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IN RE APPLICATION OF HUNT TRANSPORTATION, INC., DOING BUSINESS AS HAPPY CAB.

HUNT TRANSPORTATION, INC., DOING BUSINESS AS HAPPY CAB, APPELLEE, V. YELLOW CAB, INC., ET AL., APPELLANTS.

184 N. W. 2d 651

Filed March 12, 1971. No. 37658.

1. **Motor Carriers: Public Service Commissions.** The purpose of the Motor Carrier Act is regulation for the public interest. Its purpose is not to stifle legitimate competition but to foster it.
2. ———: ———. The reference in section 75-318, R. S. Supp., 1969, to an enlargement of competition over that then existing means a substantial or material increase in competition.
3. **Public Service Commissions: Appeal and Error.** The effect of the transfer of a certificate upon a local competitive situation is peculiarly for the determination of the Nebraska State Railway Commission.

Appeal from the Nebraska State Railway Commission. Affirmed.

Kennedy, Holland, DeLacy & Svoboda and Robert A. Skochdopole, for appellants.

Stern, Harris, Feldman & Becker, Jerry Gitnick, and Marshall D. Becker, for appellee.

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

BOSLAUGH, J.

Hunt Transportation, Inc., made application to the Nebraska State Railway Commission for authority to acquire the operating rights of Mildred Johnson, doing business as United Cab Co., to operate taxicabs within the city of Omaha and vicinity. A protest was filed by Yellow Cab, Inc., Checker Cab Company, and Safeway Cabs, Inc. After a hearing before the commission, the application was granted. The protestants' motion for rehearing or reconsideration was overruled, two commissioners dissenting. The protestants appeal.

The transfer of certificates between motor carriers is regulated by statute. Section 75-318, R. S. Supp., 1969, provides in part that if the commission "finds that the transaction proposed will be consistent with the public interest and does not unduly restrict competition and that the applicant is fit, willing, and able to properly perform the proposed service," it may approve the transfer. The statute further provides that if the proposed transfer, "as to passenger motor carriers, will tend to enlarge competition over that then existing, the commission may approve such an application for merger, consolidation, transfer, or lease only upon the basis of proof of and a finding that the proposed merger, consolidation, transfer, or lease is or will be required by the present and future public convenience and necessity, in the same manner as provided in section 75-311."

The commission found that the proposed transfer "would not be such an increase in competition over that now existing as to require a showing of present and future public convenience and necessity." The protestants contend that the finding that the proposed transfer of the Johnson certificate would not tend to enlarge competition over that then existing is erroneous and not supported by the evidence.

The protestants argue that if any increase in competition will result from the transfer of a certificate, there must be proof that the transfer is required by public convenience and necessity. In effect, the commission interpreted section 75-318, R. S. Supp., 1969, to mean that proof of public convenience and necessity is required only where there will be a substantial or material increase in competition as a result of the transfer. We think this is a proper interpretation of the statute and that the Legislature did not intend that proof of public convenience and necessity was required for every transfer of a certificate where there would be some increase in competition as a result of the transfer.

We have said that the purpose of the Motor Carrier

Act is regulation for the public interest and that its purpose was not to stifle legitimate competition but to foster it. Canada v. Peake, Inc., 184 Neb. 52, 165 N. W. 2d 587. The determination of what is consistent with the public interest is peculiarly for the determination of the commission. Ace Gas, Inc. v. Peake, Inc., 184 Neb. 448, 168 N. W. 2d 373. The rule is applicable to a determination of the effect of the transfer of a certificate upon a local competitive situation.

The record shows that for the last 15 years Mrs. Johnson has operated only 1 cab. Her gross revenue for the last 4 years before filing of the application has been between $5,000 and $6,000 per year. Her certificate was not dormant, but her operation was minimal compared to that of the protestants.

Checker Cab Company was operating 70 cabs at the time of the hearing in October 1969, and had 15 cabs on order. Yellow Cab, Inc., owned 79 cabs and planned to purchase 10 or 12 new cabs. Safeway Cabs, Inc., had 31 cabs and was operating about two-thirds of them. The applicant plans to commence business with 5 cabs and add cabs as necessary to handle the business it can acquire.

The protestants produced evidence that the number of trips per year has been declining, probably due to an increase in the number of private automobiles and competition from rental automobiles and courtesy cars. Other evidence tended to show that there are a large number of illegal "jitney" operators in Omaha; that certain areas of Omaha receive inadequate taxi service; that there is unsatisfied demand for taxi service at peak periods; and that there is a need for increased taxi service at the airport.

As we view the record it is sufficient to sustain the finding by the commission that the proposed transfer is consistent with the public interest and not such an increase in competition as to require proof that the transfer is required by public convenience and necessity.

Where there is evidence to sustain a finding of the commission, this court cannot intervene.

The order of the commission is affirmed.

AFFIRMED.

SHARON A. FRY, APPELLEE, V. WILLIAM J. FRY, APPELLANT.
184 N. W. 2d 636

Filed March 12, 1971. No. 37660.

1. **Divorce.** The factors to be considered in an award of alimony or a division of property, or both, in a divorce case are the age and health of the parties; their earning ability; their relative conduct leading up to the divorce; the duration of the marriage; the social standing of the parties; the property of the parties and its value at the time of the divorce, its income-producing capacity, the manner in which it was acquired, and the respective contributions that each party has made thereto; the property of the parties and its value at the time of the marriage; and all other relevant facts and circumstances.
2. ———. In determining the provisions to be made for the support of minor children in a divorce proceeding, their status and situation, and all other attendant circumstances, should be considered, and an amount determined in accordance with the best judgment and sound discretion of the court.
3. ———. A determination of what constitutes reasonable visitation rights is within the discretion of the trial court and will not be disturbed except for an abuse of discretion.

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

William L. Walker and Earl Ludlam, for appellant.

Hal W. Bauer and Buer, Galter & Nelson, for appellee.

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

CARTER, J.

The plaintiff, Sharon A. Fry, brought this action against the defendant, William J. Fry, for a divorce, custody of the children, child support, a division of property, and

an award of alimony. A divorce was granted to the plaintiff and the issues incidental thereto were determined. The defendant has appealed.

The evidence sustains the granting of the divorce to the plaintiff because of the adulterous relationship of defendant with another woman during the existence of the marriage relation. The grant of the divorce to plaintiff is not assigned as error. The assignments of error are directed to the claimed excessiveness of plaintiff's award in the division of the property of the parties, the award of alimony, the award of child support, the fixing of visitation rights, and the amount of attorney's fees allowed the plaintiff for legal services rendered in the district court.

There is no dispute as to the property owned by the parties at the time of the filing of the action, although there is some dispute as to its value.

We find the property of the parties and its value at the time of the trial to be as follows: Home, $18,000, subject to a mortgage of $9,000 and monthly payments thereon of $147; furniture in home, $1,750; Buick automobile, $875; 28 shares Lincoln Tel. & Tel. Co. stock, $700; Burlington Credit Union savings account, $700; Investors Fund stock, $600; Ford pickup, $150; Ford, 1934 antique, no value shown; 18 shares Lincoln Tel. & Tel. Co. stock, $450; debenture bond, Lincoln Tel. & Tel. Co., $200; government bonds, $100; insurance policy, cash value, $1,052; Investors Fund stock (for education of children), $1,500; life and health insurance policies of prospective value with limited present value estimated at $4,000 in future benefits.

The plaintiff was 33 and the defendant 34 years of age when the divorce was granted. The marriage lasted for 13 years. Two children, a son 9 and a daughter 5 years of age, were born of the marriage. Both parties are in good health. Plaintiff was employed as a key puncher on an IBM machine at a take-home salary of $110 for each 2 weeks. Defendant was a switchman for a

railroad at a take-home salary of $432.55 per month. Defendant earned gross pay of $10,276.81 in 1967 and $11,412.84 in 1968. Defendant took a lesser-paying job in 1969. His contract rights to his former job still exist, the lesser-paying job having been taken at his own volition.

The trial court in its decree awarded the home to the plaintiff subject to the $9,000 mortgage which plaintiff was to assume and agreed to pay and hold defendant free from liability thereon. Plaintiff was awarded the furnishings, fixtures, and appliances in the home. The Buick automobile was awarded to plaintiff and also the Lincoln Telephone and Telegraph Company debenture bond having a maturity value of $200. All other personal property was awarded to the defendant although some insurance and health policies were awarded to him by agreement for the benefit of the children. We find the value of the property awarded to plaintiff to be approximately $12,500. The value of the property awarded to the defendant is substantially less. The applicable rule is: "The factors to be considered in an award of alimony or a division of property in a divorce case are the age and health of the parties; their earning ability; their relative conduct leading up to the divorce; the duration of the marriage; the social standing of the parties; the property of the parties and its value at the time of the divorce, its income-producing capacity, the manner in which it was acquired, and the respective contributions that each party has made thereto; the property of the parties and its value at the time of the marriage; and all other relevant facts and circumstances." Gartside v. Gartside, 181 Neb. 46, 146 N. W. 2d 777.

It is not disputed that the defendant's improper conduct was the sole cause of the divorce. The award of the home and the furniture, fixtures, and appliances to the plaintiff as living quarters for her and the two children is an equitable disposition under the circumstances

shown. The personal property awarded to the plaintiff in addition to the home and contents is not of great value under present economic conditions. This property is low-income producing and affords little financial support for plaintiff and the two children.

The defendant complains of the award of $100 per month for the support of each child. The record does not disclose any facts indicating that the trial court abused its legal discretion in making these allowances. They are fair and reasonable. Rubottom v. Rubottom, 185 Neb. 39, 173 N. W. 2d 447. Defendant asserts that the trial court was in error in awarding $3,000 as alimony, payable $50 per month for a period of 5 years. We point out that plaintiff has a much less earning capacity than the defendant. In addition, the plaintiff is burdened with the custody and care of the two children and the expense of their care while she is working. The allowance of alimony, payable by the month as stated, is necessitated in augmentation of her earning capacity during her transition from housewife to breadwinner.

The equities of the case are with the plaintiff. The actions of defendant were the sole cause of the divorce, brought on by a most serious breach of marital obligations. The disparity in earning ability, at least in the proven potential of each, is great. The 13-year period of the marriage and the thrusting of defendant's obligation to support plaintiff and his two children upon the plaintiff is an important factor. The limited amount of income-producing property that was awarded her is a consideration of importance and her contributions made in acquiring the jointly owned property support the decree of the trial court as being fair and equitable. Foltyn v. Foltyn, 180 Neb. 42, 141 N. W. 2d 433.

Defendant complains of the visitation rights prescribed by the trial court. The court granted the right of defendant to visit the children at or away from their home from 1 p.m. to 6 p.m. on alternate Saturdays and Sundays, and on designated holidays. We find no abuse

of discretion by the trial court under the circumstances of this case, particularly since changes may be made on application when and if conditions change. Fox v. Fox, 180 Neb. 847, 146 N. W. 2d 208.

The record shows that the trial court allowed plaintiff $50 as attorney's fee pending the litigation in the district court and a additional attorney's fee of $800 in the final divorce decree. The record indicates that the trial took less than a day and that there were no exceptional or intricate legal problems involved. There is no evidence in the record to support the allowance of a fee in any particular sum. We think the award of a total of $850 attorney's fee is excessive from an examination of the record before us. In view of this situation, we allow no attorney's fee to the plaintiff for the services of her attorney in this court. Foltyn v. Foltyn, *supra*.

AFFIRMED.

STATE OF NEBRASKA EX REL. BENJAMIN C. NEFF, JR., DIRECTOR OF INSURANCE, APPELLEE, V. CHRISTIAN BROTHERHOOD OF AMERICA BURIAL ASSOCIATION, A DOMESTIC CORPORATION, APPELLANT.

184 N. W. 2d 643

Filed March 12, 1971. No. 37681.

1. **Corporations: Constitutional Law.** Domestic corporations are subject to Article XII, section 1, Constitution of Nebraska, which provides: "The Legislature shall provide by general law for the organization . . . and general control of all corporations . . . . All general laws passed pursuant to this section may be . . . repealed."
2. **Insurance: Administrative Law.** Whenever a domestic insurance company is determined to be in such condition that its further transaction of business would be hazardous to its policyholders, creditors, stockholders, or the public, the district court on application of the Director of Insurance may order liquidation of the company.

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

Gaines, Spittler, Neely, Otis & Moore and John E. Wenstrand, for appellant.

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

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

SMITH, J.

On application by the Director of Insurance the district court ordered respondent to show cause why the Department of Insurance should not liquidate its business. The district court after a trial decreed liquidation. Respondent appeals.

Respondent in the district court invoked federal and state Constitutions. It contended that repeal of legislative acts had violated obligations of contracts between it and the state, stockholders, and policyholders respectively. The district court found that the financial status and business practices of respondent rendered its further transaction of business hazardous to the policyholders, stockholders, and the public.

Respondent was incorporated in 1966 under Chapter 21, R. R. S. 1943, which then contained article 10. It issued policies of ordinary life insurance under annual certificates of authority issued by the director until April 30, 1969. The director then refused respondent further authority. A minor reason was absence of a permanent location for respondent's records.

Principal reasons for the director's refusing further authority were respondent's financial condition and repeal of enabling legislation. At the trial in September 1969, respondent had $50,000 of insurance in force, 50 policyholders, and 20 policies issued in 1969. Surplus which had been inadequate April 30, 1969, amounted to $2,700. Respondent had received responsible tenders of $5,000 in surplus notes dated in September 1969. Reinsurers had withdrawn, but a letter dated June 26, 1969, indicated a new reinsurance commitment.

The Legislature had not expressly retained the power to repeal the article that authorized organization of respondent. In contrast general corporation laws have reserved some power of repeal. See, § 21-20,133, R. R. S. 1943; Laws 1941, c. 41, § 85, p. 215. Respondent was organized subject to Article XII, section 1, Constitution of Nebraska, which stated: "The Legislature shall provide by general law for the organization . . . and general control of all corporations . . .. All general laws passed pursuant to this section may be . . . repealed."

Chapter 21, article 10, R. R. S. 1943, governing respondent prescribed paid-up capital stock of at least $10,000. Maximum benefits of a membership certificate were $500, except $1,000 in case of a $5,000 surplus or reinsurance of the excess. The article required respondent to obtain a certificate of authority from the director April 30 annually to do business. The Legislature repealed the article by Laws 1967, c. 102, p. 318.

Respondent argues that its charter is irrevocable on authority of Trustees of Dartmouth College v. Woodward, 17 U. S. (4 Wheat.) 518, 4 L. Ed. 629 (1819). There the sovereign reserved no power to alter or revoke the Dartmouth charter. Here the Constitution of Nebraska has reserved the power. Cf. Greenwood v. Freight Co., 105 U. S. 13, 26 L. Ed. 961 (1881).

Whenever a domestic insurance company is determined to be in such condition that further business transactions by it would be hazardous to its policyholders, creditors, stockholders, or the public, the court may order liquidation of the company. §§ 44-125 and 44-127, R. R. S. 1943. The district court in effect found that respondent had not shown cause why the Department of Insurance should not liquidate its business. We concur.

It is within the police power of the states to subject the insurance business to reasonable regulation. We see no impairment of contract obligation or violation of Title 15 U. S. C., §§ 1011 and 1012 (a), which State

Board of Insurance v. Todd Shipyards Corp., 370 U. S. 451, 82 S. Ct. 1380, 8 L. Ed. 2d 620 (1962), interpreted.

The judgment is affirmed.

AFFIRMED.

W. J. HANEY, APPELLEE, V. L. R. FOY CONSTRUCTION CO., INC., A CORPORATION, APPELLANT.
184 N. W. 2d 628

Filed March 12, 1971. No. 37682.

1. **Appeal and Error: Evidence.** In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party.
2. **Trial.** The verdict of a jury based upon conflicting evidence will not be set aside unless it is clearly wrong.
3. **Payment: Pleading: Evidence.** Payment is an affirmative defense and the party alleging it has the burden of proving it.
4. **Pleading.** Where the verdict is not excessive but exceeds the amount of the prayer, the prayer may be amended to conform to the proof.

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

Chesley S. Baker, for appellant.

Robert E. Paulick, for appellee.

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

BOSLAUGH, J.

The plaintiff, W. J. Haney, brought this action to recover the balance due on a construction subcontract in which the defendant, L. R. Foy Construction Co., Inc., was the principal contractor. The jury returned a verdict for the plaintiff and the defendant has appealed.

The plaintiff contracted to perform the plastering and lathing work on the Golden Towers Housing Project building at Grand Island, Nebraska. The parties stipulated that the total amount of the plaintiff's contract was

$40,046 and that the defendant had paid $33,572.85 to the plaintiff and to the plaintiff's suppliers for the benefit of the plaintiff. The verdict was for the difference between these amounts, $6,473.15.

The defendant alleged that the plaintiff failed to complete his work on time and left part of his work uncompleted which caused the defendant to expend $4,040.08 to complete the plaintiff's work. The defendant also alleged that it had paid $11,458.57 to the Chicago Lumber Company for the benefit of the plaintiff, which together with payments to the plaintiff amounted to $39,-864.25. The defendant's principal contention on appeal is that the evidence does not support the verdict.

The evidence with respect to the plaintiff's performance of the contract is in sharp conflict. The plaintiff testified that he performed the work in accordance with the terms of the contract and produced other witnesses who corroborated his testimony. The defendant produced evidence to the contrary. The evidence presented a question for the jury and, when viewed in the light most favorable to the plaintiff, was clearly sufficient to sustain the verdict. The verdict of a jury based upon conflicting evidence will not be set aside unless it is clearly wrong. McGerr v. Beals, 180 Neb. 767, 145 N. W. 2d 579.

The defendant proved that it paid $734.27 on November 16, 1964, and $1,785 on January 18, 1965, to the Chicago Lumber Company on behalf of the plaintiff. This evidence was uncontroverted, but there was no proof that these payments were in addition to the $9,207.25 paid to the suppliers which was included in the stipulation. The burden of proof was on the defendant on this issue and the jury was not required to find that the defendant had made payments in addition to those included in the stipulation. Department of Banking v. Lawhead, 181 Neb. 722, 150 N. W. 2d 734.

The amended petition prayed for judgment in the amount of $6,000 with interest and costs. After the ver-

dict had been returned, the trial court permitted the plaintiff to amend the prayer to conform to the verdict. This was proper since the stipulation and the evidence sustained the amount of the verdict. Pinches v. Village of Dickens, 127 Neb. 239, 254 N. W. 877.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRANCIS BAYLESS, APPELLANT.
184 N. W. 2d 634

Filed March 12, 1971. No. 37687.

1. **Trial: Appeal and Error.** In determining the sufficiency of evidence to sustain a conviction, it is not the province of this court to resolve conflicts in evidence, pass on the credibility of witnesses, or weigh the evidence.
2. **Criminal Law: Appeal and Error: Evidence.** In a criminal case this court will not interfere with a verdict of guilty based upon the evidence unless it is so lacking in probative force that it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt.
3. **Criminal Law: Appeal and Error.** An objection to the admission of evidence cannot be considered by this court for some reason not properly and timely raised at the trial.

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

Paul E. Watts, Samuel A. Boyer, Jr., James A. Nanfito, and Michael N. Schirber, 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.

Appellant was convicted of the crime of assault with

intent to inflict great bodily injury. Appellant argues two assignments of error: Insufficiency of evidence to sustain a conviction; and the overruling of his motion to exclude the use of the words "Hell's Angels" during the trial. We affirm.

On the evening of August 12, 1969, appellant, in company with nine others, entered the Silver Tap Bar in Omaha, pulled two tables together, and ordered beer. They were wearing grubby jeans, T-shirts, and sleeveless jackets with the words "Hell's Angels" on the back. One of the waitresses who served beer testified they were very loud, very profane, and, to use her words, "they were up running around on the stage, fooling with the instruments, with the drums, with the guitars, the amplifiers, the whole thing." Police were called, came in quietly, and tried to get the group to leave peaceably, but some of its members, particularly appellant, became very abusive, threatening, and extremely profane. When an officer sought to arrest the appellant he drew his hand back and came up with a shiny object identified by two of the officers as a pointed beer can opener, and swung at the arresting officer. This officer struck him with his night stick and a general melee ensued.

While the appellant's testimony is at variance with that given by the State's witnesses, the determination of the fact issue is for the jury. We do not agree with the appellant that the evidence is weak, contradictory, and insufficient to sustain a verdict. We find it ample to support the conviction herein. Inasmuch as there was sufficient evidence to submit the case to the jury, the law is settled that on appeal we must take the view of the evidence most favorable to support the verdict.

In determining the sufficiency of evidence to sustain a conviction, it is not the province of this court to resolve conflicts in evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Cannon, 185 Neb. 149, 174 N. W. 2d 181.

In a criminal case this court will not interfere with a

verdict of guilty based upon the evidence unless it is so lacking in probative force that it can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Goodwin, 184 Neb. 537, 169 N. W. 2d 270.

Appellant strenuously urges the use of the words "Hell's Angels" was prejudicial to him. At the start of the trial the appellant filed a motion to prohibit the State from referring to appellant as a " 'Hell's Angel' or 'Member of the Hell's Angels Club, Gang or Organization,' or any derivative thereof or any reference thereto which would imply the defendant is or was associated in any way, manner or form with the above-named organization, unless defendant should place his own character in issue, for reason of prejudice." This motion in the context it was presented was properly overruled.

The first reference to the words "Hell's Angels" appears in the examination of a State's witness describing the appearance of the group: "Q. Now, how were these parties dressed when they came in? A. Grubby jeans and T-shirts and jackets and the whole bit. Q. What kind of jackets? A. Just kind of sleeveless things with 'Hell's Angels' on the back." This testimony came in without objection. In any event, the testimony was merely descriptive of the dress of the group and definitely within the limits of admissible evidence. An individual may dress as he pleases within the limits of discretion, but as a corollary of this right he must accept its consequences. On cross-examination of this witness by appellant's counsel, the following was adduced: "Q. Is this the first time that you saw anybody from the Hell's Angels in there? A. Yes, I think so." The appellant not only failed to object to the use of the words during the trial or to strike reference to them, but actually injected the term "Hell's Angels" into the trial in more emphatic context than its use to describe the dress of the group engaged in the disturbance. Ap-

pellant's counsel subsequently by his questions identified two of his three witnesses, including appellant, as members of the organization. The only references made by the State thereafter were fully within the scope of the cross-examination of these witnesses. Appellant, apparently relying on his motion before the trial, at no time during the trial objected to the testimony or moved to strike it. As we said in State v. Oliva, 183 Neb. 620, 163 N. W. 2d 112: "An objection to the admission of evidence cannot be considered by this court for some reason not properly and timely raised at the trial."

Appellant's motion was too broad, and was made before the trial at a time when there was no way of knowing in what connection the matter might be raised. After the reference by the State the appellant himself injected the issue of membership into the trial. There is no merit to appellant's assignments of error.

Judgment affirmed.

AFFIRMED.

HAPPY HOUR, INC., DOING BUSINESS AS "20TH CENTURY LOUNGE," APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

184 N. W. 2d 630

Filed March 12, 1971. No. 37690.

1. **Administrative Law: Appeal and Error.** The review in the district court upon an appeal by a licensee from an order of suspension by the Nebraska Liquor Control Commission is by the court without a jury on the record of the agency. § 84-917, R. S. Supp., 1969.
2. **Statutes.** A statutory amendment relating to a matter of procedure is applicable to pending cases which have not been tried.

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

S. Caporale of Shrout, Lindquist, Caporale, Brodkey & Nestle, for appellant.

Clarence A. H. Meyer, Attorney General, and Robert R. Camp, for appellee.

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

BOSLAUGH, J.

The Nebraska Liquor Control Commission, after notice and hearing, suspended the retail liquor license of the plaintiff for 14 days effective November 10, 1969, for violation of section 53-168, R. S. Supp., 1969, and Rule 45(1) of the commission. The plaintiff then appealed to the district court where the order of the commission was affirmed. The plaintiff has now appealed to this court.

The issue presented concerns the manner in which an appeal to the district court from an order of suspension is to be tried and determined. The plaintiff contends that the applicable procedure is that prescribed by section 53-1,116, R. R. S. 1943.

In The Flamingo, Inc. v. Nebraska Liquor Control Commission, 185 Neb. 22, 173 N. W. 2d 369, we held that section 53-1,116, R. R. S. 1943, is not applicable to proceedings for suspension and that the applicable procedure is prescribed by section 84-917, R. R. S. 1943.

Section 84-917, R. R. S. 1943, was amended, effective December 25, 1969, to provide in part: "The review shall be conducted by the court without a jury on the record of the agency." § 84-917 (5), R. S. Supp., 1969. The hearing in the district court was held on March 23, 1970. Since the amendment related to a matter of procedure, it was applicable to pending cases that had not been tried. Lovelace v. Boatsman, 113 Neb. 145, 202 N. W. 418.

The plaintiff's contention that the transcript of the proceedings and the evidence before the commission should not have been received in evidence in the district court is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MERENUS GEORGE NORGARD, APPELLANT.
184 N. W. 2d 632

Filed March 12, 1971. No. 37692.

1. **Criminal Law: Post Conviction: Right to Counsel.** Although the record shows that the formal court appointment of counsel and the arraignment of the defendant occurred on the same day, this does not establish that the defendant was deprived of the effective assistance of counsel.
2. ———: ———: ———. The fact that interviews with the defendant were conducted by different attorneys on the public defender's staff prior to arraignment does not establish ineffective assistance of counsel.

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

D. C. Bradford of Monsky, Grodinsky, Cohen, Garfinkle & Zweiback, for appellant.

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

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

McCOWN, J.

Merenus George Norgard was convicted and sentenced for the crime of auto theft after a plea of guilty. Some months later, he filed a motion to vacate conviction and sentence under the Post Conviction Act. After a full evidentiary hearing the motion was overruled.

The defendant claims that he was deprived of the effective aid and assistance of counsel. He testified that he never talked to any lawyer until 20 minutes before he was sentenced on December 18, 1968. On November 25, 1968, the defendant appeared and waived

preliminary examination. On the same date, he had an interview with an attorney on the public defender's staff. He had an additional interview on December 4, 1968, with a different public defender. On December 5, 1968, the district court appointed the public defender to represent the defendant. On the same day, and with the same attorney who had interviewed him the preceding day, the defendant appeared in the district court and entered a plea of guilty. The record establishes beyond doubt that the defendant admitted his guilt, and that his plea of guilty was knowingly, intelligently, and voluntarily made. On December 18, 1968, the defendant appeared in court with another lawyer from the public defender's staff and was sentenced.

Although the record shows that the formal court appointment of counsel and the arraignment of the defendant occurred on the same day, this does not establish that the defendant was deprived of the effective assistance of counsel. State v. Kennedy, 185 Neb. 415, 176 N. W. 2d 12.

The fact that interviews with the defendant were conducted by different attorneys on the public defender's staff prior to arraignment does not establish ineffective assistance of counsel. Here the facts and circumstances were such that extensive investigation by counsel was not necessary, and a plea of guilty was entirely appropriate.

The district court, after thorough consideration, denied the motion to vacate. That judgment was correct and is affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

OGALLALA FERTILIZER COMPANY, APPELLANT, V. MARCIA H. SALSBERY, APPELLEE.
184 N. W. 2d 729

Filed March 12, 1971. No. 37694.

1. **Partnership: Contracts.** Benefit to the firm is generally held insufficient basis on which to predicate firm liability for a transaction entered into by a partner in his individual capacity.
2. ———: ———. Where the partners are disclosed and known to a party contracting, and the contract is signed by only one partner who contracts in his own behalf, the other partners are not bound thereby.
3. **Pleading.** Denial of the right to file an amended pleading not tending to promote the interests of justice is not an abuse of discretion.

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

Frank B. Svoboda, for appellant.

Baskins, Baskins & Schneider, for appellee.

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

NEWTON, J.

This is an action on an account brought against Marcia H. Salsbery, the surviving member of an alleged partnership. Summary judgment was entered for the defendant. We affirm the judgment of the district court.

Herbert and Marcia H. Salsbery were husband and wife. Marcia owned a quarter section of land adjoining another quarter owned by her father. They resided on the quarter owned by Marcia and farmed both quarters. A joint bank account was maintained in which the farm proceeds were deposited and upon which both wrote checks for farm and personal bills, including mortgage indebtedness on Marcia's land. Marcia signed, as guarantor, a $37,400 note of her husband to a bank and they were jointly liable on a second note of $4,459.92. Herbert Salsbery died in the fall of 1967.

Herbert arranged for the purchase of fertilizer on

credit from plaintiff. The fertilizer was charged to Herbert Salsbery and was delivered to, and used at, the farm during the year 1967. Defendant at times called plaintiff to ask for delivery of portions of the fertilizer and was consequently aware of its purchase, delivery, and use. Defendant conceded that she shared in farm profits and losses. There is no direct evidence of the actual understanding or arrangement between husband and wife.

The purchase, delivery, and use of the fertilizer, as above outlined, and the amount due are not disputed. Plaintiff's petition alleges the insolvency of the estate of Herbert Salsbery, deceased, and the absence of any partnership property. Questions presented in regard to the propriety of the entry of summary judgment necessarily include the existence of a partnership, as distinguished from an ordinary husband and wife relationship, and the liability of the alleged partnership for the indebtedness.

Were Herbert and Marcia H. Salsbery partners in their farming operations? As husband and wife, they, like many other farm couples, could have well maintained a joint checking account upon which they both drew to pay farm and personal bills and in which the farm income was deposited. In this sense, both would share in the profits or losses from the farming enterprise as do business partners. Yet this, being a quite usual marital arrangement, standing alone, is insufficient to establish a partnership, it being quite consonant with a husband's duty to support his wife, and a wife's duty as a helpmate. There were other factors present in this instance. The wife owned the land on which they lived and which comprised part of the land farmed. There is no indication of the existence of a landlord and tenant relationship. In addition, land belonging to Marcia's father was included in the farm operation. Presumably this was rented but the record is barren of any evidence in that regard. In any event, this land too comprised a

part of the farm operation and is not shown to have been a separate and distinct undertaking on the part of Herbert in which Marcia did not share. The fact that Marcia signed notes with her husband is not conclusive either way without further explanation of the circumstances. It is also apparent that in her deposition defendant carefully avoided and, in fact, refused to give any details of the understanding or arrangement existing between her and her husband. Ownership of the farm machinery and equipment and its disposition is not disclosed by this record. The same is true of crops raised in 1967. Presumably the bank holding a security interest in some, or all, of this property had a voice in such matters, but whether this property was handled through or outside the estate of Herbert Salsbery, deceased, does not appear. Under the circumstances we find that a fact question is presented relative to the existence or nonexistence of a partnership.

George Olson, a partner in the plaintiff firm, stated he dealt with Herb Salsbery, extended credit to him, charged the fertilizer to him, and after his death, filed a claim for the amount due against his estate. This raises a strong presumption that plaintiff dealt with Herbert Salsbery individually and not as a partner. Under such circumstances, the partnership is not ordinarily liable even though it benefited by the fertilizer purchase. "Benefit to the firm is generally held insufficient basis on which to predicate firm liability for a transaction entered into by a partner in his individual capacity." 68 C. J. S., Partnership, § 146 b, p. 581. See, also, Gay's Jewelry, Inc. v. Goldberg, 129 Ind. App. 356, 156 N. E. 2d 637; Perkins v. Butler County, 44 Neb. 110, 62 N. W. 308; Blue Valley State Bank v. Milburn, 120 Neb. 421, 232 N. W. 777; Meyer v. Linch, 145 Neb. 1, 15 N. W. 2d 317.

One contradictory fact in evidence is that plaintiff, in extending credit, relied on Marcia's ownership of the one farm or quarter. This factor renders it clear

that at the time of entering into the transaction, plaintiff was aware not only that Herbert was operating the farm but also that it was partially owned by Marcia. In other words, plaintiff was then aware of the existence of the same facts upon which it now claims that a partnership existed. "Where the partners are disclosed and known to a party contracting, and the contract is signed by only one partner who contracts in his own behalf, the other partners are not bound thereby." 68 C. J. S., Partnership, § 146 a, p. 581. See, also, First State Bank of Riesel v. Dyer, 151 Tex. 650, 254 S. W. 2d 92; Alaska Pac. Salmon Co. v. Matthewson, 3 Wash. 2d 560, 101 P. 2d 606; Nelson v. Seaboard Surety Co., 269 F. 2d 882.

It is evident that the credit was extended to Herbert individually and plaintiff could not now hold Marcia on this indebtedness unless it appeared that Herbert was the managing partner and the partners conducted all business in his name. This, plaintiff does not contend. No such allegation is made in its petition or substantiated. Under the circumstances, it appears that there was no issue of fact remaining on the question of defendant's liability. The summary judgment entry was correct.

Plaintiff contends an abuse of discretion occurred when the trial court denied it the privilege of filing a second amended petition. At this time the motion for summary judgment had been heard, submitted, and taken under advisement. The amended petition proffered sought to change the cause of action to one for unjust enrichment. In this respect, it failed as it did not allege facts sufficient to constitute a cause of action. It states, in substance, that the proceeds of the crop upon which the fertilizer was used were applied to the payment of the notes upon which defendant was a guarantor or jointly liable with her husband. It is not alleged that the money was used in payment of defendant's debts as distinguished from her husbands and unless this be true, it is difficult to understand how she could have

profited. Plaintiff's account is for the sale of fertilizer. For defendant to have profited from the use of the fertilizer, she would have had to obtain the crops upon which it was used. The record discloses that Herbert Salsbery's estate was administered and was insolvent. The administrator must necessarily have applied the proceeds of the crops to the indebtedness of the estate, to the exclusion of defendant. The most defendant could have received was a reduction of her secondary liability on the larger note. Had the estate paid the smaller joint note, it would have had a valid claim against defendant for one-half of the sum paid. It is apparent that defendant was not enriched at plaintiff's expense and could not have received money or credits to which plaintiff was entitled. Denial of the right to file an amended pleading not tending to promote the interests of justice is not an abuse of discretion. See McCarty v. Morrow, 173 Neb. 643, 114 N. W. 2d 512.

