decision of the Board as to appellant counties should be affirmed.

IN RE VALUATION AND EQUALIZATION OF REAL ESTATE IN THE STATE OF NEBRASKA FOR 1969.

COUNTY OF HOOKER, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

COUNTY OF THOMAS, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

COUNTY OF GRANT, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

COUNTY OF CHERRY, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

COUNTY OF BLAINE, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

E. H. SHOEMAKER, JR., ET AL., COUNTY OF MCPHERSON, NEBRASKA, APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

E. H. SHOEMAKER, JR., ET AL., COUNTY OF ARTHUR, NEBRASKA, APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

E. H. SHOEMAKER, JR., ET AL., COUNTY OF LOGAN, NEBRASKA, APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

178 N. W. 2d 785

Filed July 17, 1970. Nos. 37416, 37417, 37419, 37420, 37421, 37424, 37425, 37426.

1. **Taxation: Administrative Law.** Where the record of the proceedings before the State Board of Equalization and Assessment does not show that the order of the board was unreasonable, arbitrary, or prejudicial, it will be affirmed.
2. ———: ———. Where the record of the proceedings before the State Board of Equalization and Assessment shows that the order of the board was unreasonable and arbitrary, it will be reversed.

Appeals from the State Board of Equalization and Assessment. Affirmed in part, and in part reversed.

Thomas O. David, H. Alan Curtiss, Richard L. Spittler, Joseph J. Divis, and McGrath, North, Nelson, Shkolnick & Dwyer, for appellants.

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

Mason, Knudsen, Berkheimer & Endacott, for amicus curiae.

Heard before SPENCER, BOSLAUGH, SMITH, MCCOWN, and NEWTON, JJ., and COLWELL and TESAR, District Judges.

BOSLAUGH, J.

The State Board of Equalization and Assessment ordered the Counties of Hooker, Thomas, Grant, Cherry, Blaine, McPherson, Arthur, and Logan to increase the value of the agricultural land by 33 percent for 1969. Five of the counties and landowners in three of the counties have appealed. The appeals were consolidated for briefing and argument in this court.

The orders were made following notice and a hearing before the board. The board found the indicated ratio for agricultural land in each of the counties to be as follows:

County	Indicated Ratios	Increase	Resulting Ratio
Hooker	26	33%	34.58
Thomas	20	33%	26.60
Grant	20	33%	26.60
Cherry	19	33%	25.27
Blaine	20	33%	26.60
McPherson	26	33%	34.58
Arthur	20	33%	26.60
Logan	20	33%	26.60

The counties involved are located in the north central part of the state in an area generally known as the Sandhills. Between 75 percent and 90 percent of the land in these counties is grassland and is generally described in the record as Class VI- land. The controversy centers around the valuation of such land.

Arthur, McPherson, Grant, Hooker, Thomas, and Blaine Counties were reappraised in 1966 by the Brandt

Appraisal Company, and Class VI- land was valued at $33 per acre. In an appraisal of Cherry County by the same company in 1967, Class VI- land was valued at $30 per acre.

The 1966 Brandt Appraisal was used by the board as a basis for equalization in 1966 and is discussed in Hanna v. State Board of Equalization & Assessment, 181 Neb. 725, 150 N. W. 2d 878. The appraisal was severely criticized in the record in that case and this court reversed the orders of the board which had increased valuations upon the basis of that appraisal.

In addition to the 1966 and 1967 Brandt Appraisals, the board in these cases had before it an appraisal study made in June 1969 by the R. C. Walters Company, Inc., pursuant to a contract with the State Tax Commissioner. The Walters Appraisal Study valued Class VI land at $45 per acre.

The Walters Appraisal Study used a different land classification than was used in the Brandt Appraisals. Brandt defined Class VI- land as requiring 20 acres to support one animal unit per year. Walters assumed a 5-month grazing season and defined Class VI land as requiring 10 acres per animal unit. Although there is no direct correlation between the Brandt Appraisals and the Walters Appraisal Study, the record indicates that Class VI land in the Walters Appraisal Study was intended to approximate Class VI- land in the Brandt Appraisals.

The record is convincing that the board based its orders in these cases on the 1966 Brandt Appraisal Study. The Walters Study tends to support the board's conclusions that the valuation of agricultural land in these counties was low, but it does not fully sustain the action of the board in these cases.

When the record is considered as a whole it appears that the board raised Thomas, Grant, Cherry, Blaine, Arthur, and Logan Counties to the approximate level of Hooker and McPherson Counties before any increase

was applied. The board then applied the same percentage increase to Hooker and McPherson Counties without making any adjustment for the difference in the indicated ratios. The order on its face shows that the board disregarded its own finding. The action of the board as to Hooker and McPherson Counties was clearly arbitrary and must be reversed.

The action of the board in regard to Thomas, Grant, Cherry, Blaine, Arthur, and Logan Counties does not appear to be prejudicial since after the increase has been applied, these counties remain well below the average or median ratios for the other counties. See County of Loup v. State Board of Equalization & Assessment, 180 Neb. 478, 143 N. W. 2d 890. As to these counties, on the record before us, we are unable to say that the action of the board was arbitrary, capricious, or prejudicial.

The orders as to Thomas, Grant, Cherry, Blaine, Arthur, and Logan Counties are affirmed. The orders as to Hooker and McPherson Counties are reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

SPENCER, J., and TESAR, District Judge, concur in the result.

SMITH, J., votes to affirm the orders in all of these eight cases.

WHITE, C. J., and CARTER, J., took no part in the consideration of or decision in these cases.

DONALD HALBERT, APPELLANT, V. UNITED STATES FIDELITY & GUARANTY COMPANY ET AL., APPELLEES.

178 N. W. 2d 781

Filed July 17, 1970. No. 37476.

1. **Workmen's Compensation.** Where the evidence discloses that further medical, hospital, and surgical services would not definitely improve the condition of an injured employee, and where such improvement would be conjectural, the employer's liability

to furnish reasonable medical and hospital services and medicines, as and when needed, ceases.

2. **Workmen's Compensation: Evidence.** In a workmen's compensation case, the burden is on the plaintiff employee to prove his claim by a preponderance of the evidence, and the rule of liberal construction of the Workmen's Compensation Act does not apply to the evidence to support his claim.

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

Munro, Parker, Munro & Grossart, for appellant.

H. L. Blackledge, for appellees.

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

WHITE, C. J.

The plaintiff, Donald Halbert, appeals from a disability judgment and award in a workmen's compensation case from the district court for Buffalo County, Nebraska. He was injured by an electrical short in the equipment he was operating while an employee of the defendant, Anderson Brothers Plumbing and Heating Company, Inc., on July 15, 1966. The accident caused him to fall 12 feet to a concrete floor, landing on his heels.

The plaintiff received temporary total disability benefits from the defendant from the time of the accident until March 24, 1967. The Workmen's Compensation Court found that the plaintiff was temporarily totally disabled for 67 5/7 weeks, from the time of the accident to November 1, 1967. It then found that this temporary disability was followed by 15 percent permanent partial disability to the left leg for 32¼ weeks. Disallowed, and now in issue, were medical and travel expenses incurred for surgery on plaintiff's left leg and a claim of 5 percent permanent partial disability to plaintiff's right foot. In the district court the permanent partial disability to the left leg was increased to 20 percent for 43 weeks. The expenses connected with surgery and a claim of 5 percent permanent partial disability to the

right foot were disallowed. On trial de novo in this court we affirm the disability award to the plaintiff and direct that the judgment be modified to allow recovery for all expenses connected with the surgery on the left foot.

The plaintiff underwent surgery on his left foot, following the advice of Dr. Getscher, his treatment doctor. Dr. Getscher testified by deposition that surgery was necessary to relieve the pain and swelling in plaintiff's left foot and ankle and to enable him to walk with less of a handicap. The employer's medical expert, Dr. Yost, a qualified orthopedist, testified that he did not believe surgery would be particularly helpful to the left foot and recommended only an exercise program. He further testified that surgery might increase the pain in the left foot.

It is now asserted, in this court on trial de novo, that the prospective improvement would be conjectural and that the employer's liability for expenses ceased because of the conflicting medical testimony and the fact that the operation was unsuccessful. We are called upon again to construe section 48-120, R. R. S. 1943. The rule followed by this court is: "Where the evidence discloses that further medical, hospital and surgical services would not *definitely* improve the condition of an injured employee, and where such improvement would be *conjectural,* the employer's liability * * * to furnish reasonable medical and hospital services and medicines, as and when needed, ceases." (Emphasis supplied.) Wilson v. Brown-McDonald Co., 134 Neb. 211, 278 N. W. 254, 116 A. L. R. 702. See, also, Paulson v. Martin-Nebraska Co., 147 Neb. 1012, 26 N. W. 2d 11; Peek v. Ayres Auto Supply, 155 Neb. 233, 57 N. W. 2d 387.

We adhere to this rule that an employer should not be liable for either a panicky or merely hopeful surgical expedition into the possibilities of complete recovery when the medical evidence preponderates to show that such expenses are not reasonably warranted. However,

as we evaluate this testimony de novo, we do not feel that the plaintiff should be penalized for following the advice of his doctor under the particular circumstances of this case. Although the operation was unsuccessful it appears that it was grounded upon a reasonable belief that improvement would result in the continuous pain and disability that the plaintiff had in his left foot. We observe further that the district court did increase the disability allowance for the left foot because of the additional pain and suffering that the plaintiff had as a result of the unsuccessful operation. For these reasons we modify the judgment of the district court and direct that the plaintiff be allowed the expenses of this operation.

The other issue in this case is whether the plaintiff has suffered bimember disability, that is, whether the plaintiff has proved by a preponderance of the evidence that his injuries also resulted in a 5 percent permanent partial disability to the right foot. The deposition of plaintiff's doctor disclosed that during four examinations either no reference was made to the right foot or else it was also stated that the right foot had completely healed with no likelihood for further difficulty. Dr. Getscher's notes of April 26, 1968, disclosed that there was a possible 5 percent disability in the right foot with no change being evident in the right foot in the next two examinations.

On August 14, 1967, 3 days following Dr. Getscher's original examination of the plaintiff, and more than 1 year after the accident, Dr. Getscher stated: "At the present time it's suffice to say that the man has a well-healed fracture in the right os calcis and should have no further difficulty. * * * he will not have a bi-member disability." On November 14, 1967, Dr. Getscher stated: "He states that he has no symptoms in the right foot at this time. * * * Physical examination at this time reveals a fairly good range of motion in the right ankle with no evidence of impingement of the malleoli. The

heel is narrow and there is good (blood) supply into the foot. * * * There is no evidence of tenderness about the ankle and he has good strength in all muscles of the right leg." X-ray examination revealed a healed fracture right os calcis.

Of course, in this case, the main issue is the disability to the left foot. In Dr. Getscher's evidence, there is no reference at all to any disability or injury to the right foot in his examination of April 5, 1968, or 3 weeks later on April 26, 1968. Then on June 7, 1968, and October 11, 1968, he stated that there were no changes in the right foot that were different than they were before. Referring to the examinations of August 11, 1967, and November 1, 1967, Dr. Getscher stated that there were no changes of significance in the right foot and that there *had been no surgery, no treatment, and no examination of the plaintiff's right extremity at any time since the original examinations of August 11, 1967, and November 1, 1967.* In this status of the record we agree with the judgment of the plaintiff's doctor on August 11, 1967, that the plaintiff will not have a bimember disability as the examination conclusively reveals that there has been no development in the right foot creating such a disability. We realize that there have been, as there always are in fractures, some anatomical changes. But, the plaintiff has failed to prove by a preponderance of the evidence any functional and compensable disability to the right foot thus permitting a bimember disability. The claim for a bimember disability is based upon conjecture and speculation. In a workmen's compensation case, the burden is on the plaintiff employee to prove his claim by a preponderance of the evidence, and the rule of liberal construction of the Workmen's Compensation Act does not apply to the evidence to support his claim. Spangler v. Terry Carpenter, Inc., 177 Neb. 740, 131 N. W. 2d 159.

We therefore modify the judgment of the Workmen's Compensation Court and the district court to allow for

the surgical and medical expenses of Dr. Getscher's operation on the left foot. The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL D. WAITS, APPELLANT.

178 N. W. 2d 774

Filed July 17, 1970. No. 37545.

1. **Criminal Law: Searches and Seizures.** In passing on validity of a search warrant, the court may consider only information brought to the attention of the magistrate.
2. **Criminal Law: Searches and Seizures: Affidavits.** For the affidavit of a tip from an informant to be sufficient, the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible.
3. **Criminal Law: Searches and Seizures.** Affidavits for search warrants must be tested in a common sense, realistic fashion.
4. **Criminal Law: Searches and Seizures: Affidavits.** If an affidavit recites some of the circumstances, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense, manner.
5. ———: ———: ———. In examining the question of the sufficiency of an affidavit to support the issuance of a search warrant, the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded to warrants.
6. **Criminal Law: Searches and Seizures.** A search must be one directed in good faith toward the objects specified in the warrant or for other means and instrumentalities by which the crime charged had been committed.
7. ———: ———. When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, they may seize them whether they are initially in plain sight or come into plain sight subsequently as a result of the officers' efforts.

8. **Criminal Law: Trial: Evidence.** A trial court's determination of the admissibility of demonstrative evidence will not be overturned except for a clear abuse of discretion.
9. ———: ———: ———. An exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified it is immaterial in how many or whose hands it has been.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

Lee A. Larsen, for appellant.

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

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

WHITE, C. J.

From a jury verdict and judgment finding the defendant guilty of unlawful possession of lysergic acid diethylamide, commonly referred to as L.S.D., the defendant appeals. The validity of the affidavit of probable cause supporting a search warrant and the scope of the search are the basic issues raised on appeal. We affirm the judgment and sentence of the district court.

The background facts upon which the affidavit of probable cause was based are as follows: The postal authorities at a South Omaha post office informed officer Carl Grossoehme, a state patrolman specializing in drug abuse, of the existence of a parcel which they considered suspicious. The postal authorities located the parcel and subsequently law enforcement officers examined the parcel without opening it. The warrant authorized a search of the defendant's premises for the purpose of discovering illegal drugs and particularly L.S.D. The package was duly delivered by postal of-

ficials. At the time, the defendant's house was under surveillance by the officers. When the package was picked up by the defendant from his mail box, the officers went to the door of the house, knocked, announced their identity, and, when no one answered, they entered. As they entered the defendant was found kneeling on the floor unwrapping the package referred to. Officer Grossoehme finished unwrapping the package which contained a plastic vial filled with white capsules. The vial was subsequently taken for analysis. No result of this first analysis was introduced, but 3 weeks prior to the trial the same vial was allegedly sent in for reanalysis. The results showed that the capsules contained L.S.D.

While in the house, a search of the entire premises was made which produced various items including letters, cannabis or marijuana, and an address book. All items were seized and subsequently introduced in evidence.

The affidavit of probable cause upon which the search warrant in this case was issued states as follows: "Affiant has information that Michael Waits is in possession of illegal drugs, including L.S.D. Affiant has received information from Sgt. John Maley of the Omaha Police Dept. and other reliable informants that said Michael Waits is associated with known users and possessors of illegal drugs, particularly one Bud Medlock, one William C. Larnan and one Thomas E. Swain and one John L. Lenczowski, that illegal drugs were found in the possession of the above named associates of Michael Waits. Affiant further states that Mr. John Bullock of the Postal Inspector's office in Omaha has advised affiant that Michael Waits has received *letters* and *packages* from *Hawaii* and *California and* has *sent money orders* to *California* which affiant *believes* to be in *connection* with the *receipt* and *possession of illegal drugs* and *particularly L.S.D.* Affiant is further informed by the Postoffice Dept. that the package addressed and directed to

Michael Waits from California which is expected to contain illegal drugs is in the possession of said Michael Waits." (Emphasis supplied.)

Extensive discussions of the different holdings of the United States Supreme Court in recent cases therein are made in the briefs. It is, however, not challenged by either the State or the defendant that the following from State v. LeDent, *ante* p. 380, 176 N. W. 2d 21, is a correct summary of the law as applicable to this case: "In passing on validity of a search warrant the court may consider only information brought to the attention of the magistrate. * * * For the affidavit of a tip from an informant to be sufficient, the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible. * * * *Affidavits for search warrants must be tested in a common sense, realistic fashion.*" (Emphasis supplied.) Observations of fellow law enforcement officers of the police engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number. United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684. Analyzing this affidavit, we find that an Omaha city police officer, and an official of the United States Postal Inspector's Office furnished the information which was originally relied upon. Under the above holding this must be considered a credible basis. We also examine these facts in light of the holdings of this court and the United States Supreme Court. In State v. McCreary, 179 Neb. 589, 139 N. W. 2d 362, this court, in reviewing the controlling United States Supreme Court cases, said as follows: "The case is controlled by United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684, wherein it is said: 'Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his

detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.' "

Turning now to the supporting holding in United States v. Ventresca, *supra,* we find the following pertinent as to the standards and attitude of interpretation in examining probable cause for the issuing of a warrant. In Ventresca, the United States Supreme Court said as follows: "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, *are practical and not abstract.* If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. *They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specifity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude* by reviewing courts towards warrants will *tend to discourage* police officers from submitting their evidence to a judicial officer before acting." (Emphasis supplied.) We feel that further detailed analysis of the affidavit is unnecessary. It appears obvious that if the affidavit is construed in a common sense manner, it reveals probable cause for believing that the defendant was in the possession of illegal drugs, and to hold that the magistrate under the situation present, and with the

detailed nature of the information furnished in the affidavit would not be authorized under the Fourth Amendment to issue a search warrant, would emasculate law enforcement. There is no merit to the contention that the search warrant was improperly issued or that the affidavit for probable cause did not furnish a sufficient foundation therefor.

We are mindful of the fact that the United States Supreme Court for over 60 or 70 years has stated that the great and most important thrust of the Fourth Amendment is that the interpositions of a judicial judgment by a magistrate or a judge, before a search is conducted, are the most important elements in enforcing the command of the Fourth Amendment and its objective of preventing indiscriminate and arbitrary general searches by the government. We are not required to pass upon the question of whether a warrantless search was authorized. However, it is obvious in the recital of the background facts together with the information furnished in the affidavit that there were at least facts to authorize a warrantless search irrespective of the affidavit or arrest. A further recital of the facts in the later portions of this opinion also substantiate the significant reliability of the officials' information that supported the fact recitals in the affidavit of probable cause.

It is true that the probable cause standard must be met prior to the search. At the same time, the detailed and completely accurate information flowing logically from the original information furnished in the affidavit for probable cause, shows conclusively in this case that there were none of the elements of police arrogance, overreaching, or broom-sweeping general search that is condemned by the Fourth Amendment. There is no merit to this contention.

We now turn to the second major thrust of the defendant's argument and that is that the law officers who executed the search warrant went beyond the scope of the warrant and that those items of evidence which were

beyond the scope should have been excluded from the evidence by the trial court. The warrant, issued on the basis of the affidavit, states as follows: "You are therefore commanded, with the necessary and proper assistance, to search the following described place or person, to-wit: 7102 So. 23d St., Omaha, Sarpy, County, Nebraska, legally described as Lot 214 Chandler Hills, an Addition, as surveyed, platted and recorded in Sarpy County, Nebraska, and the person of Michael Waits and Betty Eona for the purpose of discovering and seizing the following described property, to-wit: illegal drugs, and particularly L.S.D., technically known as Lysergic acid diethylamide and if found, to seize and deal with the same as provided by law, and to make return of this warrant to me within ten days after the date hereof."

As we analyze the defendant's argument, it is based primarily upon the cases of United States v. Lefkowitz, 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877; and Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647. There is language in these cases which suggests that a search, whether or not pursuant to a warrant, may not be conducted for purposes of finding items of value merely as evidence in a criminal prosecution. However, this "mere evidence" rule was expressly rejected by the United States Supreme Court in Warden, Maryland Penitentiary v. Hayden, 387 U. S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782. We have examined the other cases cited by the defendant and they are not in point. In Gurleski v. United States, 405 F. 2d 253, the warrant was issued for the seizure of certain items of audio-visual equipment. While making the search, the officers discovered items such as pieces of paper with telephone numbers on them, a checkbook, a hotel receipt, and a motor vehicle certificate of title, all relating to a previously unsuspected automobile theft. This evidence was held to be admissible, the court saying: "The search much be one directed in good faith toward the objects specified in the warrant or for other means and instru-

mentalities by which the crime charged had been committed. It must not be a general exploratory search through which the officers merely hope to discover evidence of wrongdoing." In Skelton v. Superior Court of Orange County, 81 Cal. Rptr. 613, 460 P. 2d 485, the police conducted a two-hour search under a warrant specifying certain items of stolen property. In the course of the search, other purportedly stolen items were discovered. The California court, and we note that California has been the leading state jurisdiction in expanding the reach of the Fourth Amendment, stated as follows: "When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, they may seize them whether they are initially in plain sight or come into plain sight subsequently, as a result of the officers' efforts."

With the above rules in mind we now go to a detailed examination of the evidence in this respect. The police officers who were to execute the warrant waited until a certain package had been delivered in the mail and personally received by the defendant. Then they knocked on the door of the subject premises and announced that they were police officers with a search warrant. Having received no answer, they opened the door and entered. Almost immediately, they observed the defendant kneeling on the floor in the living room, with the above-mentioned package in his hands. The package was seized. It had a brown paper covering showing the following return address: "Kathe Cunha 20836 Woodside Rd. Van Nuys, Calif." The postmark on the wrapper indicated that the package had been mailed from "LaGuna Beach, Calif." Inside the brown wrapper was a second wrapper showing a printed birthday motif and a small circular tag with the following words (exhibit 5): "-Michael & Sandy with Love - Kathe & J-." After all of the wrappings had been re-

moved, the police officers discovered a box (exhibit 2), and inside that, a vial containing capsules which were later identified and examined as containing L.S.D. (exhibit 9). Also found inside the box was a small piece of paper (exhibit 10) containing the following notation:

"110 Doses of Divine Sacrament
$2.50 ---------- Better Than
$2.75 ---------- Any of the
Tabs. (except, maybe,
(Be sure to take the little blue
some!! barrels) ---" (Emphasis supplied.)

Also found inside an envelope was a letter containing the following language: "I hope your birthday present will be able to help you out until you hear from Jerome. Please return the $ immediately. Thank you -." These items of evidence were all clearly within the scope of the purpose of the warrant. They were on the premises mentioned in the search warrant, were within the immediate personal control and reach of one of the individuals who was named in the warrant. The vial of capsules was within the warrant's language concerning "illegal drugs" and L.S.D. was specifically mentioned in the warrant. The other items related to the manner in which these capsules had come into the defendant's possession and to the defendant's knowledge concerning the nature of the capsules. Taken together they almost conclusively suggest that the defendant knew that the capsules would be sent to him and even that he had agreed to pay for the capsules. We hold that these items and the exhibits representing them were admissible in evidence and clearly not within the scope of immaterial evidence which would constitute an invasion of the area of privacy or a general search.

We now go to the objection of exhibit 18, which was an address book found in a bedroom in the house. It is true that most of this address book would seem completely immaterial as argued by the defendant, but listed on "J" page was found the following entry:

"Jamie Kathie Cunha
59007 Huelo St.
Sunset Beach, Hawaii 96712."

The defendant moved for the exclusion of this exhibit and this address book and the trial court very properly agreed that only the above page should be presented to the jury. However, it was the defendant, himself, who decided to permit the admission of the whole book, although apparently retaining his objection to the Cunha entry itself. It is obvious that the defendant waived his objection to the introduction into evidence to the balance of the book. We point out further that we can find nothing prejudicial in this situation that would warrant a reversal of the judgment in this case. We point out further that the entry in the book relates to the crime of possession of L.S.D. because it confirmed the association with the persons who had actually sent the L.S.D. package and birthday letter that we have recited in detail heretofore. It also obviously relates to the question of defendant's knowledge of the contents of the package of L.S.D.

Finally the defendant alleges that several other items of evidence were obtained as the result of the subject search and seizure and beyond the scope of the warrant and constituted a general search. The record does not establish that these objections were presented to the trial court. The court overruled the motion to suppress that was filed prior to the trial and did not state the specific factual and legal issues raised by the defendant in his motion to suppress. The record does not show the objections made to the trial court at the time of the motion to suppress of these items. The items which we have discussed previously were the only ones to which objection was taken at the time of the trial. No objection was taken at the time of the trial to offer of exhibits 1, 2, and 5 which are now attacked. The defendant could, of course, have objected at trial to each item of evidence, as the court held in State v. Smith, 184 Neb.

363, 167 N. W. 2d 568, but apparently as a matter of trial strategy chose not to do so. The record shows that the trial court afforded the defendant a complete evidentiary hearing on the motion to suppress and that he was given full opportunity to make such objections as he deemed important, both at the time of the hearing on the motion to suppress and, of course, later at the time of the trial. There is nothing in the record to show any appropriate challenge to the scope of the search concerning exhibits 1 through 8 in this case. Again we point out that the defendant made no objections at the time of the trial to the introduction of exhibits 1 through 8. It is obvious that error cannot be predicated upon the reception by the trial court of these items in evidence. We point out further that exhibits 12, 13, 14, 15, 16, 17, and 17A were excluded from the evidence on defendant's objection. It shows a careful and conscientious attention on the part of the trial court to protect the defendant's rights and to properly limit the introduction of testimony on these exhibits.

The defendant argues insufficient foundation was made for exhibit 9, in that the State failed to show a continuous chain of custody thereof from the time of the seizure to the date of its introduction at the time of the trial. In State v. Allen, 183 Neb. 831, 164 N. W. 2d 662, this court held, in conformity with our previous cases, that a trial court's determination of the admissibility of demonstrative evidence will not be overturned except for a clear abuse of discretion. An absolute mathematical tracing of identification every second of the time, of course, is almost always impossible. A certain amount of discretion is vested in the trial court, remembering at all times, that the State must still have to meet the test of the same argument before the fact finders in the final determination of this issue. We have examined the record, and find no abuse of discretion by the trial court in admission of exhibit 9.

There is no merit to the contentions of the defendant,

and the judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

JOHN L. DEWEY ET AL., APPELLANTS, V. MONTESORRI EDUCATIONAL CENTER, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

178 N. W. 2d 792

Filed July 17, 1970. No. 37547.

1. **Municipal Corporations: Zoning: Words and Phrases.** Where the provisions of a zoning ordinance as to the uses of property which are permitted are expressed in common words without enlargement, restriction, or definition, they are to be interpreted according to their generally accepted meaning.
2. **Schools and School Districts: Words and Phrases.** A school or educational institution is a place in which persons are instructed in the arts and the process or manner of training youths for their stations in life.

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

Krause, Inserra, Petersen & Burkhard, for appellants.

Stern, Harris, Feldman & Becker, for appellees.

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

CHADDERDON, District Judge.

The plaintiffs, John L. Dewey, Phyllis J. Dewey, and Arch W. Fulton, hereinafter called plaintiffs, brought this action to restrain Montesorri Educational Center, Inc., a Nebraska corporation, John W. Adair, Lavonne Plambeck, and Mrs. A. B. (Irma) Rogers, hereinafter called the defendants, from using a plat of ground described by metes and bounds and known as 12602 Pacific Street, Omaha, Nebraska, as a preschool nursery busi-

ness. The trial court dismissed plaintiffs' petition and they have appealed.

The plaintiffs own all the property abutting on the property of the defendants on the east and north, and the property of the plaintiffs is zoned by the city of Omaha as First Residential. The property of the defendants is zoned by the city of Omaha as Second Suburban.

Second Suburban zoning by the city of Omaha provides, among other things, for the following uses: "* * * 6. Schools, elementary and high * * * 9. Hospitals and institutions of an educational, philanthropic or eleemosynary nature."

The plaintiffs allege that the defendants are using their property as a business for profit for a preschool nursery business and not as an elementary school or an educational institution, which business is prohibited under the zoning ordinances. They further allege that this use by the defendants of their property destroys the desirability of the property of the plaintiffs, and that their property has and in the future will diminish in value, and that they have no adequate remedy at law.

The defendants have in the neighborhood of 50 children in the morning, and 50 children in the afternoon, ages 3 to 6, who come to their property for prekindergarten training, and about 15 2-year-old children on Saturday for the same purpose.

There are two assignments of error, but both of these raise the point of whether or not the defendants' use of their property is acceptable under the zoning ordinances of the city of Omaha.

Where the provisions of a zoning ordinance as to the uses of the property which are permitted are expressed in common words without enlargement, restriction, or definition, they are to be interpreted according to their accepted meaning. Henke v. Zimmer, 158 Neb. 697, 64 N. W. 2d 458; City of Sidney v. Lieberman, 178 Neb. 755, 135 N. W. 2d 452.

The plaintiffs in their brief and argument rely princi-

pally upon the fact that the operation of the defendants' business is not a school as described in the Nebraska statutes, and, further, that the operation is not an educational institution as described in section 9 of the ordinance.

The evidence before the trial court shows that the school "is a school program that is aimed primarily to introduce a child to a lifetime of creative learning. It aims to develop in them the tools for learning, such as curiosity, extended powers of concentration, a positive attitude toward learning itself, and the habits of attending, of initiating and completing tasks. Perhaps the central idea is to surround the child with an appropriate curriculum of learning materials and tasks that enable the child to acquire the conviction that he can learn on his own, and build up within him a positive attitude toward learning and self-confidence in himself as a learner."

It is true that this exact proposition has never been decided by this court, and it is also true that other states differ in their interpretation of zoning ordinances similar to this.

In Livingston v. Davis, 243 Iowa 21, 50 N. W. 2d 592, the court said: "Although public elementary schools include only kindergarten and the first eight grades, we see no reason why private elementary schools may not include such a school as defendants operate. Public elementary schools include the first school the public provides for beginners—kindergarten. Why may not private elementary schools likewise include the first school they provide for beginners—the nursery school?"

A school or educational institution is a place in which persons are instructed in the arts and the process or manner of training youth for their stations in life.

We hold that the private school operated by the defendants is a school or educational institution, and the use of the defendants' property for such is not a violation of the zoning ordinances of the city of Omaha.

The question of whether a school for the teaching of esthetic dancing or other pursuits is a school or institution of education is a matter which must be decided under the facts in each individual case.

We affirm the decision of the district court.

AFFIRMED.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT, v. LESLIE M. PARKS ET AL., APPELLEES.

178 N. W. 2d 788

Filed July 24, 1970. No. 37378.

1. **Counties: Highways: Dedication.** The filing of a written consent was necessary to confer jurisdiction upon the county board to establish a consent road.
2. **Public Records: Evidence.** The ancient document rule states that an original or authentic copy of a document which appears to be at least 30 years old, found in proper custody, appearing unblemished by alterations, and is otherwise free from suspicion, is admissible in evidence without direct proof of its execution.
3. **Public Records: Highways: Evidence.** If a petition is duly presented to the proper tribunal praying for a public road from one point to another in the county and such petition is granted and the road located and opened for travel and is used by the public generally, the right in the public will become complete after 10 years and the court will not look at the original proceedings to determine the validity of the road but to ascertain the extent of the location.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Reversed and remanded with directions.

Clarence A. H. Meyer, Attorney General, Warren D. Lichty, Jr., and Dale L. Babcock, Jr., for appellant.

Sidner, Svoboda & Schilke, for appellees.

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

WHITE, C. J.

The dispute in this case focuses upon the question of title to the north 33 feet of land included in the south 66 feet of the southwest quarter of the southwest quarter of Section 12, Township 17, Range 8 East of the 6th P.M., in Dodge County, Nebraska. The State seeks to enjoin the appellees from utilizing the disputed tract, claiming that it constitutes part of the right-of-way adjacent to U. S. Highway No. 30, and to restrain the appellees from interfering in any manner with the use of said right-of-way. The district court ruled that the north right-of-way line was parallel to and 33 feet north of the centerline of highway 30, and enjoined the State from interfering with the appellees' land, unless through appropriate proceedings. Appellees concede a right-of-way extending 33 feet north of the centerline of the highway, but insist that this is the extent of said right-of-way. We must determine from what point the right-of-way is measured and second, the extent of that right-of-way. It is readily apparent that no one, including the State and county officials, knew precisely what the answers to these two questions were until 1960 or 1961. Sometime during one of those years a record was disclosed showing a county consent road fixed by Dodge County in 1882. Appellees' witness, Mr. Lind, testified that the records had been lost due to a courthouse disaster, and it had taken him several years to compile all of the records. Mr. Lind had been the county surveyor from 1950 to 1962 and was called upon to survey the land in question on several occasions. All surveys were taken prior to the discovery of the consent, the record in question.

Exhibit 11 is a consent petition filed April 12, 1882, at the bottom of which appears six names. The law in effect at the time this petition was filed provided in part: "Public roads may be established without the appointment of a commissioner, provided the written consent of all of 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." Laws 1881, c. 78, § 37, p. 443. We have recently had occasion to interpret this same statutory provision. See County of Banner v. Young, 184 Neb. 546, 169 N. W. 2d 280 (1969). In that case we affirmed the rule set forth in Warren v. Brown, 31 Neb. 8, 47 N. W. 633 (1890), which held that the filing of a *written consent* was necessary to confer jurisdiction upon the county board to establish a consent road. If the jurisdictional requirements have not been met, the right to a highway will not exist, and lapse of time will not cure the defect. Under County of Banner v. Young, *supra*, the jurisdictional inquiry is two-fold: Whether there was a valid consent to the use of the land, and whether there has been an acceptance of that land as such, other than the mere entry upon the plat book.

Authenticity of this document is controlled by the ancient document rule. That rule states that a document which appears to be at least 30 years old, found in proper custody, appearing unblemished by alterations, and is otherwise free from suspicion, is admissible in evidence without direct proof of its execution, on the theory that, under such circumstances, the instrument proves itself, or that its due execution is presumed. Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384 (1958); Anderson v. Anderson, 150 Neb. 879, 36 N. W. 2d 287 (1949); 32A C. J. S., Evidence, § 744, p. 32. Ordinarily the rule only allows receipt of a document; however, it may be admitted in evidence as proof of the facts recited therein, provided that the writers would have been competent to testify to such facts. In this case the writers would have clearly been able to testify to the facts recited in the document.

Appellees, while conceding the existence of a roadway,

contend that the ancient document rule does not apply to this instrument. The names "Morse" and "Hamann" appear on the face of the consent petition. Appellees argue that in 1882, record title to the disputed property was in Edward N. Morse and John F. Hamann as tenants in common; since the signatures of these two individuals do not appear on the petition itself, the document shows on its face that it is invalid. Appellees rely on the case of Warren v. Brown, *supra,* which held that the failure of an owner to sign the consent petition invalidated the consent required to effect a dedication. However, in that case certain owners had not signed at all, that is, their names nowhere appeared on the petition or on the record. In the instant case, the names "Morse" and "Hamann" do appear signed on the face of the document itself. Were we to adopt appellees' theory, that the petition is invalid unless the full signature appears on its face, we would emasculate the purpose of the ancient document rule. That rule is adopted for common convenience, founded upon the great difficulty, or the impossibility, of proving due execution of an instrument after an interval of many years. This case is completely different from Warren v. Brown, *supra,* where the necessary signatures did not appear on the document at all. We hold that the ancient document rule authenticates the consent petition filed in this case, and that its due execution is presumed.

Under the test of County of Banner v. Young, *supra,* it must be determined whether the public, by user or otherwise, accepted the land for the purpose of a public road. The burden lies upon the appellant to prove the acceptance of the land for highway purposes by proving that a road was opened or used. Although the record is silent as to whether the road was actually "used by the public generally" beween 1882 and 1903, in the latter year a tax plat was filed with the county clerk of Dodge County which expressly shows a county road of the description found in the original consent petition.

This is some evidence that the road was actually in use up to and including 1903. Further evidence was adduced from one of the appellees' witnesses that the road was being "used by the public generally" since his childhood days, which would have been somewhere around 1907 and 1908. This fact would seem to further indicate that the road was being used by the public without objection by the owners of the land involved herein. These factors strongly suggest that there had been acceptance of this land for the purpose of a public roadway.

Once the jurisdictional issue has been resolved under County of Banner v. Young, *supra,* then the validity and regularity of the consent road are to be presumed after 10 years. In City of Beatrice v. Black, 28 Neb. 263, 44 N. W. 189 (1889), this court held that: "If a petition is duly presented to the proper tribunal praying for a public road from one point to another in the county and such petition is granted and the road located and opened for travel and is used by the public generally, the right in the public will become complete after ten years and the court will not look at the original proceedings to determine the validity of the road *but to ascertain the extent of the location.*" (Emphasis supplied.)

The petition provided in part: "We the undersigned * * * do pray and request your Honorable Body to locate and establish a *public road* upon the whole section line between sections twelve (12) and thirteen (13) in township seventeen (17) in Range Eight (8) East in (Dodge) county. *Said road* to be located so that one half thereof shall be on each side of said section line, *except* that all of said road shall be taken off of the South West quarter of the South West quarter of said section twelve (12) * * *." (Emphasis supplied.) Chapter 78, section 2, page 627, Compiled Statutes of 1887, adopted in 1879, provided in part: "All *public roads* shall have a width of sixty-six feet, * * *." (Emphasis supplied.) When the language of the original petition is analyzed, it seems

abundantly clear that the true intent was to establish a public road 66 feet in width, with its southern boundary located on the section line of Section 12. It thus appears that the lower court, in holding that the right-of-way extended only 33 feet north of the centerline of highway 30, was in error, and that the correct right-of-way extends 66 feet north of the south section line of the southwest quarter of the southwest quarter of Section 12.

The fact that this petition was evidently lost due to a courthouse disaster for quite a number of years seems to account for the confusion surrounding the precise location of the highway right-of-way. For example, under a lease dated July 12, 1957, defendants Parks leased this property to Standard Oil which lease recognized that the right-of-way extended a distance of 66 feet north of the south section line of Section 12. A rider was subsequently attached to that lease based upon a 1958 survey instituted at the request of Parks, which showed that the right-of-way was only 33 feet. This survey was instituted after Parks had been informed by the State employees that they did not know precisely where the right-of-way line was and that Parks should get his information from the county. The admitted reason for deferring to the county was that the State did not appear to have any records pertaining to the right-of-way. That situation was changed, however, upon the discovery of the consent petition in either 1960 or 1961.

Other questions are presented and argued in the briefs. In the light of our basic holdings herein, it is not necessary to discuss these questions.

The judgment of the lower court should be vacated, and an injunction granted to restrain the appellees from utilizing the highway right-of-way of the south 66 feet of the southwest quarter of the southwest quarter of Section 12, Township 17, Range 8 East of the 6th P.M., in Dodge County, Nebraska, and to enjoin the appellees

from interfering in any manner with the use of said highway right-of-way.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

The important question in this case is where the right-of-way was located upon the ground. It has long been recognized that it is not essential that a public road be laid out upon the exact lines set out in the petition. State ex rel. Draper v. Freese, 147 Neb. 147, 22 N. W. 2d 556; Richardson v. Frontier County, 94 Neb. 27, 142 N. W. 528.

Willis Lind, the former county surveyer, testified that he had been personally familiar with the area since 1907 or 1908. He testified that when he first knew the area there was no road from Parks' corner to Broad Street, but a fence line that meandered with Rawhide Creek. The road, which is now U. S. Highway No. 30 east of Parks' corner, starting at that corner curved a little to the south until it reached a corner about a quarter of a mile east, and then meandered northeasterly to the section corner. This is the only evidence in the record that describes the road which was laid out upon the ground and used.

The State's claim is founded upon records which were not available until after 1960 or 1961. There is no testimony by any witness which disputes the recollection of Lind as to where the road was actually located.

The trial court found that the north right-of-way line was 33 feet north of the centerline of U. S. Highway No. 30 as now constructed. This finding is fully supported by the record, and the judgment should be affirmed.

McCOWN, J., joins in this dissent.

F. FAYE BESSEY ET AL., APPELLEES, V. BOARD OF EDUCATIONAL LANDS AND FUNDS, STATE OF NEBRASKA, APPELLANT.

178 N. W. 2d 794

Filed July 24, 1970. No. 37445.

1. **Public Lands: Statutes.** The statute, section 72-258, R. S. Supp., 1967, declared valid and constitutional by State ex rel. Belker v. Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156, provides that the school lands in Nebraska 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.
2. ———: ———. The statute providing for the sale of school land, now in full force and effect, authorizes the Board of Educational Lands and Funds to resell the property only in the event that the highest bidder fails to pay the balance of the purchase price in 90 days.
3. **Statutes: Courts.** A court cannot, under the guise of its powers of construction, rewrite a statute, supply omissions, or make other changes and this is particularly true where it appears that the matter was intentionally omitted.
4. **Statutes: Courts: Legislature.** If the language of a statute is clear and unambiguous, the courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature.

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

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

Barney & Carter, for appellees.

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

WHITE, C. J.

In this prophetic sequel to State ex rel. Belker v. Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156, on rehearing, *ante* p. 270, 175 N. W. 2d 63, we are now asked by the State to exercise a supervisory trust jurisdiction over the school lands trust to set aside a successful bid and order a new sale of school

lands sold under the new statute directing their mandatory sale.

The statute, section 72-258, R. S. Supp., 1967, now adamantly and unequivocally held constitutional by the controlling minority opinion of the court, says in pertinent part as follows: "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.*" (Emphasis supplied.) Following this is the lone and only provision authorizing the board to resell the property which is only in case of the highest bidder's failure to pay the balance of the purchase price.

The essential facts of this case presenting the problem are very simple. The land was appraised under the statute (section 72-204, R. S. Supp., 1967) by the board at a value of $35,840. It sold to Bessey and Simmons, the appellees, for $66,560, the highest bid. Upon receipt of a new bid in the sum of $73,225, *over twice the board appraisal,* the board attempted to resell the property and this action of the district court enjoined a new sale. We affirm the judgment of the district court.

The State does not contend that the sale was not conducted "in the manner required by law." The statute was strictly complied with and the minority declaration to that effect was fully complied with. See controlling minority opinion, State ex rel. Belker v. Board of Educational Lands & Funds, on rehearing, *ante* p. 270, 175 N. W. 2d 63, at page 271.

With a strange and paradoxical ambivalence, illustrative of the historic duality and conflict of interest between the beneficiary school children and the political pressures of private ownership, the State now reverses its position in Belker and asks the court to modify the language of the statute and step in and supervise this individual sale. It now contends that the Board of Educational Lands and Funds has the right and power to reject a sale and submit the same to further bidding,

and that this court is either the creator or protector of this power and right.

But judicial restraint and a proper regard for the principle of separation of powers in our government forbids this charitable usurpation, because the very contention of the majority of this court that ultimate supervisory power over the sale of these lands was curtly and almost summarily rejected by the controlling minority in Belker. We will not burden this opinion with a quoting review of the Belker opinions. Could it be clearer that the *majority* contention of statutory invalidity because of legislative emasculation of the board's and this court's constitutional trust powers was rejected out of hand? The declaration is that the statute is constitutional and wholly valid. It means what it says, and says what it means. No one suggests any ambiguity or vagueness in its language. History alone dictates that its design was to remove all interfering impediments to mandatory sale. It says, "* * * *shall* be sold at the expiration of the present leases, * * * at public auction, * * * to the highest bidder." (Emphasis supplied.) A new sale can only be held by the board when the bidder fails to pay. §§ 72-257 and 72-258, R. S. Supp., 1967.

The now asserted contention that we can hybridize the statute and write in some saving clause has already been passed upon and disposed of by a majority of this court. As later discussed in this opinion, the now revealed offer of an amendment to accomplish such an objective was defeated. In State ex rel. Belker v. Board of Educational Lands & Funds, on rehearing, *ante* p. 270, 175 N. W. 2d 63, at page 273, the majority of this court said: "The history of the act shows conclusively that the Legislature intended that the appraisal, sale, and payment were to constitute the sole basis for the passing of ownership. The right of the trustee to perform its duty was intended to be cut off. Its duty to protect, conserve, and safeguard the assets of the trust for the benefit of all its beneficiaries and its liability for loss

thereof resulting from its failure to exercise reasonable care, prudence, and diligence were cast aside in favor of a summary binding sale for the very purpose of subverting the duty of the trustee and the rights of beneficiaries."

Now that the statute is declared constitutional we adopt and declare the above holding herein as the proper and only interpretation the statute could and should be given. A court cannot, under the guise of its powers of construction, rewrite a statute, supply omissions, or make other changes and this is particularly true where it appears, as here, that the matter was intentionally omitted. State ex rel. Belker v. Board of Educational Lands & Funds (dissenting opinion by Carter, J., supported by a majority of the court), on rehearing, *ante* p. 270, 175 N. W. 2d 63; Long v. Poulos, 234 Ala. 149, 174 So. 230; Seattle Assn. of Credit Men v. General Motors Acceptance Corp., 188 Wash. 635, 63 P. 2d 359; Appeal of Infants Welfare League Camp, 169 Pa. Super. 81, 82 A. 2d 296; Mitchell v. Mitchell, 312 Mass. 154, 43 N. E. 2d 783.

In Armstrong v. Board of Supervisors, 153 Neb. 858, 46 N. W. 2d 602, we said: "If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning *not* intended or *expressed by the Legislature.*" (Emphasis supplied.)

The statute is constitutional. Nothing could be clearer than its meaning and its mandatory requirement of sale at or above appraised value. All conditions of the statute have been complied with. As we see it, there is nothing left to argue about, and that is the way the Legislature intended it. The Legislature, and not this court (as the majority unsuccessfully opposed), specifies the protections to the trust. They were by: (1) An opening bid at full appraised value and (2) required sale of a 6-year lease on failure of bidding. §§ 72-257 and 72-258, R. S. Supp., 1967.

But even if we were driven by some procrustean (ruthless stretching or cutting to fit) frenzy to create an ambiguity or save the situation we could not, short of outright usurpation. An amendment was offered to the statute in question on the floor of the Legislature to give the Board of Educational Lands and Funds the right to order a new sale and reject bids. Senator Harsh, in explaining his amendment, said: "* * * sometimes you do get a sale of land that is not to the best interests of all the people concerned and I think that we ought to have *a provision in here that the Board have the right to reject some bids.*" (Emphasis supplied.) (1965 Legislative floor debate, page 2902.)

The amendment was defeated 27 to 10. The discussion on the floor was about as revealing as the vote, indicating an absolute intention not to give the board any discretion in the matter. (See Legislative floor debate, page 2902 et seq.)

We point out further that this is not a judicial sale and the rules applicable thereto are not relevant. Again the statute provides no procedure for confirmation or review by the board. Again the Legislature specifically rejected such a procedure. The protections, such as they are, are *before* the sale, not after. The statute, section 72-258, R. S. Supp., 1967, says: "Such land shall be sold, at public auction, * * * to the highest bidder. * * * Settlement shall be made by paying cash of not less than twenty per cent 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.*" (Emphasis supplied.)

The only thing to be done is for the buyer to pay "ninety days *after* the sale" and not "ninety days after confirmation." It therefore is indisputably clear that a completed sale took place on the fall of the hammer, and the statute being complied with, the appellees were entitled to a deed on payment and any further attempt

to sell or review subsequent bids were not authorized by law, are void, and may be enjoined.

The judgment of the district court enjoining the Board of Educational Lands and Funds from conducting a new sale is correct and is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The majority opinion here represents an obvious desire to decide the Belker case once more. See State ex rel. Belker v. State Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156, and on rehearing, *ante* p. 270, 175 N. W. 2d 63. The issues in the Belker case, however, were not and are not the real issues here.

The only real issues in this case are whether the State Board of Educational Lands and Funds has authority under any circumstances to accept a higher upset bid subsequent to a completed statutory sale of school lands, or set the prior sale aside; and second, whether any court having jurisdiction over the school lands trust has any authority to set aside a completed statutory sale of school lands under the factual circumstances partially disclosed by the majority opinion and additionally reflected in the dissent of Judge Smith.

Even if the Belker constitutional issue were critical, which it is not, the conclusion of the present majority on that issue rests upon a misinterpretation of the legislative action relied upon as justification. In both of the previous Belker opinions, the majority grounded the decisions on the assertion that because of legislative rejection of a proposed amendment to the bill, the resulting statutory silence on the issue must be interpreted as showing a clear legislative intent that neither the board nor even a court, should have any authority "to reject or confirm bids," and demonstrated that the Legislature intended to "obstruct the trustee in the performance of its duty."

One of those opinions referred to the critical amendment as one "that would give the Board of Educational

Lands and Funds the right to reject bids." The other opinion said that "in support of amendments," two Senators argued that the board "should have the right to reject bids."

The proposed amendment was to section 2 of L. B. 234, now section 72-257, R. S. Supp., 1967. The first sentence of that section read: "All lands, now owned or hereafter acquired by the state for educational purposes, shall be sold at the expiration of the present leases." The crucial amendment was to insert the words "when the best interest of the state will be served" after the word "sold" in that sentence. The actual amendment was a far-cry from what it was said to be by the Belker majority. The interpretation of the legislative rejection of that amendment as "plainly indicating that the Legislature did not intend that such board as trustee could see to it that the land did sell for its highest market price," is a truly remarkable interpretation of that legislative action.

A far more reasonable interpretation of that action, and the only one finding support in the legislative record, is that if the amendment had been adopted, it would have left the choice of whether to sell school lands or not entirely up to the board, and the board members had advised some members of the Legislature that they did not agree with the legislative mandate to sell all of the lands. See 1965 Legislative floor debate, p. 2902. It is far-fetched indeed to ascribe to the rejection of the proposed amendment by the Legislature an intention to disregard the trust character of school lands, and to wipe out the obligation of the trustee of those lands to exercise the utmost good faith in the handling of the trust property. It is even more far-fetched to assume that it was intended to wipe out the right and duty of courts to supervise the trust for the benefit of the common schools.

The statutory silence and lack of specific authority for resale or setting a sale aside, in the opinion of the

majority in the Belker cases, made the statute requiring the sale of school lands unconstitutional. The interpretation of that same statutory silence by the minority as leaving the existing trust law in operation, was referred to as judicial legislation. While a majority here were formerly quite willing to regard that legislative silence as speaking loudly for a particular and specific interpretation of legislative intention, any different interpretation of it is now referred to as being nothing less than "outright usurpation" of the legislative function. This is simply not true.

Turning now to the real issues in this case, we can find no logical nor legal reason why the decisions and rules governing contracts, trusts, and judicial sales should not be applied here to a statutory sale of school lands. This court long ago decided that the school lands of this state are held in trust for the benefit of the common schools; that the relationship of trustee and beneficiary is a fiduciary one imposing the utmost good faith in the handling of the trust property; and that the courts are charged with supervision of that trust regardless of who may be the trustee. We have also held that 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. This law pertaining to the trust of lands for the benefit of the common schools grew out of the initial grant of the lands by the United States and its acceptance by the state. The law is judicial in origin, not statutory. It fills the void left by statutory silence and, in fact, is impervious to legislative overruling. Yet, it is from this area of judicial law, applicable specifically to the school lands involved here, that the majority wishes to abdicate in favor of an imagined interpretation of a silently expressed legislative intent.

As to judicial sales, the courts must act in the interest of fairness and prudence and with a due regard to the

rights of all concerned and the stability of judicial sales. See, Siekert v. Soester, 144 Neb. 321, 13 N. W. 2d 139, 152 A. L. R. 527; Michelson v. Wagner, 170 Neb. 28, 101 N. W. 2d 498; Hull v. Hull, 183 Neb. 773, 164 N. W. 2d 455. These holdings also do not derive from any specific statute, but from judicial interpretation and decision. Certainly the obligation of courts as to a sale of trust assets by a trustee of a trust supervised by the court, is equally demanding, even though it also is not specifically required by any statute. As stated by the current majority in the dissenting opinion on rehearing in State ex rel. Belker v. State Board of Educational Lands & Funds, *ante* p. 270, 175 N. W. 2d 63: "Among the duties of a trustee is to require in the case of the sale of trust property that he shall obtain the highest price possible and refuse to make a sale if the sale was fraudulent, or the result of chilled bidding, or any other conduct or circumstance that resulted in an inadequate sale price."

In Rupe v. Oldenburg, 184 Neb. 229, 166 N. W. 2d 417, this court unanimously approved the setting aside of a partition sale even after the sale had been initially confirmed by the court after a higher upset bid. The amount of the upset bid, made after confirmation, exceeded the initially confirmed bid by slightly more than 10 percent. There is no statute which spells out any authority of a court to set aside a judicial sale already completed and confirmed. Neither does any statute authorize an immediate resale to a higher subsequent bidder.

The subsequent bid to the Board of Educational Lands and Funds in this case exceeds the highest bid at the sale by a percentage virtually identical to the Rupe case. We can see no valid reason to reach a different result in this case. The only response to that conclusion in the majority opinion is the flat and unsupported statement that: "this is not a judicial sale and the rules applicable thereto are not relevant." Such authority

is not enough to discard the law of judicial sales, much less the law of contracts and of trusts.

The action of the Board of Educational Lands and Funds in setting aside its prior sale and ordering a resale, upon receipt of a binding bid exceeding the sale price by more than 10 percent and accompanied by certified check and payment of costs of resale, should have been affirmed. The judgment of the trial court should be reversed.

BOSLAUGH, J., dissenting.

The Legislature authorized and directed the Board of Educational Lands and Funds to sell the school lands. It did not authorize the board to give them away.

The issue is quite simple. The question is whether a trustee should be compelled to sell an asset of the trust for less than its full value.

It is the duty of the board to obtain the highest price possible for the land. State ex rel. Reed v. Scott, 18 Neb. 597, 26 N. W. 386; State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520. The purpose of the appraisal for sale purposes is to insure that the full value is received for the land. In this case the appraisal was far below the sale price and less than one-half the amount of the Buell upset bid. It is apparent that the appraisal was defective and that the land should be resold as the board contends.

In State ex rel. Belker v. State Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156, and on rehearing, *ante* p. 270, 175 N. W. 2d 63, it was pointed out that there is nothing in the act which in any way limits or attempts to limit the jurisdiction or power of the courts to determine whether a sale has been conducted in the manner required by law.

The majority opinion refers to the so-called Harsh-Budd amendment to L.B. 234 which proposed to insert the words "when the best interest of the state will be served" after the word "sold" as it now appears in section 72-257, R. S. Supp., 1967. The effect of the amend-

ment, if it had been adopted, would have been to give the Board of Educational Lands and Funds an uncontrolled discretion as to whether any school lands should be sold. That is a far different matter than the right to refuse to complete a sale when it appears to the board that the land has been sold for less than its full value because of a defective appraisal.

The Legislature has the power to provide the method of administering the public school lands, but the method provided must be one which is within the law governing the administration of trust estates. State ex rel. Ebke v. Board of Educational Lands & Funds, *supra.* The Legislature has not done otherwise. It is the court which has chosen to ignore the rules of law applicable to trust property and trustees acting in a fiduciary capacity.

In State ex rel. Reed v. Scott, *supra,* this court held that it would not interfere with the discretion of the board unless there had been an abuse of the trust. In this case the court has determined to interfere to compel what appears to be an abuse of the trust.

The problem created by the decision in this case, although of judicial origin, may nevertheless be remedied by legislative action. It is a matter to which the Legislature should address itself at the earliest opportunity.

SMITH, J., dissenting.

The following facts are significant: The notice of sale stated: "No sale will be final until approved by the Board . . . and the Board reserves the right to reject any and all bids." The terms were read to both bidders who understood them. The auctioneer announced: "Sold, subject to approval by the Board of Educational Lands and Funds."

The statutory interpretations in the majority opinion, with which I do not concur, ought not to be determinative. The parties in actual fact did not intend the transaction to be a contract which the court finds. We can only conjecture as to the extent the board's procedure

and the understanding of the bidders affected both appraisal and bidding.

Plaintiffs have invoked the extraordinary remedies of injunction and specific performance against the board. This unusual situation, even on the theory of the majority opinion, ought to be governed by this rule: Sometimes "equity does not lay so ready or so vigorous a hand upon a public official board to compel specific performance as it does to enforce the contracts of private parties." Whitlow v. Board of Education, 108 Kan. 604, 196 P. 772 (1921). Plaintiffs' suit is without equity. I respectfully dissent.

NEWTON, J., concurring.

I concur in the opinion of White, C. J., and reluctantly conclude that this court now has no other recourse.

The dissent of Smith, J., is based on the attempt by the Board to reserve "the right to reject any or all bids" and thus implement the statute in a manner specifically rejected by the Legislature as pointed out in the opinion of White, C. J. The dissent of McCown, J., falls into a similar category.

As made apparent in State ex rel. Belker v. Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156, on rehearing, *ante* p. 270, 175 N. W. 2d 63, we have here a statute deliberately and purposely designed to prevent any possibility of review of school land sales. Because it infringed the right of judicial review of sales of trust property, a majority, though not controlling, of the members of this court found the statute to be unconstitutional. The controlling minority then insisted and now again insists that the right to judicial review can be read into the statute notwithstanding the clearly expressed legislative mandate and intent. This clearly entails amendment by judicial action and the exercise of a power not conferred upon this court. The controlling minority having succeeded in preventing a ruling that the statute was unconstitutional, it must now be regarded as constitutional and enforced in ac-

cordance with the expressed command and intent of the Legislature. Rhetoric may confuse the issue, but the logic contained in the present majority opinion cannot be so readily confounded.

With the passage of sections 72-257 and 72-258, R. S. Supp., 1967, the Legislature made possible and in the case of State ex rel. Belker v. Board of Educational Lands & Funds, *supra,* this court sanctioned a situation permitting the greatest loss of public funds ever witnessed in this state. The fact that all parties acted in good faith does not serve to alleviate or lessen the prospective damage.

According to the June 30, 1968, report of the Board of Educational Lands and Funds, we have 1,611,499.19 acres of school lands in Nebraska, having an appraised value of $70,340,595, or about $43.65 per acre. With the constant inflationary rise in farmland values during the past 30 years, these figures on valuation appear to be inordinately low. This is verified by the sale of the tract now under consideration.

The present case serves to clarify and point up the existing situation and the amount of the prospective loss. The school lands have been most recently appraised at a value of $70,340,595. In this instance, one section of land was sold. This section was appraised at a supposed market value of $35,840. It was sold at auction for $66,560 and thereafter was subject to a bid of $73,225. It is evident that the appraised value was not representative of market value, yet, under the law, the land would have had to have been sold for the appraised value of $35,840 had no further bid been received. This would be $37,385 less than the amount finally bid and also less than 50 percent of the final bid. If this is a fair example of what is to be expected from the forced sale of school lands under the existing statute, without discretionary action being vested in the Board of Educational Lands and Funds, the extent of the possible loss to the school fund becomes apparent. The possible loss, on the basis of percentages found in the present case,

could amount to more than the total appraised value of $70,340,595. Thus far we have mentioned possibilities. That they would be fully realized is, of course, extremely unlikely. Nevertheless, where such extreme losses are theoretically possible, it is obvious that material or major losses will be sustained. Cases where a single bidder appears are certain to be found, as where chilled bidding is encountered, the land is surrounded by other land under one ownership, or an understanding is arrived at between prospective purchasers, and in other situations not conducive to free and open bidding.

The theory that appraisal can supplant the protection afforded by a post-sale scrutiny with a view to determining the fairness and adequacy of the sale is not tenable. This is recognized by the Legislature in other similar fields. For instance, in the sale of lands under foreclosure or belonging to a trust or decedent's estate, the Legislature requires a post-sale scrutiny and confirmation by the courts. Do lands held in trust by the state merit any less protection than those owned by private individuals or their estates? There can be but one answer. I find it impossible to believe that the Constitution of Nebraska sanctions such a position and adhere to the dissenting opinions appearing in the case of State ex rel. Belker v. Board of Educational Lands & Funds, *supra*.

SPENCER, J., concurring.

I am in full agreement with the majority opinon herein, and join in the concurrence of Newton, J. With reference to the dissenting opinion of McCown, J., I point out that the majority of the court pointed up this problem in suggesting the legislative act was unconstitutional.

With specific reference to the suggestion that the majority misinterpret the action of the Legislature on suggested amendments to L.B. 234, now section 72-257, R. S. Supp., 1967, I suggest that the legislative floor discussion leaves no doubt on that point. In substance,

Senator Harsh said: I move the adoption of the amendment. I think every one of us is interested in the sale of these school lands and that the people, or particularly the children of Nebraska, get the best possible return from them. I think that's the purpose of the introducer in the sale of the property. He then said: "* * * sometimes you do get a sale of land that is not to the best interests of all the people concerned and I think that we ought to have a provision in here that the Board have the right to reject some bids."

The introducer of the bill, in response to Senator Harsh's opening statement, said in part: "Therefore, I feel that this legislature is the group, the one to make the decision and if the Board of Educational Lands and Funds appraises these lands at the market price, we have already agreed in this legislature through our passing this over to Select File, advancing to E and R for review and so forth, that we feel that when you sell at market price, this is the thing to do, to sell and so I feel that if we give this Board of Educational Lands and Funds this privilege of evaluating this land, appraising the land, at the market value, then it will be in the best interests of the state to sell the land so therefore I am opposed to this particular amendment."

Senator Harsh said in closing: "The only thing I have in closing, that I think this is just an effort to try to get as fair and as just a value as we can for the school investments of Nebraska. I'd like to call your attention that this is no different than we now have on the sale of these small tracts, they have a right to reject certain bids. And I think this is just protection and we could have and possibly get a little more money." It is evident to me that the Senator was trying to give the Board the right to reject any bid not in the best interest of the trust, and the Legislature rejected the idea and insisted that title should pass upon the close of the sale.

NEWTON, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. CHARLES LAPLANTE, APPELLANT.

179 N. W. 2d 110

Filed August 21, 1970. No. 37467.

1. **Criminal Law: Post Conviction.** The Post Conviction Act specifically authorizes the trial court to examine the files and records and to determine whether or not a prisoner may be entitled to the relief he seeks. If the trial court finds from such examination that the proceeding is without foundation, an evidentiary hearing may be properly denied.
2. ———: ———. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.