The judgment of the district court is free from error and is affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. EUGENE PAUL OZIAH, APPELLANT.
184 N. W. 2d 725

Filed March 12, 1971. No. 37699.

1. **Criminal Law: Evidence: Witnesses.** In determining the admissibility of a state witness' in-court identification of an accused after identification by the same witness at an illegal police lineup, the proper test is whether the evidence objected to has been come at by exploitation of the illegality or by means sufficiently distinguishable to be purged of the primary taint.
2. ———: ———: ———. The application of in-court identification after prior illegal police lineup requires consideration of the prior opportunity to observe the criminal act, the existence of any discrepancy between any prior lineup description and the

defendant's actual description, any identification prior to the lineup of another person, the identification by photograph of the accused prior to the lineup, failure to identify the defendant on a prior occasion, the lapse of time between the alleged act and the lineup description, and those facts disclosed showing the impropriety of the lineup.

3. ———: ———: ———. Where the in-court identification shows that the identification had an origin independent of an illegal lineup, the in-court identification is proper to be received in evidence.

4. **Post Conviction: Right to Counsel: Evidence.** A claim of error on the ground of ineffective assistance of counsel must be supported by a record showing that counsel's assistance was so grossly inept as to jeopardize the rights of the defendant and shock the court by its inadequacy.

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

John W. Carlson, for appellant.

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

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

CARTER, J.

The defendant was convicted on two counts of robbery and sentenced to 15 years in prison. The conviction and sentence were affirmed by this court. State v. Oziah, 182 Neb. 577, 156 N. W. 2d 31. Subsequently on August 20, 1969, defendant filed his amended motion to vacate and set aside the sentence and conviction, asserting he had been denied his constitutional rights which entitled him to release from his prison sentence. An evidentiary hearing was held and the trial court denied any relief. The defendant has appealed.

The evidence shows that defendant and two others entered the farm home of Mr. and Mrs. Arlin F. Blome near Clatonia, Nebraska, and confronted them with a gun and a knife while they ransacked the house and took money, guns, and jewelry belonging to them. After

tying up the Blomes, they left the farm. The Blomes reported the robbery to law enforcement officers who advised all officers by radio to be on the lookout for a 1958 Ford, very dirty, with a bent rear bumper, and occupied by three male occupants about 5 feet 10 inches in height, one wearing a beard. The police call stated they possibly had a knife and shotgun used in a robbery at Clatonia.

The police in Lincoln picked up the message and an hour or so later picked up a car answering the description and containing two men, one of whom wore a beard. The Lincoln police had no warrant. On request, Arlin Blome came to Lincoln and identified the automobile. He looked at the men at the police station through a one-way mirror and identified defendant as a participant in the robbery because "I got a good look at just the way his eyes and face features were and you can't help but recognize a man like that." Mrs. Blome also identified the defendant at the same time by the same procedure.

The defendant contends that the judgment and sentence are violative of his constitutional rights because the in-court identification by the Blomes was based, in part, upon an unlawful lineup which was tainted by the manner in which it was conducted and the unlawful arrest which preceded it.

While we are of the opinion that the Lincoln police arrest was lawful for the reason that the police call picked up by them was reliable information constituting probable cause, we choose to place the decision on other grounds. See, Bailey v. United States, 389 F. 2d 305 (1967); State v. Berkins, 2 Wash. App. 910, 471 P. 2d 131 (1970).

Assuming that the arrest of the defendant without a warrant was illegal and that the pretrial identification of defendant in the form of a lineup was unlawful, the in-court identification of the defendant by Mr. and Mrs. Blome was proper to be considered by the jury.

The evidence at the original trial showed that defendant and two confederates came to the door of the Blome home at about 7:50 p.m., on January 22, 1967, and sought entrance. When Mrs. Blome opened the door a gun was thrust in her face and the three intruders forced their entrance. They demanded money. Mrs. Blome was compelled to sit on a chair and kept there at gunpoint. Arlin Blome saw an automobile enter his yard with its lights out, which he described as a 1958 Ford, very dirty, with one side badly beat up, and with a damaged rear bumper that he portrayed as a "sagging bumper." He ran into his garage where he observed the car and three men. He waited a few minutes, then entered the house through the back door and was jumped and subdued by defendant and one of his companions. He was taken, with a knife at his neck, to the room where his wife was held and forced to sit in a corner. While one of the intruders covered the Blomes with a shotgun, the other two ransacked the house for money and other valuables. The intruders were in the house for 20 minutes or so. The house was fully lighted and the facial features of the three men were plainly visible. The Blomes closely scrutinized the three men and positively identified the defendant at the Lincoln police station and at the trial of the defendant. It is the contention of the defendant that the in-court identification was based in part upon an unlawful pretrial identification lineup and an unlawful arrest which preceded it which tainted and made inadmissible the in-court identifications.

In a very similar case, this court said: "Thus, where the facts make it evident that the witness has had a reasonable opportunity, at the time of the commission of the crime, to view the defendant whom he later identifies as the culprit, the evidence is generally considered to be sufficiently reliable to permit it to go to the jury on the basis that such view constitutes an independent basis for identification. Such was the case here. The

defendant was observed full face under a bright light from a distance of only 20 feet. The fact that the identfying witness did have an excellent opportunity to examine the defendant is made evident by the fact that he was able to give the police a sufficiently accurate description of the person he had observed so that the police were able to locate and identify him a short time later." State v. Cannon, 185 Neb. 149, 174 N. W. 2d 181.

The decisions of the Supreme Court of the United States hold that the issue before us is a constitutional one. The decisions of that court are therefore pertinent. In Silverthorne Lumber Co., Inc. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426 (1920), the court said: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, * * *." In Wong Sun v. United States, 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), it was said: "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" The foregoing is supported by United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149; and Gilbert v. California, 388 U. S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178. In People v. Gates, 123 Ill. App. 2d 50, 259 N. E. 2d 631, the rule to be applied is well stated: "We have previously held that 'it should make no difference whether an identification procedure is or is not unnecessarily suggestive

so long as the record clearly shows a prior observation of defendant sufficient to serve as an independent origin for the in-court identification.' * * * Assuming, in the instant case, that the procedure of the hospital 'showup' was unnecessarily suggestive * * *, the victim testified that at the scene of the crime, she had observed Andrew Gates for 20 minutes under good lighting conditions * * *. There is no evidence in the record that the victim failed to identify defendants when given the opportunity to do so, nor that her testimony was shaken in any way, nor is there any conflicting identification testimony."

In the instant case, Arlin and Dorothy Blome each scrutinized the defendant and his companions for 20 minutes under good lighting conditions, at times within a distance of 5 feet. Both identified the defendant with absolute certainty within 4 or 5 hours at the Lincoln police station. Their evidence is neither disputed nor shaken. The identification of the defendant at the time of the commission of the crime is the original source of the identification where the Blomes had full opportunity to charge their minds with his identifying features. Whether or not the arrest was unlawful or the lineup illegal, the identifying evidence of the Blomes was properly admitted. It is not tainted within the meaning of the rule by an attempt to brace up an uncertain identification by the use of an illegal lineup. The taint of the illegal lineup, assuming it was illegal, was purged by the independent origin of the identifying evidence.

The brief of the defendant asserts that defendant's counsel on the original trial of this case was incompetent to such a degree as to warrant a retrial of the case. Although this issue was not raised in the motion for a new trial or the assignments of error in the brief on appeal in the instant case, there is no evidence that defendant's conviction was the result of incompetent counsel. State v. Konvalin, 181 Neb. 554, 149 N. W. 2d 755; State v. Moss, 182 Neb. 502, 155 N. W. 2d 435. The evidence is

quite conclusive that defendant committed the crime with which he was charged. Defendant's legal counsel is recognized as a capable lawyer in a large community. He protected the rights of the defendant with little in the way of proof of innocence or mitigation of punishment. An examination of the record reveals nothing to indicate that defendant did not have a fair and impartial trial or that his conviction was brought about by any failure of duty by his counsel. A defendant is entitled to a fair and impartial trial but not to a perfect one. We fail to see how a jury could have properly brought in any other verdict than the one it did.

The trial court was correct in denying any relief under the Post Conviction Act. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM PHILLIPS, APPELLANT.
184 N. W. 2d 639

Filed March 12, 1971. No. 37700.

1. **Criminal Law: Right to Counsel: Post Conviction.** Effectiveness of counsel is not to be judged by hindsight.
2. ———: ———: ———. For post conviction relief on the ground of ineffective counsel, it must appear that counsel's assistance was so grossly inept as to shock the conscience of the court.
3. ———: ———: ———. Ineffectiveness of counsel is not inferable from the single fact of the shortness of time between the appointment of counsel and the commencement of trial, but there must be some showing of prejudice and the amount of time which elapses between appointment of counsel and commencement of the trial is not *per se* sufficient to carry that burden.
4. ———: ———: ———. Late appointment of counsel is not erroneous as a matter of law. Appellant has the burden of proving that it is erroneous as a matter of fact.
5. **Criminal Law: Post Conviction: Evidence.** In a post conviction proceeding, the burden of proof is on the movant to establish a basis for relief, and where such burden is not met, a denial of relief is required.

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

Renne Edmunds and J. Patrick Green, 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.

SPENCER, J.

This is an appeal from the denial of post conviction relief. Appellant alleges his conviction was invalid because of ineffective assistance of counsel and that one of the State's witnesses was a mentally ill, paid informer. Post conviction relief was denied. We affirm.

Appellant's brief does not argue or expand on his second assignment of error. There is nothing in the record to indicate the problem, if any. There is no merit to this assignment, and we do not discuss it further.

Appellant received a sentence of 3 to 5 years after a jury found him guilty of robbery. Appellant who is 29 years of age and a high school graduate, admits two previous felony convictions. Appellant does not contend he is innocent of the offense on which he was convicted, but rather that some of his constitutional rights were denied him.

Appellant's assignment of ineffective counsel is premised on the fact that the representative of the public defender's office, Mr. Fred J. Montag, who had been counseling with appellant about his case, was not his attorney at the trial. On February 3, 1969, the trial court appointed the public defender of Douglas County as appellant's counsel. On February 10, 1969, appellant appeared for arraignment with Mr. Lynn R. Carey, Jr., of the public defender's officer as counsel, and pled not guilty. Subsequent thereto, and to the day of trial the appellant was represented by Mr. Montag.

When the case was called for trial, March 31, 1969,

Mr. Montag was not available and Mr. Carey appeared with the appellant. At that time there was some discussion between the appellant, the trial judge, and Mr. Carey, but this discussion was not transcribed. After the jury was impaneled, the appellant, Mr. Carey, and the court again visited about proceeding with the trial, and the following occurred: "(The following proceedings were had in chambers:)

"THE COURT: Let the record show that this is a conference in chambers prior to the jury being sworn. Your name is Mr. William Phillips?

"MR. PHILLIPS: Yes.

"THE COURT: I am Judge O'Brien and I am going to be the Trial Judge in this case, as you know. For your benefit, I am one of the District Judges in this court. It appears that Honorable John Burke on the 3rd day of February, 1969 at your request appointed the Public Defender to represent you. Do you recall that?

"MR. PHILLIPS: Yes, sir.

"THE COURT: Then it further appears from the docket sheet that on the 10th day of February, 1969 you were present in court with the office of the Public Defender, and specifically Mr. Lynn Carey was appointed to represent you. You were arraigned on the charge of robbery and you entered a plea of not guilty and the cause was set for trial at the next jury panel or as soon thereafter as it may be reached, and you were remanded to the custody of the Sheriff. On this 31st day of March, 1969 the record now shows that the Plaintiff appeared in the case of the State of Nebraska v. William Phillips, the State being represented by Frank Pane, one of the Deputy County Attorneys; that you appeared with your Counsel, Lynn Carey, and at this point the jury was merely impaneled. I want to call your attention that at this point the jury has not been sworn because we recessed at noon. In a sense Mr. Lynn Carey has represented you and he is one of the Assistant Public Defenders, and I want to call your attention that Fred Montag

is also an Assistant Public Defender. Do you have any objections to Mr. Lynn Carey proceeding with the trial of your case?

"MR. PHILLIPS: No.

"THE COURT: That is perfectly okay with you?

"MR. PHILLIPS: Yes.

"THE COURT: You have all the confidence in the world in Mr. Lynn Carey, Jr.?

"MR. PHILLIPS: Yes.

"THE COURT: I can assure that Mr. Carey is a competent Trial Counsel but if you want a continuance of any kind in this case I will give it serious consideration. You do not want a continuance?

"MR. PHILLIPS: No.

"THE COURT: You want to continue with the trial of your case?

"MR. PHILLIPS: Yes.

"MR. CAREY: The record should show that our office was appointed and Mr. Montag conferred with the Defendant, but I did appear at the arraignment because of Mr. Montag's non-availability, although he has given me all of the pertinent facts, and I have advised Mr. Phillips that I am willing to proceed with the trial if he wishes, and he wishes to continue at this time rather than wait for Mr. Montag.

"THE COURT: It appears that Mr. Montag is unavailable to represent you in this case, for what reasons I do not know, but this case was scheduled for trial several days ago, approximately two weeks ago and I was assigned to hear this case, and both the State of Nebraska and the office of the Public Defender during the week of March 24, 1969 were advised that this case would be brought to trial before me. You understand that, Mr. Phillips?

"MR. PHILLIPS: Yes, sir.

"THE COURT: Do you feel that you have had ample opportunity to discuss this case and particularly your defense with your Court appointed Counsel?

"MR. PHILLIPS: Yes, sir.

"THE COURT: So, as I understand it, there is no doubt about it—you are requesting me to proceed with the trial of this case, is that correct?

"MR. PHILLIPS: Yes, sir.

"THE COURT: I will grant your personal wishes and respect them.

"MR. PHILLIPS: Thank you."

The record indicates that Mr. Carey discussed the case with the appellant for approximately 15 minutes before the voir dire examination. He was not, however, unfamiliar with the case, which involved two defendants who were to be tried separately. He represented the other defendant, one Leonard Franklin, and had visited with Mr. Franklin at least six times about the case before the appellant's trial. He had also discussed the case rather extensively with Mr. Montag.

To sustain his contention of ineffective counsel, appellant argues: First, trial counsel did not have time to prepare because he was not assigned to appellant's defense until the day of the trial; and, second, that he failed to call certain alleged alibi witnesses. Appellant wholly failed to establish that he was in any way prejudiced by the late substitution of trial counsel. Effectiveness of counsel is not to be judged by hindsight. Cardarella v. United States (8th Cir.), 375 F. 2d 222. Appellant's trial counsel was familiar with the case, had been working on it preparatory to defending another defendant, and had extensively discussed it with appellant's previous counsel. The fact that the trial counsel had only 15 minutes to visit with appellant before a jury was impaneled, on the facts in this case, does not *per se* prove ineffective counsel. Additionally here, the trial judge explained the situation to the appellant and gave him an opportunity to secure a continuance if he felt one was necessary.

In State v. Putnam, 182 Neb. 185, 153 N. W. 2d 456, we held: "Ineffectiveness of counsel is not inferable

from the single fact that only 15 minutes passed between appointment of counsel and arraignment of defendant." Also: "For post conviction relief on the ground of ineffective assistance it must appear 'that counsel's assistance was so grossly inept as to shock the conscience of the court * * *.'" While the Putnam case involved a guilty plea, the principle is the same. There must be some showing of prejudice and the amount of time which elapses between appointment of counsel and the commencement of the trial is not *per se* sufficient to carry that burden.

The instant case on the point involved is not too different from Chambers v. Maroney, 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419. There the petitioner claimed counsel's appearance a few minutes before the trial was so belated he could not furnish effective legal assistance. Petitioner was represented by a legal aid society. A representative of the society conferred with petitioner and appeared for him at his first trial. The question arises out of the second trial because no one from the legal aid society again conferred with petitioner until a few minutes before the second trial began and he was represented by a different member of the legal aid society staff. No charge was made that trial counsel was incompetent or inexperienced, but rather that his appearance was so belated that he could not furnish effective legal assistance. Mr. Justice White, speaking for the majority of the court, said: "Unquestionably, the courts should make every effort to effect early appointments of counsel in all cases. But we are not disposed to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel or to hold that, whenever a habeas corpus petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel."

The evidence on the failure to call alibi witnesses would indicate that appellant's former counsel, as a

matter of trial strategy, specifically advised appellant that this defense would obviously be proved "phony" and should be abandoned. If we are to believe his trial counsel's testimony, appellant must have accepted this advice. While appellant testified that he told his trial counsel that he had asked Mr. Montag to call some witnesses, his trial counsel specifically testified that he discussed the issuance of compulsory process and witnesses with appellant and appellant told him that he had no witnesses. If appellant wanted witnesses, there was time to compel their appearance. In any event, there was no evidence adduced in the post conviction hearing as to what the alleged witnesses could or would testify.

Our examination of the record is sufficient to indicate that the conduct of appellant's trial counsel was adequate. Mr. Carey had held pretrial conferences on the case with the principal defendant in the robbery; he must have been fully aware of the nature of the State's case; and he was experienced in the defense of criminal actions. He had been a member of the staff of the public defender for 4 years previous to this trial. Under the circumstances he was in position to step into the trial on short notice. While such practice is not to be encouraged, in this case it was not prejudicial in any way. The late appointment of counsel was not erroneous as a matter of law. Appellant had the burden of proving that it was erroneous as a matter of fact. This he has not done.

In a post conviction proceeding, the burden of proof is on the movant to establish a basis for relief, and where such burden is not met, a denial of relief is required. State v. Coffen, 184 Neb. 254, 166 N. W. 2d 593. Appellant has not met his burden. The judgment of the district court is correct and is affirmed.

AFFIRMED.

GLENICE M. WEGNER, APPELLANT, V. CLIFFORD A. G. WEGNER, APPELLEE.
184 N. W. 2d 631

Filed March 12, 1971. No. 37705.

Divorce. The fixing of the amount of alimony rests, in each case, upon the sound discretion of the court.

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

Kerrigan, Line & Martin, for appellant.

Yost, Schafersman, Yost & Lamme, for appellee.

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

BOSLAUGH, J.

The plaintiff, Glenice M. Wegner, appeals from a judgment divorcing her from the defendant, Clifford A. G. Wegner. The assignments of error relate to the division of the property of the parties and the allowances for alimony and child support.

The parties were married in 1964 and have two sons, ages 2 and 5. At the time of the separation they were living on a farm near Uehling that they were purchasing on contract. The defendant became involved with another woman and the record shows that the divorce was due entirely to his misconduct.

The trial court awarded the custody of the minor children to the plaintiff; child support in the amount of $175 per month; alimony in the amount of $6,000 payable at the rate of $600 per year for 10 years; a 1968 Buick automobile; and the household goods except certain items awarded to the defendant. The defendant is required to maintain a $10,000 life insurance policy with the children designated as beneficiaries.

The defendant was awarded the interest in the farm and a 1967 pickup truck. In addition to farming the defendant operates a grain bin erection business and a

cattle feeding operation with his father and brother. The defendant owes the bank $41,300 which is secured by livestock and grain and liens on a tractor and automobile. The defendant owns other tools and machinery but the record contains little information concerning their value.

A copy of the defendant's 1969 federal income tax return appears in evidence. The return shows a profit of $6,211.31 from the bin erection business but a loss of $9,579.41 from the farm. The plaintiff works as a clerk at the Penney's store in West Point and has a take-home pay of around $2,100 per year.

The plaintiff contends that the trial court failed to consider the defendant's earning capacity and that the award of property and alimony to the plaintiff is less than one-fourth of the defendant's net worth. There is no clear evidence in this case as to what the defendant's net worth is and the evidence as to his real income is less than satisfactory.

The trial court found that the farm had a value of approximately $51,500. The evidence indicates that the principal balance remaining to be paid on the contract is approximately $33,500. Although the amount of alimony is a matter within the sound discretion of the trial court, the award of $6,000 as alimony appears inadequate in view of the evidence as to the value of the interest in the farm which was awarded to the defendant. Under the circumstances in this case we believe the judgment should be modified to increase the award of alimony to $9,000 payable at the rate of $900 per year for 10 years.

The judgment of the district court as modified is affirmed. The plaintiff is awarded $500 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

SPENCER, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. VICTOR JOURNEY, APPELLANT.
184 N. W. 2d 616

Filed March 12, 1971. No. 37713.

SUPPLEMENTAL OPINION

Criminal Law: Right to Counsel: Guilty Plea. Leave should ordinarily be given to withdraw a plea of guilty if it was entered by mistake or under a misconception of the nature of the charge; through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; was made involuntarily for any reason; or even where it was entered inadvisedly, if any reasonable ground is offered for going to the jury.

Appeal from the district court for Buffalo County: NORRIS CHADDERDON, Judge. Reversed and remanded for further proceedings.

Charles H. Beatty of Mitchell & Beatty, for appellant.

Clarence A. H. Meyer, Attorney General, and Betsy G. Berger, for appellee.

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

NEWTON, J.

The original opinion entered in this case may be found *ante* p. 416, 183 N. W. 2d 494. Due to what now appears to be an unwise curtailment of that opinion some confusion has been engendered. For this reason we now delve more deeply into the circumstances surrounding this case.

Defendant was prosecuted under section 28-450, R. R. S. 1943. That section provides that *each* failure to pay a *separate installment* of support money as provided in the divorce decree *shall be a separate offense.* Section 29-110, R. S. Supp., 1969, provides that one committing a felony, with certain exceptions not here applicable, may only be prosecuted within 3 years next following the commission of the offense. The complaint against defendant charges a failure to pay a child support payment

accruing in May 1966. It was not filed until June 27, 1969. It is consequently obvious that the statute of limitations had run on the charge to which defendant entered a plea of guilty.

Whether or not a plea of guilty waives the defense of the statute of limitations is not material here. The defendant, obviously without knowledge of the applicability of this defense, entered a plea of guilty. He then, before sentence, requested the appointment of counsel to represent him. This was denied and the denial renders it necessary to examine the consequences.

In this post conviction action the denial of counsel is assigned as error. We agree, as stated in our original opinion, that it was error. Had competent counsel been appointed he would undoubtedly have noted the availability of the defense that the statute of limitations had run and may have found it advisable to move for a withdrawal of the plea of guilty. We have held that leave should ordinarily be given to withdraw a plea of guilty if it was entered by mistake or under a misconception of the nature of the charge; through a misunderstanding as to its effect; through fear, fraud, or official misrepresentation; was made involuntarily for any reason; or even where it was entered inadvisedly, if any reasonable ground is offered for going to the jury. See, Jurgenson v. State, 166 Neb. 111, 88 N. W. 2d 129; State v. Pitzel, 181 Neb. 176, 147 N. W. 2d 524.

In the present instance, the plea of guilty may have been "inadvisable." The failure to appoint an attorney renders it necessary to set aside the sentence. This failure also prejudicially affected the right of the defendant to move for a withdrawal of his plea of guilty. It is for the defendant and his counsel to determine, in the light of other defenses, if any, whether a motion for withdrawal of the plea previously entered or other proceedings are advisable.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DONALD G. WERNER, APPELLANT, V. JOAN M. WERNER, APPELLEE.
184 N. W. 2d 646

Filed March 12, 1971. No. 37898.

1. **Actions: Dismissal.** The right of a plaintiff to dismiss a cause of action before submission to the court is a statutory right and is not a matter of judicial grace or discretion.
2. **Divorce: Dismissal.** In an action for divorce, until the trial court enters an order imposing some obligation, the plaintiff has an unqualified right to dismiss his petition without leave of court, regardless of the nature of the pleadings on file.

Appeal from the district Court for Dawes County: ROBERT R. MORAN, Judge. On motion to dismiss appeal. Appeal dismissed.

Fisher & Fisher, for appellant.

Laurice M. Margheim of Bump & Bump, for appellee.

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

SPENCER, J.

This case is before us on a motion of appellee to dismiss the appeal. We dismiss the appeal but direct the trial court to vacate his order striking appellant's dismissal of his divorce action and to reinstate the dismissal of the action.

Appellant filed a petition for divorce September 1, 1970, and obtained personal service on the appellee in Fort Collins, Colorado. Appellee filed a demurrer October 5, and an application for temporary alimony, custody of children, support, and attorney's fee October 6. Appellant at all times herein has had custody of the children. Neither the demurrer nor the application had been ruled on. On October 7, at approximately 4:20 p.m., appellant filed a dismissal of the action. Subsequently, and at approximately 4:30 the same day, appellee filed an application for an injunction on which ex parte the trial court entered a restraining order con-

cerning the removal of the children, which was never served. On October 23, appellee filed a pleading purporting to be an objection to discharge and a motion to strike, objecting to the unconditional dismissal of the action and moving the court for an order striking the same from the file. On October 27, the court entered an order striking the dismissal from the file. The appeal was perfected from that order. We file this opinion because it is obvious to us that the order striking the dismissal from the file was a nullity.

Section 25-601, R. R. S. 1943, gives a plaintiff the right to dismiss an action without prejudice *as a matter of right* at any time before final submission.

At the time of the dismissal herein, the appellee had a demurrer on file to the petition, which appears to have merit. The only other pleading pending at the time of the dismissal was an application for allowances. No action of any nature had been taken by the court on either of these pleadings previous to the dismissal.

On November 6, 1970, we decided the case of In re Interest of Moore, *ante* p. 67, 180 N. W. 2d 917, *ante* p. 158, 180 N. W. 2d 919. We there held the county attorney had the right to dismiss a juvenile action without consent of the court. We said: "At common law, a criminal action could be dismissed by the prosecuting attorney, without leave of court, at any time before a jury was impaneled. See 22A C. J. S., Criminal Law, § 457c, p. 5. By statute, civil actions may be dismissel without leave of court at any time before final submission of the cause. See, § 25-601, R. R. S. 1943; Giesler v. City of Omaha, 175 Neb. 706, 123 N. W. 2d 650."

In Giesler v. City of Omaha, 175 Neb. 706, 123 N. W. 2d 650, we held: "The right of a plaintiff to dismiss a cause of action before submission to the court is a statutory right and is not a matter of judicial grace or discretion."

In an action for divorce, until the trial court enters an order imposing some obligation, the plaintiff has an

unqualified right to dismiss his petition without leave of court, regardless of the nature of the pleadings on file. Appellee could have protected herself herein by filing an answer and cross-petition rather than a demurrer.

A question was raised as to whether or not the order entered was a final order. The view we take is that when the appellant filed his dismissal it ended the litigation, the case was no longer pending, and the order of the court reinstating the case was a nullity. We therefore dismiss the appeal at appellee's cost.

APPEAL DISMISSED.

CARTER, J., dissenting.

The dismissal of the appeal in this case deprives this court of any jurisdiction. This leaves the case wholly in the district court. The purported holdings of this court to the effect that "The view we take is that when the appellant filed his dismissal it ended the litigation, the case was no longer pending, and the order of the court reinstating the case was a nullity" is purely gratuitous, beyond the power of this court to make, and an unwarranted interference with the exclusive jurisdiction of the district court. The reinstatement of the action in the district court may have been erroneous but it was not a nullity. It is indeed an anomaly that this court can divest itself of the jurisdiction attempted to be lodged here by a purported appeal and at that same time decide issues pending in the district court. I submit that semantical acrobatics cannot serve to justify the action taken on the motion to dismiss the appeal.

ELVINA M. MERRITT, ADMINISTRATRIX OF THE ESTATE OF FERDINAND M. MERRITT, DECEASED, APPELLANT, V. DWIGHT REED, DOING BUSINESS AS REED HARDWARE, CHADRON, NEBRASKA, ET AL., APPELLEES.

185 N. W. 2d 261

Filed March 19, 1971. No. 37521.

1. **Automobiles: Negligence.** A pedestrian who crosses a street between intersections is required to keep a constant lookout for his own safety in all directions of anticipated danger.
2. **Automobiles: Death: Negligence: Witnesses.** Where both parties are deceased, are disabled, or lack memory, creating offsetting presumptions of due care, the resolution must rest upon the proper inferences to be drawn from whatever circumstantial evidence is available to the trier of fact.
3. **Appeal and Error.** To justify this court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of the reviewing court to correct the mistake.
4. **Trial: Evidence.** The persuasiveness of direct evidence may be destroyed by the physical facts or other circumstantial evidence, even though not contradicted by direct evidence.
5. **Negligence: Highways.** A pedestrian who crosses a street between intersections is charged with the exercise of a greater degree of care than one who crosses a street at a crosswalk where protection is afforded by giving the pedestrian the right-of-way.
6. ———: ———. One who attempts to cross a street between intersections without looking is guilty of such negligence as would bar a recovery as a matter of law.
7. **Negligence: Automobiles.** The duty to sound a signal or horn depends upon the circumstances of the particular case.

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

Charles A. Fisher, for appellant.

Van Steenberg & Winner and Crites & Shaffer, for appellees.

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

WHITE, C. J.

The deceased husband of the plaintiff, a pedestrian, was killed by a collision with a pick-up truck, owned by defendant Reed and being driven by defendant Lenington, while deceased was crossing Bordeaux Street between intersections in the downtown business district of Chadron, Nebraska. The district court submitted the case to the jury on issues of negligence and contributory negligence and the jury returned a verdict for the defendants. Judgment of the district court was entered accordingly. We affirm the judgment of the district court.

The plaintiff assigns 27 overlapping errors, many of which are not discussed and therefore will not be considered. They boil down to an assertion that the district court erred in the submission of the issue of contributory negligence and in the failure to submit other specifications of negligence on the part of the defendant Lenington, beyond that of speed.

Third Street (U. S. Highway No. 20) is a main arterial road running east and west through Chadron, Nebraska. It is intersected by Bordeaux Street, running north and south, which is a paved street about 40 feet wide, in the downtown business section of the City of Chadron. There is a service or filling station on each of the northwest and northeast corners of Third and Bordeaux Streets. There is another filling station on the north side of Third Street a block east of Bordeaux Street. The accident occurred around 9 a.m. on November 8, 1967. The day was clear, the pavement was dry, and the evidence is conclusive that the vision north and south on Bordeaux Street was unobstructed. The pick-up truck approached from the south on Bordeaux Street, crossed the intersection of Third and Bordeaux Streets, and continued north.

The undisputed physical facts and the measurements made by the sheriff establish that the deceased was struck somewhere around 52 feet north of the north crosswalk of Third and Bordeaux Streets and near the

center of Bordeaux Street. By judicial admission the plaintiff admits that it happened 35 to 42 feet north of the north crosswalk. This is corroborated by testimony as to the location of debris surrounding the location of the deceased's body. The deceased's body was carried or hurled a distance off the street after impact to a point approximately opposite the Elks Club entrance on the west side of Bordeaux Street further north. The hat he was wearing was found approximately in the middle of Bordeaux street, 52 feet north of the crosswalk. The one witness who observed the hat immediately after the thud of impact testified that the deceased's hat flew up in the air, and the inference is that it came to rest some place south of the actual point of impact. This would place the point of impact somewhat north of where the hat was found. There were no eyewitnesses to the accident. The deceased never regained consciousness and was dead on arrival at the hospital. The defendant has no memory of the circumstances of the accident which, while unusual, is not uncommon in major accidents. See, 11 Blashfield, Automobile Law and Practice, § 417.2, p. 144, and cases cited thereunder. In light of this situation the resolution of this case must rest upon a proper analysis of the almost undisputed circumstantial evidence in the case, and its relation to the requisite burdens of proof and presumptions involved. Both parties seem to rely upon the presumptions applicable to these situations. However, we are not aided by any presumptions involved here as the same presumption of due care as is presumed for a deceased prevails where the party's version is unavailable due to disability or loss of memory. Where both parties are deceased, are disabled, or lack memory, creating offsetting presumptions of due care, the resolution must rest upon the proper inferences to be drawn from whatever circumstantial evidence is available to the trier of fact. 11 Blashfield, Automobile Law and Practice, § 417.2, p. 144.

At the outset, since we are asked to overturn the jury

verdict for defendants, we must consider this case in light of the rule that to justify this court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of the reviewing court to correct the mistake. Schmeeckle v. Peterson, 178 Neb. 476, 134 N. W. 2d 37; Beavers v. Christensen, 176 Neb. 162, 125 N. W. 2d 551; Bentley v. Hoagland, 94 Neb. 442, 143 N. W. 465; Fried v. Remington, 5 Neb. 525. In approaching the analysis of the evidence with relation to the sufficiency or lack of evidence in this case, when there is no direct evidence from the lips of the parties involved, we are not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence is destroyed by the physical facts or other circumstantial evidence, even though not contradicted by direct evidence. Snowardt v. City of Kimball, 174 Neb. 294, 117 N. W. 2d 543; Beavers v. Christensen, *supra;* Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613.