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

Yost, Schafersman, Yost & Lamme, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

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

COLWELL, District Judge.

This is an appeal in a post conviction proceeding. On February 8, 1968, defendant-appellant, Charles LaPlante, was convicted by jury verdict in the district court for Dodge County, Nebraska, of assaulting an officer. § 28-729.01, R. S. Supp., 1967. He was also adjudged an habitual criminal and sentenced to 10 years imprisonment in the Nebraska Penal and Correctional Complex where he is now confined. The conviction was affirmed on direct appeal. State v. LaPlante, 183 Neb. 803, 164 N. W. 2d 448. A 1960 prior burglary conviction in Saunders County, Nebraska, was used as proof of his habitual criminal status. Thereafter, defendant filed a motion in the district court for Dodge County, Nebraska, for post conviction relief under section 29-3001, R. S. Supp.,

1967, alleging his prior 1960 conviction in Saunders County was void and in violation of his constitutional rights for the reason he was indigent; that no counsel was appointed for him or offered to him at the expense of the county; that he was without the advice or assistance of counsel; and that he did not knowingly, competently, intelligently, or understandingly waive the assistance of counsel. An order to show cause was entered; on hearing the motion to vacate and set aside sentence was denied by the trial court without evidentiary hearing. The order recited: "The court finds from the files and records in the case that the issue raised by the defendant in his present motion was not raised by the defendant in his original appeal of his conviction and sentence, which has been affirmed by the Nebraska Supreme Court."

"The Post Conviction Act specifically authorizes the trial court to examine the files and records and to determine whether or not a prisoner may be entitled to the relief he seeks. If the trial court finds from such examination that the proceeding is without foundation, an evidentiary hearing may be properly denied. * * * A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated." State v. Hizel, 181 Neb. 680, 150 N. W. 2d 217.

The files and records considered by the trial court are not before us and there is no certificate as to what was considered. State v. Fugate, 180 Neb. 701, 144 N. W. 2d 412. However, defendant's brief supplies a part of that record considered by the trial court: "At the hearing on the habitual criminal charge the State introduced evidence of a 1960 felony conviction from Saunders County, Nebraska, which on its face showed the defendant to have been without counsel, and to which the following objection was made: 'Comes now the defendant and objects to Exhibits A and B * * *

with respect to Exhibit B, it shows that the defendant therein was without counsel and also therein and thereby deprives the defendant of his constitutional right to representation by counsel * * *.' The objection was overruled, the exhibit received and the defendant sentenced to 10 years at hard labor without solitary confinement."

The error urged by defendant occurred at the hearing on the habitual criminal charge. It was directed to the admission of evidence of a prior 1960 conviction that defendant contends was void because of denial of counsel under rule of Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A. L. R. 2d 733 (1963), as extended to recidivist cases in Greer v. Beto, 384 U. S. 269, 86 S. Ct. 1477, 16 L. Ed. 2d 526 (1966). See, also, Burgett v. Texas, 389 U. S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967). The defendant did not raise this issue on direct appeal. Defendant was represented by able trial counsel at the original trial, direct appeal, during the post conviction proceeding, and in this court.

This case is similar to State v. Losieau, 182 Neb. 367, 154 N. W. 2d 762. In that post conviction proceeding Losieau objected to search and seizure evidence at the original trial, which was received as evidence over timely objection, but he did not raise that issue on direct appeal. We there held: "An illegal search and seizure issue cannot be considered in a post conviction review where the circumstances of the search and seizure were fully known to the defendant at the time of the trial resulting in his conviction."

Defendant here was aware of the circumstances of his 1960 prior conviction, and he specifically objected to the use of that prior conviction as evidence for the reason stated in the record that it was in violation of his constitutional rights. Defendant cannot now raise that issue on post conviction review.

The trial court was correct in denying defendant's

motion to vacate and set aside sentence and in denying an evidentiary hearing.

AFFIRMED.

JOHN V. WEICHEL, APPELLEE, V. HAROLD L. LOJKA, APPELLEE, IMPLEADED WITH NEBRASKA PRESTRESSED CONCRETE CO., APPELLANT.
179 N. W. 2d 112

Filed August 21, 1970. No. 37514.

1. **Contracts: Principal and Agent.** When the contract creating an independent contractor is limited to some particular object or the accomplishment of some particular transaction, the independent contractor status is terminated by the completion of the transaction for the accomplishment of which it was created.
2. **Negligence.** Proximate cause, as used in the law of negligence is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the injury would not have occurred. 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.
3. **Trial: Evidence.** In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
4. **Trial: Motions, Rules, and Orders: Judgments.** In a case where a motion was made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case submitted to a jury which returned a verdict contrary to the motion, and thereafter a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and remanded.

Chambers, Holland, Dudgeon & Beam, for appellant.

Nelson, Harding, Marchetti, Leonard & Tate and Richard H. Williams, for appellee Weichel.

William F. Matschullat, for appellee Lojka.

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

COLWELL, District Judge.

This is a suit to recover damages caused by a collision on Cornhusker Highway near Lincoln, Nebraska, between a pickup truck owned and operated by plaintiff, John V. Weichel, and a 1956 Plymouth sedan owned and operated by the defendant Harold L. Lojka, hereafter called Lojka. At the conclusion of the evidence the defendant, Nebraska Prestressed Concrete Company, hereafter called Prestressed, moved for a directed verdict, which was denied. The jury returned a verdict in favor of the plaintiff against both defendants for $56,432. Defendant Prestressed appeals from the denial of its motion for a new trial or in the alternative for judgment notwithstanding the verdict.

Prestressed manufactures concrete products on the outskirts of Lincoln, Nebraska. In the early fall of 1967, it experienced a labor shortage. Claude Weimer, production manager for Prestressed, went to Scottsbluff, Nebraska, more than 400 miles distant from Lincoln, to recruit laborers, using the facilities of the Nebraska State Employment Office there. Twenty-three prospective male employees were offered jobs at the Prestressed plant at Lincoln; 22 of them later reported; and they all understood that their employment with Prestressed did not begin until they reported for work at the plant in Lincoln, and "punched the time clock." Most of these men did not have sufficient funds and the means to sustain themselves for either travel, food, or lodging enroute to Lincoln, Nebraska, or after they arrived there; those without transportation were offered bus

fare or travel in available private cars; and those men having automobiles were encouraged to drive them to Lincoln. Six of the men, including defendant Lojka, drove their own cars to Lincoln; Prestressed provided 1 man with travel by air and bus fare for 9 men; and 7 of the men were passengers in private cars. Lojka was a deaf-mute, age 33 years; all communication with Lojka was by written question and answer; he elected to drive his own car to Lincoln; and Weimer advanced him $15 to cover gas and oil. Later, Lojka agreed with Weimer to take three of the other men, Dan Knaub, Carl C. Reiber, and William W. Hall, to Lincoln as passengers, since none of them had funds or the means for such travel. There is conflict in the evidence whether Lojka was to be paid additional money to transport the three men to Lincoln. Weimer saw the 1956 Plymouth but did not examine it. Lojka exhibited to Weimer his current valid Nebraska operator's permit which reflected no limitations or notations of any traffic violations. The records of the Nebraska Motor Vehicle Department at Lincoln reflect that between 1958 and August 7, 1967, Lojka had 9 accidents, the nature of which were not shown by the evidence, and prior to September 6, 1967, Lojka had two convictions for minor traffic violations. The evidence shows that Lojka admitted that the turn signals on his car were not operating and that the brakes did not function properly.

Lojka left Scottsbluff in his car with the three passengers at about 10 a.m. on September 5, 1967. Lojka was given a map by Weimer with penciled directions to the Prestressed plant in Lincoln. All of the four men were to report for work at the Prestressed plant the following morning. Lojka and his three passengers arrived without incident at the Prestressed plant about 9 p.m. the same day. A plant employee of Prestressed arranged and paid for their food and lodging that night and breakfast the next morning at a nearby motel.

The next morning shortly before 7 a.m. Lojka, accom-

panied by Knaub, Reiber, and Hall, was enroute to the Prestressed plant driving his car in an easterly direction on Cornhusker Highway. Ahead of Lojka's car in the same lane of traffic was a car stopped with turn signals operating indicating a left-hand turn. Lojka admitted that without signaling or stopping he turned his car left across the centerline of the highway into the westbound traffic lane and drove into the front end of plaintiff's pickup truck operated by the plaintiff in a westerly direction. Lojka admitted that he did not see the Weichel pickup until just before the collision. Plaintiff suffered personal injuries and damages to his pickup truck.

Plaintiff contends that: (1) Lojka was an independent contractor serving Prestressed; (2) that this relationship existed at the time of the collision; (3) that Prestressed was negligent in selecting and employing Lojka as an independent contractor; and (4) that the negligence of Prestressed was the proximate cause of the accident and the resulting injuries to the plaintiff.

Appellant Prestressed urges that the trial court erred in overruling its motion for a directed verdict at the close of the evidence.

The record supports a jury question that at the time Lojka left Scottsbluff for Lincoln he was an independent contractor serving Prestressed. We consider whether or not Lojka was an independent contractor at the time of the accident. The original arrangement between Lojka and Prestressed was an offer of a job made by Weimer. Lojka agreed to travel to Lincoln for this purpose and accepted $15 to cover the expense of gas and oil. There was no obligation on the part of Lojka to either go to Lincoln, or, if he did, to enter into the employment of Prestressed. As stated by Weimer it was a "faith" proposition that the men contacted would show up for work at the Lincoln plant. Later, this relationship betwene Lojka and Prestressed was expanded to include the transportation of Knaub, Reiber, and Hall.

The agreement between Lojka and Prestressed was to transport Lojka, Knaub, Reiber, and Hall to Lincoln, Nebraska, as shown by the following excerpts from Lojka's testimony and admissions offered by plaintiff: "Q. On September 5, 1967, you talked in Scottsbluff, Nebraska, to a Mr. Claude Weimer of Nebraska Prestressed Concrete Co. with regard to going to Lincoln to work for Nebraska Prestressed Concrete Co? A. True. Q. You were asked to and you agreed to transport three passengers to Lincoln in your car for the benefit of Nebraska Prestressed Concrete Co. in order that they might be employed by said company? A. True. Q. You arrived in Lincoln on the evening of September 5, 1967, and proceeded to the Nebraska Prestressed Concrete Co. plant? A. True. Q. Upon arrival at the plant you were directed to a motel where arrangements had been made for you and your three passengers to spend the night? A. True. Q. Did anyone there at the plant tell you to go to a motel or hotel and take the others there with you, and to all come back in the morning? A. Yes. Q. You were asked if you, or any of the four of you, needed transportation to the plant the following morning. A. True. Q. You replied that you would not, that you had your automobile. A. True. Q. You stated that you would bring the other three, Knaub, Reiber and Hall. A. True."

An independent contractor and an agent are similar in many respects, the difference turning on the degree of control over them. By analogy we apply the rule: "It sometimes happens that an agency is limited to some particular object or the accomplishment of some particular transaction. Such an agency is terminated by the completion of the transaction for the accomplishment of which it was created * * *." 3 Am. Jur. 2d, Agency, § 36, p. 441. Lojka's agreed purpose and object was to transport three men to Lincoln, Nebraska, at most to the Prestressed plant there; this purpose was complete when Lojka arrived at the plant the first time on September

5th; at that time Lojka's status as an independent contractor terminated; and thereafter Lojka's carriage of the three men was gratuitous.

Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. 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. Knuth v. Singer, 174 Neb. 182, 116 N. W. 2d 291; Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531, 82 A. L. R. 2d 714.

The evidence of the proximate cause of the accident is contained in Lojka's admissions: "Q. You were making a left turn across the north lane of Cornhusker Highway when your automobile was in collision in the north lane of Cornhusker Highway with a pickup truck proceeding in a westerly direction in said north lane? A. True. Q. You turned left without giving a left turn signal? A. True. Q. You did not see the Weichel pickup truck when you made a left turn and until just before the collision? A. True." There is no evidence in the record that either the poor mechanical condition of Lojka's car, no turn signals, faulty brakes, Lojka's inability to hear, or his driving record were either the cause or contributed to the cause of the collision and the resulting injuries to the plaintiff. Plaintiff urges that proximate cause is established by the testimony of passenger Reiber that he saw the pickup truck approaching just prior to the accident, recognized the danger, but could not warn Lojka of the danger because Lojka was deaf. Reiber did nothing. We reject this contention. The proximate cause of the collision was the failure of Lojka to maintain a lookout and to see plaintiff's pickup truck.

"In every case, before the evidence is submitted to the

jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040.

"In a case where a motion has been made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict." Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144.

At the conclusion of all the evidence, the motion of defendant Nebraska Prestressed Concrete Company for a directed verdict as to that defendant should have been sustained. The judgment of the district court as to defendant Nebraska Prestressed Concrete Company is reversed and the cause remanded in accordance with this opinion.

REVERSED AND REMANDED.

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2. Where police or prosecutors know that defendant, formally charged with felony, is represented by counsel who has requested that no statements be taken; and where defendant, after being advised of Miranda rights, has unequivocally asked for his attorney; statements deliberately elicited from defendant by custodial interrogation designed to produce incriminating statements, and undertaken before defendant has been given opportunity to consult with his lawyer, are inadmissible, in absence of effective waiver. State v. Johns -------- 590
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4. Where petitioner's confessions admitted in evidence and heard by jury, petitioner not prejudiced by

admission of codefendant's substantially similar confession where proper cautionary instructions given. State v. Hall ---------- 653

Constitutional Law.

1. Whether or not inventory of contents of impounded automobile of person in custody was reasonable and lawful inventory procedure or unauthorized exploratory search is factual question to be determined by court on motion to suppress. State v. Wallen 44
2. Safeguards prescribed by U. S. Supreme Court decision of Miranda v. Arizona applicable only in instances of "custodial interrogation" which is questioning initiated by law enforcement officers after person has been taken into custody or otherwise deprived of his freedom of action in any significant way. State v. Robinson ---------- 64
3. Independent hospital district by statute may fractionate territories of counties; harm from such district levies insufficient to establish that levies by one of counties for county hospital violate Article I, section 25, or Article VIII, section 1, Constitution of Nebraska, which prohibit discrimination and require uniformity in taxation. Shadbolt v. County of Cherry ---------- 208
4. Statute classifying cities for legislative purposes in such way that no other city may ever be added to class violates constitutional provision forbidding special laws where general laws can be applicable. City of Scottsbluff v. Tiemann ---------- 256
5. Classification which limits application of law to present condition, and leaves no room or opportunity for increase in numbers of class by future growth or development, is special, and violates Article III, section 18, Constitution of Nebraska. City of Scottsbluff v. Tiemann ---------- 256
6. When invalid portions of statute so interwoven with rest of act so that act may not be operative with void portions eliminated or where obvious from inspection of act that invalid portion formed inducement for passage of act, whole act fails. City of Scottsbluff v. Tiemann ---------- 256
7. Competent for Legislature to classify objects of legislation and if classification reasonable and not arbitrary, it is legitimate exercise of legislative power. City of Scottsbluff v. Tiemann ---------- 256
8. Legislature may make reasonable classification of

persons, corporations, and property, but classification must rest upon real differences of situation and circumstances surrounding members of class, relative to subject of legislation, which render appropriate its enactment. City of Scottsbluff v. Tiemann 256
State ex rel. Meyer v. McNeil 586
9. Classifications for purpose of legislation must be real and not illusive; cannot be based on distinctions without substantial difference. City of Scottsbluff v. Tiemann 256
10. In all criminal prosecutions accused has right to meet witness against him face to face. State v. Davis 433
11. To be effective, each item appearing in legislative appropriation bill which is increase over budget submitted to Legislature by Governor must receive two-thirds vote on final passage. State ex rel. Meyer v. State Board of Equalization & Assessment 490
12. Under all constitutional governments recognizing three distinct and independent magistracies, control of purse strings of government is legislative function; indeed, it is extreme legislative prerogative, indispensable to independence and integrity of Legislature, and not to be surrendered or abridged, save by Constitution itself, without disturbing balance of system and endangering liberties of people. State ex rel. Meyer v. State Board of Equalization & Assessment 490
13. Right of Legislature to control public treasury, to determine sources from which public revenue shall be derived and objects upon which it shall be expended, to dictate time, manner, and means, both of collection and disbursement, is firmly and inexpugnably established in our political system. State ex rel. Meyer v. State Board of Equalization & Assessment 490
14. Legislature has plenary or absolute power over appropriations; may make them upon such conditions and with such restrictions as it pleases within legal and reasonable limits; cannot, however, through power of appropriation exercise or invade constitutional rights and powers of executive branch of government. State ex rel. Meyer v. State Board of Equalization & Assessment 490
15. Without convincing evidence that Legislature intended to adopt former constitutional limitations, Supreme Court will not so interpret simultaneous

repealer and reenactment. Snyder v. Woxo, Inc. 545
16. Constitution of Nebraska not grant but restriction of legislative power; consequently courts will enforce only limitations that Constitution imposes. Snyder v. Woxo, Inc. 545
17. Cited statute concerning prohibition of usury defenses by corporations does not violate Constitution concerning classification of loans and establishment of maximum rates. Snyder v. Woxo, Inc. 545
18. Where two possible statutory penalties for first degree murder, one death penalty, and penalties may be applied either by court or by jury, whichever determines guilt, statute does not unconstitutionally discourage assertion of Fifth or Sixth Amendment rights. State v. Alvarez 557
19. Lack of specific statutory standards by which jury determines penalty between death and life imprisonment does not violate due process. State v. Alvarez 557
20. Under Constitution of Nebraska, taxation of personal property, except as otherwise authorized, must be uniform not only as to rate of taxation, but as to valuation of property as well. State ex rel. Meyer v. McNeil 586
21. Legislature has plenary power over taxation and matters incidental to such power within limits of Constitution. State ex rel. Meyer v. McNeil 586
22. Legislature may properly legislate in regard to class of property, but may not divide class of property and enact different rules for taxation of each segment of class. State ex rel. Meyer v. McNeil 586
23. Cited act violates Constitution in that it purports to grant special benefits to members of class and deny such benefits to others of same class. State ex rel. Meyer v. McNeil 586
24. In absence of some real and substantial distinction which bears reasonable, just, and proper relation to objects sought to be accomplished, tax levied upon part of those within same class cannot be sustained; classification and object to be accomplished must be germane. State ex rel. Meyer v. McNeil 586
25. Use of confession obtained in violation of due process clause requires reversal of conviction even though unchallenged evidence adequate to convict remains. State v. Johns 590
26. Under provisions of Constitution, home rule charter must be consistent with and subject to Constitution and laws. City of Millard v. City of Omaha 617

27. Constitutional provision prohibiting amendment or repeal of home rule charter except by electoral vote intended as restriction on powers of municipality, but not as restriction on powers of Legislature in annexation matters. City of Millard v. City of Omaha ---------- 617
28. To construe cited Article of Constitution as restricting legislative powers would conflict with constitutional provisions prohibiting local or special legislation and laws denying equal protection of laws. City of Millard v. City of Omaha ---------- 617
29. Annexation of one city by another in manner provided by law not denial of equal protection of law or of due process of law although it be effected without consent of inhabitants of annexed city. City of Millard v. City of Omaha ---------- 617
30. Unconstitutional statute a nullity, void from enactment, and incapable of creating any rights or obligations. State v. Bardsley ---------- 629
31. When accused, presently confined in penal institution, demands prompt trial on other outstanding charges, it is constitutional duty of authorities to make diligent, good-faith effort to bring him to trial without undue delay. State v. Washa ---------- 639
32. Necessary to show prejudice to establish violation of Sixth Amendment right to speedy trial. State v. Washa ---------- 639
33. Provisions of Article V, rather than of Article XVII, Constitution of Nebraska, apply to judges selected and appointed under merit plan of judicial selection. Garrotto v. McManus ---------- 644
34. In interpretation of Constitution, specific clause given effect as against general clause in such manner as to give meaning to both, and language of specific clause will not be restricted by language of general clause. Garrotto v. McManus ---------- 644
35. Judges of district court of this state constitute separate and distinct class for purpose of legislation regarding them, these judges are members of "a court" within meaning of cited section of Constitution. Garrotto v. McManus ---------- 644
36. Record made before State Board of Equalization and Assessment must sustain action of board, and in absence of some satisfactory explanation of divergence and discrepancy in application of different methods used and relied upon to achieve uniformity, and of satisfactory explanation of corre-

lation between those methods, Supreme Court cannot determine if constitutionally required equalization or uniformity for taxation has been attained between counties. County of Sioux v. State Board of Equalization & Assessment ---------- 741

37. Where record of proceedings before State Board of Equalization and Assessment contains no evidence to justify order, action must be held to be unreasonable and arbitrary. County of Sioux v. State Board of Equalization & Assessment ---------- 741

38. Object of constitutionally required uniformity in taxation of real property accomplished if all property within taxing jurisdiction assessed and taxed at uniform standard of value. County of Gage v. State Board of Equalization & Assessment -------- 749

39. Constitutionally required equality or uniformity for taxation cannot be achieved except in relationship to uniform standard of value. County of Gage v. State Board of Equalization & Assessment ------ 749

Contracts.

1. Where services furnished and knowingly accepted, law implies promise on recipient's part to pay reasonable value of services. Bush v. Kramer ------ 1

2. Quasi contract is contract implied in law and usually has origin in principle that person shall not unjustly enrich himself at expense of another. Bush v. Kramer ---------- 1

3. Where benefits received and retained under such circumstances that it would be inequitable and unconscionable to permit party receiving benefits to avoid payment therefor, law requires party receiving and retaining benefits to pay reasonable value of them. Bush v. Kramer ---------- 1

4. Joint tort-feasors have no right of contribution or indemnity among themselves except by contract or some other legal relation giving rise to it. Farmers Elevator Mut. Ins. Co. v. American Mut. Ins. Co. 4

5. Remedy of restitution for breach of contract available to plaintiff only in case defendant's breach is total; slight breach does not terminate duty of injured person unless nonperformance of express condition requires that result. Albers v. Koch -- 25

6. Specific performance may properly be decreed in spite of minor breach by plaintiff, the breach involving no substantial failure of exchange for performance to be compelled. Albers v. Koch -------- 25

7. Fact that contract provides for payment of liquidated damages for breach of promise is not bar to specific enforcement; where contract provides for such payment as true alternative performance, promisor's election to pay this price will prevent specific enforcement of alternative against him. Albers v. Koch ---------- 25
8. Where defense of usury established under motor vehicle installment contract, contract is not void but usurer may recover principal of contract without interest, less interest paid. Baker v. A. C. Nelson Co. 128
9. Statute purported to authorize installment contract that is subject of this action was declared unconstitutional and thereby makes applicable provisions of cited statute. Baker v. A. C. Nelson Co. ------ 128
10. Where agreement provides for bonus for continuous service which is terminated by employer through no fault of employee, latter is entitled to proportionate share of bonus according to time served; where, however, employee voluntarily quits or is discharged for reason attributable to own fault, there is no right to recover any part of bonus. Sinnett v. Hie Food Products, Inc. ---------- 221
11. Generally, statute of frauds does not apply to contract which has been performed by one party. Ridenour v. Kuker ---------- 321
12. Damages recoverable for losses caused by breach of contract only to extent that evidence affords sufficient basis of ascertaining their amount in money with reasonable certainty. Ridenour v. Kuker ------ 321
13. Measure of damages in suit for breach of contract for personal services is amount of salary agreed upon for period involved less amount which servant earned or, with reasonable diligence, might have earned from other employment during period. Ridenour v. Kuker ---------- 321
14. Where contract of employment is for indefinite term, but is not hiring at will, in event of wrongful discharge employee entitled to reasonable time in which to find other employment or go into business for himself. Ridenour v. Kuker ---------- 321
15. Threat to terminate distibutorship of distributor who is substantially indebted to manufacturer does not constitute business coercion in absence of contractual provisions to contrary or circumstances which make threat unjust and inequitable. Midland-Ross Corp. v. Swartz ---------- 484

16. In interpreting written contract, meaning of which in doubt and dispute, court, in order to determine meaning, will consider all facts and circumstances leading up to and attending execution, and will consider relationship of parties, nature and situation of subject matter, and apparent purpose of making contract. McBride v. Fort Kearney Hotel, Inc. ---------- 518

17. Requirement for specific enforcement of postemployment restraints in covenants ancillary to employment contracts is that restraints be reasonable. Farmers Underwriters Assn. v. Eckel ---- 531

18. Courts considering specific postemployment restraints strike balance among competing interests of principal and agent; balancing accommodates public interest in productive principal-agent relationship and in freedom of individual to earn living. Farmers Underwriters Assn. v. Eckel ---------- 531

19. Construction of written contract ordinarily question of law. Westbrook v. Masonic Manor ---------- 660

20. In construing contract, entire instrument must be considered and words used given ordinary and popularly accepted meaning. Westbrook v. Masonic Manor ---------- 660

21. Interpretation given contract by parties themselves while engaged in performance is one of best indications of true intent of contract, ordinarily, such construction of contract should be enforced. Westbrook v. Masonic Manor ---------- 660

22. Modification of contract which substantially changes liability of parties ordinarily requires mutual assent to be effective. Westbrook v. Masonic Manor ---- 660

23. Agreement between husband and wife to execute mutual wills, evidenced by recital in wills executed pursuant to agreement, valid and enforceable. Geiger v. Geiger ---------- 700

24. Mutual promises of parties to agreement to execute mutual wills constitutes adequate consideration. Geiger v. Geiger ---------- 700

25. When contract creating independent contractor limited to some particular object or accomplishment of some particular transaction, independent contractor status is terminated by completion of transaction for accomplishment of which it was created. Weichel v. Lojka ---------- 819

Corporations.

Corporate fiction may be disregarded when its retention would produce injustices and inequitable consequences. Ridenour v. Kuker ---------- 321

Counties.

Filing of written consent was necessary to confer jurisdiction upon county board to establish consent road. State v. Parks ---------- 794

Courts

1. District court has inherent power to vacate or modify its own judgment at any time during term at which it was rendered. Urwin v. Dickerson -- 86
   Beliveau v. Goodrich ---------- 98
2. Where judgment entered by default and prompt application made at the same term to set it aside, with tender of answer disclosing meritorious defense, court should, on reasonable terms, sustain motion and permit cause to be heard upon merits.
   Urwin v. Dickerson ---------- 86
   Beliveau v. Goodrich ---------- 98
3. Application to vacate default judgment is matter of discretion for trial court; burden of showing abuse of discretion upon party adversely affected.
   Urwin v. Dickerson ---------- 86
4. Facts and circumstances in each case, as shown by record, determine whether there has been abuse of discretion. Urwin v. Dickerson ---------- 86
5. In deciding whether or not there was abuse of discretion in setting aside default judgment, much stronger showing required to substantiate abuse of discretion when judgment vacated, than when it is not. Beliveau v. Goodrich ---------- 98
6. Mere mistake or miscalculation of party or his attorneys not sufficient, in itself, to warrant refusal to set aside default judgment, when there is good defense pleaded or proved and no change of position or substantial prejudice will result from permitting trial on merits. Beliveau v. Goodrich ---------- 98
7. Tender of answer not absolute requirement and independent proof may, in discretion of court, be permitted to resolve question of possible dilatory or frivolous nature of defense. Beliveau v. Goodrich 98
8. Court may terminate parental rights when it finds such action to be in best interests of child, and

it appears from evidence that parent has substantially and continuously or repeatedly neglected child and refused to give child necessary parental care and protection, or parent is unfit by reason of debauchery or repeated lewd and lascivious behavior, which conduct is found by court to be seriously detrimental to health, morals, or well-being of child. Mingus v. Stuchlick ---------- 139

9. Fact that trial judge heard and observed parties and witnesses is important consideration in determining weight and significance of testimony in custody proceeding. Mingus v. Stuchlick ---------- 139

10. Where parental unfitness established, court's sole concern is welfare of children. Mingus v. Stuchlick ---------- 139

11. Juvenile court has broad discretion as to disposition of child found to be delinquent. Brown v. Doeschot ---------- 293

12. Control of divorce decree during 6-month period pending finality within sound judicial discretion of trial court. Zachry v. Zachry ---------- 336

13. Only where no specific provision has been made in municipal court rules of civil procedure that district court rules of procedure relating to such matters govern and apply to actions in municipal courts of metropolitan and primary cities. Embree v. Sterling Electric Co. ---------- 677

14. Court cannot, under guise of its powers of construction, rewrite statute, supply omissions, or make other changes and this is particularly true where it appears that matter was intentionally omitted. Bessey v. Board of Educational Lands & Funds ---------- 801

15. If language of statute clear and unambiguous, courts will not by interpretation or construction usurp function of lawmaking body and give it meaning not intended or expressed by Legislature. Bessey v. Board of Educational Lands & Funds -- 801

Criminal Law.

1. When evidence shows lawful arrest followed by inventory of contents of defendant's automobile following its impoundment, and there is reasonable justification for such impoundment, taking of inventory for purpose of protecting defendant's property during defendant's detention and of protecting law enforcement officers from false claims of

loss is reasonable and lawful, and evidence of crime found while making inventory will not be suppressed. State v. Wallen ---------- 44
2. If during proper inventory of contents of an impounded vehicle, evidence of crime discovered, such evidence may be used to support charge for crime indicated. State v. Wallen ---------- 44
3. If arrest of automobile owner or impoundment of his vehicle resorted to as device and pretext for making general exploratory search of automobile without required search warrant, evidence of crime found during taking of inventory will be suppressed. State v. Wallen ---------- 44
4. Where sentence imposed within statutory limits it will not be disturbed in absence of abuse of discretion. State v. Whitaker ---------- 57
State v. Duncan ---------- 227
State v. Burnside ---------- 234
State v. Denbo ---------- 348
State v. Arguello ---------- 351
State v. Cunningham ---------- 488
State v. Barker ---------- 659
State v. Martin ---------- 699
5. In determining whether or not to set aside probationary order and impose penalty where violation established or admitted, trial court not limited to consideration of probative evidence of matters arising subsequent to order of probation. State v. Nevells ---------- 58
6. In-court identification by witness to whom accused exhibited before trial in absence of defense counsel may be admissible if independent origin of identification established. State v. Franklin ---------- 62
State v. Cannon ---------- 149
7. Question of admissibility of photographs of gruesome nature rests largely in discretion of trial court. State v. Robinson ---------- 64
8. Test is whether photographic evidence is relevant and in determining relevancy, court is to weigh and balance probative value of picture as against possible prejudicial effect. State v. Robinson ---------- 64
9. Photograph proved to be true representation of person, place, or thing which it purports to represent ordinarily proper evidence of anything of which it is competent and relevant for witness to give verbal description. State v. Robinson ---------- 64
10. In homicide case, photographs of victim, upon

proper foundation, may be received for purposes of identification, to show condition of body, nature and extent of wounds or injuries, and to establish malice or intent. State v. Robinson ---------- 64

11. Safeguards prescribed by U. S. Supreme Court decision of Miranda v. Arizona applicable only in instances of "custodial interrogation" which is questioning initiated by law enforcement officers after person has been taken into custody or otherwise deprived of his freedom of action in any significant way. State v. Robinson ---------- 64

12. Supreme Court will not interfere with verdict of guilty which is based on conflicting evidence unless evidence so lacking in probative force that it is insufficient as matter of law to support finding of guilt beyond reasonable doubt. State v. Leary ---- 76
State v. Cannon ---------- 149
State v. Tindell ---------- 683

13. Evidence sufficient to sustain verdict of guilty in criminal prosecution only when jury could properly find guilt beyond reasonable doubt. State v. Leary ---------- 76

14. When evidence of in-court identification alleged to be tainted by prior illegal line-up first challenged on appeal, such challenge, in absence of clear showing of prejudicial error, will not be considered; failure to object will be attributed to defense counsel's choice of trial tactics. State v. Cannon ---- 149

15. Primary factor in determining whether independent basis for in-court identification exists is opportunity afforded witness to observe defendant under circumstances free from taint. State v. Cannon -- 149

16. In determining sufficiency of evidence to sustain criminal conviction, it is not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence. State v. Cannon ---------- 149
State v. Huffman ---------- 417

17. Evidence of unexplained breaking and entering by defendant sufficient to require submission to jury of question whether breaking and entering was with intent to steal. State v. Cannon ---------- 149

18. Failure to bring person charged with criminal offense to trial, who has been held in jail pending trial, before close of the second term of court following filing of charge is entitled to be discharged as matter of right, pursuant to cited statute except

where delay is caused by defendant. State v. Lee -- 184
19. Whether or not delay within maximum limits fixed by Legislature entitles defendant to discharge, where defendant has not contributed to delay, is dependent on whether or not time was fair and reasonable in particular case. State v. Lee ---------- 184
20. What is fair and reasonable time in each particular case always in discretion of court; except for abuse of discretion, order of trial court denying motion to discharge defendant for unreasonable delay will not be disturbed on appeal. State v. Lee ---------- 184
21. Right of accused to discharge for failure to receive speedy trial is personal right which may be waived and ordinarily is waived if accused fails to assert right by making demand for trial, or by failing to make some effort to secure speedy trial. State v. Lee 184
22. Where no evidence of prejudice, or that delay caused by prosecution, or that it was willful by court officials, or that request or demand was made for speedier trial by defendant, trial court does not abuse discretion in denying discharge. State v. Lee ---------- 184
23. Plea of guilty, voluntarily entered, is conclusive and eliminates all questions of admissibility of evidence. State v. Burnside ---------- 234
24. Plea of guilty waives all defenses except that information fails to charge offense. State v. Burnside 234
25. Whether, during trial of criminal case, jury shall be allowed to separate, after being duly cautioned, is matter for discretion of trial court, and exercise of such discretion, unless abuse or prejudice shown, furnishes no ground for error. State v. Kirby ---- 240
26. Asking of improper questions of witness to which objections sustained by court does not constitute prejudicial error in absence of showing that defendant was thereby deprived of fair and impartial trial. State v. Kirby ---------- 240
27. Defendant entitled to fair trial but not perfect one. State v. Kirby ---------- 240
28. As general rule, evidence of other crimes than that with which accused charged not admissible in criminal prosecution. State v. Kirby ---------- 240
29. In crimes involving motive, criminal intent, or guilty knowledge, evidence of independent crimes wholly disconnected with one charged may be received. State v. Kirby ---------- 240
30. Witness may be interrogated as to previous con-

viction for felony, but no other proof of such conviction competent except record thereof. State v. Kirby ---------- 240
31. Defendant in criminal case who becomes witness subjects himself to rules applicable to other witnesses. State v. Kirby ---------- 240
32. Defendant may lawfully do in another's defense what such other might lawfully do in his own defense, but no more. State v. Washington ------ 329
33. In passing on validity of search warrant, court may consider only information brought to attention of magistrate. State v. LeDent ---------- 380
State v. Waits ---------- 780
34. For affidavit of tip from informant to be sufficient, magistrate must be informed of (1) some of underlying circumstances from which informant concluded that narcotics were located where claimed and (2) some of underlying circumstances from which officer concluded that informant was credible. State v. LeDent ---------- 380
State v. Waits ---------- 780
35. Affidavits for search warrants must be tested in a common sense, realistic fashion. State v. LeDent 380
State v. Waits ---------- 780
36 Error may not ordinarily be claimed because of nature of cross-examination if it was not challenged by timely and proper objection thereto. State v. Barnes ---------- 384
37. Where voluntary intoxication interposed as defense in criminal case involving question of intent with which act done, it is for jury to determine if such intoxication is so excessive as to wholly deprive defendant of reason and ability to form criminal intent. State v. Barnes ---------- 384
38. Where voluntary statements or confessions not offered or received in evidence, foundational requirements for such not material and, on objection or motion, should be excluded or stricken if they are not otherwise relevant to issues. State v. Brown ---- 389
39. Appointment of counsel and arraignment of defendant on same day do not show lack of effective assistance by counsel where facts and circumstances of offense were such that investigation by counsel was not required and plea of guilty appropriate. State v. Kennedy ---------- 415
40. Error in admission of evidence may be harmless if fact established by other evidence. State v. Huffman 417

41. Participation in hearing on habitual criminal charge, without objection, waiver of notice required by statute. State v. Huffman ---------- 417
42. In absence of objection in trial court, defendant may not be heard to complain of lack of sufficient foundation for admission into evidence of results of breathalizer tests. State v. Haile ---------- 421
43. Complaint charging statutory misdemeanor substantially in language of statute will be liberally rather than technically construed, and if defect amendable, if will be held sufficient on appeal in absence of objection in trial court. State v. Haile ------- 421
44. One who incites or instigates commission of felony, although not actually or constructively present, is aider, abettor, or procurer and may be prosecuted and punished as if he were principal offender. State v. Davis. ---------- 433
45. Aiding, abetting, or procuring may be proved by circumstantial evidence. State v. Davis ---------- 433
46. Evidence crime committed by someone and that defendant aided and abetted in commission sufficient to sustain conviction for aiding and abetting; actual perpetrator of crime need not be identified. State v. Davis ---------- 433
47. Circumstantial evidence sufficient to sustain conviction if facts which evidence tends to establish may be accounted for upon no rational theory which does not include guilt of accused. State v. Davis -- 433
48. In all criminal prosecutions accused has right to meet witness against him face to face. State v. Davis ---------- 433
49. An error which prevents proper consideration of only question relied upon by defendant is substantial and may not be disregarded. State v. Davis ---------- 433
50. Trial court has broad discretion in ruling upon discovery motion, but such motion should be granted where required by interests of justice. State v. Davis 433
51. Where circumstances such that there is no occasion to explain or deny, silence not admission. State v. Davis ---------- 433
52. Duty of prosecuting attorney to conduct trial in fair and impartial manner and not inflame prejudices or excite passions of jury against accused. State v. Davis ---------- 433
53. No reference or comment should be made by prosecuting attorney upon defendant's failure to testify. State v. Davis ---------- 433

54. Where any one of several errors assigned not in itself sufficient to warrant reversal, all of them in aggregate establish that defendant did not have fair trial, then duty of court to award new trial. State v. Davis ---------- 433
55. Giving of instruction in trial of criminal case which in effect peremptorily directs jury to return verdict when disagreement by jury imminent is form of importunity and coercion which invades province of jury and constitutes invasion of defendant's constitutional right to speedy, public trial by impartial jury. State v. Garza ---------- 445
56. Trial court's determination of admissibility of demonstrative evidence will not be overturned except for clear abuse of discretion. State v. Wessels ---------- 474
State v. Waits ---------- 780
57. Post conviction petitioner has burden of establishing basis for relief. Harris v. Sigler ---------- 483
58. Plea of guilty 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 procurement. State v. Cunningham ---------- 488
59. Grounds for post conviction relief because of ineffective assistance of counsel stated. State v. Moss ---------- 536
60. Court assigned counsel in criminal case have no greater or different duties than those of retained counsel. State v. Moss ---------- 536
61. Where two possible statutory penalties for first degree murder, one death penalty, and penalties may be applied either by court or by jury, whichever determines guilt, statute does not unconstitutionally discourage assertion of Fifth or Sixth Amendment rights. State v. Alvarez ---------- 557
62. Although otherwise voluntary plea of guilty partially motivated by expectation that penalty imposed by court on such plea would be less than, or different from, penalty imposed by jury upon conviction, guilty plea does not become involuntary solely because sentence of court not one expected. State v. Alvarez ---------- 557
63. Plea discussions and agreements in criminal cases, under proper and appropriate conditions, not objectionable; proper plea negotiations and agreements fully carried out do not ordinarily render plea of guilty involuntary merely because sentence not one anticipated. State v. Alvarez ---------- 557

64. Lack of specific statutory standards by which jury determines penalty between death and life imprisonment does not violate due process. State v. Alvarez 557
65. Rule that plea must be intelligently made to be valid does not require that plea be vulnerable to later attack if defendant did not correctly assess every relevant factor entering into decision. State v. Alvarez 557
66. Voluntary guilty plea intelligently made in light of then applicable law does not become vulnerable because later judicial decisions indicate that plea rested on faulty premise. State v. Alvarez 557
67. Guilt or innocence of charge for which person held in custody immaterial to charge of escape from custody while in jail awaiting trial. State v. Howard 583
68. Factors to be considered in fixing amount of bail stated. State v. Howard 583
69. Where police or prosecutors know that defendant, formally charged wtih felony, is represented by counsel who has requested that no statements be taken; and where defendant, after being advised of Miranda rights, has unequivocally asked for his attorney; statements deliberately elicited from defendant by custodial interrogation designed to produce incriminating statements, and undertaken before defendant has been given opportunity to consult with his lawyer, are inadmissible, in absence of effective waiver. State v. Johns 590
70. Use of confession obtained in violation of due process clause requires reversal of conviction even though unchallenged evidence adequate to convict remains. State v. Johns 590
71. Substitute county judge not disqualified from serving as defense counsel for indigent defendant where he has no connection with case in capacity as substitute county judge. State v. Wagner 634
72. When accused, presently confined in penal institution, demands prompt trial on other outstanding charges, it is constitutional duty of authorities to make diligent, good-faith effort to bring him to trial without undue delay. State v. Washa 639
73. Necessary to show prejudice to establish violation of Sixth Amendment right to speedy trial. State v. Washa 639
74. Proceeding for revocation of order of probation may be instituted by filing of proper motion and affidavit, and issuance of warrant. State v. Washa 639

75. Period during which probationer remains away from jurisdiction of court may be added to period of probation. State v. Washa ---------- 639
76. Where petitioner's confessions admitted in evidence and heard by jury, petitioner not prejudiced by admission of codefendant's substantially similar confession where proper cautionary instructions given. State v. Hall ---------- 653
77. Accused may waive right to be represented by attorney if does so intelligently and understandingly. State v. Green ---------- 673
State v. Birdwell ---------- 676
78. Weapons or other instruments of crime which are so connected with crime charged as to throw light thereon, or which it is reasonable to infer were used are admissible even though not shown to be connected with accused, as where they tend to throw light on issues other than defendant's connection with crime. State v. Tindell ---------- 683
79. Failure of court to caution jury on evidence given by accomplice, in absence of special request, will not ordinarily constitute reversible error. State v. Martin ---------- 699
80. Unless miscarriage of justice shown, post conviction remedy not available for reconsideration of questions that were determined by Supreme Court. State v. Agnew ---------- 716
81. If affidavit recites some of circumstances, where reason for crediting source of information is given, and when magistrate has found probable cause, courts should not invalidate warrant by interpreting affidavit in hypertechnical, rather than common sense, manner. State v. Waits ---------- 780
82. In examining question of sufficiency of affidavit to support issuance of search warrant, resolution of doubtful or marginal cases should be largely determined by preference to be accorded to warrants. State v. Waits ---------- 780
83. Search must be one directed in good faith toward objects specified in warrant or for other means and instrumentalities by which crime charged had been committed. State v. Waits ---------- 780
84. When officers, in course of bona fide effort to execute valid search warrant, discover articles which, although not included in warrant, are reasonably identifiable as contraband, they may seize them whether they are initially in plain sight or come

into plain sight subsequently as result of officers' efforts. State v. Waits ---------- 780

85. Exhibit admissible, so far as identity is concerned, when identified as being same object about which testimony was given; it must also be shown to satisfaction of trial court that no substantial change has taken place in exhibit so as to render it misleading; as long as article can be identified it is immaterial in how many or whose hands it has been. State v. Waits ---------- 780

86. Post Conviction Act specifically authorizes trial court to examine files and records and to determine whether or not prisoner may be entitled to relief he seeks; if trial court finds from such examination that proceeding is without foundation, an evidentiary hearing may be properly denied. State v. LaPlante ---------- 816

87. Motion to vacate judgment and sentence under Post Conviction Act cannot be used as substitute for appeal or to secure further review of issues already litigated. State v. LaPlante ---------- 816

Damages.

1. Where party obtains judgment against another for damages for tort on specified grounds of negligence and such judgment debtor then seeks indemnity against another on specified and different grounds of negligence, which are sustained, such parties are joint tort-feasors and each is liable as such. Farmers Elevator Mut. Ins. Co. v. American Mut. Ins. Co. -- 4

2. When damaged automobile can be repaired and restored substantially to original condition, reasonable cost of repair is proper measure for damage. Burney v. Ehlers ---------- 51

3. Damages recoverable for losses caused by breach of contract only to extent that evidence affords sufficient basis of ascertaining their amount in money with reasonable certainty. Ridenour v. Kuker 321

4. Measure of damages in suit for breach of contract for personal services is amount of salary agreed upon for period involved less amount which servant earned or, with reasonable diligence, might have earned from other employment during period. Ridenour v. Kuker ---------- 321

5. Where contract of employment is for indefinite term, but is not hiring at will, in event of wrongful discharge employee entitled to reasonable time

in which to find other employment or go into business for himself. Ridenour v. Kuker ---------- 321
6. When amount of damages allowed by jury clearly inadequate under evidence, it is error for trial court to refuse to set aside such verdict. Bohn v. Kruger 407
Webster v. Halbridge ---------- 409
7. If injury or damage to property owner or to member of household results primarily and directly from act of trespass, trespasser liable therefor even though act not negligent or willful. Connolley v. Omaha Public Power Dist. ---------- 501
8. Trespass to land does not make trespasser insurer of landowner and members of household for injuries or damages which may be secondary, indirect, or consequential result of trespass. Connolley v. Omaha Public Power Dist. ---------- 501
9. Action in tort or negligence, known at common law as trespass on case, is proper action to recover for secondary, indirect, or consequential injuries or damages resulting from trespass. Connolley v. Omaha Public Power Dist. ---------- 501
10. Trespass on case action recovery based on negligence; in such case contributory negligence, assumption of risk, and other defenses common to tort actions may be relied on by trespasser. Connolley v. Omaha Public Power Dist. ---------- 501
11. When seller, to which goods that are not resaleable are returned, salvages such goods and credits buyer with reasonable value of salvaged goods, seller is acting in good faith to mitigate damages in manner sanctioned by code. Chicago Roller Skate Mfg. Co., Inc. v. Sokol Manuf. Co. ---------- 515
12. Where seller salvages returned nonresaleable goods, measure of damages controlled by cited section, and seller entitled to recover lost profits together with expense or cost incurred in salvaging goods. Chicago Roller Skate Mfg. Co., Inc. v. Sokol Manuf. Co. 515
13. Compensation for land taken by right of eminent domain measured by full market value as of date of appropriation. Lechliter v. State ---------- 527
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14. Anything connected with land that would influence market value in mind of good-faith intending purchaser is element for consideration in considering damages. Lechliter v. State ---------- 527
Iske v. Omaha Public Power Dist. ---------- 724
15. Law in this jurisdiction well settled that when land

occupied for business purposes taken by eminent domain, anticipated profits from carrying on of business in its established location cannot be considered in estimating damages. Lechliter v. State 527

16. In eminent domain proceedings damage to remainder on account of proper construction or operation, landowner must obtain compensation in first proceeding. Hansen v. County of Cass ---------- 565

17. Final condemnation award conclusive both on questions actually litigated and on questions necessarily within issues. Hansen v. County of Cass ---------- 565

18. Condemnation award not conclusive in subsequent action as to remainder damage that was caused by improper construction or operation and that was not actually litigated in first proceeding. Hansen v. County of Cass ---------- 565

19. Measure of damages for wrongful death of child stated. Westring v. Schwanke ---------- 579

20. Whether or not knowledge of guest, that host driver of automobile has been drinking, will operate to prevent recovery of damages in particular case depends upon all facts and circumstances of case, and is usually jury question. Raskey v. Hulewicz ------ 608

21. Where recovery not mere matter of computation and depends upon intangible and quite subjective elements of pain and suffering and future disability, will not be interfered with unless it is so excessive and so grossly unresponsive to evidence as to be indicative of prejudice, passion, partiality, or corruption on part of jury. Stewart v. Ritz Cab Co. -- 692

22. No mathematical formula for translation of pain and suffering and permanent disability in terms of dollars and cents. Stewart v. Ritz Cab Co. ---------- 692

23. In eminent domain proceedings where stone or mineral deposits may have bearing on market value of land, evidence as to extent of those deposits admissible but award may not be reached by separately evaluating land and deposits, consideration given to quantity and quality of minerals that can be extracted and to value thereof, solely as evidence for arriving at value of land. Iske v. Omaha Public Power Dist. ---------- 724

24. 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. Iske v. Omaha Public Power

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Decedent's Estates.

1. Where devisee or legatee dies before testator, in absence of statute, or of other provisions in will which show that testator intended gift to go to some other designated person in case beneficiary died before testator, gift lapses. Niemann v. Zacharias 450
2. Testator can prevent lapse of legacy by providing for substitution of another beneficiary in case original beneficiary predeceased testator. Niemann v. Zacharias ---------- 450
3. Decree of county court determining heirs of decedent and directing distribution to persons so determined is final appealable order. Berger v. Berger ------ 702
4. Unless debts, allowances, expenses, and taxes have been paid or provided for, no heir, devisee, or legatee is entitled to decree of distribution, partial or complete, unless bond provided for in cited statute has been given. Berger v. Berger -------- 702

Dedication.

Filing of written consent was necessary to confer jurisdiction upon county board to establish consent road. State v. Parks ---------- 794

Deeds.

1. Where plat of lands conveyed adequately referred to in deed, usually it is to be considered as part of latter instrument and construed in connection therewith; and courses, distances, and other particulars which appear on such plat are, as general rule, to be construed as true description of land conveyed. Seefus v. Briley ---------- 202
2. Conveyance of tract of land by description shown on plat which has been vacated includes interest in one-half of adjacent alley which has been vacated, in absence of express intention to contrary shown in conveyance. Seefus v. Briley ---------- 202
3. Where owner of lot abutting on alley, which was vacated during ownership, conveyed lot by conveyance which describes lot by block and number, and contained no reservation of rights in alley, conveyance transfers fee to centerline of abutting portion of vacated alley, even though conveyance also described lot by metes and bounds description which did not include any part of alley and used edge of

alley as boundary. Seefus v. Briley ---------- 202
4. Whether deed absolute in form is mortgage depends upon intention of parties; their intention may be evidenced not only by document in question but also by declarations and conduct. Davison v. Inselman 236

Defamation of Character.
1. Reports of mercantile agencies, published in good faith and based upon probable cause, subject to qualified or conditional privilege, and ordinarily not subject to defamation action. Bartels v. Retail Credit Co. ---------- 304
2. Publication loses character as privileged and is actionable if motivated by express or actual malice or if there is such gross disregard of rights of person injured as is equivalent to malice in fact. Bartels v. Retail Credit Co. ---------- 304
3. To be privileged, mercantile agency's representatives must act impartially and in good faith, carefully evaluating all information before disseminating any defamatory statements to subscribers. Bartels v. Retail Credit Co. ---------- 304
4. Impartiality and good faith requires mercantile agency's representatives to make thorough and complete investigation and to fully and accurately report information only from reliable sources. Bartels v. Retail Credit Co. ---------- 304

Disorderly Conduct.
Term "disorderly conduct" one of general or indefinite meaning, but generally signifies any conduct which tends to breach the peace or to disturb those who see or hear it; to endanger morals, safety, or health of community; or to shock public sense of morality. State v. Cherry ---------- 103

Divorce.
1. In determining provisions to be made for support of minor children in divorce proceeding, their status and situation, and all other attendant circumstances, should be considered, and an amount determined in accordance with best judgment and sound discretion of court. Rubottom v. Rubottom ---------- 39
2. Rule stated for increasing or decreasing child support payments where change of circumstances exists. Rubottom v. Rubottom ---------- 39
3. Decree of district court in divorce action, insofar

as minor children concerned, never final in sense that it cannot be changed; such decree is at all times subject to review and adjustment in light of changed conditions regardless of particular language of award. Rubottom v. Rubottom ---------- 39
4. Allowance made for support and maintenance of minor child in divorce proceeding should be fair and reasonable under circumstances of each particular case. Rubottom v. Rubottom ---------- 39
5. Statute provides that divorce decree shall not become final or operative until 6 months after trial and decision except for purposes of appeal. Lawson v. Lawson ---------- 164
6. Either party to divorce action may within 6 months of date of entry of decree make application to have decree set aside or modified. Lawson v. Lawson -- 164
7. Automatic finality of divorce decree at end of 6 months stayed where proceedings for vacation or modification are then pending. Lawson v. Lawson 164
8. Where parties resume marital relations within 6-month period, decree may be set aside. Lawson v. Lawson ---------- 164
9. One of important purposes of law requiring 6 months to elapse between entry of decree of divorce, which is in nature of interlocutory order, and before same becomes final, is to give parties chance to effect reconciliation which law favors. Lawson v. Lawson ---------- 164
10. Consent decree is usually treated as agreement between parties; accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of parties. Lawson v. Lawson 164
11. Control of divorce decree during 6-month period pending finality within sound judicial discretion of trial court. Zachry v. Zachry ---------- 336
12. On appeal to Supreme Court, refusal of trial court to set aside decree of divorce within 6-month period may not be set aside in absence of affirmative showing of abuse of discretion. Zachry v. Zachry -- 336
13. Duty of Supreme Court on appeal of proceedings to modify divorce decree to try action de novo on record and reach conclusion uninfluenced by what was done by trial court, except if there is irreconcilable conflict in evidence court may consider that trial court saw witnesses and accepted one version of facts. Costello v. Costello ---------- 396
14. If circumstances of parties change or if in best

interests of child, court may from time to time either on motion of parties or on own motion revise or alter custody provisions of divorce decree. Costello v. Costello ---------- 396
Berigan v. Berigan ---------- 411
15. Court should change custody when it finds such action to be in best interests of child and it appears from evidence that parent having custody has subjected child to such disturbing and unsettling conditions as could be seriously detrimental to health, morals, and well-being of child. Costello v. Costello ---------- 396
16. Proper regard for welfare of children requires parent to refrain from conduct which would reflect on him and produce harmful effects upon children. Berigan v. Berigan ---------- 411
17. Proper rule in divorce case, where custody of minor children involved, is that custody of child to be determined by best interests of child, with due regard for superior rights of fit, proper, and suitable parents. Berigan v. Berigan ---------- 411
18. Natural rights of parent to custody of child are not absolute; must yield to best interests of child where preferential rights have been forfeited. Berigan v. Berigan ---------- 411
19. Court's discretion is broad and not limited to a choice between parents. Berigan v. Berigan ---------- 411
20. Change of circumstances, which will permit modification of divorce decree relating to child custody, includes those not known to court and opposing party at time of entry of decree and which could not have been discovered by exercise of reasonable diligence at time of entry of original decree. Fisher v. Fisher ---------- 469
21. Discovery of material facts which existed but were unknown to court and opposing party and could not have been ascertained with reasonable diligence, which, if known to court, might have warranted entry of different decree, are changed circumstances which court will consider in application for change of child custody. Fisher v. Fisher ---------- 469
22. Whether or not birth of illegitimate child after separation of parties of itself makes mother unfit person to have care and custody of child of marriage dependent on facts and circumstances of each particular case to be considered in connection with determination of best interests of child. Fisher v. Fisher ---------- 469

23. Judicial discretion of trial court with respect to changing custody of minor children of broken marriage will not ordinarily be disturbed unless there is clear abuse of judicial discretion or it is clearly against weight of evidence. Fisher v. Fisher ---- 469
24. No decree of divorce and of the nullity of marriage shall be made solely on declarations, confessions, or admission of parties, but court shall, in all cases, require other satisfactory evidence of facts alleged in petition for that purpose. Sims v. Sims ------ 479
25. Continuing course of conduct which so grievously wounds mental feelings or so utterly destroys peace of mind so as to nullify or destroy legitimate objects and ends of matrimony constitutes extreme cruelty within meaning of statute. Sims v. Sims -- 479
26. Degree of corroboration required in divorce action depends on facts and circumstances of particular case. Sims v. Sims ---------- 479
27. Factors to be considered by court in determining amount of alimony or in making division of property in divorce case stated. Diers v. Diers -------- 552
28. Duty of trial court in divorce action to scrutinize property settlement made before granting of divorce and see to it that no unconscionable advantage taken through fraud or intimidation, or by reason of ignorance, passion, or improvidence. Diers v. Diers ---------- 552
29. Where agreement for division of property in divorce action submitted to court and not approved, court's function to divide property in accordance with justice and right. Diers v. Diers ---------- 552
30. While proceedings to vacate or modify divorce decree may be instituted within 6 months after rendition, good reason must be shown for any such action and control of decree within sound judicial discretion of trial court. Foust v. Foust -------- 656
31. Property settlement agreement will ordinarily be respected by courts as presumably fair and valid, and just and equitable adjustment of matters of which it treats. Foust v. Foust ---------- 656
32. Where a party to divorce action, represented by counsel, voluntarily executes property settlement agreement which is approved by court and incorporated into divorce decree from which no appeal taken, ordinarily decree will not thereafter be vacated or modified as to such property provisions in absence of fraud or gross inequity. Foust v. Foust -------- 656

Drugs and Narcotics.

For affidavit of tip from informant to be sufficient, magistrate must be informed of (1) some of underlying circumstances from which informant concluded that narcotics were located where claimed and (2) some of underlying circumstances from which officer concluded that informant was credible. State v. LeDent ---------- 380

Elections.

1. Lack of notification to public concerning special meeting of county board to call election upon initiative petition under cited statutes insufficient to invalidate resulting election. Shadbolt v. County of Cherry ---------- 208
2. Private relator in statutory quo warranto contesting public irrigation district election and participating or acquiescing with knowledge of election irregularity may not be entitled to relief for that reason in certain circumstances. State ex rel. Genz v. Thomas ---------- 637

Electricity.

1. Power companies engaged in transmission of electricity charged with duty of exercising very high degree of care to safeguard those whose lawful activity exposes them to risk of inadvertent contact with electric lines. Gillotte v. Omaha Public Power Dist. ---------- 296
2. Electric companies not insurers and not liable for injuries in absence of negligence. Gillotte v. Omaha Public Power Dist. ---------- 296
3. Where circumstances such that probability of danger to persons having right to be near electric line reasonably foreseeable, power company may be liable for negligence even though specific injury might not be foreseeable. Gillotte v. Omaha Public Power Dist. 296

Eminent Domain.

1. Verdict of jury on conflicting evidence in eminent domain action will be set aside when clearly excessive. Nelson v. Tri-State G. & T. Assn., Inc. -- 219
2. Compensation for land taken by right of eminent domain measured by full market value as of date of appropriation. Lechliter v. State ---------- 527
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3. Anything connected with land that would influence

market value in mind of good-faith intending purchaser is element for consideration in considering damages. Lechliter v. State ---------- 527
Iske v. Omaha Public Power Dist. ---------- 724
4. Law in this jurisdiction well settled that when land occupied for business purposes taken by eminent domain, anticipated profits from carrying on of business in its established location cannot be considered in estimating damages. Lechliter v. State 527
5. In eminent domain proceedings damage to remainder on account of proper construction or operation, landowner must obtain compensation in first proceeding. Hansen v. County of Cass ---------- 565
6. Final condemnation award conclusive both on questions actually litigated and on questions necessarily within issues. Hansen v. County of Cass -- 565
7. Condemnation award not conclusive in subsequent action as to remainder damage that was caused by improper construction or operation and that was not actually litigated in first proceeding. Hansen v. County of Cass ---------- 565
8. In eminent domain proceedings where stone or mineral deposits may have bearing on market value of land, evidence as to extent of those deposits admissible but award may not be reached by separately evaluating land and deposits, consideration given to quantity and quality of minerals that can be extracted and to value thereof, solely as evidence for arriving at value of land. Iske v. Omaha Public Power Dist. ---------- 724
9. In eminent domain proceedings resolution of question as to presence of minerals and potential recreational development is primarily for jury under conflicting issues raised, and evidence should be decided like any other question of fact at issue, not for court to determine under guise of determination of admissibility of evidence. Iske v. Omaha Public Power Dist. ---------- 724
10. Generally in eminent domain proceedings, expert witness, otherwise properly qualified, may be permitted to use and to testify concerning different factors affecting valuation which well-informed buyer would use in arriving at price which he would pay for property at time of taking. Iske v. Omaha Public Power Dist. ---------- 724
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, it is only advisory in nature and is not binding upon jury or court. Iske v. Omaha Public Power Dist. ---------- 724

12. 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. Iske v. Omaha Public Power Dist. ---------- 724

Equity.

1. Doctrine of marshaling assets not founded upon law of contract or liens but rather doctrine based in equity and designed to promote fair dealing and justice. Platte Valley Bank of North Bend v. Kracl 168
2. Appeal in guardianship matter from county court to district court triable as suit in equity, and on appeal to Supreme Court from district court heard and determined de novo. Hyde v. Crocker -------- 428

Escape.

Guilt or innocence of charge for which person held in custody immaterial to charge of escape from custody while in jail awaiting trial. State v. Howard 583

Estates.

1. Devise which conveys property in fee simple to which conditions are attached for violation of which forfeiture may be declared by contingent devisees, creates estate in fee simple subject to conditions subsequent. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358
2. Conditions precedent are those which must take place before estate can vest or be enlarged; if land conveyed or devised on condition precedent title will not pass until condition performed; conditions subsequent are those which in terms operate on estate conveyed or devised and render it liable to defeat for breach of condition. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358
3. If estate is defeated by contingent event before its natural expiration, it goes to devisee in nature of remainder, technically constituting conditional limitation. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358
4. Devise over to residuary devisee is executory interest, or estate created in third person upon de-

feasance of prior estate in same property; it lies within general class of future estates which may be created in some person other than transferor. Cast v. National Bank of Commerce T. & S. Assn. -- 358

5. Whenever same person acquires fee simple estate and lesser estate in same property, lesser estate destroyed by or merged in fee simple estate. Niemann v. Zacharias ---------- 450

6. One cannot be owner of interest in property and also donee of power to appoint that interest. Niemann v. Zacharias ---------- 450

Estoppel.