The record demonstrates conclusively that the deceased, a pedestrian, was crossing a downtown business street between intersections. The pick-up truck approached on Bordeaux Street from the south on a clear, dry day with the view to the south completely unobscured. The defendant driver had the right-of-way. § 39-751 (5), R. R. S. 1943; Carman v. Hartnett, 161 Neb. 576, 74 N. W. 2d 352; Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531, 82 A. L. R. 2d 714; Trumbley v. Moore, *supra.*

This court has been faced in the past with a quite similar situation in Trumbley v. Moore, *supra.* In that case the court was faced with a situation where the plaintiff was an eyewitness and attempted to supply the testimony which would defeat the application of the traditional rules as to right-of-way and lookout and the duty of the pedestrian in this situation. The analysis the court made in that case is obviously applicable to

the case at bar. This court said: "But one who does so (cross between intersections) is charged with the exercise of a greater degree of care than one who crosses a street at a crosswalk where protection is afforded by giving the pedestrian the right-of-way. Doan v. Hoppe, 133 Neb. 767, 277 N. W. 64. While one who crosses a street between *intersections in direct violation of a statute or ordinance is guilty of negligence in so doing, it does not necessarily follow that it is such negligence as would bar a recovery* as a matter of law because it might still be for the jury to determine the extent that his negligence contributed to his injury or whether the driver of the car should have seen him in time to avoid the accident. But one who crosses a street between intersections is required to *keep a constant lookout for his own safety in all directions of anticipated danger.* Where such person crosses the street between intersections without looking at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see and proceeds irrespective of that fact, the situation usually presents a question for the court. Where he looks but does not see an approaching automobile, or sees it and misjudges its speed or its distance from him, or for some other reason concludes that he could avoid injury to himself, a jury question is usually presented. *But the foregoing rule does not mean that a mere statement by the injured person, that he looked in the direction from which he was struck* is sufficient of itself to insure a consideration of his case by a jury. *It must be sufficiently consistent with the circumstances and facts shown by the evidence* to present a question of fact for the jury to decide.

"It is elementary that one who attempts to cross a street between intersections without looking is guilty of such negligence as would bar a recovery as a matter of law. *If he testifies that he did look, it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse*

for not seeing is shown. The decisions of this court have consistently held to this rule. Vandervert v. Robey, 118 Neb. 395, 225 N. W. 36; Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673; Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596; Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501." (Emphasis supplied.)

Without passing on the question of whether the plaintiff was entitled to a directed verdict in this situation, it is clear from what we have said in Trumbley v. Moore, *supra,* that the trial court was amply justified in submitting the issue of contributory negligence to the jury.

The trial court submitted only the issue of the speed of the pick-up to the jury. The plaintiff now contends that her specifications of negligence relating to failure to stop at the stop sign on Bordeaux Street, improper lookout, improper control, failure to sound a horn, and other specifications constitute reversible and prejudicial error. In order to examine these contentions it becomes necessary to make a detailed examination of the only evidence upon which such a submission could be based, the testimony of the witness Orville Dau. Dau was a close friend of the deceased, and had been talking with him for some minutes immediately prior to the time of the accident. Dau and a helper were engaged in the excavation and installation of new gasoline pumps at the filling station 1 block to the east, and the exact point where they were working is some 200 to 300 feet east of Bordeaux Street where the accident happened.

Dau said that after their conversation together, deceased proceeded west on the north sidewalk of Third Street toward the filling station and the intersection of Third and Bordeaux Streets. An automobile parked upon the Skelly service station parking lot blocked Dau's view. He said he did not see the deceased from the time his view was blocked by the car until after the thud of impact. He then looked up to see the deceased's hat flying in the air (dropping 52 feet north of the north crosswalk of Bordeaux Street).

He testified that he could not say whether the defendant driver stopped at the stop sign on the south side of Third Street. This witness, after testifying as to the blocking of his vision by the intervening car on the parking lot, also testified that during this period of time he was engaged in a joint lifting and holding operation in the installation work of the pumps, in which his attention had to be focused upon his fellow employee who was underground in the excavation. There was not only a variance in his testimony in the case from that previously given in his statement, but his final summary of his own testimony is so confusing and uncertain as to not reach the point of being sufficient to sustain the plaintiff's burden of proof as to the different factors that are now claimed should have been submitted to the jury. This can only be demonstrated by a recital from the record of his testimony. It is as follows: "Q Now, Mr. Dau, do you remember when you gave a court reporter's statement, that Mr. Widler took down, on the 16th day of November 1967, just, oh, that would be eight days after the accident; do you remember that day? A Yes. Q Okay, and do you remember this question being asked, 'Q Were there any traffic controls at this intersection? A The stop sign. Q Did the vehicle stop at the stop sign? A This I can't answer because *I didn't see it cross the intersection.*' Do you remember giving that answer? A Yes. Q Well, today, now you're saying that you saw it part of the time in the intersection, are you not? A Well, its hard to designate what you—what you mean, 'across the intersection,' you mean midway of Third Street or— Q Well, the intersection is— A After you cross the point of the middle of Third Street, to me it would be beyond the intersection. Q Your testimony today is, that you saw it from the middle of Third Street till it entered or about the time it entered Bordeaux? A Yes, onto Second. Yes, it would be the second block. Q So when you said the other day you didn't see it

when it crossed the intersection, what were you referring to? This November, just eight days after the accident? A Well, maybe I had misinterpreted the way the question was approached to me. Q Well, I—I'm asking you, I'm not trying to—I'm just trying to find out. It seems to me there's a discrepancy, and I want to know what—which is right? A Well, it still *seems* to me that I seen the vehicle, at least from the middle of Third Street, north, is what I recall the pickup seeing it. Q In other— A In other words, it would be the middle of Third Street, north and on, was where I really noticed the pickup. Q But it was *blocked* from your view as it entered Bordeaux Street, by this car that *was parked in the Skelly platform or parking lot?* A *Yes.* Q So it would be only for a period of, according to your testimony today, of maybe 30 feet that you saw the Reed pickup going north? A Yes. Q So the other day when you said you didn't see it cross the intersection, what were you referring to? A In other words, I didn't mean that—I didn't see it when it left—in other words, the south side of Third Street, I didn't see it there at the stop sign, and I didn't probably see it maybe right at the mid of Third Street, but I did see it from then on to the north to the intersection. In other words, it was entering probably close to the crosswalk, I imagine you'd say,— Q Well, you just saw it for an instant, isn't that correct? A Yes, it is. That's what it was, a glance. Q Just like that. (indicating) A It was a glance. Q And the pickup has on it in large letters, or quite large letters, Reed Hardware, doesn't it? A Yes, it does. Q But you didn't see that? You didn't see it long enough to see that? A No, I didn't. That's right. Q And you knew Mr. Lenington quite well at that time, didn't you? A Yes, I did. Q And you didn't see it long enough to recognize him? A No. Q So it really is a guess when you say—try to estimate its speed, is it not? MR. FISHER: That's objected to as incom-

petent, irrelevant and immaterial; improper cross-examination, and argumentative. THE COURT: Overruled. BY MR. VAN STEENBERG: Q You may answer the question. I say, it really is just a guess when you try to estimate the speed, because it was just such an instant? A That's right." (Emphasis supplied.)

This witness further testified at the end of his recross-examination as follows: "Q But the point I'm trying to make is, when you saw the hat you were looking almost directly straight west? A Oh, possibly it could have been more to the south, oh, say 20, 30 feet. It's hard to estimate the distance. Q Orville, a little bit ago when I was reading from your statement before, I asked about this question. 'Q Did the vehicle stop at the stop sign?' And you said, 'A This I can't answer because I didn't see it cross the intersection.' Then there was another question, 'Q At the time you saw the vehicle then it was just— A Across the intersection. Q Across the intersection? A From where the sidewalk would be, from then on north, is when I— Q Okay,' Were those questions asked you and those answers given? A Yes."

And further on cross-examination as to foundation for the introduction of speed testimony this witness testified as follows: "Q Mr. Dau, when I visited with you yesterday, you said that this was just a guess, your estimate, did you not? A If you mean on the speed? Q Yes, just a guess. A Yes, it would be a guess. Q And it's still just a guess? A It is to anybody that would guess a vehicle from any moving vehicle, you just— Q Well, what you're about to testify to is a guess, though, is it not? A *Yes.*" (Emphasis supplied.)

It is self-evident that Dau's testimony is contradictory and confused. This arises out of (1) conflict with his previous testimony, and (2) uncertain confusion and contradiction in his testimony on direct, cross, re-direct, and recross-examination. Summarizing, the testimony

of this witness demonstrates that he had no reasonable time, means, distance, or opportunity to formulate a basis for an opinion as to speed, lookout, or the other factors claimed by the plaintiff to be submissible to the jury. Consequently, this testimony lacks sufficient foundation, and even though admitted by the trial court, formulates no basis for submitting to the jury any other issue than speed. Ambrozi v. Fry, 158 Neb. 18, 62 N. W. 2d 259; Tews v. Bamrick & Carroll, 148 Neb. 59, 26 N. W. 2d 499; Fairman v. Cook, 142 Neb. 893, 8 N. W. 2d 315. The plaintiff must meet the requisite burden of proof by some competent evidence to sustain it. The testimony as we see it which the plaintiff relies upon is at its best conjecture, speculation, and surmise. As we have said, a mere scintilla of evidence is not enough to require submission to the jury. Langemeier, Inc. v. Pendgraft, 178 Neb. 250, 132 N. W. 2d 880; Lindelow v. Peter Kiewit Sons', Inc., 174 Neb. 1, 115 N. W. 2d 776; Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254. In the posture of this case there is nothing to justify this court in interfering with the findings of the jury for the defendants because there is no preponderance of the evidence so purely and obviously contrary to the jury's findings that it would be the duty of this court to set aside the verdict. See, Schmeeckle v. Peterson, *supra;* Beavers v. Christensen, *supra.*

There is no direct evidence to sustain the issues of lookout, control, and failure to stop at a stop sign. We have noted there is insufficient foundation for any circumstantial evidence from which we could draw an inference that any of these elements were present. We have recently said that circumstantial evidence is not sufficient in a civil case, unless the circumstances prove or are of such a nature and so related to each other that the conclusion reached by the jury is the only one that can be fairly and reasonably drawn. Popken v. Farmers Mutual Home Ins. Co., 180 Neb. 250, 142 N. W. 2d 309; Bowers v. Maine, 179 Neb. 239, 137 N. W. 2d 796; Petra-

cek v. O.K. Rubber Welders, Inc., 176 Neb. 438, 126 N. W. 2d 466.

There is no evidence to properly submit the issue of failure of the defendant driver to sound a horn. Section 39-774, R. R. S. 1943, is not applicable because the pick-up truck was proceeding in a direct course on the highway. The duty to sound a signal or horn depends upon the circumstances of the particular case. Kauffman v. Fundaburg, 123 Neb. 340, 242 N. W. 2d 658; Tews v. Bamrick & Carroll, *supra*. There is no evidence by which a jury could find that there was a duty to sound a horn or signal because it is pure conjecture and speculation as to when or how the deceased appeared in the line of travel of the defendant driver.

We have examined the other contentions of the plaintiff and they are without merit. The record reveals that this case was carefully tried; that the district court resolved any doubts as to the submission of the issues in favor of the plaintiff; and that the error, if any, was in favor of the plaintiff for which she cannot complain.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT ALLEN COLEMAN, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. JAMES D. HAINLINE, APPELLANT.

184 N. W. 2d 732

Filed March 19, 1971. Nos. 37683, 37684.

1. **Criminal Law: Evidence.** A person charged with crime may be convicted on circumstantial evidence only.
2. ———: ———. To justify a conviction on circumstantial evidence, it is necessary for the jury to find that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and when taken together must be of such character as to be consistent

with each other and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence.

3. **Criminal Law: Evidence: Appeal and Error.** After a jury has considered the evidence in the light of the foregoing rules relating to circumstantial evidence and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt.
4. **Criminal Law: Evidence.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown.
5. ———: ———. Defense counsel in a criminal prosecution have no right to inspect or compel the production of evidence in the possession of the State unless a valid reason exists for so doing. The defendant has no inherent right to invoke this means of examining the State's evidence merely in the hope that something may be uncovered which would aid his defense.
6. **Criminal Law: Instructions.** Instructions to the jury which fully and fairly submit the issues in a criminal case are not subject to attack in the absence of a showing that the manner of their submission is prejudicial to the rights of the defendant.
7. **Criminal Law: Trial.** An argument by a prosecuting attorney, which is based on the evidence and the inferences drawn therefrom, does not constitute misconduct by the prosecution.
8. ———: ———. Remarks of the prosecutor in his summations of the evidence to the jury which do not mislead and unfairly influence the jury toward a verdict on a basis not supported by or inferred from the evidence, does not ordinarily constitute misconduct.

Appeals from the district court for Phelps County: NORRIS CHADDERDON, Judge. Affirmed.

Padley & Dudden, for appellants.

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.

CARTER, J.

The defendants, Robert Allen Coleman and James D. Hainline, were charged and tried by information on

several counts in the district court for Phelps County, summarized as follows: (a) With breaking and entering Strong Brothers, Inc., with intent to steal; (b) with feloniously and maliciously shooting at Roger D. Johnson and Dwayne C. Newman with intent to kill, wound, or maim; (c) with breaking and entering Lumpkin's Foodliner, Inc., with intent to steal; (d) with using firearms in the commission of a burglary at Strong Brothers, Inc.; and (e) stealing $1,263.97 from Lumpkin's Foodliner, Inc., all of which is alleged to have occurred on or about October 30, 1969. Hainline was additionally charged with being a habitual criminal. The defendants entered pleas of not guilty. A trial was had. The jury returned verdicts of guilty and defendants have appealed.

The evidence is that several police officers were in the Holdrege police station about 1:30 a.m., on October 30, 1969, when they heard talking and noise coming over an electric surveillance device connected to Strong Brothers garage. Three officers went immediately to the garage. One of the officers looked in and saw two men moving about within the dimly lighted building. One of the officers had stationed himself outside an outside door. The two men approached this door, but on being challenged they left the immediate area. After considerable moving about by the two men on the inside, two shots were fired from the inside of the building. Very shortly thereafter numerous shots were fired both inside and outside the building. In the last exchange of shots, Officer Roger Johnson was hit and incapacitated. It was later learned that the two men sought to leave the building by a north door where Johnson was on guard, engaged in a shooting melee resulting in Johnson's injury, and fled on foot to the north.

At approximately 2 a.m., the officers began trailing the two men by their tracks in a light snow which had been falling since midnight. Several police officers

participated in the trailing which led them through alleys, streets, and open spaces in the north part of Holdrege. After going north of the city, the tracks turned easterly through a farm area and then south to an abandoned farmstead several miles south and east of Holdrege where, about 7 a.m., defendants were taken into custody from their hiding place.

There is evidence by a state trooper that he found an open window by which entry to the garage could have been gained. There is also evidence by an employee of the garage that the window was closed when he left the garage at the close of work the evening before. Officer Johnson testified that when he saw the two men moving around in the garage building, one of the intruders was carrying what appeared to be a walkie-talkie because there was an aerial on it. Some shell casings and one bullet were found in and around the building. Some of the shell casings were .32 caliber fitting a gun or guns not carried by any of the law enforcement officers. Bullet holes were found inside the garage, a clear indication they were fired by guns inside the garage. Various items of evidence were found along the trail including a walkie-talkie, two gun holsters and a belt, a flashlight, and two guns. An F.B.I. agent, a gun expert, testified that the shell casings found were fired from these two guns.

The office safe in the garage was found on its back unopened, but showing marks that indicated an attempt had been made to pry it open. Pry bars and large screwdrivers not belonging to the Strong garage were found in the parts room of the building. The tracks followed in the light snow were described by the trackers as follows: One set of tracks appeared to be made by a smooth-soled shoe and the other set by a webbed, grated type of shoe sole. When taken into custody, defendants were wearing shoes corresponding to the track descriptions. Near the point

of the apprehension, two moneybags, one with a drawstring and the other with a zipper, were found in nearby pine trees. One carried the name of a Tulsa, Oklahoma, bank printed thereon, the other the name of the First Security Bank of Holdrege. A pair of light tan leather gloves was found with one of the moneybags in the south pine tree. The other moneybag was wrapped snugly around a branch, very close to the trunk of the north pine tree.

It was shown by the evidence, consisting of 1,161 pages of testimony, that the two men in the building on the arrival of the police were dressed in heavy clothing, one wearing a sweatshirt and coveralls and the other a leather jacket and coveralls. This fits the description of the clothing worn by Coleman and Hainline at the time of their arrest. The two men left the garage at the time Johnson was wounded by gunfire and took off to the north. They were shot at by the police at this time. They were trailed by the tracks they made in the light snow and muddy ground. The trail at one place indicated the men had separated and come back together later on the trail. After trailing the men to the point of apprehension, the police and others retraced their steps on the trail and found the objects testified to which, on the theory of the State, had been discarded by the defendants during their flight from the scene of the crimes. The evidence is clear that the defendants were fleeing from the law enforcement officers, sometimes walking and sometimes running, as testified to by the officers from the condition of the tracks as they observed them.

The State's evidence shows that on the same morning of the robbery of Strong Brothers garage, an employee of Lumpkin's Foodliner found the back door of the store unlatched when he reported for work. He went toward the office and found the safe open and lying in one of the aisles. The police were called. It was found that $1,263.97, mostly in $1 and $5 bills,

were missing from the store. The safe had been pried open and a hasp had been loosened on the back door. Some paint scrapings were taken from the pry bars and screwdrivers which appear similar to that on the safes and locks but not in sufficient quantities to conclusively establish that they were identically the same. One of the three moneybags numbered 1, 2, and 3 was missing. The number 2 bag was one of the two moneybags found at the time of the apprehension of the defendants. It contained no money. When taken into custody, defendant Coleman had the sum of $278 in currency and $2.08 in change on his person. Hainline had $126.10 on his person.

There can be little doubt that the evidence of the State, although almost wholly circumstantial, is sufficient if believed to sustain the verdict of the jury as to the robbery of the Strong Brothers garage, in the absence of prejudicial error in the trial of the case and the instructions to the jury. As to the robbery of Lumpkin's Foodliner, we think the evidence was also sufficient on a somewhat different basis. In that phase of the case, we point out the following pertinent circumstances: The two robberies occurred in the nighttime at substantially the same time and place. A substantial sum of money was found on the person of one of the defendants. One of the money sacks belonging to Lumpkin's Foodliner was found hidden in an evergreen tree close to the point of apprehension of the defendants. No other persons were observed in the neighborhood who could have committed the act. While some attempt was made to point the finger of suspicion at an employee of Lumpkin's Foodliner who quit his employment and turned in his key the next morning, there is no evidence whatever that this was anything more than coincidental. The supervisory officer of Lumpkin's Foodliner testified to the reliability of this employee. The employee testified as to his whereabouts during the night of the robbery

and to discussing the termination of his employment with his parents before he had knowledge of the robbery. In any event, the question of credibility and weight of evidence is for the jury which it determined adversely to any contention of the defendants. It is true that the manner of entry into the Lumpkin's Foodliner building was not determined, but this is not a controlling factor where it is shown that entry was in some manner unlawfully made. We conclude that the evidence is sufficient to make a prima facie case.

The evidence offered by the defendants is substantially as follows: Defendant Hainline testified that he was 32 years of age, married, and the father of six children. He went to the 10th grade in school and took courses in refrigeration school. He has been self-employed as a plumber and refrigeration mechanic. He has worked with Coleman on automobiles and has engaged in custom welding. He and Coleman were driving a pickup to Denver to buy automobile parts. They had a toolbox with them. They went south from Kearney to U.S. Highway No. 6, ran out of gas 4 or 5 miles east of Holdrege, and hitchhiked to the edge of that city. They walked into town and went to the Co-op gas station which was closed. He said he found two empty moneybags lying on the station drive which he put in his pocket and they went up the street. He said that half way up the middle of the block, they were shot at and they ran north up an alley. In the second block they ran into two men getting in a car. They ducked behind a garage and watched. Other armed persons were observed in the area and they decided to return to their stalled pickup. They got mixed up in their directions and ran into more gunfire. They wound up at a farmstead where they were apprehended. They took off their gloves and removed a flashlight and the two moneybags and placed them in a tree. He stated that he had $120 or $130 when arrested but never had $1,263.97 in his possession. He said they had never entered

Strong's garage. He stated they had no firearms, never had the guns offered in evidence, and never fired at officers Johnson or Newman or any other person. He said he picked up the moneybags because he did not believe in throwing things away. He said they did not dispose of any articles along the way and had never seen the burglary tools offered in evidence. He stated he was never in Lumpkin's Foodliner or near the place. He admitted that he had previously been convicted of a felony.

Defendant Coleman testified that he was 28 years of age, married, and the father of one child. He went to school as far as the 10th grade. He gave his trade as that of automobile mechanic. His main hobby was drag racing. His testimony was very similar to that of Hainline. He stated that they ran, as testified by Hainline, because he did not want to get involved with the police in a strange town. He admitted he had previously been convicted of a felony. He admitted ownership of the clothing he was wearing and one flashlight. He denied knowledge of all other exhibits offered against him. He denied entering or being near Lumpkin's Foodliner or Strong Brothers garage.

The evidence is circumstantial. The jury was properly instructed as to the credibility and weight of such evidence. On appeal, the question is whether or not the evidence is sufficient to sustain some rational theory of guilt. State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265; State v. Williams, 183 Neb. 257, 159 N. W. 2d 549. It is fundamental that a person charged with crime may be convicted on circumstantial evidence only. State v. Williams, *supra*. The facts and circumstances of this case are sufficient to sustain the jury's finding of guilt. It is true that the evidence of the State and that of the defendants is conflicting. The jury resolved those conflicts against the defendants and for the State, and, since the State's evidence believed by the jury sustains a rational theory of guilt, no error can properly be made

that the evidence is insufficient to sustain the convictions.

The defendants assign as error the ruling of the trial court in sustaining an objection to an offer of proof during the cross-examination of the witness Roger Johnson and to the comments of the trial court in sustaining such objection. The witness Johnson testified that the two men who left the garage building shot at him and that he was wounded by one of the shots fired by one of them. The bullet which hit him was not removed from his body and consequently was not identified as having been fired by any particular gun. Questions were asked on cross-examination about the witness' inability to identify the bullet, the description of the man who shot him, and whether or not he suffered from a disability involving blackouts. An objection to the latter as to materiality and relevancy was sustained. The offer of proof was than an examination of his clothing would show powder burns indicating a self-inflicted wound. We submit that the proferred evidence was not relevant to a charge against defendants of shooting with intent to kill, wound, or maim. If offered for impeachment purposes, it was not material since it was on a matter not testified to by the witness and was not an element of the crime charged. The witness was not called as a witness by the defendants, nor were the doctors and nurses called to prove the facts offered to be shown if, as asserted, they were material to the defense. The extent of the cross-examination under the circumstances shown was clearly in the area of the discretion of the trial court. Pierce v. State, 173 Neb. 319, 113 N. W. 2d 333; State v. Brown, 174 Neb. 387, 118 N. W. 2d 328. We find no error that could in any way prejudice the rights of the defendants. The trial court, in ruling on an objection to evidence, did say on one occasion: "I think you are badgering the witness." Defendants assert this was prejudicial error requiring a new trial. The manner in which it arose and the further fact that no objection was made thereto, precludes any valid claim

of prejudicial error. The defendants assign as error the admission of some 24 exhibits. Most of them are a part of the chain of circumstances tending to sustain the charges made against these defendants. We find no error in their admission.

The witness, Merle J. Divis, a member of the Nebraska Safety Patrol, testified in the case. He made a report to his superiors to which he made no reference in his testimony. Defendants requested that the report be produced. An objection to its production was sustained. Defendants' counsel, although he had never seen the report, claims that he was entitled to it for impeachment purposes. The notes and reports of investigating officers engaged in law enforcement are subject to production at a trial where used to refresh the officer's memory or where a foundation has been properly laid for the impeachment of the officer. Otherwise the use of such notes and reports rests within the sound discretion of the trial court. In the instant case, the notes and reports were not used by the witness to refresh his memory nor was a basis for the impeachment of the witness laid. The trial court refused to compel the production of the notes or reports. We find no error, their admission being within the discretion of the court which does not appear to have been abused. State v. Williams, *supra*.

Defendants complain of the giving of instructions Nos. 3, 8, 17, and 20. We have examined instructions Nos. 3, 8, and 17 and find them to be correct. They are as applicable to a case based on circumstantial evidence as one proved by direct evidence. The complaint against instruction No. 20 is that it consists of the first 8 paragraphs of NJI 14.81, but fails to give paragraph 9, which is asserted to be error. Paragraph 9 referred to states: "(you should consider:) * * * Evidence of previous statements or conduct inconsistent with their testimony at this trial (if any such evidence has been adduced):." NJI 14.81, p. 342. We find no inconsistent statement by

any State witness other than the inconsequential differences that occur in the testimony of most witnesses. We find no prejudice to the defendants in failing to give paragraph 9 in connection with instruction No. 20 as given. We find that the case was fairly submitted to the jury.

The defendants assert that the county attorney's argument to the jury was prejudicial to the rights of the defendants in that the county attorney in effect testified to facts outside the record. A county attorney may, of course, draw inferences from the evidence in presenting his case to the jury. Kennedy v. State, 171 Neb. 160, 105 N. W. 2d 710. This is particularly true in a circumstantial evidence case. We find no reversible error based on the misconduct of the prosecutor. See Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323.

We have examined other claimed errors and find them to be without merit. This case was fairly tried, the material evidence fully presented, the jury properly instructed, and its verdict is supported by evidence. We find no reason to interfere with the verdict of the jury, and the judgment of the trial court based thereon is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. J. W. RUTHERFORD, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. J. W. RUTHERFORD, APPELLANT.
185 N. W. 2d 449

Filed March 26, 1971. Nos. 37637, 37638.

1. **Criminal Law: Trial: Evidence.** It is error in a trial to the court in a criminal case or an action to recover a penalty under a city ordinance for the trial court to view the premises where the alleged offenses occurred without having given the defendant and counsel for both parties an opportunity to be present when the view was made by the judge.

2. ———: ———: ———. Where the evidence shows that the trial judge in a trial to the court made an unauthorized inspection of the scene where offenses were allegedly committed, it must be shown, to vitiate the judgment, that it related to a matter in dispute and could have influenced the court in making a finding of guilt.

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

Paul E. Watts and Samuel A. Boyer, Jr., for appellant.

Gary P. Bucchino, Kent H. Whinnery, John A. Gutowski, Raymond E. Gaines, Richard L. Dunning, Joseph S. Troia, and J. Patrick Mullen, for appellee.

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

CARTER, J.

The defendant was charged with failing to stop at a red light and with resisting arrest in violation of the ordinances of the city of Omaha. After a finding of guilt on each of the two charges, appeals were taken to the district court for Douglas County. A jury was waived and a trial had to the court. Defendant was found guilty and after sentences were pronounced appeals were taken to this court.

The arresting officer testified that he was parked in a parking lot about 150 to 200 feet from the intersection of 30th and Hamilton Streets in Omaha on December 8, 1969, between 9 and 9:30 p.m, watching the traffic and traffic lights. He saw the defendant approach the intersection from the east from a point a half block east of the intersection and pass through the intersection through a red light. He followed the defendant to his home two doors west of the intersection where he accosted defendant and asked for his operator's license and certificate of registration. Defendant refused. The officer told defendant he was under arrest, returned to his cruiser and requested assistance, and ran up the sidewalk

after the defendant. Defendant proceeded into his home, closing the door in the officer's face, which the officer entered by the use of force. Words and a scuffle followed in the home. No blows were struck by either participant. Upon the arrival of another officer, defendant peacefully submitted to the arrest. The defendant testified that he approached the intersection, stopped on the red light, and passed through when it changed to green. The arresting officer testified to the resisting of arrest by the defendant. Defendant, on the other hand, testified that he was not arrested until after the period testified to by the arresting officer. He denied refusing to submit to an arrest as testified to by the officer. The evidence was in conflict on both charges and was for the determination of the trier of fact who, in the instant case, was the trial court. The evidence was sufficient to sustain the findings of the trial court.

The record shows that after the taking of evidence was completed and without the consent of or notice to the parties or their counsel, the trial court at his own instance inspected the premises where the violations were alleged to have occurred. It is asserted that after hearing the evidence which was conflicting, the trial court went to the scene of the alleged offenses and then based its decision on that observation. The defendant contends that this constitutes prejudicial error.

The defendant argues that such conduct on the part of the trial judge, which it voluntarily stated at the time of the sentencing of the defendant, was in effect an admission of the insufficiency of the State's evidence and its failure to sustain the burden of proof in the prosecution for running a red light and resisting arrest. It is further asserted that if the burden of proof placed upon the State is to have any meaning in our system of jurisprudence, such conduct by a trial judge in making an unauthorized view of the scene of the alleged offenses in order to provide a sufficiency of evidence to sustain

a conviction should be and does constitute reversible error.

This court has held in a civil action that a view of the premises is evidence and not merely a means of enabling a jury to better construe and apply the evidence adduced in court. Chicago, R. I. & P. Ry. Co. v. Farwell, 59 Neb. 544, 81 N. W. 440. We see no reason why the same rule does not apply in the prosecution of a criminal action or a suit to recover a penalty. Ordinarily it is misconduct on the part of the trier of fact to take an unauthorized view of the premises involved in a judicial proceeding without informing the parties or their counsel and thereby denying them the opportunity to be present. The courts generally have refused to reverse or grant a new trial in the absence of a showing that the material rights of the defendant were prejudiced thereby. See, Crowell v. State, 79 Neb. 784, 113 N. W. 262; Phillips v. State, 157 Neb. 419, 59 N. W. 2d 598, 58 A. L. R. 2d 1141.

It is contended that the unauthorized view of the premises by the trial judge where the violations were alleged to have occurred is violative of defendant's rights of confrontation and cross-examination essential to a fair trial guaranteed by the Constitutions of the state and nation. It is asserted that such an unauthorized view of the premises where the violations are alleged to have occurred makes the judge both the trier of fact and a witness whom defendant was not given the opportunity to confront or cross-examine as constitutionally required in a criminal case.

The case of People v. Eglar, 19 Mich. App. 563, 173 N. W. 2d 5, is in point. In that case defendant was convicted in the circuit court in a trial to the court of indecent exposure. The Court of Appeals held that it was reversible error for the trial judge to view the garage in which defendant allegedly lowered his trousers and exposed himself to two girls, aged 11 and 12 years, who were walking on a public sidewalk across the street

from the garage, without having given defendant and counsel for both parties an opportunity to be present with the judge. In disposing of the case the court said: "The judge was the trier of fact. No evidence could properly be considered by him that was not presented as part of the trial. Conceivably the judge viewed the wrong garage, or viewed the right garage from a point other than the place the girls claim they were walking when they saw the defendant. The defendant and counsel for both parties had a right to be present so that they could know whether the judge viewed the garage from the same point the girls viewed it, and so that they could know what the judge saw, and could consider that in deciding whether to offer additional proofs at the trial."

In the instant case, the trial court, in viewing the premises where the violations are alleged to have occurred, saw the physical facts in and about the intersection. An examination of the evidence in the case reveals that there was no dispute on any physical fact. The trial court saw nothing about which there was conflict in the evidence. The court saw nothing that could influence his decision of the case. In such a situation, the defendant was not prejudiced by the judge's unauthorized view of the premises. The judgment of the district court will therefore be affirmed.

AFFIRMED.

AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN, A CORPORATION, APPELLANT, V. LARRY E. TOURNOR ET AL., APPELLEES.

185 N. W. 2d 267

Filed March 26, 1971. No. 37644.

1. **Insurance: Contracts.** If a contract prepared by an insurer is reasonably open to different interpretations, one favorable to

the insurer and one advantageous to the insured, the one favorable to the insured will be adopted.

2. **Trial: Appeal and Error: Judgments.** 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 Hamilton County: H. EMERSON KOKJER, Judge. Affirmed.

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

E. H. Powell, Warren Urbom, Larry G. Carstenson, and H. L. Blackledge, for appellees.

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

MCCOWN, J.

This is a declaratory judgment action to determine whether an exclusion clause in an automobile insurance policy applied to exclude coverage for a particular accident. The clause excluded coverage to any automobile "* * * while used in any prearranged racing or speed contest." The district court held that the exclusion was not applicable and that the policy was in full force and effect.

The plaintiff, American Standard Insurance Company, was the automobile insurance carrier of the defendant, Larry E. Tournor, on a policy covering a 1965 Oldsmobile automobile owned by him and his wife. At approximately 2 a.m. on a Sunday morning in May 1968, Larry E. Tournor and one Gary Stevenson arranged to have a "drag race" on a quarter-mile "strip" on State Highway No. 14, north of Aurora, Nebraska. Both drivers were familiar with the "drag strip" on the highway and its starting point and finishing line. A number of spectators gathered around the starting point. Michael Tournor, a brother of Larry, drove his Pontiac automobile north

past the finish line of the drag strip, parked it on the east side of the highway headed west, and turned his lights out. There were six people in the car.

The two competing cars lined up side by side at the starting point, headed north. The drivers were alone in their cars. Larry Tournor's car was in the right lane of the two-lane blacktop highway. Gary Stevenson's car was in the left lane. The starter stood between the two cars and slightly in front and started the race with arm signals. Larry Tournor's automobile almost immediately gained a substantial advantage. By the time he reached approximately the halfway point of the quarter-mile strip, Gary Stevenson gave up the race, decelerated and pulled over into the right-hand lane behind Larry Tournor's car. At a point approximately three-fourths of the distance down the strip, and before the finish line, Larry Tournor saw Stevenson's lights in his rear-view mirror, and ceased accelerating. Larry Tournor intended to proceed to the next intersection approximately half a mile away for the purpose of turning around and coming back. Meanwhile, Stevenson had slowed down to approximately 15 to 20 miles per hour, had pulled his right wheels off on the shoulder, and was preparing to turn around. At a point somewhere between one-eighth and one-fourth of a mile north of the finish line, the Michael Tournor car, which had been parked on the east side of the road headed westerly with its lights out, suddenly pulled onto the highway in front of Larry Tournor. Larry swung his car to the left and the vehicles met almost head-on in the west or southbound lane.