1. Proper function of equitable estoppel is prevention of fraud, actual or constructive, and doctrine should always be so applied as to promote ends of justice and accomplish that which ought to be done between man and man. John Deere Co. v. Conet --- 135

2. Essential elements of equitable estoppel stated. John Deere Co. v. Conet ---------- 135

3. Where one, by words or conduct, willfully causes another to believe in existence of certain state of facts, and induces him to act on that belief or to alter his previous condition, former is concluded from averring against latter different state of things as existing at same time. John Deere Co. v. Conet 135

4. Equitable doctrine of estoppel in pais may, in proper case, be applied to prevent fraudulent or inequitable resort to statute of limitations and defendant may, by representations, promises, or conduct be so estopped where other elements of estoppel are present. State Farm Mut. Auto. Ins. Co. v. Budd 343

5. Equitable estoppel rests largely on facts and circumstances of particular case and will be applied where wisdom and justice of principle are founded upon equity, morality, and justice in accordance with good conscience, honesty, and reason. State Farm Mut. Auto. Ins. Co. v. Budd ---------- 343

6. Equitable estoppels cannot in nature of things be subjected to fixed and settled rules of universal application like legal estoppels, nor be hampered by narrow confines of technical formula. State Farm Mut. Auto. Ins. Co. v. Budd ---------- 343

7. A person is held to representation made or position assumed, where otherwise inequitable consequences would result to another who, having right to do so under all circumstances of case, has, in good faith,

relied thereon. State Farm Mut. Auto. Ins. Co. v. Budd ---------- 343

8. One cannot justly or equitably lull adversary into false sense of security, and thereby cause him to subject claim to bar of statute of limitations, and then be permitted to plead very delay caused by his conduct as defense to action when brought. State Farm Mut. Auto. Ins. Co. v. Budd -------- 343

9. Estoppel may be urged for protection of right, but can never properly be urged to create right. State v. Bardsley ---------- 629

Evidence.

1. When evidence shows lawful arrest followed by inventory of contents of defendant's automobile following its impoundment, and there is reasonable justification for such impoundment, taking of inventory for purpose of protecting defendant's property during defendant's detention and of protecting law enforcement officers from false claims of loss is reasonable and lawful, and evidence of crime found while making inventory will not be suppressed. State v. Wallen ---------- 44

2. If during proper inventory of contents of an impounded vehicle, evidence of crime discovered, such evidence may be used to support charge for crime indicated. State v. Wallen ---------- 44

3. Only unreasonable searches prohibited by Fourth Amendment to Constitution of United States. State v. Wallen ---------- 44

4. In prosecution for keeping gaming devices adapted, devised, and designed for purpose of playing game of chance for money evidence must sustain finding that gambling devices were adapted, designed, and kept for purpose of playing games of chance for money; possession alone not enough. State v. Wallen 44

5. Opinion evidence as to value generally not binding on trier of fact, even when not met by opposing proof. Burney v. Ehlers ---------- 51

6. In determining whether or not to set aside probationary order and impose penalty where violation established or admitted, trial court not limited to consideration of probative evidence of matters arising subsequent to order of probation. State v. Nevells ---------- 58

7. Question of admissibility of photographs of gruesome nature rests largely in discretion of trial

court. State v. Robinson ---------- 64
8. Test is whether photographic evidence is relevant and in determining relevancy, court is to weigh and balance probative value of picture as against possible prejudicial effect. State v. Robinson ------ 64
9. Photograph proved to be true representation of person, place, or thing which it purports to represent ordinarily proper evidence of anything of which it is competent and relevant for witness to give verbal description. State v. Robinson ------ 64
10. In homicide case, photographs of victim, upon proper foundation, may be received for purposes of identification, to show condition of body, nature and extent of wounds or injuries, and to establish malice or intent. State v. Robinson ---------- 64
11. Supreme Court will not interfere with verdict of guilty which is based on conflicting evidence unless evidence so lacking in probative force that it is insufficient as matter of law to support finding of guilt beyond reasonable doubt. State v. Leary -- 76
State v. Cannon ---------- 149
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12. Evidence sufficient to sustain verdict of guilty in criminal prosecution only when jury could properly find guilt beyond reasonable doubt. State v. Leary ---------- 76
13. If evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, question of whether or not person riding in a motor vehicle is guest is one for decision by court as matter of law. Johnson v. Riecken ---- 78
14. When evidence with relation to negligence is such that minds may reasonably reach different conclusions therefrom, issue should be submitted to jury for determination. Johnson v. Riecken ---------- 78
15. When evidence is in conflict as to what negligence, if any, constituted proximate cause of injury, determination of proximate cause is for jury. Johnson v. Riecken ---------- 78
16. As general rule, pleadings containing admission are admissible against pleader in another action on behalf of stranger to former action. Johnson v. Riecken ---------- 78
17. Admissions made by next friend or guardian ad litem in pleadings filed for infant are not ordinarily admissible against infant. Johnson v. Riecken 78
18. Party desiring to limit purpose and application of

evidence properly admitted, must request specific instruction. Johnson v. Riecken ---------- 78

19. Where state of mind of person at particular time relevant to material issue in case, his declarations made at that time are admissible as proof on that issue, notwithstanding they were not made in presence of adverse party. Beliveau v. Goodrich ------ 98

20. Ordinarily question of admissibility of evidence as to speed of vehicle shortly prior to time of accident rests largely in discretion of court. Sandrock v. Taylor ---------- 106

21. Before evidence submitted to jury, question not whether there is literally no evidence at all but whether there is evidence so reasonably convincing that jury can properly proceed to find verdict for plaintiff producing it, upon whom burden of proof was imposed. Southern v. Willis Shaw Frozen Express, Inc. ---------- 117
Weichel v. Lojka ---------- 819

22. In determining whether evidence sufficient to sustain jury verdict, conjecture, speculation, or mere choice of quantitative possibilities are not proof; trier of fact must come to conclusion that there is something more than quantitative possibilities which would lead a reasoning mind to come to one conclusion rather than another. Southern v. Willis Shaw Frozen Express, Inc. ---------- 117

23. Competent, relevant testimony of unimpeached witnesses should not be held to be contradicted by inferences from circumstancial evidence, unless circumstances and natural inferences to be deduced therefrom cannot in reason be reconciled with conclusion that direct evidence is true. Southern v. Willis Shaw Express, Inc. ---------- 117

24. When evidence of in-court identification alleged to be tainted by prior illegal line-up first challenged on appeal, such challenge, in absence of clear showing of prejudicial error, will not be considered; failure to object will be attributed to defense counsel's choice of trial tactics. State v. Cannon ---------- 149

25. In-court identification evidence admissible where such identification is made on basis independent of tainted line-up. State v. Cannon ---------- 149

26. Primary factor in determining whether independent basis for in-court identification exists is opportunity afforded witness to observe defendant under circumstances free from taint. State v. Cannon ------ 149

27. In determining sufficiency of evidence to sustain criminal conviction, it is not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence. State v. Cannon ---------- 149
28. Evidence of unexplained breaking and entering by defendant sufficient to require submission to jury of question whether breaking and entering was with intent to steal. State v. Cannon ---------- 149
29. Parol evidence rule does not prevent reception or consideration of evidence to prove promissory fraud. Abbott v. Abbott ---------- 177
30. Party against whom motion to dismiss made is entitled to have every controverted fact resolved in his favor and to have benefit of every inference that can reasonably be drawn from evidence. Lyons v. Wagner ---------- 214
31. Verdict of jury on conflicting evidence in eminent domain action will be set aside when clearly excessive. Neilsen v. Tri-State G. & T. Assn., Inc. -- 219
32. In reviewing equity cases, where there is irreconcilable conflict on material issue, Supreme Court will, in determining weight of evidence, consider fact that trial court observed witnesses and manner of testifying and must have accepted one version of facts rather than other. Sinnett v. Hie Food Products, Inc. ---------- 221
33. Plea of guilty, voluntarily entered, is conclusive and eliminates all questions of admissibility of evidence. State v. Burnside ---------- 234
34. Evidence to prove deed absolute in form is mortgage must be clear and convincing. Davison v. Inselman ---------- 236
35. As general rule, evidence of other crimes than that with which accused charged not admissible in criminal prosecution. State v. Kirby ---------- 240
36. In crimes involving motive, criminal intent, or guilty knowledge, evidence of independent crimes wholly disconnected with one charged may be received. State v. Kirby ---------- 240
37. Witness may be interrogated as to previous conviction for felony, but no other proof of such conviction competent except record thereof. State v. Kirby 240
38. Rule for determining sufficiency of evidence to sustain judgment stated. Gillotte v. Omaha Public Power Dist. ---------- 296
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McBride v. Fort Kearney Hotel, Inc. ---------- 518
39. General rule is that burden of proving affirmative of issue on party alleging it. Bartels v. Retail Credit Co. ---------- 304
40. In action for false imprisonment against officer for arresting without warrant, reasonableness of plaintiff's detention is question for court where no conflict in evidence as to length of time and circumstances under which plaintiff held. Wilson v. Gutschenritter ---------- 311
41. Regular business record not mentioning matter that would ordinarily appear on it is admissible evidence of nonexistence of matter. Brown v. Nile Valley Building & Loan Assn. ---------- 318
42. Properly certified transcript of evidence and record of proceedings in district court is conclusive and ordinarily may not be impeached by recitals in ex parte affidavits to show falsity in such transcript. Zachry v. Zachry ---------- 336
43. If evidence entirely written and relates to matters as to which trial court is in no better position to reach correct solution than appellate court, Supreme Court will be governed by its own conclusions as to weight of evidence. State Farm Mut. Auto. Ins. Co. v. Budd ---------- 343
44. Appellate court will consider finding of trial court based on agreed statement of ultimate facts as if trying case originally in order to determine whether facts warranted judgment. State Farm Mut. Auto. Ins. Co. v. Budd ---------- 343
45. When amount of damages allowed by jury clearly inadequate under evidence, it is error for trial court to refuse to set aside such verdict. Bohn v. Kruger 407
Webster v. Halbridge ---------- 409
46. Ordinarily, where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated on it. Webster v. Halbridge ---------- 409
47. Error in admission of evidence may be harmless if fact established by other evidence. State v. Huffman 417
48. In absence of objection in trial court, defendant may not be heard to complain of lack of sufficient foundation for admission into evidence of results of breathalizer tests. State v. Haile ---------- 421
49. Clear, uncontradicted, self-consistent, and unimpeached business records of party having initial production and persuasion burdens may suffice for

directed verdict in his favor. Watkins Products, Inc. v. Keane ---------- 424
50. Aiding and abetting, or procuring may be proved by circumstantial evidence. State v. Davis ---------- 433
51. Evidence crime committed by someone and that defendant aided and abetted in commission sufficient to sustain conviction for aiding and abetting; actual perpetrator of crime need not be identified. State v. Davis ---------- 433
52. Circumstantial evidence sufficient to sustain conviction if facts which evidence tends to establish may be accounted for upon no rational theory which does not include guilt of accused. State v. Davis ---- 433
53. Trial court's determination of admissibility of demonstrative evidence will not be overturned except for clear abuse of discretion. State v. Wessels ------ 474
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54. No decree of divorce and of the nullity of marriage shall be made solely on declarations, confessions, or admission of parties, but court shall, in all cases, require other satisfactory evidence of facts alleged in petition for that purpose. Sims v. Sims -- 479
55. Degree of corroboration required in divorce action depends on facts and circumstances of particular case. Sims v. Sims ---------- 479
56. Right to introduce evidence depends upon there being issue of fact raised by pleadings to which evidence is relevant. Midland-Ross Corp. v. Swartz 484
57. In Nebraska violation of statute not negligence per se but evidence for jury to consider in determination of ultimate issues of negligence or contributory negligence. Piper v. Hill ---------- 568
58. Necessity and sufficiency of medical opinion to sustain finding of causation in favor of proponent of evidence varies according to circumstances. Christo v. Pennsylvania Life Ins. Co. ---------- 573
59. Where no evidence presented as to effect of intoxicants upon part of parties involved, not proper to submit that issue directly to jury. Raskey v. Hulewicz ---------- 608
60. Percentage of alcohol content of body fluids of defendant in civil case relevant, in absence of presumption, only when accompanied by expert opinion evidence of effect thereof. Raskey v. Hulewicz 608
61. In workmen's compensation case, burden on plaintiff employee to prove claim by preponderance of evidence, and rule of liberal construction of Work-

men's Compensation Act does not apply to evidence to support claim. Pocevicius v. Armour & Co. ---- 668
Halbert v. United States F. & G. Co. ---------- 775
62. To recover in workmen's compensation case, claimant must offer proof which preponderates in favor on each of indispensable elements of claim. Pocevicius v. Armour & Co. ---------- 668
63. Where testimony gives rise to conflicting inferences of equal degree of probability so that choice between them is mere matter of conjecture, workmen's compensation award cannot be obtained. Pocevicius v. Armour & Co. ---------- 668
64. Weapons or other instruments of crime which are so connected with crime charged as to throw light thereon, or which it is reasonable to infer were used are admissible even though not shown to be connected with accused, as where they tend to throw light on issues other than defendant's connection with crime. State v. Tindell ---------- 683
65. Failure of court to caution jury on evidence given by accomplice, in absence of special request, will not ordinarily constitute reversible error. State v. Martin ---------- 699
66. On motion to dismiss, made at close of plaintiff's case, every fact alleged and which evidence tends to support will be considered as proved. Molholm v. Lynes ---------- 707
67. Where validity of alleged gift between persons occupying confidential relationship attacked, burden of proving that confidential relationship existed between parties rests on one attacking gift, when burden met, burden then rests on alleged donee to show validity of gift. Molholm v. Lynes ------ 707
68. Elements to be proved by preponderance of evidence by person asserting undue influence stated. Molholm v. Lynes ---------- 707
69. Undue influence usually surrounded by all possible secrecy, is largely matter of inference from facts and circumstances surrounding individual, his life, character, and mental condition, as shown by evidence and opportunity afforded designing persons for exercise of improper control. Molholm v. Lynes 707
70. Where plaintiff has shown relationship of parties and that their dealings are such that presumption of undue influence or breach of trust arises therefrom, burden of going forward with evidence shifts to party seeking to sustain conveyance as gift.

Molholm v. Lynes ---------- 707

71. Compensation for land taken by right of eminent domain measured by full market value as of date of appropriation, and anything connected with land that would influence market value in mind of good faith intending purchaser is element for consideration in awarding damages. Iske v. Omaha Public Power Dist. ---------- 724

72. In eminent domain proceedings where stone or mineral deposits may have bearing on market value of land, evidence as to extent of those deposits admissible but award may not be reached by separately evaluating land and deposits, consideration given to quantity and quality of minerals that can be extracted and to value thereof, solely as evidence for arriving at value of land. Iske v. Omaha Public Power Dist. ---------- 724

73. In eminent domain proceedings resolution of question as to presence of minerals and potential recreational development is primarily for jury under conflicting issues raised, and evidence should be decided like any other question of fact at issue, not for court to determine under guise of determination of admissibility of evidence. Iske v. Omaha Public Power Dist. ---------- 724

74. Exhibit admissible, so far as identity is concerned, when identified as being same object about which testimony was given; it must also be shown to satisfaction of trial court that no substantial change has taken place in exhibit so as to render it misleading; as long as article can be identified it is immaterial in how many or whose hands it has been. State v. Waits ---------- 780

75. Ancient document rule states that original or authentic copy of document which appears to be at least 30 years old, found in proper custody, appearing unblemished by alterations, and otherwise free from suspicion, is admissible in evidence without direct proof of execution. State v. Parks ---------- 794

76. If petition duly presented to proper tribunal praying for public road from one point to another in county and such petition granted and road located and opened for travel and used by public generally, right in public will become complete after 10 years and court will not look at original proceedings to determine validity of road but to ascertain extent of location. State v. Parks ---------- 794

False Imprisonment.

1. In action for false imprisonment against officer for arresting without warrant, reasonableness of plaintiff's detention is question for court where no conflict in evidence as to length of time and circumstances under which plaintiff held. Wilson v. Gutschenritter ---------- 311
2. Where one properly arrested by lawful authority, even though without warrant, action for false imprisonment cannot be maintained. Wilson v. Gutschenritter ---------- 311

Foreclosure.

1. Resolution of county board of commissioners directing foreclosure of tax sale certificates need not identify each tax sale certificate individually. County of Lincoln v. Evans ---------- 19
2. Affixing of county treasurer's official seal to tax sale certificate not essential to validity. County of Lincoln v. Evans ---------- 19

Forfeitures.

1. We interpret cited statute to mean that after possibilities of reverter or right of entry or reentry for breach of condition subsequent are created, they cannot be thereafter conveyed or devised and must terminate within 30 years. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358
2. Where there has been an honest effort to comply, conditions subsequent should be liberally construed to avoid forfeiture. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358

Franchises.

Subsurface use of public thoroughfare, which does not interfere with public use, which is subject to termination by city, and which is of such limited nature as not to be of general public interest, not proper subject for franchise. Dunmar Inv. Co. v. Northern Nat. Gas Co. ---------- 400

Fraud.

1. Proper function of equitable estoppel is prevention of fraud, actual or constructive, and doctrine should always be so applied as to promote ends of justice and accomplish that which ought to be done between man and man. John Deere Co. v. Conet ---------- 135

2. Essential elements of equitable estoppel stated. John Deere Co. v. Conet ---------- 135
3. Where one, by words or conduct, willfully causes another to believe in existence of certain state of facts, and induces him to act on that belief or to alter his previous condition, former is concluded from averring against latter different state of things as existing at same time. John Deere Co. v. Conet 135
4. Maker of fraudulent misrepresentation not liable to one who does not rely upon its truth but upon expectation that maker will be held liable in damages for falsity. Abbott v. Abbott ---------- 177
5. Parol evidence rule does not prevent reception or consideration of evidence to prove promissory fraud. Abbott v. Abbott ---------- 177

Frauds, Statute of.

Generally, statute of frauds does not apply to contract which has been performed by one party. Ridenour v. Kuker ---------- 321

Gambling Devices.

1. Only unreasonable searches prohibited by Fourth Amendment to Constitution of United States. State v. Wallen ---------- 44
2. In prosecution for keeping gaming devices adapted, devised, and designed for purpose of playing game of chance for money evidence must sustain finding that gambling devices were adapted, designed, and kept for purpose of playing games of chance for money; possession alone not enough. State v. Wallen 44

Gifts.

1. Where validity of alleged gift between persons occupying confidential relationship attacked, burden of proving that confidential relationship existed between parties rests on one attacking gift, when burden met, burden then rests on alleged donee to show validity of gift. Molholm v. Lynes ---------- 707
2. Elements to be proved by preponderance of evidence by person asserting undue influence stated. Molholm v. Lynes ---------- 707
3. Where plaintiff has shown relationship of parties and that their dealings are such that presumption of undue influence or breach of trust arises therefrom, burden of going forward with evidence shifts to party seeking to sustain conveyance as gift. Molholm

v. Lynes ---------- 707

Governor.

1. To be effective, each item appearing in legislative appropriation bill which is increase over budget submitted to Legislature by Governor must receive two-thirds vote on final passage. State ex rel. Meyer v. State Board of Equalization & Assessment ---- 490
2. Under all constitutional governments recognizing three distinct and independent magistracies, control of purse strings of government is legislative function; indeed, it is extreme legislative prerogative, indispensable to independence and integrity of Legislature, and not to be surrendered or abridged, save by Constitution itself, without disturbing balance of system and endangering liberties of people. State ex rel. Meyer v. State Board of Equalization & Assessment ---------- 490
3. Right of Legislature to control public treasury, to determine sources from which public revenue shall be derived and objects upon which it shall be expended, to dictate time, manner, and means, both of collection and disbursement, is firmly and inexpugnably established in our political system. State ex rel. Meyer v. State Board of Equalization & Assessment ---------- 490
4. Legislature has plenary or absolute power over appropriations; may make them upon such conditions and with such restrictions as it pleases within legal and reasonable limits; cannot, however, through power of appropriation exercise or invade constitutional rights and powers of executive branch of government. State ex rel. Meyer v. State Board of Equalization & Assessment ---------- 490

Guardian and Ward.

1. Proceeding for appointment of guardian probate matter. Hyde v. Crocker ---------- 428
2. Appeal in guardianship matter from county court to district court triable as suit in equity, and on appeal to Supreme Court from district court heard and determined de novo. Hyde v. Crocker -------- 428
3. Term mentally incompetent as used in statute does not refer to person who is sane but not as wise, intelligent, or mentally strong as some other person; applies to person whose mind is so affected as to have lost control of itself to such degree as

to deprive person affected of sane and normal action. Hyde v. Crocker ---------- 428

Guilty Plea.

1. Plea of guilty, voluntarily entered, is conclusive and eliminates all questions of admissibility of evidence. State v. Burnside ---------- 234
2. Plea of guilty waives all defenses except that information fails to charge offense. State v. Burnside 234
3. Appointment of counsel and arraignment of defendant on same day do not show lack of effective assistance by counsel where facts and circumstances of offense were such that investigation by counsel was not required and plea of guilty appropriate. State v. Kennedy ---------- 415
4. Plea of guilty 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 procurement. State v. Cunningham ---------- 488
5. Although otherwise voluntary plea of guilty partially motivated by expectation that penalty imposed by court on such plea would be less than, or different from, penalty imposed by jury upon conviction, guilty plea does not become involuntary solely because sentence of court not one expected. State v. Alvarez ---------- 557
6. Plea discussions and agreements in criminal cases, under proper and appropriate conditions, not objectionable; proper plea negotiations and agreements fully carried out do not ordinarily render plea of guilty involuntary merely because sentence not one anticipated. State v. Alvarez ---------- 557
7. Rule that plea must be intelligently made to be valid does not require that plea be vulnerable to later attack if defendant did not correctly assess every relevant factor entering into decision. State v. Alvarez ---------- 557
8. Voluntary guilty plea intelligently made in light of then applicable law does not become vulnerable because later judicial decisions indicate that plea rested on faulty premise. State v. Alvarez -------- 557

Highways.

1. Where alley vacated by city council of first-class city, alley reverts to owner of adjacent real estate one-half on each side thereof. Seefus v. Briley -- 202

2. Conveyance of tract of land by description shown on plat which has been vacated includes interest in one-half of adjacent alley which has been vacated, in absence of express intention to contrary shown in conveyance. Seefus v. Briley ---------- 202
3. Where owner of lot abutting on alley, which was vacated during ownership, conveyed lot by conveyance which describes lot by block and number, and contained no reservation of rights in alley, conveyance transfers fee to centerline of abutting portion of vacated alley, even though conveyance also described lot by metes and bounds description which did not include any part of alley and used edge of alley as boundary. Seefus v. Briley ---------- 202
4. An intersection is area embraced within lateral curb lines or, if none, then lateral boundary lines of two or more highways, which join one another at an angle. Matson v. Dawson ---------- 686
5. Statutory traffic rules have not been made applicable to horseback riders, but they are bound by common law rules. Matson v. Dawson ---------- 686
6. All travelers upon highways, regardless of means of travel, must use reasonable care for own safety and safety of others. Matson v. Dawson ---------- 686
7. Left-hand turn across highway between intersections fraught with danger and party making such turn required to exercise degree of care commensurate with danger. Matson v. Dawson ---------- 686
8. Giving of statutory signal for left turn between intersections will not absolve driver from negligence where he fails to exercise care for own safety, and that of others, by looking to front and rear for approach of other vehicles using highway. Matson v. Dawson ---------- 686
9. One who attempts to cross street between intersections without looking for approaching traffic guilty of such negligence as will bar recovery as matter of law. Matson v. Dawson ---------- 686
10. When one in place of safety sees or could have seen approach of moving vehicle in close proximity and suddenly moved from place of safety into path of such vehicle and is struck, conduct constitutes contributory negligence of such degree as to preclude recovery. Matson v. Dawson ---------- 686
11. Filing of written consent was necessary to confer jurisdiction upon county board to establish consent road. State v. Parks ---------- 794

12. If petition duly presented to proper tribunal praying for public road from one point to another in county and such petition granted and road located and opened for travel and used by public generally, right in public will become complete after 10 years and court will not look at original proceedings to determine validity of road but to ascertain extent of location. State v. Parks ---------- 794

Homicide.

1. In homicide case, photographs of victim, upon proper foundation, may be received for purposes of identification, to show condition of body, nature and extent of wounds or injuries, and to establish malice or intent. State v. Robinson ---------- 64
2. Where two possible statutory penalties for first degree murder, one death penalty, and penalties may be applied either by court or by jury, whichever determines guilt, statute does not unconstitutionally discourage assertion of Fifth or Sixth Amendment rights. State v. Alvarez ---------- 557

Hospitals.

1. Proper measure of duty of hospital to patient is exercise of degree of care, skill, and diligence used by hospitals generally in community where hospital is located or in similar communities. Foley v. Bishop Clarkson Memorial Hospital ---------- 89
2. Proof of violation of hospital standards or regulations not conclusive on question of negligence, but is simply evidence of negligence. Foley v. Bishop Clarkson Memorial Hospital ---------- 89
3. Hospital must guard, not only against patient's known physical and mental conditions but also against such conditions as should have discovered by exercise of reasonable care. Foley v. Bishop Clarkson Memorial Hospital ---------- 89
4. Whether county board shall issue bonds for purpose of paying cost of acquiring existing facilities for county community hospital or purchasing site and constructing thereon county community hospital and purchasing suitable equipment for same is single proposition. Shadbolt v. County of Cherry -------- 208
5. Independent hospital district by statute may fractionate territories of counties; harm from such district levies insufficient to establish that levies by one of counties for county hospital violate Article

I, section 25, or Article VIII, section 1, Constitution of Nebraska, which prohibit discrimination and require uniformity in taxation. Shadbolt v. County of Cherry ---------- 208

Husband and Wife.

1. Agreement between husband and wife to execute mutual wills, evidenced by recital in wills executed pursuant to agreement, valid and enforceable. Geiger v. Geiger ---------- 700
2. Mutual promises of parties to agreement to execute mutual wills constitutes adequate consideration. Geiger v. Geiger ---------- 700

Indemnity.

1. Where party obtains judgment against another for damages for tort on specified grounds of negligence and such judgment debtor then seeks indemnity against another on specified and different grounds of negligence, which are sustained, such parties are joint tort-feasors and each is liable as such. Farmers Elevator Mut. Ins. Co. v. American Mut. Ins. Co. -- 4
2. Generally joint tort-feasors have no right of contribution or indemnity, one against the other. Farmers Elevator Mut. Ins. Co. v. American Mut. Ins. Co. ---------- 4
3. Rule that one of two negligent persons causing injury to third where negligence of one is active and primary and other passive and secondary, and permitting contribution or indemnity against one guilty of active negligence, has no application where negligence of each founded on separate and distinct acts of negligence and no way exists to determine relatime degrees of negligence of each. Farmers Elevator Mut. Ins. Co. v. American Mut. Ins. Co. ------ 4
4. Joint tort-feasors have no right of contribution or indemnity among themselves except by contract or some other legal relation giving rise to it. Farmers Elevator Mut. Ins. Co. v. American Mut. Ins. Co. 4

Infants.

1. Admissions made by next friend or guardian ad litem in pleadings filed for infant are not ordinarily admissible against infant. Johnson v. Riecken ---- 78
2. Valid consent or relinquishment for adoption may be executed by minor. Batt v. Nebraska Children's Home Society ---------- 124

3. No particular form of acknowledgment required for relinquishment for adoption; sufficient if evidence shows intention to voluntarily execute valid relinquishment in presence of notary public. Batt v. Nebraska Children's Home Society ---------- 124
4. Juvenile court has broad discretion as to disposition of child found to be delinquent. Brown v. Doeschot 293
5. Defendant not entitled to jury trial upon complaint filed in juvenile court alleging that defendant is delinquent child. DeBacker v. Sigler ---------- 352

Instructions.
1. Misstatement of issues tending to mislead jury is erroneous. Martin v. Richman Gordman No. 2, Inc. 95
2. Errors in instructions not prejudicial to complaining party not ground for reversal of judgment otherwise correct. Martin v. Richman Gordman No. 2, Inc. ---------- 95
Snyder v. Fort Kearney Hotel Co., Inc. ---------- 476
3. Meaning of instruction and not phraseology is important consideration; where meaning reasonably clear, it is not prejudicially erroneous. Leonhardt v. Harimon ---------- 224
4. Inadvertent substitution of one word for another in instruction is harmless error if it is clear from instruction itself and other instructions given that jury was not confused or misled. Leonhardt v. Harimon ---------- 224
5. Conflicting instructions are erroneous and prejudicial unless it appears that jury not misled. Bartels v. Retail Credit Co. ---------- 304
6. Instruction which misstates issues or defenses and has tendency to confuse or mislead jury is erroneous. Bartels v. Retail Credit Co. ---------- 304
7. Giving of instruction in trial of criminal case which in effect peremptorily directs jury to return verdict when disagreement by jury imminent is form of importunity and coercion which invades province of jury and constitutes invasion of defendant's constitutional right to speedy, public trial by impartial jury. State v. Garza ---------- 445
8. Where contributory negligence an issue under pleadings and evidence, court should give adequate instruction as to contributory negligence, and as to comparative negligence rule. Snyder v. Fort Kearney Hotel Co., Inc. ---------- 476

Insurance.

1. Where insurance company issues comprehensive liability policy to contractor insuring against injury by accident, contract for construction work is incidental to business and within insuring clause although not specifically mentioned in policy. Farmers Elevator Mut. Ins. Co. v. American Mut. Ins. Co. -- 4
2. Insuring clause in insurance policy issued to building contractor covers nondescribed contract incidental to business entered into subsequent to issuance of policy without payment of premium where classifications of work and premium rates are fixed by policy and payment of premiums determined at close of policy year by audit of insured's records. Farmers Elevator Mut. Ins Co. v. American Mut. Ins. Co. ---------- 4
3. Exclusionary provision in general liability policy, which provides for no coverage for bodily injury to employee of insured arising out of and in course of employment by insured, provides no coverage to employee of insured injured by fall from defective ladder furnished by employer. Farmers Elevator Mut. Ins. Co. v. American Mut. Ins. Co. ---------- 4
4. Where two insurance companies have issued general liability insurance policies to same insured, each obligated to defend insured for same injury, if one affords defense, no damage ordinarily results to insured from failure of other to defend. Farmers Elevator Mut. Ins. Co. v. American Mut. Ins Co. -- 4
5. Duty to defend insured is for purpose of protecting insured's interests from costs and expenses of litigation; it operates as shield for protection of insured and not as sword to impose liability where none otherwise exists. Farmers Elevator Mut. Ins. Co. v. American Mut. Ins. Co. ---------- 4

Interest.

Where defense of usury established under motor vehicle installment contract, contract is not void but usurer may recover principal of contract without interest, less interest paid. Baker v. A. C. Nelson Co. 128

Intoxicating Liquors.