Estimates of the maximum speed attained by Larry Tournor's automobile during the race varied from 75 miles per hour to 95 miles per hour. At the point of the collision, the only evidence is that his speed was 60 to 70 miles per hour. Many of the spectators quit watching the race as soon as it became apparent to them that Larry Tournor had won.

A jury trial was waived by the parties and the trial court specifically found that any prearranged race or speed contest shown by the evidence was fully terminated prior to the collision; that the exclusion in the policy did not apply; and that the plaintiff insurance company was obliged to defend its insured under the policy. The trial court's declaratory judgment was entered accordingly.

There is no dispute but that a prearranged drag race took place. The evidence is virtually uncontradicted that the race had been completed. The principal assignment of error rests on the contention that under the language of the exclusion here, the Larry Tournor car was still being "used in" a prearranged racing contest, after the competitive portion of the racing contest was completed. The exclusion here read: "This policy does not apply:

"Under any of the coverages,

"a. to any automobile (1) while rented or leased to others by the insured, (2) while used as a public or livery conveyance, or (3) while used in any prearranged racing or speed contest * * *."

Interpretation of exclusion (3) is before us for the first time. Similar clauses have been interpreted only infrequently anywhere. A 1969 annotation at 23 A. L. R. 3d 1444 cites only four cases on the subject, ranging from 1923 to 1966. See, Alabama Farm Bureau Mut. Cas. Co., Inc. v. Cofield, 274 Ala. 299, 148 So. 2d 226; Mulconery v. Federal Auto. Ins. Assn., 230 Ill. App. 236; Country Mut. Ins. Co. v. Bergman, 38 Ill. App. 2d 268, 185 N. E. 2d 513; Alabama Farm Bureau Mut. Cas. Ins. Co., Inc. v. Goodman, 279 Ala. 538, 188 So. 2d 268, 23 A. L. R. 3d 1437. The language of the exclusionary clauses in those cases varied somewhat and there were widely differing fact situations. It is quite apparent that no general rule of law can be formulated. The applicability of such an exclusionary clause depends upon its

language and the particular foundational facts to which the specific language must be applied.

In only one of the cases cited did the court find that the policy exclusion applied. In that case, the accident occurred during the course of the race and the person killed was a participant. The language involved excluded coverage "if the injury or damage is caused by an automobile race or competitive speed test * * *." See Alabama Farm Bureau Mut. Cas. Ins. Co., Inc. v. Goodman, *supra*.

The language used in the policy now before us obviously did not intend to exclude all races and all speed contests. At least one court has interpreted almost identical language as referring to a race or speed contest of a commercial or business type. See Country Mut. Ins. Co. v. Bergman, *supra* (1962). The word "while" connotes a specific segment of time. The word "in" can mean "in the course of" or "during." Either construction terminates the exclusion at the identical time the excluded event terminates. Such a construction is particularly indicated when a noncommercial race is held on a public highway, where policy coverage is specific and intended both before and after the occurrence of the excluded race.

We have held many times that if a contract prepared by an insurer is reasonably open to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the insured will be adopted. Rolfsmeier v. Implement Dealers Mut. Ins. Co., 182 Neb. 150, 153 N. W. 2d 367. The ultimate determination of whether of not an exclusionary clause applies in a case such as this inevitably involves factual determinations. Section 25-21,157, R. R. S. 1943, provides that when a declaratory judgment proceeding "* * * involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in

other civil actions in the court in which the proceeding is pending." Here a jury trial was waived. 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. Winchell v. National Bank of Commerce Trust & Sav. Assn., 181 Neb. 870, 152 N. W. 2d 2; Wonderling v. Conley, 182 Neb. 446, 155 N. W. 2d 349.

In this case the evidence established that the race was over at the time of the collision. The trial court specifically found that "any prearranged racing or speed contest shown by the evidence was fully terminated prior to the collision." The court also specifically determined that the language of the policy excluding coverage for the automobile "while used in any prearranged racing or speed contest" did not apply to the facts here. Those determinations by the trial court were correct. The judgment is affirmed.

AFFIRMED.

NEWTON, J., dissenting.

I respectfully dissent.

It is conceded that a prearranged racing or speed contest occurred and that the accident occurred a short distance beyond the finish line. The only question presented is one of interpretation. What is meant by the term "while used in" a prearranged race?

Cases involving this proposition, for the most part, display a disposition to go to great lengths in finding excuses to limit this exclusionary clause. In Krempel v. Noltze, 41 Wis. 2d 454, 164 N. W. 2d 227, the clause was disregarded on the ground that racing on a public highway was illegal and a Wisconsin statute provided that no policy could exclude from its coverage the operation of a motor vehicle for an unlawful purpose. In Mulconery v. Federal Auto. Ins. Assn., 230 Ill. App. 236, it was held that the evidence failed to show a race or speed test had occurred. In Alabama Farm Bureau

Mut. Cas. Ins. Co., Inc. v. Cofield, 274 Ala. 299, 148 So. 2d 226, it was held that there was no proof of racing at the time of the accident although it occurred only a half mile from the spot where a witness observed the cars take off side by side. In Country Mut. Ins. Co. v. Bergman, 38 Ill. App. 2d 268, 185 N. E. 2d 513, it was held that no prearranged race or speed test had occurred as the court interpreted the phrase "prearranged race or competitive speed test" to be limited to a commercial or business venture such as commercial race promotions. In only one instance has the exclusionary clause been sustained. It was enforced in Alabama Farm Bureau Mut. Cas. Ins. Co., Inc. v. Goodman, 279 Ala. 538, 188 So. 2d 268, 23 A. L. R. 3d 1437, where an accident occurred during the actual course of a race between a car and a bicycle.

Modern day interpretations of insurance policies display a definite trend toward a tendency to permit recoveries regardless of the contract provisions. Rather than follow the law of contracts and attempt to construe the policies in the light of what the parties understood and intended, they are strictly construed in favor of the insured. Simple and uncomplicated language no longer suffices in defining exclusions. To stand the light of legal interpretation, voluminous statements and descriptions defining them down to "a gnat's eyebrow" are required.

There would not appear to be any good and sufficient ground for failing to accord insurance contracts the same reasonable interpretation, under all existing circumstances, accorded other contracts. The policy under consideration also contains an exclusionary clause as follows: "* * * while used as a public or livery conveyance, * * *." It does not say it is confined to a situation in which the automobile is used in such a business. If an automobile owner or operator, not in such a business, agreed to haul a passenger for hire when does the "livery conveyance" terminate? Does it

terminate immediately on his dropping the passenger at the designated destination or does the engagement in the livery business continue on the return trip? Logically it would continue as the entire round trip is occasioned by engaging in the "livery business."

In a drag race, the engagement in the race may involve more than occurs over the designated course. If two cars are to approach the starting line at a designated speed, the approach is also part of the race. In view of the fact that in a race the participants cannot stop immediately at the finish line, it seems that the slowing down and stopping is also essentially a part of the race although this occurs beyond the finish line. The cars are still being *used* in a race or speed contest although the winner has been determined. Such is also the reasoning used in negligence cases. In Andreassen v. Esposito, 90 N. J. Super. 170, 216 A. 2d 607, where one of two participants had stopped and abandoned the race, liability continued for "results naturally and proximately ensuing."

In 38 Am. Jur., Negligence, § 55, p. 703, it is stated: "Proximity in point of time, space, or distance, of an event to an injury is important in determining liability for negligence only in so far as it bears upon proximity of causation. The proximate cause of an injury is not necessarily the immediate cause; not necessarily the cause nearest in time, distance, or space. Assuming that there is a direct, natural, and continuous sequence between an act and an injury, through which the force of the act operated without the interposition of separate force other than such a force as the act itself might have set in motion, the act can be accepted as the proximate cause of the injury without reference to its separation from the injury in point of time or distance."

In Lemons v. Kelly, 239 Ore. 354, 397 P. 2d 784, it is stated: "It was also for the jury to decide if the racing was the cause of the accident. For even if the race had terminated some seconds before it would still be for the

jury to decide if there were a causal connection between the racing and the accident."

In the present case, although Larry Tournor had crossed the finish line and was gradually slowing down, he was still traveling at an excessive and illegal rate of speed at the time of the accident. To hold, as does the majority opinion, that the exclusionary clause applied prior to his having reached the finish line, but not 3 feet beyond, is not reasonable. This court has said that: "Starting and stopping are as much an essential part of travel on a motor vehicle as is 'motion.'" Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669. Just as surely as starting and stopping is a part of traveling in a motor vehicle, it is also part of racing. Larry Tournor stated he was intending to continue on to a crossroad before turning and going back. This may have a bearing on the question of "stopping" after the race, but it cannot be denied that he was proceeding at the time of the accident at a high and excessive rate of speed, engendered by and resulting from the race, and he had not yet reduced his speed to a normal or lawful rate. His automobile was still being used in racing and came within the term "while used in any prearranged racing or speed contest."

WHITE, C. J., and CARTER, J., join in the foregoing dissent.

OEA SENIOR CITIZENS, INC., A CORPORATION, APPELLANT, V. COUNTY OF DOUGLAS, STATE OF NEBRASKA, APPELLEE.
185 N. W. 2d 464

Filed March 26, 1971. No. 37649.

1. **Taxation: Charities. Property owned and used exclusively for charitable purposes is exempt from taxation if such property is not owned or used for financial gain or profit to either the owner or user.**
2. **Taxation: Statutes. Statutes exempting property from taxation**

should be strictly construed, and one contending that his property is exempt must clearly show that he is within the exemption provided by statute.

3. **Taxation: Evidence.** The burden of proof is upon one claiming property to be exempt from taxation to establish that its predominant use is for one of the purposes set out in section 77-202, R. S. Supp., 1969.
4. **Words and Phrases.** The word "exclusively" as used in the Constitution is one of general understanding. Its meaning is so clear that it requires no interpretation but only application.
5. **Taxation.** In determining tax exempt status, it is neither the incidental use of the property nor the character of the owner which controls. Rather, it is the primary or dominant use of the property which is controlling.
6. **Taxation: Charities.** There is no reason why an institution, merely because it caters to the needs of the aged and infirm, should be exempt from taxation if someone other than that institution is furnishing the cost of the care and maintenance provided by the institution.

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

Leo Eisenstatt and Daniel B. Kinnamon of Eisenstatt, Higgins, Miller & Kinnamon, for appellant.

Donald D. Knowles, Arthur D. O'Leary, Harold H. Zabin, and Paul F. Peters, for appellee.

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

SPENCER, J.

This is an appeal from the denial of tax exempt status to OEA Senior Citizens, Inc., for a retirement home for the aged operated by appellant, known as OEA Manor, hereinafter referred to as Manor. We affirm.

This case is essentially a retrial of the same issues presented in a 1961 case between the same parties. County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N. W. 2d 719. Appellant urges the previous decision is no longer controlling because of material changes in the use of the property as well as changes in our con-

struction of the applicable law in other cases subsequent to that decision.

While the previous action was disposed of on a motion for summary judgment, a review of the pleadings and evidence was extensively incorporated into the opinion. It is true that in some respects the operation of Manor has been expanded, but these expansions were in some measure considered in the previous case. We incorporate herein by reference the description of the status of appellant and its parent corporation, Omaha Education Association, hereinafter referred to as OEA, as well as the details of its organization and a description of the building and its method of operation. Since 1961 the operation of Manor has been turned over to managers who have been paid for their services, and unlike the previous case none of the residents are on county welfare.

One of the important developments since 1964 on which appellant predicates its contention is the establishment of a health center in 12 units on the second floor, hereinafter referred to as Center, under the direction of a registered nurse. Previous to this time there was a practical nurse living in Manor, but there was no medical care center. There are no surgical facilities of any nature in the building. Center provides hospital-type nursing care for residents, but if anyone becomes seriously ill she is transferred to a hospital. Center does not have any doctors on its staff. All medical services other than those embraced by the term "nursing care" are rendered by the resident's own doctor. While Center is maintained for the welfare of residents, all services rendered therein and by its personnel are billed to those receiving such services. Charges are also made for any services rendered by the staff of Center in other parts of the building, such as giving of shots, tub baths, or helping a resident from her room to the dining area. No drugs are administered except on the order of the doc-

tor for the resident, and no drugs are furnished by Center.

Manor maintains a dining room for the benefit of its residents. Residents are charged for each meal served but may contract for either one, two, or three meals on a monthly basis at a better rate. If food is delivered to the rooms of those unable to come to the dining area, a special charge is made. A charge is also made where an individual comes to the dining area but needs help to take the tray from the serving area to a table. These charges are made by Manor and are not for the benefit of the employee furnishing the service. A laundry room, with coin-operated equipment, is available to the residents. Manor's apartments are essentially unfurnished, and the residents are expected to furnish the apartments at their own expense. The residents also pay their own telephone bills.

There is testimony that OEA contributed $248,000 to appellant in order to secure government funds to build Manor. Part of this sum, however, was secured from the sale of lifetime lease options to prospective residents, originally for $1,200 but soon thereafter for $1,500. These options give the party a right to move into Manor after certain notice, but give no interest in nor title to the property. They are no more than options to lease. The resident who comes in on an option is expected to pay the same charges as other residents, and no credit from the option payment would or could be applied to these charges.

Appellant's founders were motivated by a desire to provide improved housing for retired teachers. So far as possible, retired teachers are given preference in filling vacancies in Manor, but appellant will take any person near the retirement age of 65 if a vacancy exists. Of the 111 residents responding to a questionnaire in evidence herein, 44 were not retired teachers. Some of the teachers who are in residence were not members of

OEA but taught in other states or in other localities in Nebraska.

Appellant, except possibly in one instance, does not knowingly take anyone who is not fully able to meet its charges. These charges are explained to applicants before admission. Exhibit 32 would indicate that appellant secures full information on an applicant's income and its source in the application. No one is admitted to Manor unless approved by the admission's committee. The board of trustees of appellant are appointed for 1-year terms by the board of directors of OEA. Appellant's Articles of Incorporation provide that a majority of its board of trustees must be members of the board of directors of OEA.

If any of the retired teachers who are residents of Manor do not have sufficient funds to pay all charges, any deficiency is handled through OEA Foundation which, while it makes donations to appellant in the form of equipment and help for retired teachers on care and drug bills, is no part of appellant's operation. It is a separate corporation, organized by OEA, founded to supplement the charitable and educational activities of OEA. It operates a rummage store in which in the past it employed residents of Manor to qualify them for social security.

The main support of Manor's residents is social security, annuities, other income, or family contributions. Appellant now charges $100 monthly for rent, and $60 a month for three meals daily. The average monthly income of the 109 residents who answered a questionnaire circulated by appellant would indicate a monthly average income of $220.86.

Article VIII, section 2, Constitution of Nebraska, provides in part: "The Legislature by general law may exempt * * * property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user. * * * No

property shall be exempt from taxation except as provided in the Constitution."

Pursuant to this grant of power, the Legislature has enacted section 77-202, R. S. Supp., 1969, which, so far as pertinent herein, provides: "(1) The following property shall be exempt from taxes: * * * (c) Property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user."

The question presented is whether Manor is used exclusively for educational or charitable purposes within the ambit of the constitutional grant. We hold that it is not. Statutes exempting property from taxation should be strictly construed and one contending that his property is exempt must clearly show that he is within the exemption provided by statute. Berean Fundamental Church Council, Inc. v. Board of Equalization, 186 Neb. 431, 183 N. W. 2d 750.

In Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization, 179 Neb. 326, 138 N. W. 2d 455, we held: "The burden of proof is upon one claiming property to be exempt from taxation to establish that its predominate use is for one of the purposes set out in section 77-202, R. R. S. 1943."

Can Manor be classed as a charitable institution? It might be considered a charity in the sense that any benefit afforded another may be a charitable act, but that is not the test. Some jurisdictions grant tax exemption when the property has some charitable characteristics. Our law, however, requires a finding that the property is used exclusively for charitable purposes. The word "exclusively" as used in the Constitution is one of general understanding. Its meaning is so clear that it requires no interpretation but only application. The test then under our law is whether Manor's dominant purpose may be classified as exclusively charitable within the meaning of those terms to qualify for tax

exemption. The fact that some of its residents have been unable to pay all the charges assessed does not make Manor a charitable institution. Every profit-oriented nursing home will have some uncollectible accounts.

Appellant makes a very strong case for the plight of the aged. We concede that moral and charitable considerations dictate the need for a much greater effort to meet the increasing social, medical, mental, and physical problems of the aged. We also concede, as we said in the previous case, it is not difficult to perceive the very worthy charitable aspects of appellant's operation. However, we cannot agree with appellant that Manor is owned and used exclusively for charitable purposes and not for financial gain or profit to appellant. We further concede appellant's attempt to operate its facility as close to cost as possible, but cannot ignore the fact that this cost includes the amortization of a very substantial mortgage which will eventually mean the facility will be entirely owned by appellant.

There is some merit to appellant's contention that it is difficult to distinguish this case from some of the previous cases where exemption has been allowed. It is entirely possible some of the distinctions made in the past may be more ethereal than real. This sometimes results from a case-by-case application where ill-defined rules are constantly expanded in difficult cases. Possibly we may have gone too far in some of those cases. Because conditions do change, if they were before us today the result might be otherwise.

In none of the cases on which appellant relies are the facts significantly similar to appellant's, and no attempt will be made to distinguish them. However, as appellant relies extensively on Evangelical Lutheran Good Samaritan Soc. v. County of Gage, 181 Neb. 831, 151 N. W. 2d 446, we do point out some distinctions. The dominant use of the property in that case was to provide nursing home care to any adult 21 or over in need

of help; practically all of its residents require assistance for their mental and physical well-being, with a few of them being mentally subnormal; some require 24-hour supervision; and some are bedfast and incapable of feeding themselves.

In line with the nursing home feature of the "Good Samaritan" case, appellant urges that one of the important distinctions between the present case and the previous one is that Manor is now maintaining a health care center. While Center is an important service for residents of Manor, it is merely incidental to appellant's dominant purpose because that dominant purpose is not to provide nursing home service or medical service akin to a hospital, but to provide housing facilities for the aged. The status of an applicant's physical or mental health is one of the considerations for admission to Manor. No applicant has ever been accepted who was physically or mentally ill.

Appellant's Articles of Incorporation provide that the corporation is formed: "(a) to provide and erect, own, lease, furnish and manage an apartment building, the land and appurtenances thereto, for the use in whole or in part of the Omaha Education Association, a Nebraska corporation, for housing facilities and services for elderly persons on a non profit and/or charitable basis, especially designed to meet the physical, social and psychological needs of the aged, and contribute to their health, security, happiness and usefulness in longer living; * * *."

The addition of Center and the expansion of the health facilities did nothing to change either the dominant use or purpose of Manor, and with the exception of Center, we are dealing with the same essential facts we had before us in 1961 when we held that Manor was taxable. It is neither the incidental use of the property nor the character of the owner which controls. Rather, it is the primary and the dominant use of the property which is controlling in determining whether the property is exempt from taxation. That primary

and dominant purpose herein was to furnish housing to a selected group at cost in an environment that would be conducive to a healthful and happy old age.

Appellant's case is not too different from the recent case of Christian Retirement Homes, Inc. v. Board of Equalization, 186 Neb. 11, 180 N. W. 2d 136, which involved a nonprofit corporation organized by members of the Lincoln Evangelical Ministerial Fellowship who were concerned with the welfare of older members of the community, and developed Eastmont Manor as a project for ministering to the needs of senior citizens. The operation of Eastmont Manor was to be at cost with the residents providing the funds necessary for its operation and to retire its debt. Eastmont Manor contains 64 apartments, a dining room, kitchen, lounge, chapel, recreation area, medicenter, and other facilities. The medicenter is located on the top floor of the building and is equipped to furnish extended hospital care. The district court found that the medicenter and chapel were exempt from taxation but that the balance of the property was not tax exempt. There was no cross-appeal so the only question presented was that of the taxation of the property other than the medicenter and the chapel. We held the dominant purpose of the corporation was to provide housing for elderly persons, and although the operation of Eastmont Manor included many worthy charitable aspects, the ownership and use of the property was not exclusively charitable.

Appellant directs our attention to certain holdings in Evangelical Lutheran Good Samaritan Soc. v. County of Gage, *supra,* and urges their applicability herein. We have heretofore pointed out some of the distinctions between that case and the instant one. The purpose to be accomplished in the establishment of Manor was to provide a place for elderly citizens to obtain suitable homes in attractive and congenial surroundings. It was contemplated that only those with the financial means to pay the rents and charges essential to the operation

of Manor would be accepted. At Manor's inception, options to lease were sold to raise funds to enable Manor to meet governmental requirements to secure a construction loan. While Manor was promoted to provide a suitable residence for retired teachers, others were and are accepted if apartments are available. Ability of the resident to pay has always been of primary concern, and membership in OEA has not been a controlling or absolute factor. The nursing care provided by Manor is a part of the service offered the prospective resident as an inducement to contract with Manor, and is in no sense of the word charity.

There is nothing in this record to indicate that OEA expected to invest its own funds in Manor as an act of charity. When the loans are finally paid off, they will have been paid by the proceeds of options to lease which have been sold and the charges which have been paid through the years by residents. The residents, in paying for the services rendered them in accordance with their contracts, do not consider themselves as the beneficiaries of charity. The development of Manor was a private venture primarily for the convenience of a class having the ability to pay.

From a consideration of all the facts we cannot say that Manor was or is engaged in an operation that was exclusively charitable. We submit that its operations were the same as many privately operated homes for the elderly for profit. We therefore hold that appellant's dominant purpose is to provide housing facilities for members of the teaching profession, and its medical care center is merely incidental to that purpose and does not by virtue of that fact change its dominant purpose or qualify it for tax exemption.

Because an institution is organized as a nonprofit corporation, it is not, merely by virtue of that description, entitled to tax exemption. Even though an enterprise may be operated at a very moderate cost or even at cost, and for the good of humanity, it is not solely by

virtue of those facts a charitable institution within the meaning of our law. With the advent of social security, welfare, medicare, and medicaid programs, assistance is now much more readily available to the elderly than formerly, and possibly some of our earlier thinking on the charitable aspects of certain institutions may not now be realistic. We now see no reason why an institution, merely because it caters to the needs of the aged and infirm, should be exempt from taxation if someone other than that institution is furnishing the cost of the care and maintenance provided by the institution.

Appellant had the burden of proving its right to exemption. It has not met that burden. Judgment affirmed.

AFFIRMED.

BOSLAUGH, J., concurring in result.

I concur in the result reached in this case. I do not concur in many of the statements contained in the opinion of the court.

I do not agree with the vague suggestion that a number of our past decisions should be overruled, particularly those relating to institutions furnishing care for the sick and the infirm.

Nonprofit institutions for the care of the sick and the infirm have long been recognized as charitable institutions. St. Elizabeth Hospital v. Lancaster County, 109 Neb. 104, 189 N. W. 981; Mary Lanning Memorial Hospital Assn. v. Adams County, 117 Neb. 618, 221 N. W. 959; Allebach v. City of Friend, 118 Neb. 781, 226 N. W. 440; 14 C. J. S., Charities, § 16, p. 447. As stated in 15 Am. Jur. 2d, Charities, § 79, p. 85: "It is universally held that a gift of property for the establishment of a hospital is a valid charitable gift and, as to such a gift, the rule against perpetuities does not apply. The establishment of hospitals is in fact one of the objects enumerated in the Statute of Charitable Uses."

Charitable does not mean that the services of the institution are furnished free of charge. It is well established that a hospital operated not for profit is not deprived of its eleemosynary character by the fact that patients who are able to pay are required to do so. As stated in St. Elizabeth Hospital v. Lancaster County, *supra:* "No individual, society or corporation receives any pecuniary profit from hospital property, funds or earnings. Surplus and donations are used to enlarge buildings and to improve hospital facilities, equipment and service. The institution is open alike to charity patients and others without regard to race or religious beliefs. Reasonable compensation is required from those who are able to pay it. Only a small percentage of those who seek rooms, food and hospital care, however, can be considered charity patients, but this does not change the charitable purpose for which the property as a whole is used, where no one receives any pecuniary profit from any source. Part of the burdens of government in caring for the poor is borne by the hospital. Charitable gifts and gratuitous services are contributed to the welfare of society. There are therefore reasons for immunity from taxation. The better rule, one sanctioned by precedent, is that the property in controversy is used exclusively for religious and charitable purposes within the meaning of the constitutional and statutory provisions relating to exemptions."

These rules which have become an inherent part of the law affecting such institutions and their property should not be abandoned by this court at this time.

McCOWN, J., dissenting.

I agree with the concurring opinion of Boslaugh, J., except that I believe exemption should have been allowed here for the infirmary.

The one physical change in the property and its use after our original decision involved the complete remodeling of the second floor and its subsequent exclusive use as an infirmary. There should be little question

under our previous cases that a specific identified portion of a building, which differs in use from the remainder of the building, may be either taxed or excluded separately. See Christian Retirement Homes, Inc. v. Board of Equalization, *ante* p. 11, 180 N. W. 2d 136. Constitutional exemptions for property as applied to portions of a single building ought not to depend upon whether there is a separate and distinct title to the portion of the building sought to be taxed or exempted. In the day of condominiums, such distinctions are a matter of form and not of substance.

NEWTON, J., concurring.

I agree with the opinion of Spencer, J., but wish to make clear the essential characteristic of OEA Manor. This is not a philanthropic or charitable promotion. It is, in essence, an attempt by a group of private citizens, namely teachers, to provide a retirement home *for themselves* in their later years. True they do admit others, but only when the Manor is not fully occupied by the teachers who promoted it, and then for the obvious purpose of securing the maximum income. In what respect does it differ from a cooperative apartment project? If the active teachers in Omaha were to enter into such a venture to provide housing for themselves, could it be seriously contended that because it was a nonprofit venture it was therefore charitable in nature? I think not.

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

185 N. W. 2d 663

Filed March 26, 1971. No. 37743.

1. **Criminal Law: Sentences: Probation and Parole.** An order by the district court purporting to vacate a sentence legally pronounced in a criminal action for the purpose of placing defendant on probation is a nullity.

2. **Criminal Law: Post Conviction: Appeal and Error.** A motion for post conviction relief is not a substitute for an appeal.

Appeal from the district court for Washington County: ROBERT L. FLORY, Judge. Reversed and remanded with directions.

Roy I. Anderson, for appellant.

Kerrigan, Line & Martin, for appellee.

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

SMITH, J.

We review an order that the district court entered under the Post Conviction Act. The order vacated prior sentences of defendant, placing him on probation for 3 years. Validity of the order and our appellate jurisdiction are questioned.

Informations consolidated for trial charged defendant with breaking and entering and possession of burglary tools. After pleas of not guilty and a trial, the court on September 13, 1966, found defendant guilty of both charges. On September 27 it imposed concurrent sentences of imprisonment for 3 years. We affirmed the judgment in State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129 (1967). Federal litigation ensued. See Carpenter v. Sigler, 419 F. 2d 169 (8th Cir., 1969).

On February 17, 1970, defendant moved the court under the Post Conviction Act, section 29-3001, R. S. Supp., 1969, to vacate the sentences. He alleged one ground: "Defendant was denied due process at the time of his sentence . . . for the reason that said sentence was excessive . . . in view of defendant's cooperation with the State in waiving a jury trial and contesting only the legality of the search and seizure. . . ."

The court heard the motion on May 4, 1970, taking it under advisement pending further investigation by the probation officer. The order vacating the sentences

was entered June 9. It provided for the probation term and the preparation of a probation order.

On July 7, 1970, the State filed notice of appeal and praecipe for transcript, and it paid the $20 docket fee to the clerk of the district court. On June 23 the State had presented to the district judge an application for leave to docket error proceedings. The judge certified that the record designated was adequate to present the objections of the State to the order of June 9. We granted the State leave to file the application.

An order by the district court purporting to vacate a sentence legally pronounced in a criminal prosecution for the purpose of placing defendant on probation is a nullity. See § 29-2218, R. R. S. 1943; *cf.* Moore v. State, 125 Neb. 565, 251 N. W. 117 (1933). The rule is consistent with the function of the Board of Parole. "The Legislature shall provide by law for the establishment of a Board of Parole. . . . Said board . . . shall have power to grant paroles after conviction and judgment . . .." Art. IV, § 13, Constitution of Nebraska.

Relief under the Post Conviction Act is limited to denial or infringement of a prisoner's rights so as to render the judgment void or voidable under federal or state Constitution. § 29-3001, R. S. Supp., 1969. A motion for post conviction relief is not a substitute for an appeal. State v. Erving, 180 Neb. 680, 144 N. W. 2d 424 (1966).

The motion of defendant set out no ground for post conviction relief. The district court ought to have directed execution of the sentences. See § 29-2401, R. S. Supp., 1969.

The State perfected the appeal. See § 29-3002, R. S. Supp., 1969; § 25-1912, R. R. S. 1943. The pendency of error proceedings under section 29-2315.01, R. R. S. 1943, did not affect our jurisdiction on appeal to reverse the order.

The order of June 9, 1970, is reversed, and the cause is remanded with directions for reinstatement of the

sentences of September 27, 1966, and for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., concurs in result.

HENRY S. HAMMERLY, APPELLANT, V. COUNTY OF DODGE, STATE OF NEBRASKA, ET AL., APPELLEES, LAVERLE MOREHOUSE ET AL., INTERVENERS-APPELLEES.
185 N. W. 2d 452

Filed March 26, 1971. No. 37535.

1. **Quieting Title: Adverse Possession: Evidence.** The claim of adverse possession must be proved by actual, open, exclusive, and continuous possession under claim of ownership for the statutory period of 10 years.
2. **Quieting Title: Adverse Possession.** The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is not a controlling factor.
3. ———: ———. The adverse possession is sufficient if the land is used continuously for the purpose to which it is adapted because of its nature and character.
4. ———: ———. The acts of dominion over land of the title owner, to be effective against him, must be so open, exclusive, and continuous as to put an ordinarily prudent person on notice that his lands are in adverse possession of another.

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

Edward J. Robins, for appellant.

Richard L. Kuhlman, for appellees.

Sidner, Svoboda & Schilke, for interveners-appellees.

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

WHITE, C. J.

The plaintiff appeals from a decree in the district court

for Dodge County denying a writ of mandamus and quieting title to the real estate involved in the interveners herein.

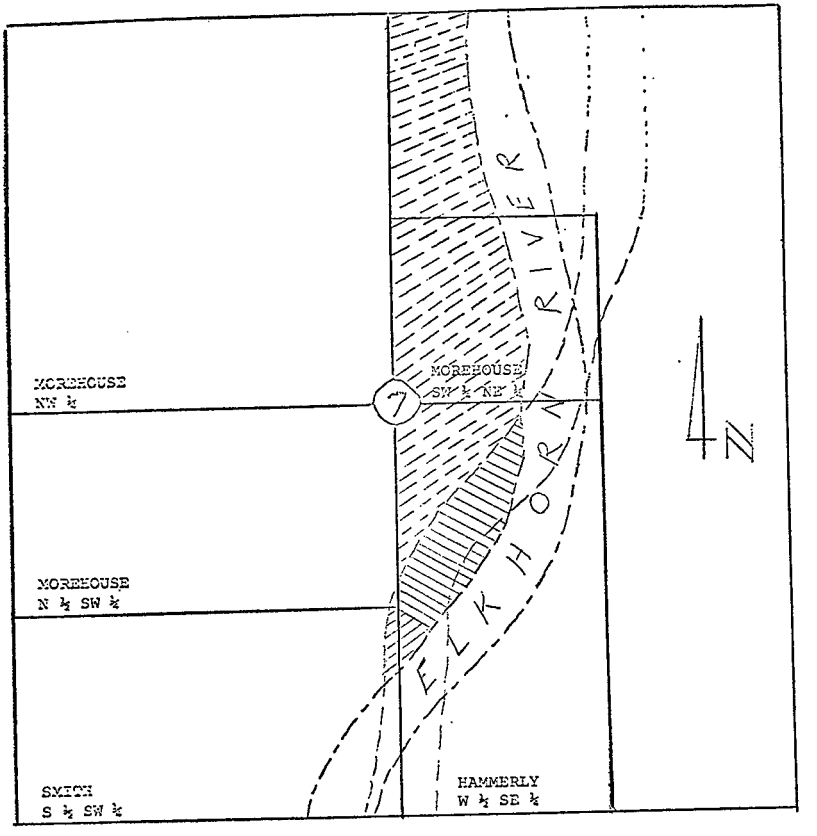
The action was commenced to require Dodge County to lay out two roads through separate properties. The county, by its answer, denied the ownership of the land in question but took the position that it was willing to act and construct the access road when ownership of the property was determined by final judicial order.

LaVerle Morehouse, Richard C. Morehouse, Barbara Cook Campbell, and John D. Cook (hereinafter referred to as Morehouse) and the executors of the Leonora P. Smith estate intervened in denying Hammerly's ownership of the land in question and asking that title be quieted in them. Although the petition prayed for a writ of mandamus, with the intervention of the purported adverse owners, the issue was finally joined the same as in a quiet title action turning on the issue of adverse possession.