1. Where voluntary intoxication interposed as defense in criminal case involving question of intent with which act done, it is for jury to determine if such intoxication is so excessive as to wholly deprive

defendant of reason and ability to form criminal intent. State v. Barnes ---------- 384
2. Guest may be guilty of contributory negligence, or assumption of risk, by riding or continuing to ride with driver who he knows, or in exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate vehicle with proper prudence or skill. Raskey v. Hulewicz ---------- 608
3. Where no evidence presented as to effect of intoxicants upon part of parties involved, not proper to submit that issue directly to jury. Raskey v. Hulewicz ---------- 608
4. Whether or not knowledge of guest, that host driver of automobile has been drinking, will operate to prevent recovery of damages in particular case depends upon all facts and circumstances of case, and is usually jury question. Raskey v. Hulewicz 608
5. Percentage of alcohol content of body fluids of defendant in civil case relevant, in absence of presumption, only when accompanied by expert opinion evidence of effect thereof. Raskey v. Hulewicz 608

Judges.
1. Substitute county judge not disqualified from serving as defense counsel for indigent defendant where he has no connection with case in capacity as substitute county judge. State v. Wagner -------- 634
2. Provisions of Article V, rather than of Article XVII, Constitution of Nebraska, apply to judges selected and appointed under merit plan of judicial selection. Garrotto v. McManus ---------- 644
3. Rights of newly appointed judges under merit plan of judicial selection governed by applicable laws in effect at time of appointment and qualification. Garrotto v. McManus ---------- 644
4. Under merit plan of judicial selection, judge appointed to independent term and enters upon full term of office upon appointment and qualification. Garrotto v. McManus ---------- 644
5. Judges of district court of this state constitute separate and distinct class for purpose of legislation regarding them, these judges are members of "a court" within meaning of cited section of Constitution. Garrotto v. McManus ---------- 644

Judgments.
1. Where party obtains judgment against another for

damages for tort on specified grounds of negligence and such judgment debtor then seeks indemnity against another on specified and different grounds of negligence, which are sustained, such parties are joint tort-feasors and each is liable as such. Farmers Elevator Mut. Ins. Co. v. American Mut. Ins. Co. ---------- 4

2. District court has inherent power to vacate or modify its own judgment at any time during term at which it was rendered. Urwin v. Dickerson -- 86
Beliveau v. Goodrich ---------- 98

3. Where judgment entered by default and prompt application made at the same term to set it aside, with tender of answer disclosing meritorious defense, court should, on reasonable terms, sustain motion and permit cause to be heard on merits. Urwin v. Dickerson ---------- 86
Beliveau v. Goodrich ---------- 98

4. Application to vacate default judgment is matter of discretion for trial court; burden of showing abuse of discretion upon party adversely affected. Urwin v. Dickerson ---------- 86

5. Facts and circumstances in each case, as shown by record, determine whether there has been abuse of discretion. Urwin v. Dickerson ---------- 86

6. Ordinarily, opposing counsel should be notified before a default it taken. Urwin v. Dickerson ------ 86

7. In deciding whether or not there was abuse of discretion in setting aside default judgment, much stronger showing required to substantiate abuse of discretion when judgment vacated, than when it is not. Beliveau v. Goodrich ---------- 98

8. Mere mistake or miscalculation of party or his attorneys not sufficient, in itself, to warrant refusal to set aside default judgment, when there is good defense pleaded or proved and no change of position or substantial prejudice will result from permitting trial on merits. Beliveau v. Goodrich ---------- 98

9. Essential in action for declaratory judgment that there be justiciable issue and that all interested persons be before court before declaratory judgment may be granted; when these conditions met, court authorized to enter such judgment. Baker v. A. C. Nelson Co. ---------- 128

10. Issue to be tried on motion for summary judgment stated. John Deere Co. v. Conet ---------- 135
Piper v. Hill ---------- 568

11. Where parties resume marital relations within 6-month period, decree may be set aside. Lawson v. Lawson ---------- 164
12. One of important purposes of law requiring 6 months to elapse between entry of decree of divorce, which is in nature of interlocutory order, and before same becomes final, is to give parties chance to effect reconciliation which law favors. Lawson v. Lawson 164
13. Consent decree is usually treated as agreement between parties; accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of parties. Lawson v. Lawson ---------- 164
14. Where notice of appeal not filed within 1 month from entry of judgment or final order appealed from, Supreme Court obtains no jurisdiction to hear appeal and it must be dismissed. Giangrasso v. Eagle Distributing Co. ---------- 406
State v. Pauley ---------- 478
15. In determining sufficiency of evidence to sustain judgment in law action, evidence must be considered most favorably to successful party, every controverted fact must be resolved in that party's favor, and he must have benefit of any inferences reasonably deducible from it. McBride v. Fort Kearney Hotel, Inc. ---------- 518
16. Judgment of trial court in action at law where jury waived has effect of verdict of jury and it will not be set aside unless clearly wrong. McBride v. Fort Kearney Hotel, Inc. ---------- 518
17. In summary judgment proceeding, burden upon movant to show no genuine issue of fact exists. Piper v. Hill ---------- 568
18. Purpose of summary judgment not to serve as substitute for trial, but is only proper remedy when movant entitled to judgment as matter of law. Piper v. Hill ---------- 568
19. When motion made at close of all evidence for directed verdict, which motion should have been sustained but was overruled and case submitted to jury which returned verdict contrary to motion, and thereafter motion for judgment notwithstanding verdict duly filed, it is duty of court to sustain motion and render judgment in accordance with motion for directed verdict. Weichel v. Lojka ---- 819

Juries.

1. When evidence with relation to negligence is such that minds may reasonably reach different conclusions therefrom, issue should be submitted to jury for determination. Johnson v. Riecken 78
2. When evidence is in conflict as to what negligence, if any, constituted proximate cause of injury, determination of proximate cause is for jury. Johnson v. Riecken 78
3. Before evidence submitted to jury, question not whether there is literally no evidence at all but whether there is evidence so reasonably convincing that jury can properly proceed to find verdict for plaintiff producing it, upon whom burden of proof was imposed. Southern v. Willis Shaw Frozen Express, Inc. 117
4. In determining whether evidence sufficient to sustain jury verdict, conjecture, speculation, or mere choice of quantitative possibilities are not proof; trier of fact must come to conclusion that there is something more than quantitative possibilities which would lead a reasoning mind to come to one conclusion rather than another. Southern v. Willis Shaw Frozen Express, Inc. 117
5. Evidence of unexplained breaking and entering by defendant sufficient to require submission to jury of question whether breaking and entering was with intent to steal. State v. Cannon 149
6. Party in selection of jury ordinarily has no right to examine juror out of presecnce of all other jurors. State v. Kirby 240
7. Whether, during trial of criminal case, jury shall be allowed to separate, after being duly cautioned, is matter for discretion of trial court, and exercise of such discretion, unless abuse or prejudice shown, furnishes no ground for error. State v. Kirby 240
8. One who cannot subordinate personal view to what he perceives to be duty to abide by oath as juror and to obey law of state must be excused for cause. State v. Kirby 240
9. Giving of instruction in trial of criminal case which in effect peremptorily directs jury to return verdict when disagreement by jury imminent is form of importunity and coercion which invades province of jury and constitutes invasion of defendant's constitutional right to speedy, public trial by impartial jury. State v. Garza 445

Landlord and Tenant.

1. Rights of lessee of school land determined by law as it was at time lease was made and lessee may not be deprived of any substantial right resulting from lease in his favor by subsequent legislation; likewise, trustee of public school lands may not convey any interest in such lands without adequate compensation. State v. Bardsley ---------- 629
2. Improvements which become part of real estate may not be removed and do not become property of lessee in absence of agreement, express or implied, or valid statute granting such right. State v. Bardsley -- 629

Legislature.

1. To be effective, each item appearing in legislative appropriation bill which is increase over budget submitted to Legislature by Governor must receive two-thirds vote on final passage. State ex rel. Meyer v. State Board of Equalization & Assessment 490
2. Under all constitutional governments recognizing three distinct and independent magistracies, control of purse strings of government is legislative function; indeed, it is extreme legislative prerogative, indispensable to independence and integrity of Legislature, and not to be surrendered or abridged, save by Constitution itself, without disturbing balance of system and endangering liberties of people. State ex rel. Meyer v. State Board of Equalization & Assessment ---------- 490
3. Right of Legislature to control public treasury, to determine sources from which public revenue shall be derived and objects upon which it shall be expended, to dictate time, manner, and means, both of collection and disbursement, is firmly and inexpugnably established in our political system. State ex rel. Meyer v. State Board of Equalization & Assessment 490
4. Legislature has plenary or absolute power over appropriations; may make them upon such conditions and with such restrictions as it pleases within legal and reasonable limits; cannot, however, through power of appropriation exercise or invade constitutional rights and powers of executive branch of government. State ex rel. Meyer v. State Board of Equalization & Assessment ---------- 490
5. Legislature has plenary power over taxation and matters incidental to such power within limits of Constitution. State ex rel. Meyer v. McNeil ------ 586

6. Legislature may make reasonable classification of persons, corporations, and property, but classification must rest upon real differences of situation and circumstances surrounding members of class, relative to subject of legislation, which render appropriate its enactment. State ex rel. Meyer v. McNeil -------- 586
7. Legislature may properly legislate in regard to class of property, but may not divide class of property and enact different rules for taxation of each segment of class. State ex rel. Meyer v. McNeil 586
8. Constitutional provision prohibiting amendment or repeal of home rule charter except by electoral vote intended as restriction on powers of municipality, but not as restriction on powers of Legislature in annexation matters. City of Millard v. City of Omaha ---------- 617
9. To construe cited Article of Constitution as restricting legislative powers would conflict with constitutional provisions prohibiting local or special legislation and laws denying equal protection of laws. City of Millard v. City of Omaha ---------- 617
10. In enacting statute, Legislature must be presumed to have had in mind all previous legislation upon subject; in construction of statute, courts must consider preexisting law together with any other laws relating to same subject, which, although enacted at different times, are in pari materia therewith. Airport Authority of City of Millard v. City of Omaha 623
11. When Legislature subsequently enacts legislation making related preeexisting laws applicable thereto, it will be presumed that it did so with full knowledge of such preexisting legislation and judicial decisions of Supreme Court construing and applying it. Airport Authority of City of Millard v. City of Omaha 623
12. If language of statute clear and unambiguous, courts will not by interpretation or construction usurp function of lawmaking body and give it meaning not intended or expressed by Legislature. Bessey v. Board of Educational Lands & Funds ---------- 801

Licenses and Permits.

1. Words "suspension" and "revocation" not synonymous, suspension normally means temporary cessation but with expectation or purpose of resumption, revocation implies permanent termination and when used within statute imports finality. The Flamingo, Inc. v. Nebraska Liquor Control Commis-

sion ---------- 22
2. Since it is not a revocation, a suspension is not governed by cited statute. The Flamingo, Inc. v. Nebraska Liquor Control Commission ---------- 22
3. Liquor Control Commission is administrative agency within meaning of term as defined in cited statute, and is therefore governed by rules of administrative agencies. The Flamingo, Inc. v. Nebraska Liquor Control Commission ---------- 22
4. Right to appeal statutory and requirements of statute are mandatory and must be complied with before appellate court acquires jurisdiction of subject matter of action. The Flamingo, Inc. v. Nebraska Liquor Control Commission ---------- 22
5. City of metropolitan class operating under home rule charter may properly provide for use of its streets for private purposes under proper permit issued as provided by ordinance. Dunmar Inv. Co. v. Northern Nat. Gas Co. ---------- 400

Liens.

1. Cited section of Nebraska motor vehicle code establishes procedure by which lienor can secure interest in motor vehicle, and if such procedure is followed, then lienor's interest shall take priority, and on default, secured creditor given an absolute right to immediate possession of motor vehicle. Platte Valley Bank of North Bend v. Kracl ---------- 168
2. Rule as to marshaling assets has proper exceptions and limitations, and where, by reason of circumstances in particular case, it would be inequitable and work an injustice to require one of two creditors having lien on two securities to first resort to one on which other creditor has no lien, court of equity will not enforce doctrine of marshaling assets. Platte Valley Bank of North Bend v. Kracl ------ 168
3. Doctrine of marshaling assets will not be applied if it will hinder or impose hardships on paramount creditor, or inconvenience him in collection of debt, or deprive him of rights under contract. Platte Valley Bank of North Bend v. Kracl ---------- 168

Limitations of Actions.

1. Demurrer on ground of statute of limitations opens record pertaining to time action was commenced. Schmer v. Gilleland ---------- 54
2. Under the provisions of cited statute, after a

holding of unconstitutionality by Supreme Court, no action attacking enforcement of installment contract authorized by invalid statute may be brought or maintained unless it be raised within 1 year from effective date of decision or within 1 year from November 22, 1963, whichever is latest in time. Baker v. A. C. Nelson Co. ---------- 128

3. Where community of interest or privity of estate exists between intervener and other plaintiffs, suit commenced before expiration of statutory period inures to benefit of person who intervenes therein after time when action would be barred. Baker v. A. C. Nelson Co. ---------- 128

4. Where no community of interest or privity of estate exists between intervener and another party or parties to original action, commencement of action before statute of limitations has run does not inure to benefit of person who intervenes after time when action would be barred. Baker v. A. C. Nelson Co. -- 128

5. Cause of action pleaded by amendment ordinarily relates back to original pleading for limitation purposes, provided claimant seeks recovery on same general set of facts. Abbott v. Abbott ---------- 177

Marshaling Assets.

1. Equitable doctrine of marshaling assets rests upon basic principle that senior creditor who has two funds from which he may satisfy debt may not defeat junior creditor who may resort to only one of these assets. Platte Valley Bank of North Bend v. Kracl ---------- 168

2. Doctrine of marshaling assets not founded upon law of contract or liens but rather doctrine based in equity and designed to promote fair dealing and justice. Platte Valley Bank of North Bend v. Kracl 168

3. Rule as to marshaling assets has proper exceptions and limitations, and where, by reason of circumstances in particular case, it would be inequitable and work an injustice to require one of two creditors having lien on two securities to first resort to one on which other creditor has no lien, court of equity will not enforce doctrine of marshaling assets. Platte Valley Bank of North Bend v. Kracl ---------- 168

4. Doctrine of marshaling assets will not be applied if it will hinder or impose hardships on paramount creditor, or inconvenience him in collection of debt, or deprive him of rights under contract. Platte

Valley Bank of North Bend v. Kracl ---------- 168
5. Doctrine of marshaling assets not absolute right of litigant and generally may not be invoked or applied so as to defeat statutory rights. Platte Valley Bank of North Bend v. Kracl ---------- 168

Master and Servant.
1. In determining whether individual is servant as distinguished from independent contractor, under doctrine of respondeat superior, basic test is whether or not his physical conduct in performance of service is controlled or is subject to right of control. Sandrock v. Taylor ---------- 106
2. Employer cannot insulate himself against burdens of employer-employee relationship by contract that leaves him with control benefits of that relationship; nor can he escape his liability under doctrine of respondeat superior by contract that expressly provides that workman is independent contractor, if in fact, under entire contract, workman only possesses same independence that employees in general enjoy. Sandrock v. Taylor ---------- 106
3. Employer not insurer of safety of appliances which he furnishes; if he exercises reasonable care which prudent man would ordinarily take for own safety, under like circumstances, in furnishing employees with instruments reasonably safe for particular purpose for which used, he has fulfilled whole duty in that respect. Lyons v. Wagner ---------- 214
4. Mere expression of opinion by employer not assurance of safety that will absolve employee from assumption of risk. Lyons v. Wagner ---------- 214
5. Where agreement provides for bonus for continuous service which is terminated by employer through no fault of employee, latter is entitled to proportionate share of bonus according to time served; where, however, employee voluntarily quits or is discharged for reason attributable to own fault, there is no right to recover any part of bonus. Sinnett v. Hie Food Products, Inc. ---------- 221
6. Measure of damages in suit for breach of contract for personal services is amount of salary agreed upon for period involved less amount which servant earned or, with reasonable diligence, might have earned from other employment during period. Ridenour v. Kuker ---------- 321
7. Where contract of employment is for indefinite

term, but is not hiring at will, in event of wrongful discharge employee entitled to reasonable time in which to find other employment or go into business for himself. Ridenour v. Kuker ---------- 321

Mistake.

Mere mistake or miscalculation of party or his attorneys not sufficient, in itself, to warrant refusal to set aside default judgment, when there is good defense pleaded or proved and no change of position or substantial prejudice will result from permitting trial on merits. Beliveau v. Goodrich ---------- 98

Mortgages.

1. Equitable doctrine of marshaling assets rests upon basic principle that senior creditor who has two funds from which he may satisfy debt may not defeat junior creditor who may resort to only one of these assets. Platte Valley Bank of North Bend v. Kracl ---------- 168
2. Upon default, secured party may enforce his security interest by any available judicial procedure. Platte Valley Bank of North Bend v. Kracl ---------- 168
3. Under article 9, U. C. C., a secured creditor under mortgage of motor vehicle given, on default, statutory right to immediate possession of motor vehicle. Platte Valley Bank of North Bend v. Kracl -------- 168
4. Whether deed absolute in form is mortgage depends upon intention of parties; their intention may be evidenced not only by document in question but also by declarations and conduct. Davison v. Inselman 236
5. Evidence to prove deed absolute in form is mortgage must be clear and convincing. Davison v. Inselman ---------- 236

Motions, Rules, and Orders.

1. Trial court has broad discretion in ruling upon discovery motion, but such motion should be granted where required by interests of justice. State v. Davis ---------- 433
2. Decree of county court determining heirs of decedent and directing distribution to persons so determined is final appealable order. Berger v. Berger 702
3. Unless debts, allowances, expenses, and taxes have been paid or provided for, no heir, devisee, or legatee is entitled to decree of distribution, partial or complete, unless bond provided for in cited statute

has been given. Berger v. Berger ---------- 702
4. When motion made at close of all evidence for directed verdict, which motion should have been sustained but was overruled and case submitted to jury which returned verdict contrary to motion, and thereafter motion for judgment notwithstanding verdict duly filed, it is duty of court to sustain motion and render judgment in accordance with motion for directed verdict. Weichel v. Lojka ---------- 819

Municipal Corporations.
1. Where alley vacated by city council of first-class city, alley reverts to owner of adjacent real estate one-half on each side thereof. Seefus v. Briley --- 202
2. Subsurface use of public thoroughfare, which does not interfere with public use, which is subject to termination by city, and which is of such limited nature as not to be of general public interest, not proper subject for franchise. Dunmar Inv. Co. v. Northern Nat. Gas Co. ---------- 400
3. City of metropolitan class operating under home rule charter may properly provide for use of its streets for private purposes under proper permit issued as provided by ordinance. Dunmar Inv. Co. v. Northern Nat. Gas Co. ---------- 400
4. Under provisions of Constitution, home rule charter must be consistent with and subject to Constitution and laws. City of Millard v. City of Omaha ---- 617
5. Powers conferred under home rule charter effective only as to matters of purely municipal concern and ineffective as to matters of concern to others or to state generally. City of Millard v. City of Omaha 617
6. Municipal corporations are legislative creations and as such, subject to dissolution by legislative action. City of Millard v. City of Omaha ---------- 617
7. Constitutional provision prohibiting amendment or repeal of home rule charter except by electoral vote intended as restriction on powers of municipality, but not as restriction on powers of Legislature in annexation matters. City of Millard v. City of Omaha ---------- 617
8. To construe cited Article of Constitution as restricting legislative powers would conflict with constitutional provisions prohibiting local or special legislation and laws denying equal protection of laws. City of Millard v. City of Omaha ---------- 617
9. Annexation of one city by another in manner pro-

vided by law not denial of equal protection of law or of due process of law although it be effected without consent of inhabitants of annexed city. City of Millard v. City of Omaha ---------- 617

10. Generally, city may annex territory that is also part of territory of district or public corporation formed for limited purpose. Airport Authority of City of Millard v. City of Omaha ---------- 623

11. Annexation of city which has established airport authority includes authority. Airport Authority of City of Millard v. City of Omaha ---------- 623

12. When city which has established airport authority annexed by metropolitan city, by operation of law debts and obligations of authority become debts and obligations of metropolitan city. Airport Authority of City of Millard v. City of Omaha ---------- 623

13. Where provisions of zoning ordinance as to uses of property which are permitted are expressed in common words without enlargement, restriction, or definition, they are to be interpreted according to generally accepted meaning. Dewey v. Montesorri Educational Center, Inc. ---------- 791

Negligence.

1. Rule that one of two negligent persons causing injury to third where negligence of one is active and primary and other passive and secondary, and permitting contribution or indemnity against one guilty of active negligence, has no application where negligence of each founded on separate and distinct acts of negligence and no way exists to determine relative degrees of negligence of each. Farmers Elevator Mut. Ins. Co. v. American Mut. Ins. Co. ---------- 4

2. Foresight, not retrospect, is standard of negligence; act which prudent men, exercising reasonable care under circumstances, would not forsee or anticipate might endanger or injure another is not negligence. Lock v. Packard Flying Service, Inc. ---------- 71

3. Causal connection is broken if between defendant's negligent act and plaintiff's injury there has intervened negligence of third person who had full control of situation and whose negligence was such as defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in injury to plaintiff. Lock v. Packard Flying Service, Inc. ---------- 71

4. Injury that could not have been foreseen or reasonably anticipated as probable result of negligence is not actionable, nor is injury that is not natural consequence of negligence complained of, and would not have resulted from it, but for interposition of some new, independent cause that could not have been anticipated. Lock v. Packard Flying Service, Inc. ---------- 71
5. When evidence with relation to negligence is such that minds may reasonably reach different conclusions therefrom, issue should be submitted to jury for determination. Johnson v. Riecken ---------- 78
Gillotte v. Omaha Public Power Dist. ---------- 296
6. When evidence is in conflict as to what negligence, if any, constituted proximate cause of injury, determination of proximate cause is for jury. Johnson v. Riecken ---------- 78
7. Proper measure of duty of hospital to patient is exercise of degree of care, skill, and diligence used by hospitals generally in community where hospital is located or in similar communities. Foley v. Bishop Clarkson Memorial Hospital ---------- 89
8. Proof of violation of hospital standards or regulations not conclusive on question of negligence, but is simply evidence of negligence. Foley v. Bishop Clarkson Memorial Hospital ---------- 89
9. Hospital must guard, not only against patient's known physical and mental conditions but also against such conditions as should have discovered by exercise of reasonable care. Foley v. Bishop Clarkson Memorial Hospital ---------- 89
10. Where no evidence of relationship between driver of automobile and passenger other than that of gratuitous social host and guest, mere fact that trip is for passenger's benefit and that he happens to have business purpose, does not make driver controlled agent and passenger controlling principal; and negligence of driver not ordinarily imputable to passenger. Sandrock v. Taylor -------- 106
11. Employer not insurer of safety of appliances which he furnishes; if he exercises reasonable care which prudent man would ordinarily take for own safety, under like circumstances, in furnishing employees with instruments reasonably safe for particular purpose for which used, he has fulfilled whole duty in that respect. Lyons v. Wagner ---------- 214
12. Mere expression of opinion by employer not assur-

ance of safety that will absolve employee from assumption of risk. Lyons v. Wagner ---------- 214

13. Power companies engaged in transmission of electricity charged with duty of exercising very high degree of care to safeguard those whose lawful activity exposes them to risk of inadvertent contact with electric lines. Gillotte v. Omaha Public Power Dist. ---------- 296

14. Electric companies not insurers and not liable for injuries in absence of negligence. Gillotte v. Omaha Public Power Dist. ---------- 296

15. Where circumstances such that probability of danger to persons having right to be near electric line reasonably foreseeable, power company may be liable for negligence even though specific injury might not be foreseeable. Gillotte v. Omaha Public Power Dist. 296

16. In absence of notice of knowledge to contrary, pedestrian making normal use of public sidewalk, night or day, has right to assume that it is in reasonably safe condition, and while he must use ordinary care for personal safety and make reasonable use of faculties to avoid injury to himself, he is not required to keep eyes fixed on ground or to be on constant lookout for danger. Crosswhite v. City of Lincoln ---------- 331

17. In operating water system city acts in proprietary capacity and is liable for negligence to same extent as private corporation engaged in same business. Crosswhite v. City of Lincoln ---------- 331

18. Supply or service line from water main to property of consumer, including stop box constructed and maintained in public sidewalk, is part of water system of city which it must construct and maintain in reasonably safe condition for protection of public. Crosswhite v. City of Lincoln ---------- 331

19. Abutting landowner may be subject to liability for dangerous condition of portions of public sidewalk which have been altered or constructed for benefit of his property and which serve use independent of and apart from ordinary and customary use for which sidewalks designed. Crosswhite v. City of Lincoln ---------- 331

20. Where persons are injured by dangerous sidewalk condition created and maintained subject to joint control of city and abutting landowner, and where condition maintained for benefit of proprietary business operated by city, and is also for benefit of

property of abutting landowner, city and abutting landowner are joint or concurrent tort-feasors and each is directly liable for his own wrong. Crosswhite v. City of Lincoln ---------- 331

21. Where contributory negligence an issue under pleadings and evidence, court should give adequate instruction as to contributory negligence, and as to comparative negligence rule. Snyder v. Fort Kearney Hotel Co., Inc. ---------- 476

22. If injury or damage to property owner or to member of household results primarily and directly from act of trespass, trespasser liable therefor even though act not negligent or willful. Connolley v. v. Omaha Public Power Dist. ---------- 501

23. Trespass to land does not make trespasser insurer of landowner and members of household for injuries or damages which may be secondary, indirect, or consequential result of trespass. Connolley v. Omaha Public Power Dist. ---------- 501

24. Action in tort or negligence, known at common law as trespass on case, is proper action to recover for secondary, indirect, or consequential injuries or damages resulting from trespass. Connolley v. Omaha Public Power Dist. ---------- 501

25. Trespass on case action recovery based on negligence; in such case contributory negligence, assumption of risk, and other defenses common to tort actions may be relied on by trespasser. Connolley v. Omaha Public Power Dist. ---------- 501

26. Trespass which merely produces condition cannot be considered to be proximate cause of accident which would not have occurred except for subsequent independent act of third person; where reasonable minds could not differ on facts adduced it is duty of court to decide issue and not submit it to jury. Connolley v. Omaha Public Power Dist. ---------- 501

27. In Nebraska violation of statute not negligence per se but evidence for jury to consider in determination of ultimate issues of negligence or contributory negligence. Piper v. Hill ---------- 568

28. Mere stalling of motor vehicle temporarily on highway caused by some disablement, does not ipso facto constitute negligence as matter of law, but failure to remove stalled vehicle within reasonable time may constitute negligence. Piper v. Hill ---- 568

29. Guest may be guilty of contributory negligence, or assumption of risk, by riding or continuing to ride

with driver who he knows, or in exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate vehicle with proper prudence and skill. Raskey v. Hulewicz -------- 608

30. One who attempts to cross street between intersections without looking for approaching traffic guilty of such negligence as will bar recovery as matter of law. Matson v. Dawson ---------- 686

31. When one in place of safety sees or could have seen approach of moving vehicle in close proximity and suddenly moved from place of safety into path of such vehicle and is struck, conduct constitutes contributory negligence of such degree as to preclude recovery. Matson v. Dawson ---------- 686

32. Where facts adduced to sustain issue of negligence such that reasonable minds can draw but one conclusion therefrom, it is court's duty to decide question as matter of law, rather than submit it to jury for determination. Stewart v. Ritz Cab Co. -- 692

33. Relationship of subsequent independent act of third person to proximate cause discussed. Weichel v. Lojka ---------- 819

New Trial.

1. Motion for new trial ordinarily addressed to sound discretion of trial court and not subject to review absent abuse of discretion. Schmer v. Gilleland -- 54
Lechliter v. State ---------- 527

2. District court has power and is required to consider and determine motions for new trial by exercise of judicial discretion. Webster v. Halbridge -- 409

3. Supreme Court will not ordinarily disturb trial court's order granting new trial, and not at all unless clearly appears that no tenable ground existed therefor. Webster v. Halbridge ---------- 409
Lechliter v. State ---------- 527

4. Where any one of several errors assigned not in itself sufficient to warrant reversal, all of them in aggregate establish that defendant did not have fair trial, then duty of court to award new trial. State v. Davis ---------- 433

Parent and Child.

1. In determining provisions to be made for support of minor children in divorce proceeding, their status and situation, and all other attendant circumstances, should be considered, and an amount determined in

accordance with best judgment and sound discretion of court. Rubottom v. Rubottom ---------- 39
2. Rule stated for increasing or decreasing child support payments where change of circumstances exists. Rubottom v. Rubottom ---------- 39
3. Decree of district court in divorce action, insofar as minor children concerned, never final in sense that it cannot be changed; such decree is at all times subject to review and adjustment in light of changed conditions regardless of particular language of award. Rubottom v. Rubottom ---------- 39
4. Allowance made for support and maintenance of minor child in divorce proceeding should be fair and reasonable under circumstances of each particular case. Rubottom v. Rubottom ---------- 39
5. Court may terminate parental rights when it finds such action to be in best interests of child, and it appears from evidence that parent has substantially and continuously or repeatedly neglected child and refused to give child necessary parental care and protection, or parent is unfit by reason of debauchery or repeated lewd and lascivious behavior, which conduct is found by court to be seriously detrimental to health, morals, or well-being of child. Mingus v. Stuchlick ---------- 139
6. Fact that trial judge heard and observed parties and witnesses is important consideration in determining weight and significance of testimony in custody proceeding. Mingus v. Stuchlick ---------- 139
7. Where parental unfitness established, court's sole concern is welfare of children. Mingus v. Stuchlick 139
8. If circumstances of parties change or if in best interests of child, court may from time to time either on motion of parties or on own motion revise or alter custody provisions of divorce decree. Costello v. Costello ---------- 396
Berigan v. Berigan ---------- 411
9. Court should change custody when it finds such action to be in best interests of child and it appears from evidence that parent having custody has subjected child to such disturbing and unsettling conditions as could be seriously detrimental to health, morals, and well-being of child. Costello v. Costello 396
10. Proper regard for welfare of children requires parent to refrain from conduct which would reflect on him and produce harmful effects upon children. Berigan v. Berigan ---------- 411

11. Proper rule in divorce case, where custody of minor children involved, is that custody of child to be determined by best interests of child, with due regard for superior rights of fit, proper, and suitable parents. Berigan v. Berigan ---------- 411
12. Natural rights of parent to custody of child are not absolute; must yield to best interests of child where preferential rights have been forfeited. Berigan v. Berigan ---------- 411
13. Court's discretion is broad and not limited to a choice between parents. Berigan v. Berigan ---- 411
14. Change of circumstances, which will permit modification of divorce decree relating to child custody, includes those not known to court and opposing party at time of entry of decree and which could not have been discovered by exercise of reasonable diligence at time of entry of original decree. Fisher v. Fisher 469
15. Discovery of material facts which existed but were unknown to court and opposing party and could not have been ascertained with reasonable diligence, which, if known to court, might have warranted entry of different decree, are changed circumstances which court will consider in application for change of child custody. Fisher v. Fisher ---------- 469
16. Whether or not birth of illegitimate child after separation of parties of itself makes mother unfit person to have care and custody of child of marriage dependent on facts and circumstances of each particular case to be considered in connection with determination of best interests of child. Fisher v. Fisher 469
17. Judicial discretion of trial court with respect to changing custody of minor children of broken marriage will not ordinarily be disturbed unless there is clear abuse of judicial discretion or it is clearly against weight of evidence. Fisher v. Fisher ---- 469
18. Measure of damages for wrongful death of child stated. Westring v. Schwanke ---------- 579
19. Legal obligation of adult child to support parents prescribed by statute and cannot be enforced in action against third person. Westring v. Schwanke 579

Parties.