For illustrative purposes only, a chart based on exhibits 1 and 2 is included in this opinion so a clear picture of the issue involved can be grasped. The Elkhorn River runs through the property.

The evidence shows that plaintiff Hammerly bought the west half of the southeast quarter (except a strip of land 33 feet wide on each side of a ditch located across the southwest quarter of the southeast quarter and a small strip of land which had been conveyed to the State of Nebraska). Crossing the river to the north and to the west, the interveners are the owners and in possession of the northwest quarter; the southwest quarter of the northeast quarter; the north half of the southwest quarter; and the south half of the southwest quarter; all of the land is located in Section 7, Township 18 North, Range 9 East, Dodge County, Nebraska. The interveners claim that part of the northwest quarter of the southeast quarter and that part of the southwest quarter of the southeast quarter lying west of the Elkhorn

Section 7, Township 18 North, Range 9 East of the 6th P.M.



KEY

= Banks of Elkhorn River from 1941 Photo

= Banks of Elkhorn River from 1955 Photo

= Land occupied & claimed by Morehouse since 1920

= Land accreted to Morehouse & land claimed by Morehouse

= Land accreted to Smith

River and immediately adjacent to the property to which they have record title. The chart identifies this as the property immediately to the north and to the west of the stream of the Elkhorn River.

Legal title to the Morehouse land had been in a trust for the Morehouse family from 1921 to 1955. With the termination of the trust in 1955, the title to the Morehouse property vested in Joseph Morehouse, Richard Morehouse, and Gene Cook. After 1955 Gene Cook and Joseph Morehouse died and their shares vested in their heirs who appear as interveners in this action and are referred to generally as Morehouse.

The title to the south half of the southwest quarter of Section 7 was in Leonora P. Smith from 1931 to the date of her death in 1967 and since that date has been in the estate of Leonora P. Smith. This land is referred to as the Smith land.

There is some confusion about ownership of the various lands because of the fact that over 20 years ago the so-called Hammerly land was owned by the Dave Herman estate and Joseph Morehouse was married to LaVerle Herman Morehouse. In 1947 LaVerle Morehouse and husband, Joe Morehouse, conveyed this Hammerly 80 to her brother, Clairmont J. Herman, who in turn sold this 80 to Lee Johnson in 1951. Lee Johnson sold this 80 to the plaintiff in 1964.

The Elkhorn River forms a natural boundary between the west half of the southeast quarter (record title to which is in the name of Henry Hammerly) and the Morehouse land which is in the north half of the southwest quarter and the Smith land which was the south half of the southwest quarter. The record in this case shows that through the years the Elkhorn River has been gradually moving east and that the land in dispute has accreted to the property on the west bank of the river.

This is an equity case and we try it de novo. The basic issue in the case is whether the property has been

acquired by adverse possession by the interveners. A third and collateral contention in the case is that there was error in the manner in which the trial court viewed the premises involved in this dispute. The evidence shows, mainly adduced by Hammerly, that there is considerable difficulty in determining one's location and bearings on the property, and it is peculiarly important that an inspection be made visually because of the Elkhorn River cutting through the property. It is clear that under the evidence introduced by Hammerly himself the trial judge acted well within his discretion and did not abuse it in viewing the premises. See, Ricenbaw v. Kraus, 157 Neb. 723, 61 N. W. 2d 350.

The main thrust of the appeal, of course, is simply that the decree is contrary to and not supported by the law or evidence and that the interveners have not established their title under the law of adverse possession. The claim of adverse possession must be proved by actual, open, exclusive, and continuous possession under claim of ownership for the statutory period of 10 years. Foos v. Reuter, 180 Neb. 301, 142 N. W. 2d 552; Mentzer v. Dolan, 178 Neb. 42, 131 N. W. 2d 671. It should be noted, as we did in the recent case of McCain v. Cook, 184 Neb. 147, 165 N. W. 2d 734, that this case involves a boundary dispute turning on the overlapping questions of adverse possession and the claimed mutual recognition of a boundary line fence between the properties for the statutory period of 10 years. See, also, Cunningham v. Stice, 181 Neb. 299, 147 N. W. 2d 921.

While the instant case does not involve the erection of a fence and the subsequent mutual recognition of such fence as a boundary line between two properties, the concept of mutual recognition of the natural barrier, the Elkhorn River, is identical. The evidence in this case shows that the mutual acquiescence of the parties of the Elkhorn River as being a boundary line coupled with the exclusive exercise of dominion over the land west of the Elkhorn River by the Morehouses

and Smiths is fatal to the claims of the record title holder Hammerly.

The record is clear that none of the predecessors in title to the Hammerly land on the west side of the Elkhorn ever exercised any control or dominion over it. The deposition of Lee Johnson, deceased, was introduced by the interveners. Johnson owned the land which includes record title to the disputed premises from 1951 to 1964 when it was conveyed to Hammerly. Johnson testified that he never went across the Elkhorn to the land west of the river parallel to his estate, this was even though he thought he might own some of that land.

Moreover, Arthur Sidner, an attorney actively managing the Morehouse lands as trustee from 1944 to 1955, testified that he gave permission to certain people to fish and hunt on the disputed land. At different times when he was upon the land he observed fences which the tenants had constructed on the land to allow the pasturing of cattle, and he observed that a small strip of the land was actually under cultivation. Prior to Arthur Sidner's management of the land his father had performed the same service. Recalling his long association with the property of the interveners and their exercise of control over all land west of the Elkhorn he testified: "The tenants that I have known and I will have to go back to about the late 1930's exercised complete domination and possession and use of the land which has been marked in dispute. From that time on until today." Sidner also testified as follows: "Q- With respect to your handling of this and management and control of the land, what was the boundary with respect to this area—you have already said it— A- The Elkhorn River was the east boundary as far as either the Smith or Morehouse land was concerned."

In the trial there appears some dispute as to the kind of dominion exercised by the interveners. It is hinted that they never realized they were on land which was not theirs by deed. It is settled in Nebraska that: "The

fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is not a controlling factor." Converse v. Kenyon, 178 Neb. 151, 132 N. W. 2d 334.

It is the fact that the interveners did exercise exclusive possession which is controlling and not their desire to hold in accordance with their deed. Furthermore although the interveners did not cultivate all the ground west of the Elkhorn, they exercised control commensurate with the nature of the land. "The sufficiency of the possession in an action of this kind depends upon the character of the land and the use that can reasonably be made of it. The possession is sufficient if the land is used continuously for the purpose to which it is adapted because of its nature and character. The acts of dominion over land of the title owner, to be effective against him, must be so open, exclusive, and continuous as to put an ordinarily prudent person on notice that his lands are in adverse possession of another." Cunningham v. Stice, *supra*.

Hammerly has raised in his brief, without assigning as error, the relationship of Arthur Sidner as trustee for the Morehouse property and as attorney for one of the predecessors in title to the Hammerly land. It is sufficient answer that Sidner's last connection with the Hammerly property was in 1950, many years prior to a date which would invalidate the running of the 10-year period required for adverse possession and arguably after the predecessors in title to the Hammerly land had lost any claim they had to the disputed land. As we have demonstrated, the interveners have acquired title to the disputed land west of the Elkhorn either by adverse possession or mutual boundary acquiescence or both.

The judgment of the district court quieting title in the interveners is affirmed.

AFFIRMED.

GEER-MELKUS CONSTRUCTION COMPANY, INC., A CORPORATION, APPELLEE, V. HALL COUNTY MUSEUM BOARD, APPELLEE, COUNTY OF HALL, STATE OF NEBRASKA, INTERVENER-APPELLANT.

185 N. W. 2d 671

Filed April 2, 1971. No. 37556.

1. **Trial: Parties: Intervention.** Anyone having an interest in the result of pending litigation may intervene as a matter of right.
2. ———: ———: ———. The interest required as a prerequisite of intervention is a direct and legal interest of such character that the intervener will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
3. **Equity.** It is the practice of courts of equity, when they have once obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties.
4. **Elections: Municipal Corporations.** Voters at an election are entitled to such information as will enable them to consider, weigh, discuss, and vote upon the actual merits of a proposition. If unfounded facts are set out which obscure the issues or mislead the voters on material questions of fact, the election will be held to be null and void.

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

Robert E. Paulick and Cunningham & Blackburn, for intervener-appellant.

Prince, Lauritsen & Baker for appellee Geer-Melkus Constr. Co.

Cronin & Shamberg, for appellee Hall County Museum Board.

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

SPENCER, J.

This action was originally filed by Geer-Melkus Construction Company, Inc., hereinafter referred to as Mel-

kus, against Hall County Museum Board, hereinafter referred to as Museum, praying for judgment for a balance due on construction costs. Museum answered, demanding that Melkus be put on strict proof and requesting the court to make a determination and declare the powers granted to it under section 51-506, R. R. S. 1943, and specifically to determine whether or not tax revenue may be expended for museum construction purposes.

The County of Hall, hereinafter referred to as County, sought to intervene in the action. This right was denied but County was subsequently granted the right to intervene on the matter of the enforcement of the judgment entered in favor of Melkus. Judgment was entered for $217,698.54. Thereafter County filed an answer, contesting the right of Museum to use tax funds for construction purposes. After a hearing the trial court dismissed the petition in intervention and held Museum was required to pay the judgment from its tax revenue. County has appealed.

The proceeding to establish Museum was initiated by a letter from Leo B. Stuhr to the board of supervisors of Hall County, hereinafter referred to as County Board, suggesting that he felt a great need for the establishment of an historical museum in the county and that he was sure a great majority of the citizens of County shared his view and would contribute to the erection and establishment of such a museum, and that an adequate museum building in his opinion could be constructed for a sum around $100,000. He thereupon offered to donate approximately 35 acres of land and $25,000, provided there should be pledged by public subscription a sum of at least $100,000 for the erection of the building, and that the voters of Hall County should vote to establish a county museum. The County Board accepted Stuhr's offer by the following resolution dated September 2, 1960, which, so far as material herein, provides: "The Hall County Board of Supervisors, in regular session assembled at the Courthouse in Grand

Island, Hall County, Nebraska, this 2nd day of September, 1960, adopted the following:

"WHEREAS, by letter under date of June 20, 1960, Leo B. Stuhr did offer to the County of Hall, State of Nebraska, a tract of land of about 35 acres being a part of the farm known as Stuhr Farm and did offer the sum of $25,000.00 cash, provided the residents of Hall County, voluntarily by public subscription, pledge and provide $75,000.00, said land to be used as a site for a historical museum or pioneer settlement and said money to be used for erection of a museum building thereon,

"AND WHEREAS, according to Section 51-501 to 51-512, inclusive, Revised Statutes of Nebraska, 1943, 1959 Cumulative Supplement, the law requires before establishing such county museum or levying tax for the maintenance of said museum, that the County Board submit the question to the voters of Hall County and must receive authorization for a levy by a majority of the voters voting at said election,

"NOW, THEREFORE, BE IT RESOLVED that the County Clerk of Hall County, Nebraska, place on the ballot to be voted on by the voters of the County of Hall at the general election, November 8, 1960, the question of establishing a Hall County Museum to be constructed by public subscriptions and to levy a tax for the maintenance of said museum thereafter."

This proposition was submited to the voters in the following language: "To establish a Hall County, Nebraska Museum *to be constructed by public donated funds and to levy a tax for the maintenance of said museum thereafter.*" (Italics supplied.)

The proposition as submitted was approved by the voters, and County Board appointed a Museum Board, hereinafter referred to as Board. Leo B. Stuhr was appointed as one of the members and served as its president until his death. Stuhr, who died in 1961, left the bulk of his estate of approximately $700,000 to Museum. S. N. Wolbach has been the president of Board since

May 1961. After May 1961 Board hired a director and established him in an office in Grand Island. Subsequently, Board employed a New York architect to draw the plans for a museum to cost not to exceed $500,000. When bids were received on the plans submitted, they ranged from a low of $941,000 to a high of $1,700,000. All bids were rejected.

Melkus, who was a local contractor, submitted the low bid. After the bids were rejected, Board asked the architect to meet with Melkus to see how the plans could be changed to reduce the construction cost to $600,000. The architect submitted a revised figure of $668,000, and Board agreed on a working figure of $670,000, and decided to let the contract in phases to Melkus without taking new bids. The record would indicate that the total construction cost was $760,000, exclusive of the cost of land, architect fees, landscaping, road, parkways, or dirt moving. The museum was not constructed on the Stuhr land, but was constructed on other land purchased through the Grand Island Industrial Corporation for $70,000. The Stuhr land was sold for $118,000. After construction, Melkus claimed a balance due of $189,172.87 on the construction contract. This amount, plus interest, is the basis of the judgment entered in the amount of $217,698.54.

The questions we consider herein are: The right of the County to intervene; whether or not Museum was validly established; and if so, whether or not the mill levy may be used to pay construction costs.

On the question of the right to intervene, we have consistently interpreted section 25-328, R. R. S. 1943, to provide that anyone having an interest in the result of pending litigation may intervene as a matter of right. Gilbert v. First National Bank, 154 Neb. 404, 48 N. W. 2d 401. The interest required as a prerequisite of intervention is a direct and legal interest of such character that the intervener will lose or gain by the direct operation and legal effect of the judgment which may be

rendered in the action. Noble v. City of Lincoln, 158 Neb. 457, 63 N. W. 2d 475.

While the question as to the use of funds by Museum would purportedly be settled by the court's judgment, the question of the availability of tax funds for the satisfaction of the Melkus judgment is in the hands of the County Board and would require further litigation. The following from Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N. W. 2d 150, is pertinent herein: "The applicable principle of law is expressed in First Trust Co. v. Airedale Ranch & Cattle Co., 136 Neb. 521, 542, 286 N. W. 766, quoting from Madison Avenue Baptist Church v. Baptist Church in Oliver Street, 73 N. Y. 82, 95: 'It is the practice of courts of equity, when they have once obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties.'"

When Museum filed its answer to the action of Melkus, it prayed that: "* * * the Court herein make a determination and declare the powers granted to the Museum Board of Hall County, Nebraska, under Section 51-506 of the Revised Statutes of Nebraska, 1943, Reissue of 1968, and specifically determine whether or not under such Statute, tax revenues collected for museum purposes may be expended for museum building purposes and for such other, further and additional orders as may be proper in the premises." Further, Museum in its answer set out that the Attorney General had given an opinion that tax funds could not be used by Museum for the purposes of construction of a museum, for which reason Museum had been unable to pay the balance due Melkus. The burden of defending the issue raised by the answer of Museum was carried by County. The trial court, after submission of the case, stated that he could not see how County could be affected by use of tax money to pay the construction judgment, erroneously dismissed the petition in intervention, and held Museum

could use tax funds for the payment of the judgment.

While section 51-506, R. R. S. 1943, gives Board exclusive control of expenditures of all money collected or donated to the credit of the Museum fund, section 51-509, R. R. S. 1943, requires Board to make a report to County Board as to the condition of its trust on June 1 of each year, showing all money received or expended, and giving a general report of all of its activities as well as any information and suggestions it deems of general interest, or as County *may* require. It is to be noted that by virtue of section 51-501, R. R. S. 1943, the County Board *may* levy a tax of not more than 2 mills upon the assessed value of all taxable property in the county. This levy is to be based on the report of Board, and may be in the amount determined by the County Board, not to exceed 2 mills. In this respect, the powers of County Board are distinguishable from those involved in many of the cases cited by appellees, such as State ex rel. Agricultural Extension Service v. Miller, 182 Neb. 285, 154 N. W. 2d 469. We hold County had an interest in the result of the pending litigation and had standing to intervene on the question as to whether proceeds from the tax levy could be used to pay the Melkus judgment for construction costs.

This brings us to the question as to whether or not Museum was validly established. We call attention to section 51-501, R. R. S. 1943, which provides that County Board "* * * shall have the power to establish a museum for the use of the inhabitants of such * * * county * * * or to contract for the use of a museum already established; * * *." We interpret this language as being sufficiently broad to permit County Board to provide for the establishment of a museum to be constructed by public donated funds, and to levy a tax for the maintenance of the museum thereafter. If County Board can contract for the use of an established museum, it is logical to hold it may accept one to be constructed by donated funds and have it established as a county

museum. We do not agree with appellees that under the statute the duties of the County Board are ministerial only. The word "may" in sections 51-501 and 51-509, R. R. S. 1943, denotes discretion.

Unless County Board had authority to submit the proposition as limited, the election would be null and void. We said in Drummond v. City of Columbus, 136 Neb. 87, 285 N. W. 109, voters at an election are entitled to such information as will enable them to consider, weigh, discuss, and vote upon the actual merits of a proposition. If unfounded facts are set out which obscure the issues or mislead the voters on material questions of fact, the election will be held to be null and void. The election to establish Museum was essentially one to accept as the Hall County Museum a museum to be constructed by public donated funds. The voters were asked to vote for the establishment of such museum as the Hall County Museum, and to authorize the levy of a tax for its maintenance thereafter. We hold the language "Museum to be constructed by public donated funds" was a very substantial inducement to the voters to encourage them to vote for the estabishment of Museum and for its future maintenance. The voters could not by any conceivable interpretation have understood they were voting to provide tax funds to construct a museum. To so hold would be a material variance, because the levy is limited to maintenance by the ballot and would constitute a fraud upon the voters. This we refuse to do.

We do not discuss nor reach any issue on the cost of the museum. Melkus in its brief states: "* * * at the time the museum was established no one envisioned the size, the elegance and splendor, nor the size and extent of the project." With this we agree. The suggested cost when presented to the voters was $100,000. We merely point out that the museum was to be constructed with public donated money and not with tax funds. This action is concerned with the use of tax money for costs of construction. While Museum has exclusive control of funds

raised for the support and maintenance of the museum, it has no power to use tax money to pay construction costs, and to do so would be an illegal use of those funds. We hold that tax funds cannot be used for construction purposes, because the vote establishing Museum limited the tax levy to the maintenance of a museum constructed by public donated funds.

There is no merit to appellees' claim of estoppel. County is not denying the establishment of Museum. It is contesting Board's right to use tax money to pay construction costs. The County Board sets the amount of the tax levy, based upon the needs of Museum. As the statute reads, the County Board has discretion in determining what needs will be met within the statutory limit. County was not a mere interloper as contended by Melkus, but had the right to raise the question of illegality of the use of tax funds authorized by County Board under section 51-501, R. R. S. 1943.

Melkus infers that the judgment can be paid by a special tax levied pursuant to section 77-1619, R. R. S. 1943. This issue is not before us, so while we may doubt the applicability of that section on the facts herein, we express no opinion thereon.

For the reasons given, we reverse the judgment of the trial court and remand the cause for the entry of a judgment in accordance with this opinion.

REVERSED AND REMANDED.

BOSLAUGH, J., dissenting.

The trial court found that the intervener had failed to plead or prove any facts evidencing an interest in the matter in litigation which would support intervention. This finding is sustained by the record. The judgment dismissing the petition in intervention and the answer of the intervener should be affirmed.

McCOWN, J., joins in this dissent.

McCOWN, J., dissenting.

The museum involved here was established under the authority of specific statutes. §§ 51-501 to 51-512, R. R.

S. 1943. Those statutes provide that two issues shall be submitted to the voters: (1) Whether the county museum shall be established, and (2) whether a tax of not more than 2 mills on the dollar shall be levied for the museum. See § 51-501, R. R. S. 1943.

The museum board here was duly appointed by the county board of Hall County after approval of the establishment of the museum and the levy of the tax by the voters. Section 51-506, R. R. S. 1943, specifically provides: "The museum board shall have exclusive control of expenditures, of all money collected or donated to the credit of the museum fund, of the renting *or construction* of a museum building and the supervision, care, and custody of the grounds, rooms, or buildings constructed, leased, or set apart for that purpose."

Because the county board here inserted the words "to be constructed by public donated funds" in the proposition submitted to the voters, the majority opinion holds that the addition of those words limited the statutory power of the museum board and restricted the use of tax funds to maintenance only. This is neither justified by the statute nor by any realistic approach to policy issues involved in the determination. If a museum was established here, the museum board had the powers granted by statute. No more and no less. The majority opinion limits the powers of a statutorily created body by judicial interpretation even when the maximum tax burden remains unaffected, and was clearly assumed by the voters. When such action also destroys the right of a contractor, dealing in good faith, to recover from a public body authorized to contract with it, the rule adopted by the majority assumes alarming proportions.

The record reveals that the museum board has received total donated funds greatly exceeding the total of tax funds received. Either there was never a legal museum formed here or the museum board has all the power granted by the statute under which the museum was established.

ROBERT DEMBOWSKI, APPELLEE, V. CENTRAL CONSTRUCTION COMPANY, APPELLANT, IMPLEADED WITH MEL LINSMAN, APPELLEE.
185 N. W. 2d 461

Filed April 2, 1971. No. 37593.

1. **Agency: Contracts.** A person with notice of a limitation of an agent's authority cannot subject the principal to liability upon a transaction with the agent if he should know that the agent is acting improperly.
2. **Principal and Agent: Contracts.** An innocent principal can, by contract with another, relieve himself of liability for deceit because of unauthorized fraud by a servant or other agent upon the other party.
3. **Principal and Agent: Trial: Evidence: Fraud.** One seeking to recover from a principal, for an unauthorized act of an agent, must establish that the principal obtained knowledge of such act before it had changed its position.

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

David L. Herzog and Healey, Healey, Brown & Burchard, for appellant.

Homer E. Hurt, Jr., for appellee Dembowski.

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

NEWTON, J.

This is an action in equity to reform a contract. The decree of the district court granting plaintiff's prayer for reformation is reversed.

Defendant, Central Construction Company, was in the home improvement business. It sold materials and furnished labor for that purpose. It also employed a number of salesmen on a commission basis. One of defendant's salesmen called on the plaintiff and induced him and his wife to sign a contract for the purchase and installation of new siding materials and aluminum doors and windows on their home. The contract provided:

"There are no representations, guarantees or warranties except such as may herein be incorporated, if any, nor any agreement collateral hereto, nor is this contract dependent upon or subject to any conditions not herein stated. Any subsequent agreement in reference hereto shall be binding only if in writing and if signed by all parties. Owner(s) understand and agree that Contractor does not make, and no agent of Contractor is authorized to make, any agreement with Owner(s) either concerning the use of the Owner(s) premises as a 'model home' or concerning any payments, credits or commissions to be received by Owner(s) for referrals of prospective customers. Owner(s) further understand and agree that, in the event Owner(s) make any such agreements with any person whomsoever, Contractor has no responsibility whatsoever for the performance of such agreements. Contractor does hereby expressly disaffirm any such agreements purportedly made on its behalf." Plaintiff and his wife were aware of this provision, made objection to it to the agent, but, nevertheless, executed the contract in reliance upon the agent's representations that they would not have to pay anything on the contract as their house was to be used as a model home and a percentage of other sales made on the strength of it would be credited to them in sufficient amounts to pay the contract in full; they also knew the contract provision mentioned did not apply to them and would be disregarded. Like representations were made to two other parties by agents of the defendant. The evidence fails to prove that defendant had any knowledge of the fraudulent conduct of its agents until after the materials and labor called for in the contract had been furnished to plaintiff by defendant.

The issue presented is the responsibility of the defendant principal for the fraud of its agent. Plaintiff relies on the case of Central Constr. Co. v. Osbahr, 186 Neb. 1, 180 N. W. 2d 139. Although based on similar facts, this case must be distinguished from the one before us as the

issue here was not raised or presented in the Osbahr case.

As noted, plaintiff and his wife were aware of the contract provisions limiting the agent's authority to enter into what would be a most unusual contract. Ordinarily, "A person with notice of a limitation of an agent's authority cannot subject the principal to liability upon a transaction with the agent if he should know that the agent is acting improperly." Restatement, Agency 2d, § 166, p. 392.

The evidence fails to establish that the defendant principal had knowledge of its agent's fraudulent conduct until after the contract had been entered into and fully performed by defendant.

"(1) An innocent principal can, by contract with another, relieve himself of liability for deceit because of unauthorized fraud by a servant or other agent upon the other party.

"(2) A contract with, or a conveyance to, the principal obtained by his agent through misrepresentations can be rescinded by the other party to the contract or conveyance prior to a change of position by the principal, even though the contract provides that 'it shall not be affected by misrepresentations not contained therein' and includes a statement that the agent has made no representations." Restatement, Agency 2d, § 260, p. 566.

The equitable remedy of rescission is denied after performance by the principal. In Maixner v. Travelers Ins. Co., 133 Neb. 574, 276 N. W. 163, it is stated: "One seeking to recover from a principal, for an unauthorized act of an agent, must establish that the principal obtained knowledge of such act before it had changed its position."

In Omaha Alfalfa Milling Co. v. Pinkham, 105 Neb. 20, 178 N. W. 910, it was held that where a party entering into a contract is informed of the limitation of the agent,

if the agent exceeds such limitation, the contract will not be binding upon his principal.

"A person dealing with one known to be an agent is held to the exercise of reasonable prudence, and, if an agent makes an agreement, representation or promise so unusual and unreasonable as to arouse the suspicion of a man of ordinary or average business prudence, he is put upon notice and must ascertain if actual authority has been conferred." Schuster v. North American Hotel Co., 106 Neb. 672, 184 N. W. 136.

In Scottsbluff Nat. Bank v. Blue J Feeds, Inc., 156 Neb. 65, 54 N. W. 2d 392, Restatement, Agency, § 166, is cited and applied. Plaintiff, aware of the agent's restricted authority, was denied recovery against the principal.

The pertinent principles of agency applicable to this case are well stated in 3 Am. Jur. 2d, Agency, § 77, p. 481: "It is always competent for a principal to limit the authority of his agent, and if such limitations have been brought to the attention of the party with whom the agent is dealing, the power to bind the principal is defined thereby. Accordingly, the general rule is that one who deals with an agent, knowing that he is clothed with a limited or circumscribed authority and that his act transcends his powers, cannot hold his principal. This is true whether the agent is a general or a special one, for a principal may limit the authority of one as well as of the other. Clearly, a limitation by the principal of the agent's authority, communicated to a third party, is effective to excuse the principal from liability to that third party for acts by the agent in excess of the limit prescribed; and a person dealing with an agent must use reasonable diligence and prudence to ascertain whether the agent is acting within the scope of his powers. It follows that the principal is not bound, on the basis of either actual or apparent authority, if the third person dealing with the agent knows, or should know, the limitations placed by the principal on the agent's authority and that the agent is exceeding it."

We conclude that the decree of the district court was erroneous and must be reversed, and the cause is remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

SPENCER, J., dissenting.

I do not agree with the majority opinion that Central Constr. Co. v. Osbahr, 186 Neb. 1, 180 N. W. 2d 139, is distinguishable from the instant case. The present action is one in equity to reform the written instrument. The Osbahr case was a mechanic's lien foreclosure, which accomplished the same purpose. I believe the Osbahr case to be applicable to the facts herein. I would affirm the judgment of the trial court.

McCOWN, J., joins in this dissent.

DOUGLAS L. RHODES, APPELLANT, V. MAURICE H. SIGLER, WARDEN, NEBRASKA PENAL COMPLEX, APPELLEE.
185 N. W. 2d 457

Filed April 2, 1971. No. 37702.

1. **Habeas Corpus: Sentences.** To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void.
2. ———: ———. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose.

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

Douglas L. Rhodes, 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.

Petitioner filed a petition for a writ of habeas corpus in the district court and now appeals from a denial of the relief prayed. His principal complaint appears to be due to an alleged infringement, in various respects, of his right to appeal his former conviction. His conviction was the result of a plea of guilty to a charge of issuing an insufficient fund check. He does not allege either a violation of his constitutional rights when the plea was taken nor facts indicating his sentence was void.

The following well-established rules appear to be applicable: "To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void.

"Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose." Hawk v. Olson, 146 Neb. 875, 22 N. W. 2d 136. See, also, Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, 165 A. L. R. 932.

We conclude that habeas corpus does not lie and the judgment of the district court is affirmed.

AFFIRMED.

RADFORD JONES, APPELLEE, V. CONSUMERS COOPERATIVE PROPANE COMPANY, APPELLANT.

185 N. W. 2d 458

Filed April 2, 1971. No. 37745.

1. **Automobiles: Evidence: Negligence.** If a motorist fails to see an automobile not shown to be in a favored position, the question of his contributory negligence is ordinarily a jury question.
2. **Automobiles: Evidence: Instructions.** Before a verdict can be directed against a motorist for failing to see an approaching

automobile at a nonprotected intersection, the approaching automobile must be undisputably located in a favored position.

3. **Trial: Instructions.** The refusal of a requested instruction substantially covered by the charge given is not error.
4. **Negligence: Instructions.** The doctrine of sudden emergency is not applicable where the emergency is caused in part by the negligence of the party claiming its benefit.
5. **Trial: Evidence.** The introduction in evidence of a map, chart, or diagram illustrating the scene of a transaction and the relative location of objects rests in the sound discretion of the court.

Appeal from the district court for Clay County: EDMUND NUSS, Judge. Affirmed.

William B. Craig of Craig, Woodruff & Hanley and John Bottorf, for appellant.

John P. Miller of Eisenstatt, Higgins, Miller & Kinnamon and David B. Downing of Downing & Downing, for appellee .

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

BOSLAUGH, J.

This is an action by Radford Jones, plaintiff, to recover damages sustained in an automobile accident. The jury returned a verdict for the plaintiff in the amount of $55,000. The defendant, Consumers Cooperative Propane Company, appeals.

The accident happened at about 9:45 a.m., on October 6, 1966, at an intersection of county graveled roads near Glenvil, Nebraska. The weather was clear and the roads were dry. There were no stop signs at the intersection but there was a "Slow" sign approximately ½ mile west of the intersection.

A farmhouse is located 71 feet north and 97 feet west of the intersection. The farmhouse, together with trees and other buildings in the farmyard, partially obscured the vision of traffic approaching the intersection from the west and the north.

The plaintiff was driving a milk truck carrying about 6 tons of milk. When the plaintiff was 1 mile west of the intersection he was traveling about 40 miles per hour. When the plaintiff was about ½ mile west of the intersection, and where he could get a good view of the road, he looked to the north and could see no traffic or dust from that direction. As the plaintiff passed the slow sign he down-shifted to fourth gear and gradually reduced his speed to about 25 miles per hour. As he approached the intersection the plaintiff looked to the north, then to the south, and again to the north. Just as the plaintiff was entering the intersection, he saw the defendant's truck coming from the north about 3 lengths away. The plaintiff was then traveling at about 20 miles per hour. The plaintiff attempted to accelerate to clear the intersection, but the defendant's truck swerved to the left and collided with the left rear side of the plaintiff's truck in the southeast quadrant of the intersection.

The driver of the defendant's truck died from natural causes before the trial and his testimony was not available. A state patrolman testified that after the accident the defendant's driver said that by the time he saw the plaintiff's truck, "it was too late to avoid the collision" and that "he turned his truck to the left to cushion the impact."

The defendant contends the evidence shows that the plaintiff was guilty of contributory negligence as a matter of law sufficient to bar any recovery. The defendant relies upon the rule that a motorist entering an intersection is obligated to look for approaching automobiles and to see any vehicle within the radius which denotes the limit of danger.

In this case the plaintiff approached the intersection from the right of defendant's truck and entered the intersection before the defendant's truck. If a motorist fails to see an automobile not shown to be in a favored position, the question of his contributory negligence is

ordinarily a jury question. Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571. Before a verdict can be directed against a motorist for failing to see an approaching automobile at a nonprotected intersection, the approaching automobile must be undisputably located in a favored position. Flanagin v. DePriest, 182 Neb. 776, 157 N. W. 2d 389. The evidence did not show that the defendant's truck was in a favored position. The trial court properly submitted the issue of the plaintiff's contributory negligence to the jury.

The defendant requested that the trial court give NJI No. 7.03 relating to lookout and reasonable control. The trial court did not give the instruction verbatim as requested but did instruct the jury adequately in regard to control, lookout, and the right-of-way at intersections. The instructions given were correct. Under the circumstances in this case, the refusal to give the requested instruction was not prejudicial error. The refusal of a requested instruction substantially covered by the charge given is not error. Deremer v. State, 182 Neb. 586, 156 N. W. 2d 6.

The defendant also requested that the trial court instruct the jury in regard to the sudden emergency doctrine. The doctrine is not applicable where the emergency is caused in part by the negligence of the party claiming its benefit. Krantz v. Marge's Mufflers, Inc., 184 Neb. 838, 172 N. W. 2d 624. The requested instruction was properly refused.

The trial court, over objection, permitted the plaintiff to introduce an exhibit which was a diagram of the scene of the accident prepared by a state patrolman who had investigated the accident. The exhibit was offered and received for the limited purpose of reflecting measurements made at the scene of the accident. The trial court admonished the jury that the exhibit was admitted only for the purpose of showing distances and that the representations as to the location of the cars on the exhibit should not be considered as evidence. The rul-

ing was within the discretion of the trial court and was not reversible error. Zawada v. Anderson, 181 Neb. 467, 149 N. W. 2d 329.

Later, the defendant recalled the patrolman and, over objection, the witness was allowed to testify that he had indicated on his report that each driver had been exceeding a safe speed. On the following day, the trial court reversed this ruling and directed the jury to disregard that testimony. The defendant argues that since the plaintiff was allowed to introduce a part of the patrolman's report, the defendant should have been allowed to introduce the balance of the report. The contention is without merit.