1. Essential in action for declaratory judgment that there be justiciable issue and that all interested persons be before court before declaratory judgment may be granted; when these conditions met, court authorized to enter such judgment. Baker v. A.

C. Nelson Co. ---------- 128
2. Where community of interest or privity of estate exists between intervener and other plaintiffs, suit commenced before expiration of statutory period inures to benefit of person who intervenes therein after time when action would be barred. Baker v. A. C. Nelson Co. ---------- 128
3. Where no community of interest or privity of estate exists betwen intervener and another party or parties to original action, commencement of action before statute of limitations has run does not inure to benefit of person who intervenes after time when action would be barred. Baker v. A. C. Nelson Co. ---------- 128
4. Generally suit cannot be maintained by taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed, each taxpayer must bring action on own behalf. State ex rel. Sampson v. Kenny ---------- 230
5. Action may not be maintained as class action by plaintiff on behalf of himself and others unless he has power as member of class to satisfy judgment on behalf of all members of class. State ex rel. Sampson v. Kenny ---------- 230
6. General rule is that plaintiff in class action must have interest in controversy common with those for whom he sues and there must be that unity of interest between them that action might be brought by them jointly. Evans v. Metropolitan Utilities Dist. ---------- 464
7. Persons having interest adverse to those of parties purported to be represented cannot maintain representative or class suit on behalf of latter. Evans v. Metropolitan Utilities Dist. ---------- 464
8. Statute requires every action be prosecuted in name of real party in interest. Scholting v. Alley 549
9. Courts will not entertain controversy as to title or right of possession of real or personal property, except at instance of some person having or claiming right thereto. Scholting v. Alley ---------- 549
10. Taxpayer of metropolitan city has no right to intervene in annexation proceedings when proper procedures followed. Airport Authority of City of Millard v. City of Omaha ---------- 623

Payment.

1. Where services furnished and knowingly accepted,

law implies promise on recipient's part to pay reasonable value of services. Bush v. Kramer 1
2. Where benefits received and retained under such circumstances that it would be inequitable and unconscionable to permit party receiving benefits to avoid payment therefor, law requires party receiving and retaining benefits to pay reasonable value of them. Bush v. Kramer 1
3. Fact that contract provides for payment of liquidated damages for breach of promise is not bar to specific enforcement; where contract provides for such payment as true alternative performance, promisor's election to pay this price will prevent specific enforcement of alternative against him. Albers v. Koch 25

Pleadings.
1. Objection to jurisdiction of court over person of nonresident defendants timely made if asserted after dismissal of action as to resident defendant and before any further appearance. Plantz v. Armbrust 37
2. As general rule, pleadings containing admission are admissible against pleader in another action on behalf of stranger to former action. Johnson v. Riecken 78
3. Admissions made by next friend or guardian ad litem in pleadings filed for infant are not ordinarily admissible against infant. Johnson v. Riecken 78
4. Where judgment entered by default and prompt application made at the same term to set it aside, with tender of answer or other proof disclosing meritorious defense, court should on reasonable terms sustain motion and permit cause to be heard upon merits. Beliveau v. Goodrich 98
5. Tender of answer not absolute requirement and independent proof may, in discretion of court, be permitted to resolve question of possible dilatory or frivolous nature of defense. Beliveau v. Goodrich 98
6. Either party to divorce action may within 6 months of date of entry of decree make application to have decree set aside or modified. Lawson v. Lawson 164
7. Automatic finality of divorce decree at end of 6 months stayed where proceedings for vacation or modification are then pending. Lawson v. Lawson 164
8. Cause of action pleaded by amendment ordinarily relates back to original pleading for limitation purposes, provided claimant seeks recovery on same general set of facts. Abbott v. Abbott 177

9. Party claiming that law of another state applicable should allege facts which make foreign law applicable and substance of law relied upon. Midland-Ross Corp. v. Swartz ---------- 484
10. Right to introduce evidence depends upon there being issue of fact raised by pleadings to which evidence is relevant. Midland-Ross Corp. v. Swartz 484
11. Allegation that promissory note executed as accommodation maker or surety without consideration does not state defense where pleadings show that other maker was party accommodated and received consideration for note. Midland-Ross Corp. v. Swartz 484

Post Conviction.
1. Post conviction petitioner has burden of establishing basis for relief. Harris v. Sigler ---------- 483
2. Grounds for post conviction relief because of ineffective assistance of counsel stated. State v. Moss 536
3. Unless miscarriage of justice shown, post conviction remedy not available for reconsideration of questions that were determined by Supreme Court. State v. Agnew ---------- 716
4. Post Conviction Act specifically authorizes trial court to examine files and records and to determine whether or not prisoner may be entitled to relief he seeks; if trial court finds from such examination that proceeding is without foundation, an evidentiary hearing may be properly denied. State v. LaPlante 816
5. Motion to vacate judgment and sentence under Post Conviction Act cannot be used as substitute for appeal or to secure further review of issues already litigated. State v. LaPlante ---------- 816

Powers.
1. To be effective, each item appearing in legislative appropriation bill which is increase over budget submitted to Legislature by Governor must receive two-thirds vote on final passage. State ex rel. Meyer v. State Board of Equalization & Assessment ------ 490
2. Under all constitutional governments recognizing three distinct and independent magistracies, control of purse strings of government is legislative function; indeed, it is extreme legislative prerogative, indispensable to independence and integrity of Legislature, and not to be surrendered or abridged, save by Constitution itself, without disturbing balance of system and endangering liberties of people. State

ex rel. Meyer v. State Board of Equalization & Assessment ---------- 490

3. Right of Legislature to control public treasury, to determine sources from which public revenue shall be derived and objects upon which it shall be expended, to dictate time, manner, and means, both of collection and disbursement, is firmly and inexpugnably established in our political system. State ex rel. Meyer v. State Board of Equalization & Assessment ---------- 490

4. Legislature has plenary or absolute power over appropriations; may make them upon such conditions and with such restrictions as it pleases within legal and reasonable limits; cannot, however, through power of appropriation exercise or invade constitutional rights and powers of executive branch of government. State ex rel. Meyer v. State Board of Equalization & Assessment ---------- 490

Principal and Agent.

1. Unless otherwise agreed, agent is subject to duty to principal to act solely for benefit of principal in all matters connected with agency. Allied Securities, Inc. v. Clocker ---------- 524

2. Unless otherwise agreed, agent subject to duty not to deal with principal as adverse party in transaction connected with agency without principal's knowledge; burden of proof upon agent to show that he has satisfied duty. Allied Securities, Inc. v. Clocker ---------- 524

3. Principal whose agent has violated duties may properly refuse to pay compensation. Allied Securities, Inc. v. Clocker ---------- 524

4. Requirement for specific enforcement of postemployment restraints in covenants ancillary to employment contracts is that restraints be reasonable. Farmers Underwriters Assn. v. Eckel ---------- 531

5. Courts considering specific postemployment restraints strike balance among competing interests of principal and agent; balancing accommodates public interest in productive principal-agent relationships and in freedom of individual to earn living. Farmers Underwriters Assn. v. Eckel ---------- 531

6. When contract creating independent contractor limited to some particular object or accomplishment of some particular transaction, independent contractor status is terminated by completion of

transaction for accomplishment of which it was created. Weichel v. Lojka ---------- 819

Privileged Communications.

1. Reports of mercantile agencies, published in good faith and based upon probable cause, subject to qualified or conditional privilege, and ordinarily not subject to defamation action. Bartels v. Retail Credit Co. ---------- 304
2. Publication loses character as privileged and is actionable if motivated by express or actual malice of if there is such gross disregard of rights of person injured as is equivalent to malice in fact. Bartels v. Retail Credit Co. ---------- 304
3. To be privileged, mercantile agency's representatives must act impartially and in good faith, carefully evaluating all information before disseminating any defamatory statements to subscribers. Bartels v. Retail Credit Co. ---------- 304
4. Impartiality and good faith requires mercantile agency's representatives to make thorough and complete investigation and to fully and accurately report information only from reliable sources. Bartels v. Retail Credit Co. ---------- 304

Probable Cause.

1. Law enforcement officer may arrest, without process, person who he has reasonable cause to believe is guilty of felony and may detain him for reasonable time until warrant procured; such officer justified in so doing even though has no personal knowledge of guilt of accused if officer in good faith acted upon information received from others upon whom he had reason to rely although it should be subsequently discovered that one arrested was not guilty. Wilson v. Gutschenritter ---------- 311
2. When evidence conflicting, question whether officer had reasonable ground for believing person arrested had committed felony is for jury under proper instructions; but when facts are admitted or undisputed, probable cause is question of law for court. Wilson v. Gutschenritter ---------- 311
3. Probable cause defined. Wilson v. Gutschenritter -- 311

Probation and Parole.

1. In determining whether or not to set aside probationary order and impose penalty where violation

established or admitted, trial court not limited to consideration of probative evidence of matters arising subsequent to order of probation. State v. Nevells ---------- 58

2. Proceeding for revocation of order of probation may be instituted by filing of proper motion and affidavit, and issuance of warrant. State v. Washa 639

3. Period during which probationer remains away from jurisdiction of court may be added to period of probation. State v. Washa ---------- 639

Property.

1. Where alley vacated by city council of first-class city, alley reverts to owner of adjacent real estate one-half on each side thereof. Seefus v. Briley -- 202

2. Where plat of lands conveyed adequately referred to in deed, usually it is to be considered as part of latter instrument and construed in connection therewith; and courses, distances, and other particulars which appear on such plat are, as general rule, to be construed as true description of land conveyed. Seefus v. Briley ---------- 202

3. Conveyance of tract of land by description shown on plat which has been vacated includes interest in one-half of adjacent alley which has been vacated, in absence of express intention to contrary shown in conveyance. Seefus v. Briley ---------- 202

4. Where owner of lot abutting on alley, which was vacated during ownership, conveyed lot by conveyance which describes lot by block and number, and contained no reservation of rights in alley, conveyance transfers fee to centerline of abutting portion of vacated alley, even though conveyance also described lot by metes and bounds description which did not include any part of alley and used edge of alley as boundary. Seefus v. Briley ---------- 202

5. We interpret cited statute to mean that after possibilities of reverter or right of entry or reetntry for breach of condition subsequent are created, they cannot be thereafter conveyed or devised and must terminate within 30 years. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358

6. Where there has been an honest effort to comply, conditions subsequent should be liberally construed to avoid forfeiture. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358

7. Whenever same person acquires fee simple estate

and lesser estate in same property, lesser estate destroyed by or merged in fee simple estate. Niemann v. Zacharias ---------- 450
8. One cannot be owner of interest in property and also donee of power to appoint that interest. Niemann v. Zacharias ---------- 450
9. Courts will not entertain controversy as to title or right of possession of real or personal property, except at instance of some person having or claiming right thereto. Scholting v. Alley ---------- 549
10. Improvements which become part of real estate may not be removed and do not become property of lessee in absence of agreement, express or implied, or valid statute granting such right. State v. Bardsley 629

Public Administrative Bodies.
1. Lack of notification to public concerning special meeting of county board to call election upon initiative petition under cited statutes insufficient to invalidate resulting election. Shadbolt v. County of Cherry ---------- 208
2. Whether county board shall issue bonds for purpose of paying cost of acquiring existing facilities for county community hospital or purchasing site and constructing thereon county community hospital and purchasing suitable equipment for same is single proposition. Shadbolt v. County of Cherry ------ 208

Public Lands.
1. Rights of lessee of school land determined by law as it was at time lease was made and lessee may not be deprived of any substantial right resulting from lease in his favor by subsequent legislation; likewise, trustee of public school lands may not convey any interest in such lands without adequate compensation. State v. Bardsley ---------- 629
2. Cited section declared valid and constitutional by State ex rel. Belker v. Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156, provides that school lands in Nebraska 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 land is located, to highest bidder. Bessey v. Board of Educational Lands & Funds ---------- 801
3. Statute providing for sale of school land, now in full force and effect, authorizes the Board of Edu-

cational Lands and Funds to resell property only in event that highest bidder fails to pay balance of purchase price in 90 days. Bessey v. Board of Educational Lands & Funds ---------- 801

Public Officers and Employees.

1. Police officer, when there is just cause, must not only impound vehicle from public highway for its own protection, but should inventory contents to safeguard owner and protect against false claims of loss. State v. Wallen ---------- 44
2. Police officer may use such force as is reasonably necessary to perform official duties in enforcement of law; exercise of force in excess of that reasonably necessary under circumstances may give rise to charge of assault and battery. Wilson v. Gutschenritter ---------- 311
3. Where office newly created by legislative action, term begins when office first filled. Garrotto v. McManus ---------- 644
4. Officer appointed to fill vacancy created by legislative act creating new office takes and enters upon term of his own. Garrotto v. McManus ---------- 644

Public Records.

1. Ancient document rule states that original or authentic copy of document which appears to be at least 30 years old, found in proper custody, appearing unblemished by alterations, and otherwise free from suspicion, is admissible in evidence without direct proof of execution. State v. Parks ---------- 794
2. If petition duly presented to proper tribunal praying for public road from one point to another in county and such petition granted and road located and opened for travel and used by public generally, right in public will become complete after 10 years and court will not look at original proceedings to determine validity of road but to ascertain extent of location. State v. Parks ---------- 794

Public Utilities.

1. In operating water system city acts in proprietary capacity and is liable for negligence to same extent as private corporation engaged in same business. Crosswhite v. City of Lincoln ---------- 331
2. Supply or service line from water main to property of consumer, including stop box constructed

and maintained in public sidewalk, is part of water system of city which it must construct and maintain in reasonably safe condition for protection of public. Crosswhite v. City of Lincoln ---------- 331

Right to Counsel.

Appointment of counsel and arraignment of defendant on same day do not show lack of effective assistance by counsel where facts and circumstances of offense were such that investigation by counsel was not required and plea of guilty appropriate. State v. Kennedy ---------- 415

Sales.

1. Supplying of heat and cold by means of circulated steam and refrigerated water does not constitute sale of gas or water. Dunmar Inv. Co. v. Northern Nat. Gas Co. ---------- 400
2. When seller, to which goods that are not resaleable are returned, salvages such goods and credits buyer with reasonable value of salvaged goods, seller is acting in good faith to mitigate damages in manner sanctioned by code. Chicago Roller Skate Mfg. Co., Inc. v. Sokol Manuf. Co. ---------- 515
3. Where seller salvages returned nonresaleable goods, measure of damages controlled by cited section, and seller entitled to recover lost profits together with expense or cost incurred in salvaging goods. Chicago Roller Skate Mfg. Co., Inc. v. Sokol Manuf. Co. 515

Schools and School Districts.

1. Mandatory duty of county superintendent where conditions precedent in cited statute exist, unless valid waiver has been given, to take action to dissolve school district involved and to attach territory to another district or districts. Chappell v. Carr ---------- 158
2. Unless county school district reorganization committee acts promptly on petitions presented to it under provisions of cited statute, or unless on its failure to act interested parties within reasonable time institute proceedings to force action, reorganization committee will lose jurisdiction to act on those petitions. Chappell v. Carr ---------- 158
3. Ordinarily, when statute specifies time or date when proceeding creating or altering school districts shall become effective, status of districts affected

remains unchanged until such time or date. School Dist. of Bellevue v. Strawn ---------- 392
4. On completion of merger of one school district, or portion of one, with another, merging district, or part of district, loses former identity; it is dissolved, abolished, and ceases to have separate existence. School Dist. of Bellevue v. Strawn ------ 392
5. School or educational institution is place in which persons are instructed in arts and process or manner of training youths for stations in life. Dewey v. Montesorri Educational Center, Inc. ---------- 791

Searches and Seizures.
1. If arrest of automobile owner or impoundment of his vehicle resorted to as device and pretext for making general exploratory search of automobile without required search warrant, evidence of crime found during taking of inventory will be suppressed. State v. Wallen ---------- 44
2. Whether or not inventory of contents of impounded automobile of person in custody was reasonable and lawful inventory procedure or unauthorized exploratory search is factual question to be determined by court on motion to suppress. State v. Wallen ---------- 44
3. In passing on validity of search warrant, court may consider only information brought to attention of magistrate. State v. LeDent ---------- 380
4. Affidavits for search warrants must be tested in a common sense, realistic fashion. State v. LeDent 380
5. In passing on validity of search warrant, court may consider only information brought to attention of magistrate. State v. Waits ---------- 780
6. For affidavit of tip from informant to be sufficient, magistrate must be informed of (1) some of underlying circumstances from which informant concluded that narcotics were located where claimed, and (2) some of underlying circumstances from which officer concluded that informant was credible. State v. Waits ---------- 780
7. Affidavits for search warrants must be tested in common sense, realistic fashion. State v. Waits -- 780
8. If affidavit recites some of circumstances, where reason for crediting source of information is given, and when magistrate has found probable cause, courts should not invalidate warrant by interpreting affidavit in hypertechnical, rather than common

sense, manner. State v. Waits 780
9. In examining question of sufficiency of affidavit to support issuance of search warrant, resolution of doubtful or marginal cases should be largely determined by preference to be accorded to warrants. State v. Waits 780
10. Search must be one directed in good faith toward objects specified in warrant or for other means and instrumentalities by which crime charged had been committed. State v. Waits 780
11. When officers, in course of bona fide effort to execute valid search warrant, discover articles which, although not included in warrant, are reasonably identifiable as contraband, they may seize them whether they are initially in plain sight or come into plain sight subsequently as result of officers' efforts. State v. Waits 780

Self Defense.

Defendant may lawfully do in another's defense what such other might lawfully do in his own defense, but no more. State v. Washington 329

Sentences.

1. Where sentence imposed within statutory limits it will not be disturbed in absence of abuse of discretion. State v. Whitaker 57
State v. Duncan 227
State v. Burnside 234
State v. Denbo 348
State v. Arguello 351
State v. Cunningham 488
State v. Barker 659
State v. Martin 699
2. Where two possible statutory penalties for first degree murder, one death penalty, and penalties may be applied either by court or by jury, whichever determines guilt, statute does not unconstitutionally discourage assertion of Fifth or Sixth Amendment rights. State v. Alvarez 557
3. Although otherwise voluntary plea of guilty partially motivated by expectation that penalty imposed by court on such plea would be less than, or different from, penalty imposed by jury upon conviction, guilty plea does not become involuntary solely because sentence of court not one expected. State v. Alvarez 557

4. Plea discussions and agreements in criminal cases, under proper and appropriate conditions, not objectionable; proper plea negotiations and agreements fully carried out do not ordinarily render plea of guilty involuntary merely because sentence not one anticipated. State v. Alvarez ---------- 557
5. Lack of specific statutory standards by which jury determines penalty between death and life imprisonment does not violate due process. State v. Alvarez 557

Specific Performance.
1. Remedy of restitution for breach of contract available to plaintiff only in case defendant's breach is total; slight breach does not terminate duty of injured person unless nonperformance of express condition requires that result. Albers v. Koch ------ 25
2. Specific performance may properly be decreed in spite of minor breach by plaintiff, the breach involving no substantial failure of exchange for performance to be compelled. Albers v. Koch ----- 25
3. Fact that contract provides for payment of liquidated damages for breach of promise is not bar to specific enforcement; where contract provides for such payment as true alternative performance, promisor's election to pay this price will prevent specific enforcement of alternative against him. Albers v. Koch ---------- 25

Statute of Limitations.
1. Equitable doctrine of estoppel in pais may, in proper case, be applied to prevent fraudulent or inequitable resort to statute of limitations and defendant may, by representations, promises, or conduct be so estopped where other elements of estoppel are present. State Farm Mut. Auto. Ins. Co. v. Budd 343
2. One cannot justly or equitably lull adversary into false sense of security, and thereby cause him to subject claim to bar of statute of limitations, and then be permitted to plead very delay caused by his conduct as defense to action when brought. State Farm Mut. Auto. Ins. Co. v. Budd ---------- 343

Statutes.
1. Words "suspension" and "revocation" not synonymous, suspension normally means temporary cessation but with expectation or purpose of resumption, revocation implies permanent termination and

when used within statute imports finality. The Flamingo, Inc. v. Nebraska Liquor Control Commission ---------- 22

2. Since it is not a revocation, a suspension is not governed by cited statute. The Flamingo, Inc. v. Nebraska Liquor Control Commission ---------- 22

3. Liquor Control Commission is administrative agency within meaning of term as defined in cited statute, and is therefore governed by rules of administrative agencies. The Flamingo, Inc. v. Nebraska Liquor Control Commission ---------- 22

4. Right to appeal statutory and requirements of statute are mandatory and must be complied with before appellate court acquires jurisdiction of subject matter of action. The Flamingo, Inc. v. Nebraska Liquor Control Commission ---------- 22

5. Statutory phrase "without giving compensation therefor" indicates intention not to limit compensation to persons specifically paying for transportation in cash or equivalent, or to require that it pass exclusively from passenger to driver. Johnson v. Riecken ---------- 78

6. Statute purporting to authorize installment contract that is subject of this action was declared unconstitutional and thereby makes applicable provisions of cited statute. Baker v. A. C. Nelson Co. 128

7. Under the provisions of cited statute, after a holding of unconstitutionality by Supreme Court, no action attacking enforcement of installment contract authorized by invalid statute may be brought or maintained unless it be raised within 1 year from effective date of decision or within 1 year from November 22, 1963, whichever is latest in time. Baker v. A. C. Nelson Co. ---------- 128

8. Where legislative act complete in itself is repugnant to or in conflict with prior statute which is not referred to nor repealed by latter, earlier statute is repealed or modified by implication by later act, but only to extent of repugnancy or conflict. Connor v. City of Omaha ---------- 146

9. Mandatory duty of county superintendent where conditions precedent in cited statute exist, unless valid waiver has been given, to take action to dissolve school district involved and to attach territory to another district or districts. Chappell v. Carr ---------- 158

10. Unless county school district reorganization com-

mittee acts promptly on petitions presented to it under provisions of cited statute, or unless on its failure to act interested parties within reasonable time institute proceedings to force action, reorganization committee will lose jurisdiction to act on those petitions. Chappell v. Carr ---------- 158

11. Statute provides that divorce decree shall not become final or operative until 6 months after trial and decision except for purposes of appeal. Lawson v. Lawson ---------- 164

12. Cited section of Nebraska motor vehicle code establishes procedure by which lienor can secure interest in motor vehicle, and if such procedure is followed, then lienor's interest shall take priority, and on default, secured creditor given an absolute right to immediate possession of motor vehicle. Platte Valley Bank of North Bend v. Kracl ---------- 168

13. Statute not to be read as if open to construction as matter of course. City of Scottsbluff v. Tiemann 256

14. Where words of statute plain, direct, and unambiguous, no interpretation needed to ascertain meaning. City of Scottsbluff v. Tiemann ---------- 256

15. Not within province of court to read meaning into statute that is not warranted by legislative language; neither is it within province of court to read anything plain, direct, and unambiguous out of statute. City of Scottsbluff v. Tiemann ---------- 256

16. Statute classifying cities for legislative purposes in such way that no other city may ever be added to class violates constitutional provision forbidding special laws where general laws can be applicable. City of Scottsbluff v. Tiemann ---------- 256

17. Classification which limits application of law to present condition, and leaves no room or opportunity for increase in numbers of class by future growth or development, is special, and violates Article III, section 18, Constitution of Nebraska. City of Scottsbluff v. Tiemann ---------- 256

18. When invalid portions of statute so interwoven with rest of act so that act may not be operative with void portions eliminated or where obvious from inspection of act that invalid portion formed inducement for passage of act, whole act fails. City of Scottsbluff v. Tiemann ---------- 256

19. Competent for Legislature to classify objects of legislation and if classification reasonable and not arbitrary, it is legitimate exercise of legislative

power. City of Scottsbluff v. Tiemann ---------- 256
20. Legislature may make reasonable classification of persons, corporations, and property, but classification must rest upon real differences of situation and circumstances surrounding members of class, relative to subject of legislation, which render appropriate its enactment. City of Scottsbluff v. Tiemann 256
State ex rel. Meyer v. McNeil ---------- 586
21. Classifications for purpose of legislation must be real and not illusive; cannot be based on distinctions without substantial difference. City of Scottsbluff v. Tiemann ---------- 256
22. Ordinarily, when statute specifies time or date when proceeding creating or altering school districts shall become effective, status of districts affected remains unchanged until such time or date. School Dist. of Bellevue v. Strawn ---------- 392
23. Fundamental principle of statutory construction is to ascertain legislative intent and give effect to it, if it is lawful one. School Dist. of Bellevue v. Strawn ---------- 392
24. Complaint charging statutory misdemeanor substantially in language of statute will be liberally rather than technically construed, and if defect amendable, it will be held sufficient on appeal in absence of objection in trial court. State v. Haile 421
25. Without convincing evidence that Legislature intended to adopt former constitutional limitations, Supreme Court will not so interpret simultaneous repealer and reenactment. Snyder v. Woxo, Inc. 545
26. Constitution of Nebraska not grant but restriction of legislative power; consequently courts will enforce only limitations that Constitution imposes. Snyder v. Woxo, Inc. ---------- 545
27. Cited statute concerning prohibition of usury defenses by corporations does not violate Constitution concerning classification of loans and establishment of maximum rates. Snyder v. Woxo, Inc. 545
28. Statute that prohibits usury defense by corporate maker of obligation may impliedly prohibit defense by individual who is subject to secondary liability on obligation. Snyder v. Woxo, Inc. ---------- 545
29. Statute requires every action be prosecuted in name of real party in interest. Scholting v. Alley ------ 549
30. In Nebraska violation of statute not negligence per se but evidence for jury to consider in determination of ultimate issues of negligence or con-

tributory negligence. Piper v. Hill ---------- 568
31. Cited act violates Constitution in that it purports to grant special benefits to members of class and deny such benefits to others of same class. State ex rel. Meyer v. McNeil ---------- 586
32. In absence of some real and substantial distinction which bears reasonable, just, and proper relation to objects sought to be accomplished, tax levied upon part of those within same class cannot be sustained; classification and object to be accomplished must be germane. State ex rel. Meyer v. McNeil ---------- 586
33. In enacting statute, Legislature must be presumed to have had in mind all previous legislation upon subject; in construction of statute, courts must consider preexisting law together with any other laws relating to some subject, which, although enacted at different times, are in pari materia therewith. Airport Authority of City of Millard v. City of Omaha ---------- 623
34. When Legislature subsequently enacts legislation making related preexisting laws applicable thereto, it will be presumed that it did so with full knowledge of such preexisting legislation and judicial decisions of Supreme Court construing and applying it. Airport Authority of City of Millard v. City of Omaha ---------- 623
35. When city which has established airport authority annexed by metropolitan city, by operation of law debts and obligations of authority become debts and obligations of metropolitan city. Airport Authority of City of Millard v. City of Omaha ---------- 623
36. Unconstitutional statute a nullity, void from enactment, and incapable of creating any rights or obligations. State v. Bardsley ---------- 629
37. Where office newly created by legislative action, term begins when office first filled. Garrotto v. McManus ---------- 644
38. Officer appointed to fill vacancy created by legislative act creating new office takes and enters upon term of his own. Garrotto v. McManus ---------- 644
39. Rights of newly appointed judges under merit plan of judicial selection governed by applicable laws in effect at time of appointment and qualification. Garrotto v. McManus ---------- 644
40. Under merit plan of judicial selection, judge appointed to independent term and enters upon full

term of office upon appointment and qualification. Garrotto v. McManus ---------- 644

41. Only where no specific provision has been made in municipal court rules of civil procedure that district court rules of procedure relating to such matters govern and apply to actions in municipal courts of metropolitan and primary cities. Embree v. Sterling Electric Co. ---------- 677

42. Statutory traffic rules have not been made applicable to horseback riders, but they are bound by common law rules. Matson v. Dawson ---------- 686

43. Unless debts, allowances, expenses, and taxes have been paid or provided for, no heir, devisee, or legatee is entitled to decree of distribution, partial or complete, unless bond provided for in cited statute has been given. Berger v. Berger ---------- 702

44. Right of appeal in this state clearly statutory and, unless statute provides for appeal from decision of quasi-judicial tribunal, such right does not exist, if statutes create such right, mode and manner of appeal is statutory and such jurisdiction can only be conferred in manner provided by statute. Lydick v. Johns ---------- 717

45. Filing of bond approved by Auditor of Public Accounts with Director of Motor Vehicles is condition precedent for initiation of appeal in implied consent proceeding. Lydick v. Johns ---------- 717

46. Cited section declared valid and constitutional by State ex rel. Belker v. Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156, provides that school lands in Nebraska 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 land is located, to highest bidder. Bessey v. Board of Educational Lands & Funds ---------- 801

47. Statute providing for sale of school lands, now in full force and effect, authorizes the Board of Educational Lands and Funds to resell property only in event that highest bidder fails to pay balance of purchase price in 90 days. Bessey v. Board of Educational Lands & Funds ---------- 801

48. Court cannot, under guise of its powers of construction, rewrite statute, supply omissions, or make other changes and this is particularly true where it appears that matter was intentionally omitted. Bessey v. Board of Educational Lands & Funds -- 801

49. If language of statute clear and unambiguous, courts will not by interpretation or construction usurp function of lawmaking body and give it meaning not intended or expressed by Legislature. Bessey v. Board of Educational Lands & Funds ---------- 801

Streets and Sidewalks.

1. In absence of notice of knowledge to contrary, pedestrian making normal use of public sidewalk, night or day, has right to assume that it is in reasonably safe condition, and while he must use ordinary care for personal safety and make reasonable use of faculties to avoid injury to himself, he is not required to keep eyes fixed on ground or to be on constant lookout for danger. Crosswhite v. City of Lincoln ---------- 331
2. Abutting landowner may be subject to liability for dangerous condition of portions of public sidewalk which have been altered or constructed for benefit of his property and which serve use independent of and apart from ordinary and customary use for which sidewalks designed. Crosswhite v. City of Lincoln ---------- 331
3. Where persons are injured by dangerous sidewalk condition created and maintained subject to joint control of city and abutting landowner, and where condition maintained for benefit of proprietary business operated by city, and is also for benefit of property of abutting landowner, city and abutting landowner are joint or concurrent tort-feasors and each is directly liable for his own wrong. Crosswhite v. City of Lincoln ---------- 331
4. Subsurface use of public thoroughfare, which does not interfere with public use, which is subject to termination by city, and which is of such limited nature as not to be of general public interest, not proper subject for franchise. Dunmar Inv. Co. v. Northern Nat. Gas Co. ---------- 400
5. City of metropolitan class operating under home rule charter may properly provide for use of its streets for private purposes under proper permit issued as provided by ordinance. Dunmar Inv. Co. v. Northern Nat. Gas Co. ---------- 400

Taxation.

1. Resolution of county board of commissioners directing foreclosure of tax sale certificates need not

identify each tax sale certificate individually. County of Lincoln v. Evans ---------- 19
2. Affixing of county treasurer's official seal to tax sale certificate not essential to validity. County of Lincoln v. Evans ---------- 19
3. Generally suit cannot be maintained by taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed, each taxpayer must bring action on own behalf. State ex rel. Sampson v. Kenny ---------- 230
4. Under Constitution of Nebraska, taxation of personal property, except as otherwise authorized, must be uniform not only as to rate of taxation, but as to valuation of property as well. State ex rel. Meyer v. McNeil ---------- 586
5. Legislature has plenary power over taxation and matters incidental to such power within limits of Constitution. State ex rel. Meyer v. McNeil ---------- 586
6. Legislature may properly legislate in regard to class of property, but may not divide class of property and enact different rules for taxation of each segment of class. State ex rel. Meyer v. McNeil 586
7. Provision of act fixing value of agricultural income-producing machinery and equipment as those used by taxpayer in determining income under Internal Revenue Code not relevant to nor does it afford any basis for fixing actual value; purpose is to fix equitable rate of depreciation during life use of property and not to fix actual value of property. State ex rel. Meyer v. McNeil ---------- 586
8. Cited act violates Constitution in that it purports to grant special benefits to members of class and deny such benefits to others of same class. State ex rel. Meyer v. McNeil ---------- 586
9. In absence of some real and substantial distinction which bears reasonable, just, and proper relation to objects sought to be accomplished, tax levied upon part of those within same class cannot be sustained; classification and object to be accomplished must be germane. State ex rel. Meyer v. McNeil 586
10. State Tax Commissioner can hold only administrative hearing, not discretionary or quasi-judicial one, because power of State Board of Equalization and Assessment cannot be delegated to State Tax Commissioner. County of Sioux v. State Board of Equalization & Assessment ---------- 741
11. Primary duty of State Board of Equalization and

Assessment to equalize or establish uniformity for taxation among various counties. County of Sioux v. State Board of Equalization & Assessment ---- 741
County of Sarpy v. State Board of Equalization & Assessment ---------- 760
12. While absolute uniformity of approach for taxation may not be possible, there must be reasonable attempt at uniformity. County of Sioux v. State Board of Equalization & Assessment ---------- 741
County of Sarpy v. State Board of Equalization & Assessment ---------- 760
13. Record made before State Board of Equalization and Assessment must sustain action of board, and in absence of some satisfactory explanation of divergence and discrepancy in application of different methods used and relied upon to achieve uniformity, and of satisfactory explanation of correlation between those methods, Supreme Court cannot determine if constitutionally required equalization or uniformity for taxation has been attained between counties. County of Sioux v. State Board of Equalization & Assessment ---------- 741
14. Where record of proceedings before State Board of Equalization and Assessment contains no evidence to justify order, action must be held to be unreasonable and arbitrary. County of Sioux v. State Board of Equalization & Assessment ---------- 741
County of Sarpy v. State Board of Equalization & Assessment ---------- 760
15. For purposes of taxation, terms "actual value," "market value," and "fair market value" mean exactly same thing. County of Gage v. State Board of Equalization & Assessment ---------- 749
16. Record of proceedings before State Board of Equalization and Assessment must be sufficient to sustain action taken by that board. County of Gage v. State Board of Equalization & Assessment ------ 749
17. State Board of Equalization and Assessment may adopt any reasonable method of equalization for taxation, including use of reasonably reliable assessment sales ratios. County of Gage v. State Board of Equalization & Assessment ---------- 749
18. Object of constitutionally required uniformity in taxation of real property accomplished if all property within taxing jurisdiction assessed and taxed at uniform standard of value. County of Gage v. State Board of Equalization & Assessment ------ 749

19. Where record of proceedings before State Board of Equalization and Assessment shows that order of board was unreasonable and arbitrary, it will be reversed. County of Gage v. State Board of Equalization & Assessment ---------- 749
County of Lancaster v. State Board of Equalization & Assessment ---------- 757
County of Hooker v. State Board of Equalization & Assessment ---------- 772
20. Constitutionally required equality or uniformity for taxation cannot be achieved except in relationship to uniform standard of value. County of Gage v. State Board of Equalization & Assessment -------- 749
21. Where record of proceedings before State Board of Equalization and Assessment does not show that order of board was unreasonable, arbitrary, or prejudicial, it will be affirmed. County of Hooker v. State Board of Equalization & Assessment ------ 772

Tenancy in Common.

Tenant in common has interest in possession of every part of common property and has right to occupy whole of property and every part thereof, but is not entitled to exclusive possession of whole or of any particular part, as against other cotenants, except by agreement. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358

Time.

1. Demurrer on ground of statute of limitations opens record pertaining to time action was commenced. Schmer v. Gilleland ---------- 54
2. Ordinarily, when statute specifies time or date when proceeding creating or altering school districts shall become effective, status of districts affected remains unchanged until such time or date. School Dist. of Bellevue v. Strawn ---------- 392
3. Where notice of appeal not filed within 1 month from entry of judgment or final order appealed from, Supreme Court obtains no jurisdiction to hear appeal and it must be dismissed. Giangrasso v. Eagle Distributing Co. ---------- 406
State v. Pauley ---------- 478

Torts.

1. Proper measure of duty of hospital to patient is exercise of degree of care, skill, and diligence used

by hospitals generally in community where hospital is located or in similar communities. Foley v. Bishop Clarkson Memorial Hospital ---------- 89

2. Proof of violation of hospital standards or regulations not conclusive on question of negligence, but is simply evidence of negligence. Foley v. Bishop Clarkson Memorial Hospital ---------- 89

3. Hospital must guard, not only against patient's known physical and mental conditions but also against such conditions as should have discovered by exercise of reasonable care. Foley v. Bishop Clarkson Memorial Hospital ---------- 89

Trespass.

1. Trespass to land is breaking of close; invasion of one's property or any encroachment thereon; was anciently referred to as trespass quare clausum fregit. Connolley v. Omaha Public Power Dist. -- 501

2. If injury or damage to property owner or to member of household results primarily and directly from act of trespass, trespasser liable therefor even though act not negligent or willful. Connolley v. Omaha Public Power Dist. ---------- 501

3. Trespass to land does not make trespasser insurer of landowner and members of household for injuries or damages which may be secondary, indirect, or consequential result of trespass. Connolley v. Omaha Public Power Dist. ---------- 501

4. Action in tort or negligence, known at common law as trespass on case, is proper action to recover for secondary, indirect, or consequential injuries or damages resulting from trespass. Connolley v. Omaha Public Power Dist. ---------- 501

5. Trespass on case action recovery based on negligence; in such case contributory negligence, assumption of risk, and other defenses common to tort actions may be relied on by trespasser. Connolley v. Omaha Public Power Dist. ---------- 501

6. Trespass which merely produces condition cannot be considered to be proximate cause of accident which would not have occurred except for subsequent independent act of third person; where reasonable minds could not differ on facts adduced it is duty of court to decide issue and not submit it to jury. Connolley v. Omaha Public Power Dist. -- 501

Trial.

1. In-court identification by witness to whom accused exhibited before trial in absence of defense counsel may be admissible if independent origin of identification established. State v. Franklin ---------- 62
2. Scope of cross-examination of witness rests largely in discretion of trial court, and ruling will be upheld unless abuse of discretion shown. State v. Franklin ---------- 62
3. Credibility of witnesses and weight of evidence are for jury to determine in criminal case, and verdict of jury may not be disturbed by Supreme Court unless it is clearly wrong. State v. Leary 76
4. Evidence sufficient to sustain verdict of guilty in criminal prosecution only when jury could properly find guilt beyond reasonable doubt. State v. Leary 76
5. Party desiring to limit purpose and application of evidence properly admitted, must request specific instruction. Johnson v. Riecken ---------- 78
6. Where judgment entered by default and prompt application made at the same term to set it aside, with tender of answer disclosing meritorious defense, court should, on reasonable terms, sustain motion and permit cause to be heard on merits. Urwin v. Dickerson ---------- 86
7. Misstatement of issues tending to mislead jury is erroneous. Martin v. Richman Gordman No. 2, Inc. 95
8. Errors in instructions not prejudicial to complaining party not ground for reversal of judgment otherwise correct. Martin v. Richman Gordman No. 2, Inc. ---------- 95
9. Where state of mind of person at particular time relevant to material issue in case, his declarations made at that time are admissible as proof on that issue, notwithstanding they were not made in presence of adverse party. Beliveau v. Goodrich ------ 98
10. Ordinarily question of admissibility of evidence as to speed of vehicle shortly prior to time of accident rests largely in discretion of court. Sandrock v. Taylor ---------- 106
11. Before evidence submitted to jury, question not whether there is literally no evidence at all but whether there is evidence so reasonably convincing that jury can properly proceed to find verdict for plaintiff producing it, upon whom burden of proof was imposed. Southern v. Willis Shaw Frozen Express, Inc. ---------- 117

Weichel v. Lojka ---------- 819

12. In determining whether evidence sufficient to sustain jury verdict, conjecture, speculation, or mere choice of quantitative possibilities are not proof; trier of fact must come to conclusion that there is something more than quantitative possibilities which would lead a reasoning mind to come to one conclusion rather than another. Southern v. Willis Shaw Frozen Express, Inc. ---------- 117

13. Competent, relevant testimony of unimpeached witnesses should not be held to be contradicted by inferences from circumstantial evidence, unless circumstances and natural inferences to be deduced therefrom cannot in reason be reconciled with conclusion that direct evidence is true. Southern v. Willis Shaw Frozen Express, Inc. ---------- 117

14. Summary judgment authorized when moving party entitled to judgment as matter of law, it is clear what truth is, and no genuine issue remains for trial. John Deere Co. v. Conet ---------- 135

15. Failure to bring person charged with criminal offense to trial, who has been held in jail pending trial, before close of the second term of court following filing of charge is entitled to be discharged as matter of right, pursuant to cited statute except where delay is caused by defendant. State v. Lee 184

16. Whether or not delay within maximum limits fixed by Legislature entitles defendant to discharge, where defendant has not contributed to delay, is dependent on whether or not time was fair and reasonable in particular case. State v. Lee ------ 184

17. What is fair and reasonable time in each particular case always in discretion of court; except for abuse of discretion, order of trial court denying motion to discharge defendant for unreasonable delay will not be disturbed on appeal. State v. Lee ---------- 184

18. Right of accused to discharge for failure to receive speedy trial is personal right which may be waived and ordinarily is waived if accused fails to assert right by making demand for trial, or by failing to make some effort to secure speedy trial. State v. Lee 184

19. Where no evidence of prejudice, or that delay caused by prosecution, or that it was willful by court officials, or that request or demand was made for speedier trial by defendant, trial court does not abuse discretion in denying discharge. State v. Lee 184

20. Party against whom motion to dismiss made is

entitled to have every controverted fact resolved in his favor and to have benefit of every inference that can reasonably be drawn from evidence. Lyons v. Wagner ---------- 214

21. Verdict of jury on conflicting evidence in eminent domain action will be set aside when clearly excessive. Neilsen v. Tri-State G. & T. Assn., Inc. -- 219

22. Meaning of instruction and not phraseology is important consideration; where meaning reasonably clear, it is not prejudicially erroneous. Leonhardt v. Harimon ---------- 224

23. Inadvertent substitution of one word for another in instruction is harmless error if it is clear from instruction itself and other instructions given that jury was not confused or misled. Leonhardt v. Harimon ---------- 224

24. Party in selection of jury ordinarily has no right to examine juror out of presence of all other jurors. State v. Kirby ---------- 240

25. Whether, during trial of criminal case, jury shall be allowed to separate, after being duly cautioned, is matter for discretion of trial court, and exercise of such discretion, unless abuse or prejudice shown, furnishes no ground for error. State v. Kirby ------ 240

26. One who cannot subordinate personal views to what he perceives to be duty to abide by oath as juror and to obey law of state must be excused for cause. State v. Kirby ---------- 240

27. Asking of improper questions of witness to which objections sustained by court does not constitute prejudicial error in absence of showing that defendant was thereby deprived of fair and impartial trial. State v. Kirby ---------- 240

28. Defendant entitled to fair trial but not perfect one. State v. Kirby ---------- 240

29. Defendant in criminal case who becomes witness subjects himself to rules applicable to other witnesses. State v. Kirby ---------- 240

30. Where facts adduced to sustain issue are such that reasonable minds can draw but one conclusion therefrom, it is duty of court to decide question, as matter of law, rather than submit it to jury for determination. Ranney v. Gartner ---------- 254
Stewart v. Ritz Cab Co. ---------- 692

31. If facts such that reasonable men may draw different inferences from them, question of existence of actionable negligence ordinarily for jury. Gillotte

v. Omaha Public Power Dist. ---------- 296
32. Conflicting instructions are erroneous and prejudicial unless it appears that jury not misled. Bartels v. Retail Credit Co. ---------- 304
33. General rule is that burden of proving affirmative of issue on party alleging it. Bartels v. Retail Credit Co. ---------- 304
34. Instruction which misstates issues or defenses and has tendency to confuse or mislead jury is erroneous. Bartels v. Retail Credit Co. ---------- 304
35. Defendant not entitled to jury trial upon complaint filed in juvenile court alleging that defendant is delinquent child. DeBacker v. Sigler ---------- 352
36. When amount of damages allowed by jury clearly inadequate under evidence, it is error for trial court to refuse to set aside such verdict. Bohn v. Kruger 407
Webster v. Halbridge ---------- 409
37. Ordinarily, where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated on it. Webster v. Halbridge ---------- 409
38. Error in admission of evidence may be harmless if fact established by other evidence. State v. Huffman 417
39. Participation in hearing on habitual criminal charge, without objection, waiver of notice required by statute. State v. Huffman ---------- 417
40. Clear, uncontradicted, self-consistent, and unimpeached business records of party having initial production and persuasion burdens may suffice for directed verdict in his favor. Watkins Products, Inc. v. Keane ---------- 424
41. In all criminal prosecutions accused has right to meet witness against him face to face. State v. Davis ---------- 433
42. An error which prevents proper consideration of only question relied upon by defendant is substantial and may not be disregarded. State v. Davis -- 433
43. Duty of prosecuting attorney to conduct trial in fair and impartial manner and not inflame prejudices or excite passions of jury against accused. State v. Davis ---------- 433
44. No reference or comment should be made by prosecuting attorney upon defendant's failure to testify. State v. Davis ---------- 433
45. Where any one of several errors assigned not in itself sufficient to warrant reversal, all of them in aggregate establish that defendant did not have fair

trial, then duty of court to award new trial. State v. Davis ---------- 433
46. Trial court's determination of admissibility of demonstrative evidence will not be overturned except for clear abuse of discretion. State v. Wessels ------ 474
State v. Waits ---------- 780
47. Trespass which merely produces condition cannot be considered to be proximate cause of accident which would not have occurred except for subsequent independent act of third person; where reasonable minds could not differ on facts adduced it is duty of court to decide issue and not submit it to jury. Connolley v. Omaha Public Power Dist. ---------- 501
48. In interpreting written contract, meaning of which in doubt and dispute, court, in order to determine meaning, will consider all facts and circumstances leading up to and attending execution, and will consider relationship of parties, nature and situation of subject matter, and apparent purpose of making contract. McBride v. Fort Kearney Hotel, Inc. -- 518
49. Issue to be tried on motion for summary judgment stated. Piper v. Hill ---------- 568
50. In summary judgment proceeding, burden upon movant to show no genuine issue of facts exists. Piper v. Hill ---------- 568
51. Purpose of summary judgment not to serve as substitute for trial, but is only proper remedy when movant entitled to judgment as matter of law. Piper v. Hill ---------- 568
52. Any reasonable doubt touching existence of genuine issue of material fact must be resolved against moving party. Piper v. Hill ---------- 568
53. Where no evidence presented as to effect of intoxicants upon part of parties involved, not proper to submit that issue directly to jury. Raskey v. Hulewicz ---------- 608
54. Whether or not knowledge of guest, that host driver of automobile has been drinking, will operate to prevent recovery of damages in particular case depends upon all facts and circumstances of case, and is usually jury question. Raskey v. Hulewicz 608
55. When accused, presently confined in penal institution, demands prompt trial on other outstanding charges, it is constitutional duty of authorities to make diligent, good-faith effort to bring him to trial without undue delay. State v. Washa ---------- 639
56. Necessary to show prejudice to establish violation

of Sixth Amendment right to speedy trial. State v. Washa ---------- 639

57. Where petitioner's confessions admitted in evidence and heard by jury, petitioner not prejudiced by admission of codefendant's substantially similar confession where proper cautionary instructions given. State v. Hall ---------- 653

58. Weapons or other instruments of crime which are so connected with crime charged as to throw light thereon, or which it is reasonable to infer were used are admissible even though not shown to be connected with accused, as where they tend to throw light on issues other than defendant's connection with crime. State v. Tindell ---------- 683

59. Verdict should be directed if evidence is undisputed or if evidence, even though conflicting, so conclusive that it is insufficient to justify verdict or sustain judgment. Stewart v. Ritz Cab Co. ---------- 692

60. Failure of court to caution jury on evidence given by accomplice, in absence of special request, will not ordinarily constitute reversible error. State v. Martin ---------- 699

61. On motion to dismiss, made at close of plaintiff's case, every fact alleged and which evidence tends to support will be considered as proved. Molholm v. Lynes ---------- 707

62. In eminent domain proceedings resolution of question as to presence of minerals and potential recreational development is primarily for jury under conflicting issues raised, and evidence should be decided like any other question of fact at issue, not for court to determine under guise of determination of admissibility of evidence. Iske v. Omaha Public Power Dist. ---------- 724

63. Generally in eminent domain proceedings, expert witness, otherwise properly qualified, may be permitted to use and to testify concerning different factors affecting valuation which well-informed buyer would use in arriving at price which he would pay for property at time of taking. Iske v. Omaha Public Power Dist. ---------- 724

64. Expert opinion evidence in condemnation case, as in all other cases, to be considered and weighed by triers of fact like any other testimony, it is only advisory in nature and is not binding upon jury or court. Iske v. Omaha Public Power Dist. ---------- 724

65. Weight and credibility of testimony of either lay or

expert witnesses for jury. Iske v. Omaha Public Power Dist. ---------- 724

66. Exhibit admissible, so far as identity is concerned, when identified as being same object about which testimony was given; it must also be shown to satisfaction of trial court that no substantial change has taken place in exhibit so as to render it misleading; as long as article can be identified it is immaterial in how many or whose hands it has been. State v. Waits ---------- 780

67. When motion made at close of all evidence for directed verdict, which motion should have been sustained but was overruled and case submitted to jury which returned verdict contrary to motion, and thereafter motion for judgment notwithstanding verdict duly filed, it is duty of court to sustain motion and render judgment in accordance with motion for directed verdict. Weichel v. Lojka ---------- 819

Trusts.

1. In determining if trust created by will, intent and purpose of testator as disclosed by language used to be ascertained and given effect if not contrary to law or public policy. Cahill v. Armatys ---------- 539
2. For valid trust to be created by will, must be trustee, an estate devised to him, and trustee and beneficiary must be separate and distinct entities, however, condition does not apply if more than one trustee and trustees and beneficiaries identical. Cahill v. Armatys ---------- 539
3. Trust passive if imposes no affirmative duties upon trustee but merely conveys bare legal title with all beneficial use passing to cestui que trust. Cahill v. Armatys ---------- 539
4. While, as general rule, family settlement may provide for disbursement of estate in manner at variance with will, valid, unexecuted testamentary trust cannot thus be modified or destroyed. Cahill v. Armatys ---------- 539
5. When act or agreement of parties disappoints purpose of settlor by divesting property from purposes named, such act or agreement void ab initio. Cahill v. Armatys ---------- 539

Undue Influence.

1. Elements to be proved by preponderance of evidence by person asserting undue influence stated. Mol-

holm v. Lynes 707

2. Undue influence usually surrounded by all possible secrecy, is largely matter of inference from facts and circumstances surrounding individual, his life, character, and mental condition, as shown by evidence and opportunity afforded designing persons for exercise of improper control. Molholm v. Lynes 707

3. Where plaintiff has shown relationship of parties and that their dealings are such that presumption of undue influence or breach of trust arises therefrom, burden of going forward with evidence shifts to party seeking to sustain conveyance as gift. Molholm v. Lynes 707

Usury.

1. Where defense of usury established under motor vehicle installment contract, contract is not void but usurer may recover principal of contract without interest, less interest paid. Baker v. A. C. Nelson Co. 128

2. Statute purporting to authorize installment contract that is subject of this action was declared unconstitutional and thereby makes applicable provisions of cited statute. Baker v. A. C. Nelson Co. 128

3. Under the provisions of cited statute, after a holding of unconstitutionality by Supreme Court, no action attacking enforcement of installment contract authorized by invalid statute may be brought or maintained unless it is raised within 1 year from effective date of decision or within 1 year from November 22, 1963, whichever is latest in time. Baker v. A. C. Nelson Co. 128

4. Cited statute concerning prohibition of usury defenses by corporations does not violate Constitution concerning classification of loans and establishment of maxium rates. Snyder v. Woxo, Inc. 545

5. Statute that prohibits usury defense by corporate maker of obligation may impliedly prohibit defense by individual who is subject to secondary liability on obligation. Snyder v. Woxo, Inc. 545

Utilities.

Supplying of heat and cold by means of circulated steam and refrigerated water does not constitute sale of gas or water. Dunmar Inv. Co. v. Northern Nat. Gas Co. 400

Venue.

1. Where action dismissed as to resident defendant before trial, jurisdiction over nonresident defendants lost. Plantz v. Armbrust ---------- 37
2. Objection to jurisdiction of court over person of nonresident defendants timely made if asserted after dismissal of action as to resident defendant and before any further appearance. Plantz v. Armbrust 37

Warranty.

Implied warranty can be excluded or modified by usage of trade. R. D. Lowrance, Inc. v. Peterson 679

Waters.

Diffused surface waters may be used in such manner as owner of land sees fit, provided that he does not concentrate and dump them unlawfully on land of another to other's damage; he may change their course, store them, or reuse them, but may divert them on land of another only through depressions, draws, or other drainways as they were wont to flow in state of nature. Nickerson Township v. Adams ---------- 31

Wills.

1. Settlement of will contest, unlike composition among creditors, does not rest upon assumption of equality among various claimants and heirs. Abbott v. Abbott 177
2. Testator has right to dispose of property in any manner he sees fit and to attach any conditions to its possession and enjoyment, provided no positive rule of law or public policy is infringed, and it is duty of courts to enforce will of testator under this limitation in accordance with his intention, as expressed by words used. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358
3. Condition that devise or bequest be dependent upon change of name is reasonable and enforceable and one that testator can reasonably impose. Cast v. National Bank of Commerce T. & S. Assn. -------- 358
4. Validity of requirement that beneficiary must reside on certain premises well established. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358
5. Provisions and conditions of will to be construed by courts with view of carrying out intention of testator; basic object of will construction is to ascertain intent and purpose of testator as shown

by will, and then to give that intention effect if not contrary to law. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358

6. Intention which must be given effect is intention which testator expressed by language employed in will. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358

7. Intention of testator not to be ascertained by subtle rules of construction or obscure legal principles and technicalities, but by ordinary meaning of language employed by testator in will. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358

8. Devise which conveys property in fee simple to which conditions are attached for violation of which forfeiture may be declared by contingent devisees, creates estate in fee simple subject to conditions subsequent. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358

9. Conditions precedent are those which must take place before estate can vest or be enlarged; if land conveyed or devised on condition precedent title will not pass until condition performed; conditions subsequent are those which in terms operate on estate conveyed or devised and render it liable to defeat for breach of condition. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358

10. If estate is defeated by contingent event before its natural expiration, it goes to devisee in nature of remainder, technically constituting conditional limitation. Cast v. National Bank of Commerce T. & S. Assn. ---------- 358

11. Devise over to residuary devisee is executory interest, or estate created in third person upon defeasance of prior estate in same property; it lies within general class of future estates which may be created in some person other than transferor. Cast v. National Bank of Commerce T. & S. Assn. 358

12. Where devisee or legatee dies before testator, in absence of statute, or of other provisions in will which show that testator intended gift to go to some other designated person in case beneficiary died before testator, gift lapses. Niemann v. Zacharias 450

13. Testator can prevent lapse of legacy by providing for substitution of another beneficiary in case original beneficiary predeceased testator. Niemann v. Zacharias ---------- 450

14. In determining if trust created by will, intent and

purpose of testator as disclosed by language used to be ascertained and given effect if not contrary to law or public policy. Cahill v. Armatys ---------- 539

15. For valid trust to be created by will, must be trustee, an estate devised to him, and trustee and beneficiary must be separate and distinct entities, however, condition does not apply if more than one trustee and trustees and beneficiaries identical. Cahill v. Armatys ---------- 539

16. While, as general rule, family settlement may provide for disbursement of estate in manner at variance with will, valid, unexecuted testamentary trust cannot thus be modified or destroyed. Cahill v. Armatys ---------- 539

17. When act or agreement of parties disappoints purpose of settlor by divesting property from purposes named, such act or agreement void ab initio. Cahill v. Armatys ---------- 539

18. Agreement between husband and wife to execute mutual wills, evidenced by recital in wills executed pursuant to agreement, valid and enforceable. Geiger v. Geiger ---------- 700

19. Mutual promises of parties to agreement to execute mutual wills constitutes adequate consideration. Geiger v. Geiger ---------- 700

Witnesses.

1. Scope of cross-examination of witness rests largely in discretion of trial court, and ruling will be upheld unless abuse of discretion shown. State v. Franklin 62

2. Asking of improper questions of witness to which objections sustained by court does not constitute prejudicial error in absence of showing that defendant was thereby deprived of fair and impartial trial. State v. Kirby ---------- 240

3. Defendant in criminal case who becomes witness subjects himself to rules applicable to other witnesses. State v. Kirby ---------- 240

4. Necessity and sufficiency of medical opinion to sustain finding of causation in favor of proponent of evidence varies according to circumstances. Christo v. Pennsylvania Life Ins. Co. ---------- 573

5. Generally in eminent domain proceedings, expert witness, otherwise properly qualified, may be permitted to use and to testify concerning different factors affecting valuation which well-informed buyer would use in arriving at price which he would pay for

property at time of taking. Iske v. Omaha Public Power Dist. ---------- 724
6. Expert opinion evidence in condemnation case, as in all other cases, to be considered and weighed by triers of fact like any other testimony, it is only advisory in nature and is not binding upon jury or court. Iske v. Omaha Public Power Dist. -------- 724
7. Weight and credibility of testimony of either lay or expert witnesses for jury. Iske v. Omaha Public Power Dist. ---------- 724

Words and Phrases.
1. Words "suspension" and "revocation" not synonymous, suspension normally means temporary cessation but with expectation or purpose of resumption, revocation implies permanent termination and when used within statute imports finality. The Flamingo, Inc. v. Nebraska Liquor Control Commission ------ 22
2. Since it is not a revocation, a suspension is not governed by cited statute. The Flamingo, Inc. v. Nebraska Liquor Control Commission ---------- 22
3. Statutory phrase "without giving compensation therefor" indicates intention not to limit compensation to persons specifically paying for transportation in cash or equivalent, or to require that it pass exclusively from passenger to driver. Johnson v. Riecken ---------- 78
4. Term "disorderly conduct" one of general or indefinite meaning, but generally signifies any conduct which tends to breach the peace or to disturb those who see or hear it; to endanger morals, safety, or health of community; or to shock public sense of morality. State v. Cherry ---------- 103
5. Term mentally incompetent as used in statute does not refer to person who is sane but not as wise, intelligent, or mentally strong as some other person; applies to person whose mind is so affected as to have lost control of itself to such degree as to deprive person affected of sane and normal action. Hyde v. Crocker ---------- 428
6. Continuing course of conduct which so grievously wounds mental feelings or so utterly destroys peace of mind so as to nullify or destroy legitimate objects and ends of matrimony constitutes extreme cruelty within meaning of statute. Sims v. Sims ---------- 479
7. Trespass to land is breaking of close; invasion of one's property or any enroachment thereon; was

anciently referred to as trespass quare clausum fregit. Connolley v. Omaha Public Power Dist. -- 501
8. Meaning of word "knowingly" in criminal statute varies in context; commonly imports perception of facts requisite to make up crime. R. D. Lowrance, Inc. v. Peterson ---------- 679
9. An intersection is area embraced within lateral curb lines or, if none, then lateral boundary lines of two or more highways, which join one another at an angle. Matson v. Dawson ---------- 686
10. Requirement "to look" means to look at time and place when to look would be effective. Matson v. Dawson ---------- 686
11. For purposes of taxation, terms "actual value," "market value," and "fair market value" mean exactly same thing. County of Gage v. State Board of Equalization & Assessment ---------- 749
12. Where provisions of zoning ordinance as to uses of property which are permitted are expressed in common words without enlargement, restriction, or definition, they are to be interpreted according to generally accepted meaning. Dewey v. Montesorri Educational Center, Inc. ---------- 791
13. School or educational institution is place in which persons are instructed in arts and process or manner of training youths for stations in life. Dewey v. Montesorri Educational Center, Inc. ---------- 791

Workmen's Compensation.
1. In workmen's compensation case, burden on plaintiff employee to prove claim by preponderance of evidence, and rule of liberal construction of Workmen's Compensation Act does not apply to evidence to support claim. Pocevicius v. Armour & Co. -------- 668
Halbert v. United States F. & G. Co. ---------- 775
2. On appeal to Supreme Court, workmen's compensation proceeding will be considered de novo upon record, but where evidence is conflicting and cannot be reconciled, fact that trial court observed demeanor of witnesses and give credence to testimony of some rather than others will be considered. Pocevicius v. Armour & Co. ---------- 668
3. To recover in workmen's compensation case, claimant must offer proof which preponderates in favor on each of indispensable elements of claim. Pocevicius v. Armour & Co. ---------- 668
4. Where testimony gives rise to conflicting inferences

of equal degree of probability so that choice between them is mere matter of conjecture, workmen's compensation award cannot be obtained. Pocevicius v. Armour & Co. ---------- 668

5. Where evidence discloses that further medical, hospital, and surgical services would not definitely improve condition of injured employee, and where such improvement would be conjectural, employer's liability to furnish reasonable medical and hospital services and medicines, as and when needed, ceases. Halbert v. United States F. & G. Co. ---------- 775

Zoning.

Where provisions of zoning ordinance as to uses of property which are permitted are expressed in common words without enlargement, restriction, or definition, they are to be interpreted according to generally accepted meaning. Dewey v. Montesorri Educational Center, Inc. ---------- 791