The exhibit which the plaintiff introduced was admissible as a diagram to show measurements only. The exhibit was not admissible as a report, or a part of a report, and the rule relied upon by the defendant is not applicable.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANTHON JAY RODGERS, APPELLANT.
185 N. W. 2d 448

Filed April 2, 1971. No. 37764.

1. **Post Conviction: Criminal Law: Joinder.** When the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan, they may be joined.
2. **———: ———: ———.** If it appears that joinder would prejudice the defendant, the court may order an election for separate trials of the counts.
3. **———: ———: ———.** The question of election between counts and the advisability of joint or separate trials is one directed to the sound discretion of the trial court.

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

John T. Carpenter of Matthews, Kelley, Cannon & Carpenter, 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.

On June 17, 1968, robberies occurred at two automobile service stations in Omaha, Nebraska. Approximately 2 hours elapsed between the 2 robberies. Defendant, in separate counts, was charged with participating in each offense. Defendant's objection to the joinder of the two charges in the information and his request for separate trials on each were overruled. He was convicted on both counts.

The only assignment of error refers to the failure of the court to grant separate trials on the two charges or counts. Defendant's contention is limited to an allegation of prejudice stemming from a joint trial of the two offenses. This is based on the assertion that the evidence supporting the offense set out in Count I was insufficient to support a conviction on that count and that a conviction on that count would not have resulted but for the cumulative evidence submitted in support of Count II.

It is necessary to examine the evidence bearing on the offense charged in Count I. Gerald Fay was employed as a chicken cutter at a place of business called "Chicken Delight." He was purchasing from his employer a white 1968 Valiant automobile bearing Nebraska license plate 1-X4335. In the performance of his duties, Fay used a Chinese chopping knife which resembled a meat cleaver. He kept it with him at all times to prevent its becoming dull. The station operator stated a 1968 white Plymouth automobile occupied by

two men drove into the station. The driver got out, threatened him with a meat cleaver, and demanded and took money from him. The other man, who the witness identified as the defendant, got out and entered the station. He was wearing dark glasses. The two men left. The witness stated the license number of the car had an "X" and a "4" in it. He also identified the chopping knife or meat cleaver.

The robbery charged in Count I occurred at about 2:40 p.m. The second offense, in which two men also participated, occurred at about 4:30 to 4:50 p.m. At approximately 5 p.m. the police stopped the Fay automobile which was then occupied by Fay and the defendant. The cutting knife or meat cleaver and two pair of sunglasses were found in the car.

In view of the foregoing evidence, it appears that defendant's contention is without merit. Section 29-2002, R. R. S. 1943, authorizes the joinder and combined trial of certain offenses in the absence of prejudice to the defendant. When the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan, they may be joined. If it appears that such joinder would prejudice the defendant, the court may order an election for separate trials of the counts.

Defendant maintains that the combining of the two offenses for trial was prejudicial due to weakness in the evidence on Count I. As pointed out, the record fails to sustain this contention. The question of election between counts and the advisability of joint or separate trials is one directed to the sound discretion of the trial court. It was said in Robinson v. State, 107 Neb. 591, 186 N. W. 977, that: "The question of election rests largely in the discretion of the trial court, and unless some prejudice has resulted from the ruling of the court, it will not be held that this discretion has been abused." See, also, Korth v. State, 46 Neb. 631, 65 N. W. 792;

Sheppard v. State, 104 Neb. 709, 178 N. W. 616, 18 A. L. R. 1074. The element of prejudice charged by defendant is not substantiated and we are unable to observe the presence of any other prejudicial element.

The judgment of the district court is affirmed.

AFFIRMED.

DOROTHY BAILEY STUCKY, APPELLEE, V. GLENN ELMER STUCKY, APPELLANT.
185 N. W. 2d 656

Filed April 9, 1971. No. 37643.

1. **Domicile.** A state has judicial jurisdiction over an individual who is domiciled in the state.
2. ———. A domicile once established continues until it is superseded by a new domicile.
3. **Domicile: Trial: Evidence.** The burden of proof is on the party who asserts that a change of domicile has taken place.
4. **Domicile: Process: Constitutional Law.** Domicile in the state is alone sufficient to bring an absent defendant within reach of a state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. Personal service of summons is adequate to meet the requirements of due process of law.
5. **Domicile: Process: Constitutional Law: Statutes.** In personam jurisdiction may be acquired over a nonresident defendant in a divorce action by extraterritorial personal service of process made in accordance with a statute of this state if there exist sufficient contacts between the defendant and this state relevant to the cause of action to satisfy traditional notions of fair play and substantial justice.

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

Hal Bauer of Bauer, Galter & Nelson, for appellant.

Bert L. Overcash and Woods, Aitken & Aitken, for appellee.

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

McCOWN, J.

This is a divorce action brought by Dorothy Bailey Stucky against Glenn Elmer Stucky. Defendant filed special appearance challenging jurisdiction. The special appearance was overruled and default entered. The decree awarded plaintiff a divorce, custody of a minor child, and certain real and personal property. The decree also ordered the defendant to pay child support, alimony, and costs, including an attorney's fee. The defendant has appealed. The sole issue is whether the court had in personam jurisdiction of the defendant to support its order to pay support, alimony, costs, and fees.

Plaintiff and defendant were married in South Dakota in 1942. The defendant was a civil engineer. Since the completion of defendant's military service, he has been employed by the Soil Conservation Service of the United States Department of Agriculture. The parties lived in Sidney, Montana; Belleville, Illinios; Billings, Montana; and Lansing, Michigan; before moving to Lincoln, Nebraska, in 1961. In 1962, they purchased a home at 1726 South 51st Street in Lincoln. Title to the home was taken in joint tenancy between plaintiff and defendant. A mortgage requiring monthly payments was placed on the house. This became and was the home of plaintiff and defendant and their three children.

In February 1965, the defendant left Lincoln. Between then and December 30, 1969, the defendant had returned to Lincoln twice. On each occasion he was at the home for a very brief period of about an hour. After his initial departure in February 1965, the defendant each two weeks sent checks to the First National Bank of Lincoln for deposit in the joint bank account of plaintiff and defendant. In the calendar years 1965 through 1968, the total amounts varied from $7,883 to $8,880 per year. Beginning in 1969, the defendant decreased the amounts to $250 each two weeks. All credit accounts and all utility accounts at the home in Lincoln were in defendant's name, and were never discontinued nor

had names been changed. Mortgage payments on the house were joint.

By agreement between plaintiff and defendant, the plaintiff filed joint income tax returns for the family for each of the calendar years 1965 through 1968. The return for the calendar year 1968 shows that it was prepared by a Lincoln accountant and his signature as preparer was dated April 12, 1969. The federal income tax returns were signed by the defendant in blank and forwarded to the plaintiff along with his lists of deductions and his withholding statement. The home address shown on the joint income tax returns was 1726 South 51st Street, Lincoln, Nebraska. The employee's address shown on the defendant's withholding statement, Form W-2, prepared by the United States Department of Agriculture, attached to the return, showed defendant's address as 1726 South 51st Street, Lincoln, Nebraska.

In November 1968, the defendant filed a divorce complaint in Montana and alleged that he had been a resident of Montana for more than a year. That complaint was later dismissed. In the spring of 1969, the defendant filed an action for divorce in Pennsylvania.

The plaintiff's petition for divorce was filed in the district court for Lancaster County, Nebraska, on May 28, 1969. On that date plaintiff's attorney filed a praecipe for service of summons supported by an affidavit stating that the defendant was a nonresident of the State of Nebraska and was a resident of the State of Pennsylvania. The summons was served on the defendant personally in Pennsylvania on June 3, 1969.

The decree of the district court for Lancaster County, entered on January 21, 1970, specifically found that the court had jurisdiction "over the parties." The decree also found that the defendant should be awarded the hunting and fishing equipment and his personal belongings located in the residence in Lincoln, Nebraska.

The defendant contends that the district court for Lancaster County, Nebraska, did not have personal juris-

diction over the defendant and that a personal judgment for support, alimony, and costs based on constructive service outside the territorial limits of Nebraska was wholly ineffectual to sustain a judgment in personam.

Section 42-305, R. R. S. 1943, provides: "A petition for divorce, alimony and maintenance may be exhibited by a wife in her own name, as well as by a husband, and in all cases the defendant may answer such petition without oath. No person shall be entitled to a divorce unless the defendant shall have either (1) been served with process in person if within this state, (2) been served with personal notice duly proved and appearing of record if out of this state, (3) been served by publication under section 42-305.01, or (4) entered an appearance in the case."

Section 42-305.03, R. R. S. 1943, provides: "Personal notice as provided in subsection (2) of section 42-305 shall not be had without the plaintiff or his attorney filing an affidavit showing that the defendant is a nonresident of this state, or if a resident of this state that the defendant is absent therefrom, and that personal service cannot be had on the defendant in this state. Such notice shall be served upon the defendant in person by issuance and delivery of summons in the manner provided in section 25-521." Service here was in full conformity with section 25-521, R. R. S. 1943.

Proposed Official Draft, Restatement, Conflict of Laws 2d, § 27, p. 151, states the bases for the state's power to exercise judicial jurisdiction over an individual. Domicile and residence will each support jurisdiction. In Mounts v. Mounts, 181 Neb. 542, 149 N. W. 2d 435, we held that a state has judicial jurisdiction over an individual who is domiciled in the state and that a domicile once established continues until it is superseded by a new domicile. See, also, Proposed Official Draft, Restatement, Conflict of Laws 2d, § 19, p. 99. Comment (c) under that section states: "The burden of proof is

on the party who asserts that a change of domicil has taken place."

In layman's language, the primary meaning of "domicile" is "home." "It is commonly said that a person may have more than one residence, but only one domicile." Leflar, American Conflicts Law, § 16, p. 30. "Every person has a domicile at all times and, at least for the same purpose, no person has more than one domicil at a time." Proposed Official Draft, Restatement, Conflict of Laws 2d, § 11(2), p. 53.

The evidence in this case establishes that the defendant continuously and systematically maintained his family in a permanent home in Lincoln, Nebraska, and that that particular domicile was established in 1962. The defendant has failed to carry the burden of proof that a change of that domicile took place. Domicile in the state is alone sufficient to bring an absent defendant within reach of a state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. Milliken v. Meyer, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278, 132 A. L. R. 1357 (1940). Personal service of summons is clearly adequate to meet the requirements of due process of law.

We have thus far dealt with the problem under traditional concepts. Older cases generally denied personal jurisdiction over a nondomiciliary of the forum state unless service of summons was made within the jurisdiction. Since International Shoe Co. v. State of Washington, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057 (1945), the doctrine of minimum contacts has been adopted in many states. Nebraska's statutory version was adopted in 1967. See, §§ 25-535 to 25-541, R. S. Supp., 1969.

Section 25-536, R. S. Supp., 1969, provides in part: "(1) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's: (a) Transacting any business in this state; (b) Contracting to supply services

or things in this state; (c) Causing tortious injury by an act or omission in this state; (d) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state; (e) Having an interest in, using, or possessing real property in this state; or (f) Contracting to insure any person, property, or risk located within this state at the time of contracting."

While that language does not cover divorce in specific words, it indicates clearly the legislative intention to apply the minimum contacts rule where it does not offend traditional concepts of fair play and substantial justice.

In addition, section 25-539, R. S. Supp., 1969, provides: "A court of this state may exercise jurisdiction on any other basis authorized by law."

The service provided for outside the state specifically includes personal delivery in the manner prescribed for service within this state or in the manner prescribed by the law of the place in which service is made for service in that jurisdiction. The entire act is cumulative and in addition to any other procedure for service of summons.

From the earliest days of this state, our unlimited equity jurisdiction and our divorce statutes by their own terms, gave us personal jurisdiction in cases such as this. That state-granted power was traditionally limited because of federal due process restrictions stemming from Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1877). Following Milliken v. Meyer, *supra,* and International Shoe Co. v. State of Washington, *supra,* those restrictions were removed. It should be clear that both our divorce statutes previously referred to, as well as the statutes authorizing personal jurisdiction on minimum contacts principles, fully satisfy the requirements of procedural and substantive due process. "* * * it is reason-

able and fair to require a defendant whose voluntary acts have given rise to a cause of action in a state to litigate his responsibility for that conduct at the place where it occurred." Owens v. Superior Court, 52 Cal. 2d 822, 345 P. 2d 921, 78 A. L. R. 2d 388. See, also, Soule v. Soule, 193 Cal. App. 2d 443, 14 Cal. Rptr. 417; Mizner v. Mizner, 84 Nev. 268, 439 P. 2d 679.

It seems clear to us that the minimum contacts concept as a basis for in personam jurisdiction is peculiarly suited to marital support cases. We hold that in personam jurisdiction may be acquired over a nonresident defendant in a divorce action by extraterritorial personal service of process made in accordance with a statute of this state if there exist sufficient contacts between the defendant and this state relevant to the cause of action to satisfy traditional notions of fair play and substantial justice. In the case before us, those contacts are obviously sufficient. The last marital domicile was established in this state and the defendant continuously and systematically maintained his family here thereafter. His persistent and voluntary course of conduct, both in and outside this state had their effect in this state and gave rise to the plaintiff's cause of action for divorce. Under such circumstances, the defendant should be subject to the personal jurisdiction of this state.

The district court here found that it had jurisdiction of the parties, overruled the defendant's special appearance, and entered judgment accordingly. That judgment was correct and is affirmed.

AFFIRMED.

NEWTON, J., dissenting.

I respectfully dissent from the majority opinion in this case. That opinion presents a beautiful edifice built upon a completely false foundation. It is true that the terms "residence" and "domicile" are not always synonymous. It is also true that the authorization by a Legislature for the service of summons giving a court jurisdiction in personam if based upon either domicile or resi-

dence is sufficient to meet the requirements of the constitutional due process clause. Milliken v. Meyer, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278, 132 A. L. R. 1357. It is also possible that the type of service of summons which the majority here seeks to authorize by judicial legislation *may be* desirable. That, however, is not for this court to determine. Nebraska has long authorized constructive service by publication and substituted service by personal service of summons outside the state, but all through the history of these statutes, over a period extending back a great many years, it has been recognized and, indeed, undisputed that such service could be used only in cases and for purposes usually denominated as in rem. Never before have the courts of this state sought to base a judgment in personam upon such service. See, Rhoades v. Rhoades, 78 Neb. 495, 111 N. W. 122; Gates v. Tebbetts, 83 Neb. 573, 119 N. W. 1120; Carpenter v. Carpenter, 104 Neb. 635, 178 N. W. 217. The first and third of these cases deal with questions growing out of divorce and alimony.

This same rule has been followed almost exclusively in all American jurisdictions. Since an action for divorce is universally considered to be an action in rem and an action for alimony or support money an action in personam, it is similarly, universally recognized that a divorce may be obtained on the basis of constructive or substituted service, but a judgment for alimony or support money cannot be so obtained. As indicated, the cases so holding are legion. Attention is called to the following: Vanderbilt v. Vanderbilt, 354 U. S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456; Estin v. Estin, 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561, 1 A. L. R. 2d 1412; Dorney v. Dorney, 145 F. Supp. 281 (1956); Wagner v. Wagner (D. C. Cir., 1961), 293 F. 2d 533; Rodriguez v. Rodriguez, 8 Ariz. App. 5, 442 P. 2d 169; Carnie v. Carnie, 252 S. C. 471, 167 S. E. 2d 297; Shonk v. Shonk, 45 Ohio Op. 2d 86, 16 Ohio Misc. 123, 241 N. E. 2d 178. See, also, 24 Am. Jur. 2d, Divorce and Separation, § 544, p. 665, and § 828, p.

939; 27A C. J. S., Divorce, § 94, p. 333, and § 78, p. 280.

Section 42-305, R. R. S. 1943, has been in effect in Nebraska in substantially the same form for a great many years. See § 1571, R. S. 1913. During all these years, this statute has been construed in accordance with the Nebraska cases first above cited and the cited cases from other jurisdictions. Now for the first time an attempt is made to pervert the clear meaning of the statute under the guise of interpretation. That statute authorizes the entry of a decree of divorce based upon either constructive or substituted service, but it *does not* authorize the entry of a personal judgment for alimony on the basis of such service. It states in part: "No person shall be entitled to a divorce unless the defendant shall have either (1) been served with process in person if within this state, (2) been served with personal notice duly proved and appearing of record if out of this state, (3) been served by publication * * *." Subsection (2) is the basis for the majority opinion. If subsection (2), providing for substituted service, can be so construed, then subsection (3), providing for constructive service, must also be construed as authorizing a judgment in personam for alimony. This would clearly be a violation of due process. The statute, as a whole, must be construed as a whole and it is positively barren of any distinction made between subsections (2) and (3) in regard to judgments in personam. Clearly, the Nebraska courts which, down through the years, have construed this statute as requiring personal service within the state as necessary to a judgment in personam are correct.

The majority opinion seeks to bulwark the result by adopting the "minimum contact" rule as a basis for approval of the service and judgment had in this case. The rule has not been heretofore applied in Nebraska. As pointed out above, the Nebraska statutes have been on the books, substantially unchanged, for at least half a century. They were adopted at a time when the federal

courts held it was a violation of the due process clause of the United States Constitution to enter a judgment in personam on substituted or personal service outside the state. Presumably the Legislature was aware of this situation and satisfied with the limited application of our statutes as they have not been changed, notwithstanding a reversal of the federal rule. In Nebraska it has been the uniform practice to deny in personam judgments where substituted service has been obtained on nonresidents.

As previously mentioned, Nebraska has followed the general rule. "Where there is no personal service upon defendant in a divorce case within the state and no appearance by him, the trial court is without jurisdiction to enter a personal decree against him for the payment of alimony, attorney's fees, or court costs." Allegrezza v. Allegrezza, 236 Minn. 464, 53 N. W. 2d 133. This rule has been followed in the great majority of jurisdictions. See, Pollock v. Pollock, 273 Wis. 233, 77 N. W. 2d 485; Carnie v. Carnie, 252 S. C. 471, 167 S. E. 2d 297; Curtis v. Curtis, 215 Ga. 367, 110 S. E. 2d 668; Stauffer v. Stauffer, 204 N. Y. S. 2d 217, 26 Misc. 2d 254; Cockrum v. Cockrum, 246 N. Y. S. 2d 376, 20 App. Div. 2d 642; Wagner v. Wagner (D. C. Cir., 1961), 293 F. 2d 533; Dorney v. Dorney, 145 F. Supp. 281 (1956); Accardi v. Accardi, 97 R. I. 336, 197 A. 2d 755; Emmons v. Emmons, 124 Vt. 107, 197 A. 2d 812; King v. Superior Court, 99 Cal. App. 2d 91, 221 P. 2d 120; Rodriguez v. Rodriguez, 8 Ariz. App. 5, 442 P. 2d 169.

There have been some recognized exceptions to the general rule. These cases involve instances wherein the defendant was not a bona fide nonresident. One such case is Mounts v. Mounts, 181 Neb. 542, 149 N. W. 2d 435. Others are: Gill v. Gill, 277 Minn. 166, 152 N. W. 2d 309; Dupuis v. Patin (La. App.), 155 So. 2d 768; Morelli v. Morelli, 226 N. Y. S. 2d 459; Lansdale v. Lansdale, 150 N. Y. S. 2d 42, 1 App. Div. 2d 374.

The wisdom of adopting the "minimum contact" rule

in certain types of cases is now becoming generally recognized, *but in no instance has any jurisdiction applied it generally in all types of cases.* This would be the result in Nebraska if the rule is adopted by judicial action in the present case. The interpretation given to section 42-305, R. R. S. 1943, is necessarily applicable also to section 25-521, R. R. S. 1943, which provides for substituted service: "In all cases where service may be made by publication, and in all other cases where the defendants are nonresidents, * * *." To thus widen the scope and generally extend the use of personal service outside the state on nonresidents in obtaining judgments in personam has not been contemplated either in Nebraska practice or by the Legislature.

The only states that have applied the "minimum contact" rule have done so by statute. These statutes are quite comprehensive and clearly specify in what types of cases and under what circumstances it is applicable. *In no instance has the rule been made available in all types of cases.* The states that have adopted the rule are California, Wisconsin, Kansas, and Illinois.

Wisconsin adhered to the general rule and prohibited judgments in personam under the minimum contact rule. See Pollock v. Pollock, 273 Wis. 233, 77 N. W. 2d 485. Since the 1959 passage of a statute *specifically* authorizing in personam judgments under certain circumstances in divorce cases, it too recognizes the rule in a limited manner.

The case of Mizner v. Mizner, 84 Nev. 268, 439 P. 2d 679, *does not* apply the rule in Nevada by judicial fiat. It simply gives full faith and credit to a California judgment entered in compliance with the California statute adopting the rule, and makes a pitch for approval of the rule without legislating it into Nevada law. In fact, the case specifically holds that one requirement is "a statute of the support ordering state has authorized the acquisition of such jurisdiction in that manner." (Sic personal service out of state.)

The California statute appears to have been adopted in 1957 and applies the rule only in cases where the defendant "was a resident of this State * * * at the time of the commencement of the action, or * * * *at the time that the cause of action arose,* or * * * at the time of service." (Emphasis supplied.)

In *no instance* has any state adopted the minimum contact rule by judicial decision. The opinion cites section 25-536, R. S. Supp., 1969, which, in effect, adopts the "minimum contact rule" in certain cases. It obviously is *not* applicable to divorce cases. The logical conclusion is that they were purposely omitted and the effect of the majority opinion is to amend this statute by judicial legislation.

I conclude that the advisable course would be to leave this matter to the Legislature.

WHITE, C. J., and BOSLAUGH, J., join in this dissent.

SPENCER, J., concurring in the result.

I concur in the result herein. I restrict my concurrence to the fact that the defendant was personally served with process and the following language of the opinion: "The evidence in this case establishes that the defendant continuously and systematically maintained his family in a permanent home in Lincoln, Nebraska, and that that particular domicile was established in 1962. The defendant has failed to carry the burden of proof that a change of that domicile took place."

S.M.S. TRUCKING COMPANY, APPELLEE, V. MIDLAND VET, INC., APPELLANT.
185 N. W. 2d 667

Filed April 9, 1971. No. 37673.

1. **Master and Servant. Where an employee acts under the direction of his employer, the employer is liable, not merely under the rule of respondeat superior, but also as a joint participant**

in the acts complained of. The employees and the company are, in fact, principals and joint participants.

2. ———. An employer is regarded as a joint tort-feasor having joint and several liability.

3. **Master and Servant: Trial.** The mere fact that an agent was not, at the exact time of an accident, immediately pursuing the principal's business purposes does not necessarily take him out of the scope of employment. Such a question must be determined by looking at all of the relevant factors concerning the nature of the employment as well as the purpose and degree of any alleged deviation.

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

Ray C. Simmons, for appellant.

Yost, Schafersman, Yost & Lamme, for appellee.

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

WHITE, C. J.

This is an appeal from a jury verdict and judgment awarding damages to the plaintiff as a result of an automobile-truck collision. We affirm the judgment of the district court.

All of the following facts have been stipulated by the parties. The defendant is a Nebraska corporation dealing in veterinary supplies with its principal offices in Fremont, Nebraska. At about 2:25 a.m. on the morning of January 24, 1968, Darwin Wegner, at that time president and general manager of the defendant, driving an automobile owned by defendant, was in a collision with the plaintiff's truck. The collision occurred when Wegner, proceeding south, went left of the highway centerline into the northbound lane of traffic, colliding head-on with plaintiff's truck. Wegner was killed instantly in the collision. Wegner did not have proper control of his automobile at the time of the accident; plaintiff's truck was entirely within its own lane; Wegner was driving while under the influence of alco-

hol, his blood having 0.31 percent alcoholic content; and plaintiff's driver was free of all negligence in the collision. Plaintiff's stipulated damages were $13,801.46.

The trial court submitted the issue of defendant's liability for Wegner's negligence to the jury. The jury found for the plaintiff and awarded the full stipulated amount of damages.

Defendant contends the trial court erred in refusing to hold that the proper statute of limitations had run against the plaintiff's action. Plaintiff did not file a claim in Wegner's estate within the prescribed period set by the county court, but elected to sue Wegner's employer, the defendant. Under section 30-609, R. R. S. 1943, if a person having a claim against a deceased person's estate does not exhibit his claim to the probate court within the time set by the court for that purpose, he is forever barred from recovering on the claim. Defendant contends that this statute, commonly referred to as the nonclaim statute, not only applies to tort actions brought against a decedent's estate, see Rehn v. Bingaman, 151 Neb. 196, 36 N. W. 2d 856 (1949), but also to actions brought against the decedent's employer when based on the doctrine of respondeat superior. Under this theory plaintiff would be barred from suing the defendant since plaintiff failed to file the claim. Plaintiff argues that the 4-year general statute of limitations on torts, section 25-207, R. R. S. 1943, applies.

We are unable to find any cases from any jurisdiction dealing directly with this problem nor have we been referred to any by the parties. However, we believe certain principles announced in other cases from this court are sufficiently analagous to show there is no merit to defendant's contention.

This is not a question of determining the master's liability after the servant has been found not liable. Here the servant is protected because of a statute of limitations, not because of any decision on the merits. Nebraska has enacted the nonclaim statute with the pur-

pose of securing the earliest possible settlement of the estates of deceased persons compatible with the just rights of creditors. The limitations embodied in that legislation exist independent of the general law of limitation affecting actions against living persons. In re Estate of Tucker, 128 Neb. 387, 258 N. W. 645 (1935).

It is true that the basis for plaintiff's claim is the imputed negligence of the deceased employee; but, under the particular facts of this case, any action the plaintiff may have against the employer must be considered independent of the employee's liability. The employer and employee are regarded as joint tort-feasors having joint and several liability. Allen v. Trester, 112 Neb. 515, 199 N. W. 841 (1924); Fonda v. Northwestern Public Service Co., 134 Neb. 430, 278 N. W. 836 (1938). In addition, in Fonda v. Northwestern Public Service Co., 138 Neb. 262, 292 N. W. 712 (1940), this court said: "Where an employee acts under the direction of his employer, the employer is liable, not merely under the rule of respondeat superior, but rather as a joint participant in the acts complained of. McInerney v. United Railroads, 50 Cal. App. 538, 195 Pac. 958. See, also, McCullough v. Langer, 23 Cal. App. (2d) 510, 73 Pac. (2d) 649. The employees and the company are, in fact, principals and joint participants. 'So a verdict against the master and an acquittal of the servant will be sufficient to sustain a judgment against the master where the act resulting in the injury complained of was committed under the express command of the master.' 39 C. J. 1368." Although that case dealt primarily with the right of an injured third person to sue an employer and employee together with the same action, the quoted excerpt, which discusses the nature of the master-servant relationship, applies to the case presented here. As a result, the causes of action against the deceased employee and the employer were joint and several, the action against one not depending on the right to sue the other. The trial court was correct in ruling that the

nonclaim statute did not apply to plaintiff's action against the defendant.

The defendant also claims the trial court erred in submitting the issue of defendant's liability for Wegner's negligence to the jury. Defendant contends there were no disputed facts or conclusions which justified submitting the issue to the jury, thus allowing it to find that Wegner was within the scope of his employment at the time of the accident. We find no merit in defendant's contention since an examination of the evidence shows that, at a minimum, a jury question was presented.

On the afternoon of January 23, 1968, Wegner drove from Fremont to Beemer, a distance of approximately 46 miles, in a 1966 Oldsmobile owned by the defendant. As the defendant's president and general manager, Wegner had been furnished this car to carry on the defendant's business. There is no indication from the record that the car was used for anything but company business.

The evidence shows that Wegner went to Beemer to conduct business for the defendant. While he was there he contacted Jim Albers, a customer of the defendant, and subsequently discussed business matters with Forrest Magnuson, the defendant's salesman. Wegner had arrived in Beemer at approximately 4 p.m. He talked with Albers for about one-half hour and then both went to the Pastime Bar where they remained for several hours. While at the bar, they had drinks, discussed veterinary business of the defendant, and generally talked of cattle feed supplements and cattle feeding operations. They were subsequently joined by Magnuson. Later the trio moved from the Pastime Bar to the Indian Trails Country Club where the drinking and discussing of business matters continued.

During the evening Magnuson talked to Wegner about some difficulties he was having collecting on certain accounts owed the defendant. The two agreed to meet in Beemer at 8 a.m. the following morning to further discuss the delinquent accounts.

Both Magnuson and Albers were under the impression that Wegner intended to stay overnight in Beemer. Wegner had had both Albers and the bartender make a reservation for him at a local motel. However, after taking Albers to his pickup truck, Magnuson having left in his own car, Wegner drove back toward Fremont. It was then that he collided with plaintiff's truck. Although no one will ever know for sure, it was apparently Wegner's intention to go home for the night and return to Beemer the next day for his meeting with Magnuson. The defendant claims that since the collision occurred while Wegner was apparently headed home, he was not within the scope of his employment.

In a case such as this, whether the act in question was within the scope of employment is, ordinarily, one of fact for the determination of the jury. Watts v. Zadina, 179 Neb. 548, 139 N. W. 2d 290 (1966); LaFleur v. Poesch, 126 Neb. 263, 252 N. W. 902 (1934). The mere fact that an agent was not, at the exact time of the accident, immediately pursuing the principal's business purposes does not necessarily take him out of the scope of employment. Such a question must be determined by looking at all of the relevant factors concerning the nature of the employment as well as the purpose and degree of any alleged deviation. LaFleur v. Poesch, *supra;* Peterson v. Brinn & Jensen Co., 134 Neb. 909, 280 N. W. 171 (1938); Vanderlippe v. Midwest Studios, Inc., 137 Neb. 289, 289 N. W. 341 (1939).

Wegner was both the president and general manager of the defendant. He had been invested with broad general powers of management and superintendence, and was obviously the principal officer of the defendant, having general charge of the defendant's activities. His powers were coextensive with the powers of the defendant itself. He had broad implied or ostensible authority to do any act which was usual or necessary in the conduct of the defendant's business. See, Barber v. Stromberg-Carlson Tel. Mfg. Co., 81 Neb. 517, 116 N. W. 157

(1908); Koepplin v. Pfister Hybrid Co., 179 Neb. 423, 138 N. W. 2d 637 (1965); Geyer v. Walling Co., 175 Neb. 456, 122 N. W. 2d 230 (1963). Wegner was pursuing his duties for the defendant just prior to the accident and he was scheduled to again perform company business the following morning. *The business purpose of the trip was clearly shown.* The car he was driving at the time of the collision was owned exclusively by the defendant, having been given to Wegner to help conduct company business. The cumulative effect of this evidence was to show a business use of the car at the time of the accident, even though it may have been in combination with a personal purpose. This was sufficient to present a jury question.

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

AFFIRMED.

SPENCER, J., participating on briefs.

BOSLAUGH and SMITH, JJ., concur in the result.

KINGERY CONSTRUCTION COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. SCHERBARTH WELDING, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE.
185 N. W. 2d 857

Filed April 9, 1971. No. 37688.

1. **Contracts: Time.** Time is not generally considered as the essence of a contract, unless it is expressly provided or it appears it was the intention of the parties that it should be of the essence thereof.
2. **Trial: Appeal and Error.** A verdict will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence, and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, or mistake.

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

Joseph F. Chilen and Denney, Denney & Sass, for appellant.

Ginsburg, Rosenberg, Ginsburg & Krivosha and Cathcart, Wishnow & Knight, for appellee.

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

WHITE, C. J.

This is an action for damages for violation of a contract. The defendant appeals from an adverse judgment and the plaintiff has cross-appealed contending inadequacy of the damages allowed. The errors assigned relate to construction of a contract and the amount of damages awarded by the jury. We affirm the judgment of the district court.

The plaintiff, Kingery Construction Company, is a general contractor engaged in the business of constructing commercial buildings. Plaintiff entered into a contract with the Ralston Purina Company for the construction of a chow mill in Lincoln, Nebraska. The proposed structure called for the installation of 3 10,000-bushel steel storage tanks. The plaintiff obtained outside bids and quotations for the installation of these tanks since plaintiff did not have the equipment, men, or necessary background for such a job. A quotation of $3,157 was obtained from the defendant, Scherbarth Welding, Inc., of Fairbury, who was known to be engaged in the installation of such structures. Based upon the defendant's quotation, plaintiff made its overall general bid and quotation to Ralston Purina. On September 18, 1967, a written subcontract agreement was signed by plaintiff and defendant, in which the defendant agreed to erect the three steel tanks. Defendant never did erect the tanks, thus requiring the plaintiff to allegedly expend $10,290.27 in excess of the subcontract agreement to complete the construction. Plaintiff brought suit to

recover this money, alleging the defendant had breached the agreement.

The defense, in substance, contends that time was of the essence under the terms of the contract and that the plaintiff had failed to prepare the preliminary work for the installation of the steel bins on time, and thus prevented the defendant from erecting the tanks. The jury found for the plaintiff in the amount of $1,124.47 and the district court entered judgment thereon.

Under the parties' agreement, defendant was to complete installation of the tanks within 5 weeks after the foundation and base were ready, allowing the plaintiff to complete the entire job by June 15, 1968. The defendant was to begin work on the project within 3 calendar days after being notified in writing by the plaintiff to do so. If the defendant did not begin the job within these 3 days, plaintiff had the right to take over the contract and charge the defendant the costs of completion.

After signing the agreement, the parties proposed various dates when the defendant could begin installation of the tanks. Because of certain difficulties, the plaintiff was delayed in preparing the preliminary concrete base. *On December 20, 1967,* the plaintiff wrote the defendant explaining that the originally proposed date of March 18, 1968, would have to be postponed and that the plaintiff would notify the defendant when installation of the tanks could begin.

On June 15, 1968, plaintiff notified the defendant that the foundations had been prepared and, in accordance with the agreement, defendant now had 3 days to begin installing the tanks. Because of other commitments defendant had made, it was unable to begin the work within the 3-day period. As a result, plaintiff took over the job.

Defendant claims that time was of the essence in the contract and since the contract said that the defendant's obligation was to be completed by June 15, 1968, plain-

tiff's failure to complete the preliminary work with reference to the foundation disallowed the defendant on the premises to complete the job, excused the defendant from completing its part of the agreement. A review of the evidence in this record shows that the parties did not intend the day of June 15, 1968, to be of the essence to the contract.

The evidence in the record in this case shows that it is customary in building contracts to fix a time when the work is to begin and another time when the work is to be completed. Generally, neither of these times is considered to be of the essence to the contract unless there is a special stipulation to that effect. Construction contracts are subject to many delays, the reasons for which may often be difficult to determine. The parties usually foresee that such delays will occur and thus do not consider performance by the contractor at the agreed time to be of the essence. See 3A Corbin on Contracts, § 720, p. 377 (1960). We have said: "Time is not generally considered as the essence of a contract, unless it is expressly provided or it appears it was the intention of the parties that it should be of the essence thereof." Melville Lumber Co. v. Welpton Lumber Co., 121 Neb. 370, 236 N. W. 438. See, also, Morison v. Fremont Joint Stock Land Bank, 130 Neb. 104, 264 N. W. 163.

In the case before us here, no express date was given when the defendant was to start the work, the only precedent condition stipulated being that the plaintiff give the defendant a 3-day notice when to begin working. However, the parties did state that the defendant was to complete the work by June 15, 1968. The evidence shows that because of severe winter weather, underground water problems at the construction site, and other complexities of the work involved, the plaintiff was not able to complete the base and foundation for the installation of the steel bins until May 31, 1968. Since the defendant needed 5 weeks to complete

its obligation, the June 15 deadline obviously could not be met. The evidence shows that both parties have been in the construction business for many years and that both knew the special problems in such a job as this. As stated, at the outset, both parties realized that there might be considerable delay before the preliminary work would be completed. In a message on January 10, 1968, defendant told the plaintiff that upon unloading the construction materials it was found certain items were damaged. Defendant then said: "(T)here will be considerable delay before bins are erected." The defendant never told the plaintiff that it was withdrawing from the contract because of the delays. It was only when defendant's counsel notified the plaintiff on June 22, 1968, that it would have to bear the cost of any delay that the plaintiff realized the defendant regarded June 15, 1968, as the terminal date. It is unnecessary to set out the correspondence between the parties in full. Suffice to say that the correspondence and the actions taken by both parties clearly show that June 15, 1968, was not considered to be of the essence. We therefore come to the conclusion that the defendant was not relieved of its duty to complete the contract and the plaintiff had the right to sue for the defendant's breach.

We turn now to the cross-appeal of the plaintiff in which it complains of the inadequacy of the verdict in the sum of $1,124.47. The verdict will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence, and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, or mistake. Cover v. Platte Valley Public Power & Irr. Dist., 173 Neb. 751, 115 N. W. 2d 133. The record in this case shows that the only major necessary expenditure the plaintiff was put to in the erection of the bins, on the breach of the defendant, was the acquisition of rental equipment in the amount of $1,301.84. The contract price was for $3,157. The evidence shows that the plaintiff, an experienced

construction firm, had men in its employ with the necessary expertise for the erection of the bins and all that was necessary in order to perform the contract was the rental of special equipment. The matter of damages, of course, is for the jury and in light of this situation, we are unable to say that the verdict of the jury was so inadequate or so disproportionate as to indicate that it was the result of passion, prejudice, or mistake. There is no merit to this contention.

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

AFFIRMED.

FRED H. BRUNS, JR., APPELLEE, V. CITY OF SEWARD, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
185 N. W. 2d 853

Filed April 9, 1971. No. 37698.

Airports: Municipal Corporations: Words and Phrases. The word "airport" in the clause "any city . . . owning or operating an airport" in the Cities Airport Authorities Act, section 3-502, R. R. S. 1943, means an airport qualified and licensed for public use.

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

Russell A. Souchek, for appellants.

Byron J. Norval, for appellee.

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

SMITH, J.

Plaintiff, a taxpayer, attacked a resolution by which the city council of the City of Seward had undertaken to establish an airport authority. Seeking injunctive relief, he alleged that the city had not satisfied a statutory condition. The statute has required a city to own or

operate an airport before it can create an airport authority. The district court found for plaintiff, declaring the airport authority nonexistent and ordering a permanent injunction. Defendants city, councilmen, clerk, and members of the airport authority appeal.

An airport was built in 1966 by Charles H. Krutz. Having cleared and sodded the strip, he registered it with the Nebraska Department of Aeronautics. He last renewed his registration on February 3, 1969, when in his application he designated the land a personal use airport not open to the public except by prior arrangement. The department designated the airport with the symbol "P" on its aeronautical chart. The symbol represented a personal use airport with emergency facilities only, and an airport that was "Not for public use—possible unreported hazards—user assumes all risk."

Personal use airports were permitted without certificate by the department's practice, and no certificate was issued to Krutz. According to testimony of a department representative no minimum standard existed for a personal use airport. The principal purpose of annual registration requirements was analysis of aviation activity within the state. See Report of the Department of Aeronautics to the Governor (1969).

On April 1, 1969, Seward leased the airport from the Krutzes and also other land from other parties in connection with the airport. The term of each lease was 1 year subject to earlier termination on 30 days notification by either party. The consideration was $1. On April 15, the city council resolved to create an airport authority. On May 6, the city assigned the leases to the authority.

On June 6, 1969, the airport authority applied to the Department of Aeronautics for a municipal license. The application was denied. The land fell far short of satisfying requirements for a municipal airport. According to a department representative, the airport authority was "granted a license for a personal use airport" on June 10.

The department approved a state grant in aid of the authority, and an application for federal aid was pending. Running through the statutes are declarations of public purpose, public need, and federal aid relating to airports. See, §§ 3-102, 3-104, 3-123, 3-147, 3-206, 3-216, 3-218, 3-237, 3-239, 3-504 (14), 18-1506, and 18-1507, R. R. S. 1943.

The Department of Aeronautics Act provided: "(1) For the purpose of the laws of this state relating to aeronautics, the following words . . . shall have the meanings herein given, unless otherwise specifically defined, or unless another intention clearly appears, or the context otherwise requires. . . . (6) Airport means (a) any area of land or water, except a restricted landing area, which is designed for the landing and takeoff of aircraft, ... (8) Restricted area means any area of land, water, or both, which is used or is made available for the landing and takeoff of aircraft, the use of which shall, except in case of emergency, be only as provided from time to time by the commission." § 3-101, R. R. S. 1943.

The Cities Airport Authorities Act which was the ground of the council resolution provided: "Any city now or hereafter owning or operating an airport is hereby authorized to create an airport authority . . .." § 3-502, R. R. S. 1943. The Revised Airports Act required the licensing of airports and restricted landing areas, except "restricted landing areas designed for personal use." §§ 3-133 and 3-136, R. R. S. 1943.

The Revised Airports Act authorized a bond issue only with electoral approval; yet it provided for taxation to raise money to acquire, construct, and enlarge airports. See, §§ 3-211, 3-213, 17-507, and 18-1502, R. R. S. 1943.

The Cities Airport Authorities Act limited the tax levy to 2 mills, but it empowered an airport authority to incur debt, issue negotiable bonds, and provide for the rights of bondholders. § 3-504 (12) and (15), R. R.

S. 1943. Electoral approval was unnecessary. See, §§ 3-504.01, 3-507 (2), and 3-513, R. R. S. 1943.

The question is close. The powers conferred by the Cities Airport Authorities Act were greater than were the powers conferred by the Revised Airports Act. The different provisions for issuance of bonds are important. We conclude that the word "airport" in the clause "Any city . . . owning or operating an airport" in section 3-502, R. R. S. 1943, means an airport qualified and licensed for public use. Cf. Title 49 U. S. C., § 1101 (8), as amended by Sept. 20, 1961, Pub. L. 87-255, § 8 (a), 75 Stat. 526, now Title 49 U. S. C., § 1711 (12) (1970). The Seward airport did not fall within that definition.

The judgment is affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

WHITE, C. J., dissenting.

I must respectfully but strongly dissent. The majority opinion finds that the word "airport" in section 3-502, R. R. S. 1943, can mean only an airport authority licensed for public use. In so doing the majority opinion prohibits the lawful attempts of the City of Seward to operate under the Cities Airport Authorities Act, sections 3-501 to 3-514, R. R. S. 1943, to develop a safe and approved airport for the city.

The majority opinion thwarts the project of the City of Seward in the initial stages of its project for the singular reason that the airport being developed does not already meet the standards that the Cities Airport Authorities Act is designed to achieve. At best, this is an incongruous result. The lawfulness and appropriateness of the City of Seward's action is best demonstrated by a brief survey of the Cities Airport Authorities Act.

Section 3-502, R. R. S. 1943, authorizes the creation of a city airport authority at the discretion of the mayor and city council of the city.

Section 3-504(4), R. R. S. 1943, specifically gives a city airport authority the power: "To acquire, in the name

of the city, by purchase or condemnation, real property or rights or easements therein necessary or convenient for its corporate purposes, * * *."

The corporate purposes of the authorities are clearly defined in the same section at subsection (9): "To *design, construct,* maintain, operate, improve, and reconstruct so long as its corporate existence shall continue such *projects* as shall be necessary and convenient to the maintenance and *development* of aviation services to and for the city in which such authority is established, including landing fields, * * * and all facilities necessary or convenient in connection with any such project * * *." (Emphasis supplied.)

The word "project" as used in the act includes, "any airport operated by the authority, including all real and personal property, * * *." § 3-501 (6), R. R. S. 1943.

The word "real property" is "any and all things and rights usually included within the term real property, including not only fee simple absolute but also any and all lesser interests, such as * * * leases." § 3-501 (5), R. R. S. 1943.

Property acquired by the city may be conveyed or transferred to the city airport authority by resolution of the city council for use by the airport authority in connection with the project.

The city airport authority is given the power to tax the property of the city it services, to accept grants from the United States, the State of Nebraska, or any other agency, and incur debt and issue negotiable bonds. It may also expend all such funds for corporate purposes. § 3-504 (12), (14), (15), R. R. S. 1943.

The corporate purposes, as have been cited above, are the design, construction, improvement, or maintenance of an airport project.

The Legislature has clearly and thoroughly provided authorization for a city to acquire land and funds to develop an airport to service the city. The city airport authority is to have "full and exclusive jurisdiction and

control over all facilities owned or *thereafter acquired* by such city for the purpose of aviation operation, * * *." (Emphasis supplied.) § 3-502, R. R. S. 1943.

The language of the statute is explicit in referring to present and future land and facilities. The words "design" and "construct" do not envision existing entities but rather proposed facilities. As, if the language of the Cities Airport Authorities Act was not sufficiently clear, the Legislature included an even more definitive section. Furthermore, the section is relevant to the appellee's attempt to put the question of the airport authority to a vote of the electors of the city.

"Sections 3-501 to 3-514 shall be full authority for the creation of airport authorities by cities, and for the exercise of the powers therein granted to cities and to such authorities, and *no action, proceeding or election* shall be required *prior* to the creation of airport authorities hereunder or to authorize the exercise of any of the powers herein granted, any *provision of law or of any city charter to the contrary notwithstanding,* * * *." (Emphasis supplied.) § 3-504.01, R. R. S. 1943.

The conduct of the City of Seward through its city council during the period between acquisition of the lease from Charles Krutz and the application for a license to operate a public use and then a private use personal landing area, is completely consistent with the spirit and letter of the Cities Airport Authorities Act. The council did not have to act in haste or deception in acquiring the lease of the Krutz' land or creating the airport authority by resolution. The denial of a license to operate a public use airport in no way jeopardizes the powers or authority of a city airport authority to *design* and construct a project airport under the auspices of the Cities Airport Authorities Act.

According to statute, council resolution is sufficient to create the airport authority; a lease interest in property is sufficient real property for the airport authority to manage; and, the corporate purposes of the air-

port authority thereby created include the design and construction of airport projects.

Furthermore, the federal definition of airport, on which the majority opinion relies, Title 49 U. S. C., § 1101(8), now § 1711(12), is part of an even more extensive program for the development of civil aviation in the United States. See, Title 49 U. S. C., §§ 1713(a), 1714 (a), 1716 (a), and 1716(b).

It is clear that the statutory scheme and spirit of the Nebraska Cities Airport Authorities Act is in response to the natural priority evidenced by Title 49 U. S. C., § 1701: "That the nation's airport and airway system is inadequate to meet current and projected growth in aviation."

The City of Seward was attempting to work within the statutory framework provided by the Nebraska Legislature for the acquisition of land and development of municipal airports. The city should not be forbidden to comply with the laws of Nebraska in order to bring public aviation facilities to Seward.

I would reverse the judgment and dismiss the cause so that the city airport authority may continue its project under the authority of the Cities Airport Authorities Act.

CARTER, J., joins in this dissent.

KENNETH MITZNER ET AL., APPELLANTS, V. IRMA A. PUTNAM ET AL., APPELLEES.
185 N. W. 2d 665

Filed April 9, 1971. No. 37727.

Mortgages: Acknowledgments: Homestead. A mortgage upon real estate, other than the homestead, executed and delivered by the mortgagor is valid between the parties, even though it was not lawfully acknowledged or witnessed.

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

A. Michael Alesio and Beynon, Hecht & Fahrnbruch, for appellants.

Andrew J. McMullen, for appellees.

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

WHITE, C. J.

This is an appeal from a district court judgment dismissing plaintiffs' petition for foreclosure of first and second real estate mortgages on land owned by the defendant Irma Putnam. Richard and Betty Putnam are only nominal defendants in this appeal and, therefore, Irma Putnam will hereinafter be referred to as the defendant. We reverse the judgment of the trial court.

Kenneth Mitzner, co-plaintiff with his wife, Marianne, is a professional bail bondsman. In late July or early August of 1964, defendant contacted Mitzner and requested that he write a bail bond for her son, Stanley Putnam. Two bonds were needed by the defendant, one for $10,000 to guarantee her son's appearance for a trial in Dodge County and one in the amount of $1,000 for a separate trial in northwestern Nebraska. Mitzner asked for and received indemnity agreements and promissory notes from the defendant, as well as a first and second mortgage on defendant's real property. This was done to secure the bond premiums, any expenses Mitzner might incur, and the face amount of the bonds in the event they were forfeited. The mortgages were in the amounts of $1,550 and $11,000 respectively, and were payable on demand. The mortgages were originally given to Kenneth Mitzner alone who assigned them to the Commonwealth Company of Lincoln, Nebraska. They were subsequently reassigned, however, to Kenneth and Marianne Mitzner on September 26, 1968. When defendant failed to pay principal and interest due on the notes and mortgages, plaintiffs instituted this action to foreclose both mortgages.

Plaintiffs admit that no notary was present when the mortgages were executed, although both instruments were subsequently notarized by Mitzner's secretary. Since the defendant never went before the notary and declared the executed instruments to be her act or deed, they were not properly acknowledged. See, Aultman & Taylor Co. v. Jenkins, 19 Neb. 209, 27 N. W. 117 (1886). The trial court dismissed plaintiffs' petition because of this lack of acknowledgment and because the court was under the impression that there was no record of a reassignment of the mortgages by the Commonwealth Company to plaintiffs.

Defendant contends that the trial court's decision must be upheld because there was no evidence in the trial itself that the mortgages had been reassigned to the plaintiffs by the Commonwealth Company. The record shows that the reassignment was not admitted into evidence until the day that the motion for a new trial was heard. This was after the trial court had ruled that plaintiffs' petition had to be dismissed because of a lack of acknowledgment and because plaintiffs apparently had no interest in the case. During the trial, however, plaintiffs possessed the notes and mortgages and produced them to the court, uncanceled and unextinguished.

Upon receiving the reassignment evidence and hearing the plaintiffs' motion, the trial court made this journal entry: "Now on this 5th day of June, 1970, this matter came on for hearing on the motion for new trial. On the basis of the evidence offered on the assignment, the Court finds that had it been offered at the time of trial, one of the reasons for the Court holding for the Defendant would have been eliminated. The complaint made in the motion for new trial that certain evidence was not received for the purpose of disposing of this motion, the Court is assuming that said exhibits should have been received and that the assignment was offered in time. The Court's ruling on the Defendant's motion

for a judgment of dismissal at the conclusion of the Plaintiffs' evidence would still be the same and it is still the same and *the motion for new trial is denied on the basis that the mortgage was never properly executed.*" (Emphasis supplied.) From this it is clear that the real basis for the trial court's dismissal of plaintiffs' petition was that the mortgages were not properly acknowledged. However, even if this were not the case, the fact that the mortgages were in the possession of the plaintiffs and were produced at the time of trial was prima facie evidence of plaintiffs' ownership. Western Securities Co. v. Naughton, 124 Neb. 702, 248 N. W. 56 (1933). Thus, if defendant is to prevail it must be on the ground that the mortgages were not properly acknowledged.

A mortgage upon real estate, *other than the homestead,* executed and delivered by the mortgagor is valid between the parties, even though it was not lawfully acknowledged or witnessed. Holmes v. Hull, 50 Neb. 656, 70 N. W. 241 (1897); Prout v. Burke, 51 Neb. 24, 70 N. W. 512 (1897); Mazanec v. Lincoln Bonding & Ins. Co., 169 Neb. 629, 100 N. W. 2d 881 (1960). It was neither alleged nor proved by the defendant that she occupied the mortgaged premises as a homestead. In fact, no evidence whatsoever was given by the defendant. The homestead law should not be so construed as to protect land which apparently has not only never been occupied as a homestead, but concerning which the testimony fails to show even an intent to so occupy it in the future. Clements, Bane & Co. v. Kopietz, 2 Neb. (Unof.) 18, 95 N. W. 1126 (1901). The mortgages are valid as between the parties and the trial court should have so held.

For the reasons given, the judgment of the trial court must be reversed and the cause remanded with directions to enter a decree for foreclosure.

REVERSED AND REMANDED WITH DIRECTIONS.

GARDEN CITY PRODUCTION CREDIT ASSN., APPELLANT, V. J. P. LANNAN, APPELLEE.

186 N. W. 2d 99

Filed April 16, 1971. No. 37373.

1. **Contracts: Security Interest: Sales.** A security interest continues in collateral notwithstanding sale, exchange, or other disposition thereof by the debtor, unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.
2. ———: ———: ———. A provision in a security agreement granting a security interest in proceeds of collateral, as well as in the collateral itself, does not amount to written consent to dispose of collateral but only a provision that should a sale, exchange, or other disposition occur, the proceeds also would be covered by the security agreement.
3. ———: ———: ———. The failure to rebuke or object alone by the lender to the sale of the collateral does not amount to written consent to dispose of the collateral free of the lender's security interest.
4. ———: ———: ———. The coupling of a provision prohibiting disposition of the collateral without written consent, together with a reservation of a security interest in the proceeds of the sale, are provisions primarily designed for the further protection of the security holder and not provisions to expand the rights of a purchaser.
5. **Estoppel: Waiver.** Ordinarily to establish a waiver of legal right there must be a clear, unequivocal and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his part.
6. **Waiver.** Ordinarily a waiver is a voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intention that such right shall be surrendered.

Appeal from the district court for Platte County: C. THOMAS WHITE, Judge. Reversed and remanded.

Snell, Winkle & Heese, for appellant.

Wagner & Johnson, Raymond E. Baker, Gale D. Tessendorf, and Mattson, Ricketts, Gourlay & Lewis, for appellee.

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

WHITE, C. J.

A protected Kansas lender seeks in replevin to recover 161 head of cattle in the possession of an innocent Nebraska purchaser. The basic issue is whether, under the Uniform Commercial Code, the lender has waived his otherwise protected security interest. The judgment of the district court was against the lender. We reverse the judgment of the district court.

Section 9-306(2), U. C. C., provides: "Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor."

The cattle in question were from the ranch of Murlin and Doris Carter in Syracuse, Hamilton County, Kansas. The plaintiff, Garden City Production Credit Association, hereinafter referred to as P.C.A., extended the Carters a loan in 1965 to finance their farming and ranching operations. A signed financing statement, covering the cattle in question and executed and perfected pursuant to the Uniform Commercial Code of the State of Kansas, was filed with the Hamilton County register of deeds in Syracuse, Kansas, on May 2, 1966. Several subsequent security agreements were filed by P.C.A. pursuant to the Kansas Uniform Commercial Code covering farm machinery, crops, and branded likestock. On March 9, 1967, the Carters executed a security agreement which included the 161 head of cattle here involved. This agreement prohibited Carter from encumbering, removing, selling, or otherwise disposing of the cattle without the *written consent* of P.C.A., and provided the right to repossess in the event of default.

Subsequent to these security agreements, the Carters at various times did sell and remove secured property in the course of their farming and ranching operation and each time they did so without first obtaining the written consent required by the financing agreement. The record shows that after various sales, Carter endorsed all checks received for the sale of the cattle involved to P.C.A. for application on his indebtedness. Carter has never requested written consent to sell the various collateral nor has Carter ever been rebuked by P.C.A. for failing to secure the written consent required by its financing contract. Carter sold the 161 head of cattle here involved to the Western Cattle Company, hereinafter referred to as Western, a large livestock brokerage firm operating principally in western Kansas. On June 15, 1967, Western negotiated a contract between Carter and Augustin Brothers, of Shelby, Nebraska, hereinafter referred to as Augustin, for delivery of 165 head of steers on or before September 20, 1967. Mr. Daly of Western issued a sight draft on a Columbus bank for the Augustin account payable to Murlin Carter in the amount of $1,650 as part payment for the cattle. The draft was forwarded to Carter by Western and Carter endorsed it over to P.C.A. as payment under the financing contract. The draft included a notation that it was given as part payment for 165 head of cattle as per contract.

P.C.A. had knowledge of the intended sale on September 20, 1967, as Carter had informed a Mr. Jones at P.C.A. of the contract when Carter applied for an additional advance on the financing agreement in June 1967. On September 20, 1967, the contract date, Carter delivered the cattle to Western, the livestock broker, for shipment to the Augustin lots in Columbus, Nebraska.

Because of rejects, only 161 head of steers were actually delivered to Nebraska. A second sight draft (in the amount of $28,537.76) was again drawn on a Colum-

bus bank, on the Augustin account, and signed by Daly of Western for Augustin.

Carter endorsed the draft over to P.C.A. and forwarded it to it for credit to his account. P.C.A. sent the draft through regular banking channels for collection. Approximately 2 weeks later, P.C.A. was informed that the draft was being dishonored for insufficient funds and was being returned.

Augustin sold the cattle to defendant Lannan, delivered possession, and received payment from Lannan. After learning of Lannan's possession of the cattle, P.C.A. caused a financing statement covering the 161 head of steers to be recorded with the county clerk of Platte County, Nebraska, thus perfecting the security interest, pursuant to the Nebraska Uniform Commercial Code; and made a demand for return of the cattle from Lannan. The demand was refused, whereupon this action commenced.

The district court found that P.C.A. had knowledge of the proposed sale; that it had failed to rebuke or object to the sale; and therefore it "had waived its security interest in the cattle."

There is no evidence in the record to support the defendant's allegation in his amended answer that P.C.A. had orally or in writing waived its security interest under the terms of the financing agreement. In essence, then, the defense to this action, in violation of the express terms of the security financing agreement, is based on the doctrine of implied consent or authorization (§ 9-306(2), U. C. C.) flowing from P.C.A.'s acknowledgment of the sale, and its failure to rebuke or object and require compliance with the express terms of the agreement when it accepted and applied the proceeds of the sale on the loan.

The evidence reveals a typical farm-ranch operation contemplating a course of dealing in the sale of farm products, and the necessity of securing credit financing for such an operation. The Uniform Commercial Code,

whatever else its objects may be, was designed to close the gap in the classic conflict between the lender and the innocent purchaser and furnish acceptable, certain, and suitable standards which would promote the necessity of and the fluidity of farm credit financing in the modern context, and at the same time facilitate the sale and exchange of collateral by furnishing a definable and ascertainable standard which purchasers could rely on. Case application is in its genesis, but an examination of the textual and court authority supports such an approach to an examination of cases in a specific factual context. See Uniform Commercial Code Bibliography, 1969 (published by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association), "Article 9—Secured Transactions," pp. 87 to 101.

We have already had occasion to construe section 9-306(2), U. C. C., in a slightly different factual context, but the principles therein announced furnish the guide for an approach and a determination in the factual context of this case. In Overland Nat. Bank v. Aurora Coop. Elevator Co., 184 Neb. 843, 172 N. W. 2d 786, we held that a provision in a security agreement granting a security interest in proceeds of collateral, as well as in the collateral itself, does not amount to written consent to dispose of collateral but only a provision that should a sale, exchange, or other disposition occur, the proceeds also would be covered by the security agreement.

In the Overland case, the borrower expressly promised not to sell or otherwise dispose of the collateral. In our case here the borrower covenanted not to dispose of the collateral without written consent. The financing agreement, herein, and the provisions of section 9-306(2), U. C. C., provide that the security interest of the lender continues in any identifiable proceeds including collections received by the debtor. It is difficult to see, either considering the purpose of the code, or examining the

intent of P.C.A. and Carter in their course of dealing that there was any intention, either express or implied, on the part of P.C.A. to waive its security interest up to the point of acceptance and actual application of the proceeds of the sale. We must assume that section 9-306(2), U. C. C., was drafted with an awareness of the practical realities of farm credit financing, the market movement of chattel property, and the practical problems of a simultaneous sale and payment. This provision of the code must clearly have been designed to accommodate and to fit the practical realities of financing a farming and business operation contemplating the raising, feeding, and processing, and sale of livestock and tangible chattel property. It is uncontested in the present case that there was strict compliance with the filing and notice provisions of the code. Lannan, the purchaser, was bound by the provisions of the code and must ordinarily take the risk of a failure to make the appropriate investigation contemplated by its provisions.

In this case we have a coupling of a provision prohibiting disposition of the collateral without written consent, together with a reservation of a security interest in the proceeds of any sale. These provisions cannot be construed otherwise than a further protection for the security holder under the terms of the code, and cannot be construed as provisions which open up the door to an expanded permissiveness or consent to the borrower, or a purchaser bound by the filing and notice provisions of the code. See Overland Nat. Bank v. Aurora Coop. Elevator Co., *supra*.

Lannan, defendant here, must necessarily rely upon a previous course of dealing between the lender and the debtor, amounting to nothing more than a failure to object or rebuke the debtor for selling without written consent. At the same time P.C.A. was entitled to rely upon its agreement and the provisions of the code giving it a continuing perfected security interest in the identifiable proceeds of the sale. Considering the realities involved

in accomplishing a simultaneous exchange of property for money, we can find nothing in P.C.A.'s choice of alternatives in its previous course of dealing from which an inference could be drawn that it had waived its security agreement or that Lannan was entitled to ignore the provisions of the code because of a private and undisclosed arrangement or course of dealing between the debtor and the lender alone. It must be borne in mind that in this case we are dealing with a controversy between the lender and a third party purchaser who had no knowledge of the course of dealing between the debtor and borrower. We are not called upon here to resolve a controversy between the lender and the debtor in which such agreement or arrangement or course of dealing might be relevant to the enforcement of a security interest against the debtor's property.

We are aware that section 1-205, U. C. C., provides that a course of dealing which by previous conduct between the parties, may alter an agreement by fact recognition. But, as we have said, we fail to see how a failure to rebuke or object contemporaneous with a delivery by the debtor and acceptance of the proceeds to which the security agreement attaches, can be construed as a voluntary and intelligent waiver by the lender of its right under a perfected security agreement against a third party purchaser, and this is particularly true when the security agreement itself provides a specific means for obtaining such waiver.

The code does provide for certain situations where a security interest in collateral is defeated, even in the absence of authorization by the security agreement or by the secured party. These provisions need no detailed examination for the purpose of this case. They relate to purchasers in the ordinary course of trade and if applicable leave the secured party with only an interest in the proceeds from the sale. It is true that Western's purchase of the cattle from Carter was in good faith and without knowledge of the course of dealing between

P.C.A. and Carter. It appears that the seller, Carter, was a person engaged in selling goods of the kind purchased and that Western was a buyer in the ordinary course of business. § 1-201(19), U. C. C. *Such a buyer does not, however, take goods free of a security interest his seller created when he buys farm products from a person engaged in farming operations.* § 9-307(1), U. C. C.

The cattle herein are by definition "farm products," and they were bought from Carter, a seller engaged in "*raising,* fattening, grazing, or other farming operations." (Emphasis supplied.) § 9-109(3), U. C. C. This being the case, Western did not take the cattle free of the security interest created by the seller, Carter, under these applicable provisions of the code. It therefore appears that since Western received the cattle subject to P.C.A.'s security interest, no person who thereafter purchased the cattle from the seller was free of the security interest of P.C.A.. P.C.A. had a continuously perfected security interest by virtue of its filing a financing statement in Nebraska within 4 months of the collateral's removal to this state. See §§ 9-103(3) and 9-401(4), U. C. C.

The conclusion we come to herein is in harmony with the express provisions of section 1-205(4), U. C. C., which states: "The express terms of an agreement and an applicable course of dealing or usage of the trade shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable *express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.*" (Emphasis supplied.)

As we have pointed out the mere failure to rebuke the seller, the reasonable acceptance of the proceeds of the sale when actually delivered to apply upon the debt, are not acts which indicate intention to waive a security interest, but in the event such unreasonable act is inconsistent and contradictory of the express agreement, then the express terms control both the course of deal-

ing and the usage of trade between the parties. The action of the lender and the debtor and their course of dealings between themselves is reasonable and is consistent with the underlying policy of the code and the provision prohibiting waiver of the security interest unless expressed in writing.

We are not called upon to decide this case on the basis of our previous case law. Our decision herein is in harmony with the general rule that in order to establish a waiver of legal right there must be a clear, unequivocal and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his part. 28 Am. Jur. 2d, Estoppel and Waiver, § 158, p. 842; Jessen v. Blackard, 159 Neb. 103, 65 N. W. 2d 345. In the last-mentioned case, a waiver was characterized as a "voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intention that such right shall be surrendered and such person forever deprived of its benefit."

We observe further that the record reveals that the secured agreements here between P.C.A. and Carter were periodically reexecuted and contained a prohibition against resale without written authorization. The record shows that P.C.A. was engaged in a business involving the extension of loans on collateral involving some $60,000,000 or $70,000,000. We feel it cannot seriously be contended that P.C.A., by the methods by which it carried out its business and dealt with its debtors during the continuing contemplated process of sales of collateral farm products, intended to waive its security interest in the collateral against third party purchasers.

For the reasons given the judgment of the district court holding that there was a valid waiver of the perfected security interest of P.C.A. is reversed and the cause remanded.

REVERSED AND REMANDED.

NEWTON, J., dissenting.

Plaintiff relies on the provisions of section 9-307(1)

of the Uniform Commercial Code. The unwarranted discrimination against purchasers of farm products contained in this section has been severely criticized, has been restricted in some jurisdictions by statute, and its demise is now contemplated. See, 26 The Business Lawyer, p. 314 (No. 2, Nov., 1970); Bender's Uniform Commercial Code Service, § 9-307, p. 1-751. All other buyers in the "ordinary course of business" take free of a security interest created by the seller. One who extends credit necessarily does so on a basis of trust in the honesty and reliability of the borrower. A buyer in the ordinary course of business does not ordinarily rely on the trustworthiness of the seller. As between such a buyer and the holder of a security interest, the latter has the better opportunity to protect itself as the security holder knows with whom it is dealing whereas the buyer is often unaware of the origin of the products purchased and unable to trace them back to the original owner who created the security interest. The farm-product exception tends to restrict the free movement of such goods in commerce. It places an unwarranted responsibility on all commission firms, sale barns, auctioneers, and purchasers at public markets. In the case of fed cattle, it enables the security holder to follow through to the steak or meat on the consumer's table. Notwithstanding this situation, I am obliged to agree with the majority opinion which holds that under the existing Nebraska statute, the lien followed the cattle into defendant's hands, unless there was a waiver of the lien. When the cattle fell into the hands of Augustin Brothers, who were simply dealers in cattle and not engaged in farming operations, they became "inventory" and could have been sold free of any lien created by Augustin Brothers, but since the lien was not created by the defendant's seller, the plaintiff's lien survives.

I disagree with the result arrived at by the majority of the members of this court. It is held that since the security agreement provides that consent to sale must

be in writing, no other type of consent or waiver of this provision is valid. 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, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating clause shall supplement its provisions." Section 1-107, U. C. C., provides: "Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party." As indicated in the comments on this section, it is subject to the provisions of section 2-209(4), U. C. C., which provides: "Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver."

Gilmore, in his work entitled "Security Interests in Personal Property," in commenting on security interests in farm products states in Volume II, § 26:11, p. 715: "The usual common law rules of waiver and estoppel may of course be invoked against such a secured party, and the debtor's authority to sell the collateral may derive either from an express provision in the security agreement or from the secured party's actions or conduct. In his filed financing statement the secured party may claim not only the original collateral but its proceeds. If he does so, his interest in the proceeds continues perfected indefinitely after their receipt by the debtor. A 'proceeds' claim in a financing statement suggests, however, a financing arrangement under which the debtor is expected to sell the collateral and the secured party expects to be reimbursed from the proceeds. The statutory text stops short of saying that good faith buyers without actual notice take free of a security interest when the financing statement covers proceeds, but the Comment to § 9-306(2) cautiously remarks that such a claim 'might be considered as impliedly author-

izing sale or other disposition of the collateral, depending upon the circumstances of the parties, the nature of the collateral, the course of dealing of the parties and the usage of trade.' "

We have held that a security agreement which covers proceeds may not be deemed to authorize sale by implication. See Overland Nat. Bank v. Aurora Coop. Elevator Co., 184 Neb. 843, 172 N. W. 2d 786. It is nevertheless a factor to be considered in determining whether an implied consent to sale has been given.

In Clovis National Bank v. Thomas, 77 N. M. 554, 425 P. 2d 726, cattle subject to a security agreement containing a similar provision forbidding sale without prior written consent was dealt with. The court stated: "The plaintiff, if not expressly consenting to the questioned sales, certainly impliedly acquiesced in and consented thereto. It not only permitted Mr. Bunch, but permitted all its other debtors who granted security interests in cattle, to retain possession of the cattle and to sell the same from time to time as the debtor chose, and it relied upon the honesty of each debtor to bring in the proceeds from his sales to be applied on his indebtedness.

"Plaintiff was fully aware of its right to require its written authority to sell or otherwise dispose of the collateral, but it elected to waive this right. Waiver is the intentional abandonment or relinquishment of a known right."

In Hempstead Bank v. Andy's Car Rental System, Inc., 35 App. Div. 2d 35, 312 N. Y. S. 2d 317, an automobile rental company sold its used cars, which were subject to a security interest, to an automobile wholesaler. It was held that the purchase was not made from one in the business of selling automobiles and was therefore not made in the ordinary course of business. U. C. C., § 1-201(9). The court stated: "In sum, we hold that as a matter of law Auto Buyers did not purchase from a person in the business of selling automobiles and is not, therefore, entitled to the protection afforded to buyers

in the ordinary course of business by section 9-307 (subd. (1)) of the U. C. C. There is, however, an issue of fact on the question of implied authorization of the sales by the plaintiff; and the action should be retried and submitted to the jury on that issue alone."

In Overland Nat. Bank v. Aurora Coop. Elevator Co., *supra*, this court conceded the possibility of an implied authorization to sell.

Plaintiff cites section 9-205, U. C. C., which states that a security interest is not invalid or fraudulent against creditors because the debtor may dispose of the collateral. Suffice it to say that this section does not include bona fide purchasers for value within its purview. It is limited in its scope to persons extending credit to the debtor.

There has been some criticism of the Clovis National Bank case due to the fact that in that case the security holder did not have actual knowledge of the particular sale at issue prior to delivery of the cattle. That is not true here. Plaintiff accepted and credited upon the debtor's note the downpayment made by Augustin Brothers on the cattle. It likewise accepted and credited the final draft. It had frequently acquiesced in previous sales by the debtor and on the strength of this particular sale had made an additional loan to the debtor. Notwithstanding full knowledge of the sale before its final consummation and delivery of the cattle to the purchasers, it failed to object until the Augustin Brothers' final draft was dishonored. By that time defendant had purchased the cattle in good faith and received possession. The conduct of plaintiff evidences an intentional relinquishment of its contract-right to stop the sale and a deliberate waiver of that right. "The essential elements of a waiver, * * * are the existence, at the time of the alleged waiver, of a right, advantage, or benefit, the knowledge, actual or constructive, of the existence thereof, and an intention to relinquish such right, advantage, or benefit." 56 Am. Jur., Waiver, § 12, p. 113. All of the

elements are present in this instance and, in addition, plaintiff accepted money on its contract with the debtor although it knew he had sold the cattle contrary to the strict terms of the security agreement. "Where a party to a contract, with full knowledge of the facts and with knowledge of a breach by the other party, receives money in the performance of the contract the breach will be deemed to have been waived." Wegner v. West, 169 Neb. 546, 100 N. W. 2d 542.

There are also elements of estoppel present. By failing to question its debtor's sale of the cattle to Augustin Brothers, plaintiff made it possible for defendant to suffer from the combined acts of its debtor and Augustin Brothers. "Where one of two innocent persons must suffer by the acts of a third, the one whose conduct, act, or omission enabled such third person to occasion the loss must sustain it if the other party acted in good faith without knowledge of the facts, and altered his position to his detriment." Jordan v. Butler, 182 Neb. 626, 156 N. W. 2d 778.

I respectfully submit that the judgment of the district court should be affirmed.

McCOWN, J., joins in this dissent.

BOSLAUGH, J., dissenting.

I concur in the opinion of Newton, J., that the circumstances in this case established both an authorization of the sale by the plaintiff, which waived its security interest in the cattle sold, and a ratification of the sale by the acceptance of the proceeds. See, Farmers' Nat. Bank v. Missouri Livestock Commission Co., 53 F. 2d 991; First Nat. Bank & Trust Co. v. Stock Yards Loan Co., 65 F. 2d 226; Seymour v. Standard Live Stock Commission Co., 110 Neb. 185, 192 N. W. 398; Warrick v. Rasmussen, 112 Neb. 299, 199 N. W. 544. These long-standing principles of law and equity have not been displaced by any provision of the code. See § 1-103, U. C. C.

McCOWN, J., joins in this dissent.

ROBERT L. ANDERSEN, APPELLEE, V. BLONDO PLAZA, INC., A CORPORATION, APPELLANT.
186 N. W. 2d 114

Filed April 16, 1971. No. 37652.

1. **Trial: Contracts: Evidence.** The trier of fact is to determine a question of interpretation of an integrated agreement if the question depends on the credibility of extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence.
2. **Damages: Contracts: Evidence.** Damage caused by breach of a restriction on competition is rarely susceptible of accurate proof.
3. **Trial: Evidence.** Where testimony is given by a witness on direct examination, from which an inference arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut the inference is admissible on cross-examination. The opposing party is ordinarily entitled to pursue that line of cross-examination.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Reversed and remanded for new trial.

Gaines, Spittler, Neely, Otis & Moore and John P. Mullen, for appellant.

Abrahams, Kaslow & Cassman, for appellee.

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

SMITH, J.

Plaintiff, tenant, recovered damages of $16,000 on a claim that defendant, owner-lessor of a shopping center, had breached a covenant against competition. The district court overruled defendant's motion for judgment notwithstanding the verdict and an alternative motion for a new trial. Defendant appeals. Assignments of error are related to interpretation of the agreement, nominal damages, and admissibility of evidence.

SUMMARY OF EVIDENCE

Plaintiff, a farmer with dairy cattle, began bottling dairy products and selling food in 1963. His first food

establishment at 3641 Q Street, Omaha, has been selling sandwiches, ice cream, and milk. In July 1965, he opened Andersen Dairy Drive-In at 9201 North 30th Street, without service to parked automobiles. It has been carrying a full line of food, doughnuts, dairy products, and ice cream.

Defendant had leased the shopping center to 30 tenants. A form lease of 8013 Blondo Street in the center was assigned to plaintiff by Clyde F. Marquardt, doing business as Bakers Dozen Donuts. The lease ran from July 1, 1966, to June 30, 1970. Marquardt had an option to extend it for a period not exceeding 5 years, but defendant reserved the right to terminate it on 6 months notice. The rent comprised a minimum plus other amounts that included 5 percent of annual gross receipts exceeding $45,000.

Paragraph 1 of the Marquardt lease contained approximately 2½ blank lines with ¼ inch between lines for insertions. In it Marquardt agreed to use the property for "retail bakery and donut shop and other specialty food items related to a snack bar." Elsewhere in the lease, use for an unspecified purpose was prohibited. Marquardt agreed to obey all ordinances and laws of city and state and to use none of the area as "non-selling space." Both parties agreed not to operate another similar store within 4,000 feet of the shopping center.

When Marquardt assigned the lease to plaintiff with defendant's consent, all parties modified paragraph 1 to read: ". . . Retail bakery and donut shop and other specialty food items related to a snack bar covered by the following permits: Bakery permit, Soft Drink, Ice Cream permit, Food and Drink permit, Egg permit and Restaurant permit."

Extrinsic evidence of the modification was in conflict. According to Bill Stuht, defendant's manager, Marquardt had been selling sandwiches either prewrapped or prepared on order. Stuht added the language to paragraph 1 of the lease at plaintiff's request only because plaintiff

said Marquardt's operation without restaurant and other permits was unlawful. Informed of plaintiff's desire to operate snack bar and bakery and to add dairy products, Stuht said a similar store would be a dairy store. He also said defendant would probably lease the vacant space next door, 8017 Blondo Street, for restaurant purposes. The latter property had been designed and used as a restaurant. The last tenant prior to a fire in 1967 sold pizza at sit-down counters. Plaintiff manifested no intention to open a restaurant.

According to plaintiff, Marquardt had sold no sandwiches. Plaintiff requested the modification. He informed Stuht he would sell "the complete sandwich line, hamburgers, french fries, fish, chicken dinners, shrimp, and scallops, and potatoes; also our dairy line . . . and ice cream." It would be a complete food line like that in his store on 30th Street. Plaintiff had learned that the vacant space had been a "pizza place." Neither he nor Stuht mentioned the possibility of a restaurant there in the future.

Andersen Dairy Foods and Bakery, the name of plaintiff's store at Blondo Plaza, had a counter, 20 seats, 3 tables, chairs and a drive-in without outside service. It was a fast foods or short order business which possessed restaurant and other permits. For sale were "broasted" chicken, hamburgers, cheeseburgers, tenderloin sandwiches, fish burgers, french fries, onion rings, and chili, plaintiff using disposable plates and cups. Business hours ran from 6:30 or 7 a.m. to 9:30 or 10 p.m., 7 days a week. One employee arrived at 3 a.m. to fry doughnuts for all the stores. Two employees served customers in the morning, one in the afternoon, two at the close of the school day, and one in the evening during bad weather. Plaintiff's wife worked there from time to time, training employees.

The space at 8017 Blondo Street remained closed until November 16, 1967, when Taco Grande, a Mexican restaurant, opened there. It had 8 to 10 tables and a counter

where a table customer received his food. It was open for business from noon to 10 or 11 p.m., 7 days a week. It sold tacos, tostados, "tacoburgers," refried beans, "burritos," "sanchos," and chili. It went out of business July 7, 1969.

Although plaintiff's knowledge of his finances was slight, he estimated a daily loss of $50 to $75 in gross receipts from November 16, 1967, to July 20, 1969. The ratio of cost of ingredients to sale price varied considerably with the kind of food. He estimated that labor and overhead increased costs to 60 or 70 percent of sales. Excluded from labor costs were services rendered by plaintiff, his wife, and three daughters-in-law, who worked part time. He related the losses solely to competition with Taco Grande. His wife conceded some seasonal fluctuations in sales, otherwise corroborating him.

Plaintiff's wife and one of his daughters-in-law kept books of account from which certified public accountants prepared plaintiff's income tax returns. Jim Caltabiano, in addition to preparing the return for 1968, examined plaintiff's books from 1967 through October 1969, accepting them as correct. The principal records were a cash receipts journal, identified as exhibit 8, and an "expense ledger."

Exhibit 8 for April and May 1967, separately recorded receipts from each of plaintiff's stores, but it did not further break down receipts. In subsequent months two columns headed "Paid-Out" and "Salaries" were added for each store. Total deposits, payouts, and salaries represented gross sales. At Blondo Plaza they were:

	1967	1968	1969
January		$2,781	$3,188
February		2,944	2,920
March		3,559	3,382
April	$3,381	2,976	3,307
May	4,184	2,800	3,276
June	4,448	2,945	3,232

July	4,601	2,897	**3,612
August	4,676	3,155	3,778
September	4,204	3,010	3,559
October	4,058	3,214	3,797
November	*4,174	3,522	3,852
December	2,920	3,165	3,787

*Taco Grande opened.
**Taco Grande closed.

Caltabiano estimated plaintiff's net profits and losses before certain expenses at Blondo Plaza from this data: Merchandise inventory set out only as a lump sum for all stores in the 1967 and 1968 income tax returns; that part of exhibit 8 relating to the Blondo Plaza store; the ledger sheets; sales tax returns; traceable fixed expenses; allocated expenses; and a telephone conversation with the bookkeeper concerning number of employees, hours, and pay. He excluded depreciation, legal fees, interest, and several other items. He found the net profit or loss before the excluded expenses as follows:

	1967	1968	1969
January		$-368	$-53
February		-275	-65
March		17	38
April		-277	17
May	795	-231	-7
June	832	-201	38
July	861	-313	477
August	835	-108	588
September	654	-272	414
October	470	-86	618
November	615	66	
December	-150	-199	

Caltabiano estimated the ratio of net profits before the excluded expenses to gross sales at Blondo Plaza. Using a statistical "method of least squares," he plotted the future trend. It indicated a slight increase in profits, but a 1-month change in his base period would have turned the trend downward.

Caltabiano charged the Blondo Plaza store almost $17,000 for labor out of a total of $23,677.63 for the 3 stores in 1967. Yet the Blondo Plaza store contributed from 19 to 30 percent of gross receipts from the three stores. He knew that most of the employees worked at the Blondo Plaza store. For example, he testified, "Some . . . work at Blondo is baking bread that is delivered to the other stores, and they didn't charge the other stores with it." Defendant has not asserted a breach of the covenant against use of "non-selling space."

INTERPRETATION OF THE LEASE

Omaha ordinances requiring permits to sell food defined restaurant as a "coffee shop, cafeteria, short order cafe, luncheonette, tavern, sandwich stand, soda fountain, ice cream stands, and all other public eating and/or drinking establishments, as well as kitchens in other places in which food or drink is prepared for sale elsewhere."

The state, for registration purposes, defined restaurant as a building used or held out to the public to be a place where meals and lunches were served. See § 41-104, R. R. S. 1943.

The phrase "snack bar" has been defined as follows: "A public eating place where snacks are served usually at a counter," Webster's Third New International Dictionary, p. 2154 (Unabr. Ed., 1961); "A lunch counter where light meals are served," The American Heritage Dictionary, p. 1222 (1969); "A lunchroom or restaurant where light meals are sold," The Random House Dictionary, p. 1346 (1966). Among the synonyms for "cafe" in the Original Roget's Thesaurus of English Words and Phrases, p. 114 (Dutch Am. Ed., 1962), are restaurant and snackbar.

Valid restraints of competition are not subject to strict construction by us. See Herpolsheimer v. Funke, 1 Neb. (Unof.) 304, 95 N. W. 687 (1901).

The trier of fact is to determine a question of interpretation of an integrated agreement if the question de-

pends on the credibility of extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence. Restatement, Contracts 2d (Tent. Dr. No. 5, 1970), § 238(2), p. 142. See Ely Constr. Co. v. S & S Corp., 184 Neb. 59, 165 N. W. 2d 562 (1969).

Defendant argues that extrinsic evidence was limited to the circumstances at the time of the modification. The rule of "practical construction" by the parties during performance, we are told, was inapplicable. A jury might reasonably find that (1) defendant at the outset with knowledge of plaintiff's business made no protest and (2) the nature of the business did not significantly change while the term of the lease was running.

". . . The basis of inference in such cases is often an admission by one party, by his conduct, that the contract has a certain meaning . . .."

". . . However, the position taken by one party in the course of performance may signify to the other a representation or a promise on which he relies and acts to such an extent as to create an estoppel, and when this occurs the representation can not be corrected nor the promise revoked . . .."

". . . practical construction may entrap a party who is not alert to detect and repudiate practical interpretations with which he disagrees." Patterson, "The Interpretation and Construction of Contracts," 64 Colum. L. Rev. 833 at 844 and 845 (1964). See, also, Enterprise Co., Inc. v. Nettleton Business College, 186 Neb. 183 at 188, 181 N. W. 2d 846 (1970); cf. § 2-208 (1), U.C.C.

In the present case the lease was ambiguous and the extrinsic evidence for consideration as admissions embodied relevant conduct of the parties during performance. The evidence was sufficient to support a finding of breach of covenant by defendant.

NOMINAL DAMAGES

Defendant contends that plaintiff at most could recover nominal damages; therefore, overruling the mo-

tion for judgment notwithstanding the verdict or for new trial, it adds, was error. The basis of the contention is not clear. It is enough that a jury on the evidence here might reasonably award plaintiff substantial damages. Overruling defendant's motion for judgment notwithstanding the verdict or for a new trial was not error. Such damage is rarely susceptible of accurate proof. Gallagher v. Vogel, 157 Neb. 670, 61 N. W. 2d 245 (1953).

ADMISSIBILITY OF EVIDENCE

The rulings in question relate to exhibit 8 and recross-examination of Caltabiano. Only that part of the exhibit concerning the Blondo Plaza store was in evidence. Defendant offered the remainder of it and interrogated the witness concerning comparable estimates of net profits or losses and trend lines for the stores on Q and 30th Streets. The court sustained objections to the offer and the questions.

On the scope of cross-examination, loss of time and confusion of issues are sometimes important elements to be considered. Another is embodied in this rule: Where testimony is given by a witness on direct examination, from which an inference arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut the inference is admissible on cross-examination. The opposing party is ordinarily entitled to pursue that line of cross-examination. See Clark v. Smith, 181 Neb. 461, 149 N. W. 2d 425 (1967).

Caltabiano tended to corroborate plaintiff's testimony that Taco Grande had caused substantial damage notwithstanding the concession by plaintiff's wife regarding seasonal fluctuations. Defendant might have elicited a positive correlation of sales, profits, and losses at the three stores. The rulings under the circumstances were too restrictive and prejudicially erroneous.

Defendant was entitled to a new trial but not to judgment notwithstanding the verdict. The judgment is

reversed and the cause remanded for a new trial.
REVERSED AND REMANDED FOR NEW TRIAL.

SIOUX CITY AND NEW ORLEANS BARGE LINES, INC., APPELLEE AND CROSS-APPELLANT, V. BOARD OF EQUALIZATION OF DOUGLAS COUNTY, NEBRASKA, APPELLANT AND CROSS-APPELLEE, CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., INTERVENERS-APPELLEES AND CROSS-APPELLEES.
185 N. W. 2d 866

Filed April 16, 1971. No. 37669.

1. **State: Municipal Corporations: Taxation: Constitutional Law.** The property of the state and its governmental subdivisions is exempt from taxation under Article VIII, section 2, Constitution of Nebraska.
2. **Statutes: Municipal Corporations: Taxation.** Under the circumstances involved, a barge line operating and leasing a portion of the port area of the city of Omaha is not the "owner" of improvements on the port area within the meaning of section 77-1209, R. R. S. 1943.
3. **Municipal Corporations: Taxation: Constitutional Law.** Improvements on real estate constituting the Missouri River port area under the control and supervision of the Dock Board of the City of Omaha, and owned by the city, are exempt from taxation.

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

Donald L. Knowles, Arthur D. O'Leary, and Paul F. Peters, for appellant.

Clement B. Pedersen and Young, Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellee.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, Jon B. Abbott, Kent N. Whinnery, Verne W. Vance, Allen L. Morrow, George S. Selders, Jr., James E. Fellows, and Thomas F. Dowd, for interveners-appellees.

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

McCOWN, J.

The Douglas County assessor attempted to tax the value of improvements located on the Missouri River port and terminal area owned by the City of Omaha. The assessment was for the years 1966, 1967, and 1968, and was made against the plaintiff, Sioux City and New Orleans Barge Lines, Inc. The Board of Equalization of Douglas County upheld the assessor's action and the plaintiff appealed to the district court. The City of Omaha and the Dock Board of the City of Omaha intervened in the appeal in the district court. The district court entered an order in favor of the plaintiff and the interveners and decreed that the improvements were owned by the City of Omaha and were exempt from taxation. The Board of Equalization of Douglas County has appealed.

On April 13, 1965, an agreement was entered into between the Dock Board of the City of Omaha and Sioux City and New Orleans Barge Lines, Inc. The agreement applied to most of the land comprising the Missouri River port and terminal area of the City of Omaha, as described in the agreement. The agreement was for an initial term of 15 years with an option to the barge line to renew for a second 15-year period. In 1967, the agreement was amended to grant to the barge line an additional 15-year option and the right to assign the agreement to subsidiaries or as security for loans.

At the time the agreement was entered into, there were improvements of substantial value located on the port and terminal area, including some storage and warehouse facilities. In the agreement the barge line agreed to provide warehousing space sufficient and adequate in size to handle, protect, store, and house cargo, freight, and other traffic which might flow through the port and terminal, together with an office building to constitute

the terminal office. Any capital improvements on the port area, including specifications and location, required the approval of the dock board. Title, ownership, and equity in any buildings, storage tanks, or other improvements of any kind, were vested and remained in the City of Omaha under the agreement.

The barge line was to have the supervision, control, management, and jurisdiction of the port area and of the improvements constructed in the port area, except for the portions occupied by two tenants of the City, one of which operated the grain handling and storage facilities in the port area. The other operated some liquid tank and storage facilities.

The port buildings and facilities were to be operated and maintained by the barge line. The barge line was to comply fully with state and federal laws, rules, and regulations, or legislation governing the operation of the port area. Rules and regulations were to be prepared by the barge line for the operation of the port area which were required to be approved by the dock board and the dock board would then promulgate those rules. The barge line was required to issue a terminal service bulletin listing all rates, fees, charges, and wharfage, and all such charges were required to be approved by the dock board. All of the rates and charges were required to be applied uniformly and without discrimination. All facilities at the terminal area are open to the public. The barge line was to provide all services and all of the fees and charges were to be paid to it.

The rental payments to be made by the barge line to the dock board were based solely upon the gross tonnage loaded, unloaded, handled, lifted, or moved in the port area. The charges were applicable only once on any and all freight and were based on the first or initial handling in the port area, including warehousing. For rental purposes, there was a minimum tonnage requirement of 100,000 tons per year.

The barge line was required to employ sufficient and

adequate personnel in the port area for the efficient loading, unloading, storage, handling, and transferring of cargo and the efficient operation of the port and terminal. The barge line was required to furnish certificates of insurance for public liability, and for fire and extended coverage upon all capital improvements, equipment, and machinery. The barge line and the dock board and city were to be named as assureds. In the event of any casualty damage to buildings, the proceeds of insurance were to be used to rebuild or repair.

The dock board warranted that the leasehold interest of the barge line under the agreement, including all improvements then located or later constructed on the land, should not be subject to ad valorem taxes against such land and improvements by the state or any political subdivision. If any such taxes were levied and assessed, the barge line was granted an offset and deduction from any rental payments due under the agreement. The tax warranty applied only to land and improvements, the title to which was in the City of Omaha or the dock board. It did not apply to personal property titled in and owned by the barge line.

Either party to the agreement was given the right to terminate it for failure of the other party to perform its covenants, provided default continued for a period of 30 days after written demand for performance was given to the other party.

It might fairly be said that the 50-paragraph agreement, as well as the testimony, reflect both a management agreement and a lease agreement with elements of each intermixed.

The district court adjudged and decreed that the improvements designated as omitted personal property by the county assessor were owned by the City of Omaha and were exempt from taxation. It also decreed that the provisions of section 77-1209, R. R. S. 1943, did not apply.

The primary issue is whether the tangible property here may be taxed by governmental subdivisions of Ne-

braska. Article VIII, section 2, of the Constitution of Nebraska, provides in part: "The property of the state and its governmental subdivisions shall be exempt from taxation." The county board of equalization bases its claim to tax here upon section 77-1209, R. R. S. 1943, which provides in part: "All improvements put on leased public lands shall be assessed to the owner of such improvements as personal property, together with the value of the lease, and listed and assessed as such in the place where the land is situated." The attempt to apply that statute to taxation of the property here rests upon an interpretation of Offutt Housing Co. v. County of Sarpy, 160 Neb. 320, 70 N. W. 2d 382, 351 U. S. 253, 76 S. Ct. 814, 100 L. Ed. 1151.

The City of Omaha is, of course, a governmental subdivision of the State of Nebraska and so is the Dock Board of the City of Omaha, which is a separate and distinct body corporate and politic. See, §§ 18-701 to 18-716, R. R. S. 1943. The dock board has exclusive charge and control of all harbor and water terminal structures, facilities, and appurtenances, including the building, rebuilding, alteration, repairing, operation, and leasing of such property. § 18-705, R. R. S. 1943.

The dock board has the power to perform its statutory duties "whether the same shall be done by the board or by others" and has power to employ harbor masters, managers, and other employees as may be necessary for the efficient and economical performance of its statutory duties outlined in sections 18-701 to 18-716, R. R. S. 1943.

The critical distinction between the case before us and the Offutt Housing Co. case rests on the fact that no constitutional exemption from taxation under the Constitution of Nebraska was involved in the Offutt case. The United States had waived any immunity or exemption from taxation granted under the Enabling Act and ceding statutes, and had specifically granted to the state the right to tax the interests of the lessee. There was

no constitutional exemption under the Nebraska Constitution. In the Offutt case, the lease was for 75 years, while the estimated useful life of the improvements placed on the premises was only 35 years. The Offutt case determined that under such circumstances, the value of the leasehold interest was measured by the total value of the improvements where the lessee would obtain for its private purposes the entire value of all improvements before the termination of the lease. The interest of the lessee in the real estate was mortgaged as real estate with the consent of the United States and under a federal loan.

In the case before us, the agreement is clear and undisputed that title and ownership of all of the land and all of the improvements is and will remain at all times in the City of Omaha, and there is no showing as to the estimated useful life of any of the improvements. In the attempt to tax the improvements here, Douglas County made no distinction between improvements constructed and paid for by the dock board and those constructed and paid for by the barge line. Neither did the agreement make any such distinctions in fixing title and ownership. In the case before us it is also clear that the agreement of April 13, 1965, was intended to, and did, carry out the statutory public powers and duties of the dock board. It cannot be accurately said that the land and improvements here were used solely for the private benefit of the barge line. All of the facilities in the port area were open to the public and the promotion of their use was also in furtherance of the statutory obligations placed upon the Dock Board of the City of Omaha.

We hold that the improvements attempted to be taxed as personal property here were owned by the City of Omaha, and that Sioux City and New Orleans Barge Lines, Inc., was not the "owner" of such improvements within the meaning of section 77-1209, R. R. S. 1943.

From the foregoing holding, it follows that the im-

provements here involved were under the control and supervision of the Dock Board of the City of Omaha and were the property of the city. As such property it was exempt from taxation under the provisions of Article VIII, section 2, Constitution of the State of Nebraska.

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

AFFIRMED.

VALERIE JEANNE COPPLE, APPELLANT, V. THOMAS DALE COPPLE, APPELLEE.

185 N. W. 2d 846

Filed April 16, 1971. No. 37711.

1. **Statutes: Divorce: Parent and Child.** The statutes of Colorado provide that orders regarding the custody of children may be changed after the entry of a divorce decree as circumstances may warrant.
2. **Comity: Divorce: Parent and Child.** Whatever effect the full faith and credit clause may have with respect to custody decrees, it is clear that the state of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the state where it was rendered.
3. **Comity: Infants.** Ordinarily effect will be given to the judgments of a sister state fixing the custody of minor children as a matter of comity unless circumstances require a change in the interests of the minors' welfare.
4. **Divorce: Infants: Comity.** Child custody provisions of a divorce decree entered in a sister state have no extraterritorial effect upon questions of proper custody arising under circumstances materially changed with reference to the welfare of the children.
5. ———: ———: ———. When a child has been surreptitiously removed from the state which had fixed custody pursuant to a divorce decree, the courts of a sister state are very reluctant to refuse comity and will do so only under extraordinary circumstances.
6. **Parent and Child: Infants: Comity.** The children are not to be punished for the unlawful act of the parent and when the circumstances clearly indicate an extraordinary detriment to the children if comity is extended, it will be denied.

7. **Parent and Child: Infants.** The welfare of minors is not to be determined by legal technicalities, or by adversary rights as between the parents or other custodians, or by contumacy or other reprehensible conduct of the parents which does not have a direct bearing on the children's welfare.
8. **Habeas Corpus: Infants.** It is the position of this court that when a court's jurisdiction is invoked by a habeas corpus petition seeking custody of a child, the child becomes a ward of the court and the prime consideration is the welfare of the child.
9. **Domicile: Infants: Parent and Child: Residence.** The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the child, but it arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants, and residence within the state suffices even though the domicile may be in another jurisdiction.

Appeal from the district court for Adams County: NORRIS CHADDERDON, Judge. Affrimed.

Kelly & Kelly, for appellant.

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

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

NEWTON, J.

This case involves the custody of two minor children of relator and respondent. The district court denied relator's petition for a writ of habeas corpus. We affirm the judgment of the district court.

Relator obtained an uncontested decree of divorce from respondent in the State of Colorado on October 24, 1967. She was awarded custody of Regan Dale Copple and Gretchen Christine Copple, the minor children of the parties, then aged 3 and 2 years, respectively, in accordance with a stipulation entered into by relator and respondent. Respondent subsequently moved to the State of Nebraska and in September of 1968 surreptitiously removed the children to Nebraska without the sanction of

the Colorado court. Relator has instituted this habeas corpus action for the purpose of again obtaining custody of the children.

Respondent was 29 years of age and employed as a music teacher in the Hastings public schools. On April 10, 1968, relator left the children with respondent and took them back on July 26, 1968. Relator was 22 years of age and stated she owns and operates an interior design shop in Colorado Springs, Colorado, but it was not yet in operation. During the 3 years preceding trial, she had been employed in approximately 15 different positions. Relator denied she had been arrested on September 4, 1968, and charged with prostitution, but when faced with the court record, admitted she had been. She admitted to being in a house other than her residence on May 22, 1969, when it was raided by the police and she was again arrested and charged with prostitution and maintaining a bawdy house. In each case a nolle prosequi was entered.

Respondent stated he took the children after learning about the charges filed against relator. The children were then very nervous, insecure, and emotionally disturbed. He had them tested in the state hospital and took them for weekly treatment for several months. This condition of the children and their subsequent improvement is verified by the testimony of a clinical psychologist.

A former acquaintance of relator testified by deposition to numerous admissions by relator to acts of prostitution and to having actually witnessed such acts by relator on two or three occasions.

The statutes of Colorado provide that orders regarding the custody of children may be changed after the entry of a divorce decree as circumstances may warrant. See, § 46-1-5, Colorado Rev. Statutes, 1963; Searle v. Searle, 115 Colo. 266, 172 P. 2d 837.

It is contended that the Constitution of the United States requires us to give full faith and credit to the

Colorado decree. While this is ordinarily true as to the judgments of sister states, it is not true in cases of this nature. The judgment was subject to change under Colorado law and it is held in Kovacs v. Brewer, 356 U. S. 604, 78 S. Ct. 963, 2 L. Ed. 2d 1008, that: "Whatever effect the Full Faith and Credit Clause may have with respect to custody decrees, it is clear, as the Court stated in Halvey, 'that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.'" See, also, Halvey v. Halvey, 330 U. S. 610, 67 S. Ct. 903, 91 L. Ed. 1133; Annotation, 160 A. L. R. 408.

Ordinarily effect will be given to the judgment of a sister state fixing the custody of minor children as a matter of comity unless circumstances require a change in the interests of the minors' welfare. Child custody provisions of a divorce decree entered in a sister state have no extraterritorial effect upon questions of proper custody arising under circumstances materially changed with reference to the welfare of the children. See, Barker v. Barker, 286 Minn. 314, 176 N. W. 2d 99; Annotation, 160 A. L. R. 408. When a child has been surreptitiously removed from the state which had fixed custody pursuant to a divorce decree, the courts of a sister state are very reluctant to refuse comity and will do so only under extraordinary circumstances. See State ex rel. Glasier v. Glasier, 272 Minn. 62, 137 N. W. 2d 549. Surreptitious acts of this nature are not to be encouraged, but on the contrary, soundly condemned. Children are not to be punished for the unlawful act of the parent and when the circumstances clearly indicate an extraordinary detriment to the children if comity is extended, it will be denied. It was stated in Winter v. Crowley, 374 F. 2d 317 (D. C. Cir., 1967), that: "The welfare of minors is not to be determined by legal technicalities, or by adversary rights as between the parents or other custodians, or by contumacy or other reprehensible conduct of the parents which does not have a direct bear-

ing on the children's welfare." See, also, People ex rel. Bukovich v. Bukovich, 39 Ill. 2d 76, 233 N. W. 2d 382.

It is the position of this court that when a court's jurisdiction is invoked by a habeas corpus petition seeking custody of a child, the child becomes a ward of the court and the prime consideration is the welfare of the child. "The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the child, but it arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants, and the residence within the state suffices even though the domicile may be in another jurisdiction." In re Application of Reed, 152 Neb. 819, 43 N. W. 2d 161.

In the present instance there has been a very major change in circumstances relating to the custody of the children since the original decree was entered in Colorado awarding their custody to relator. Relator has entered into a life of prostitution and has become morally unfit to retain the custody of her children. The change is an extraordinary one and would necessarily entail a setting aside of its decree as to custody were it called to the attention of the Colorado court. What Colorado may do, Nebraska may do, and we would indeed be remiss in our duties were we to approve relator's petition for custody and return these children to a mother who had maintained a home for them in a house where prostitution was practiced.

The judgment of the district court is affirmed and the petition for a writ of habeas corpus denied.

AFFIRMED.

CITY OF OMAHA, APPELLEE, V. ARTICE DANNER, APPELLANT, IMPLEADED WITH JOSEPH A. HOFFMAN ET AL., APPELLEES.
185 N. W. 2d 869

Filed April 16, 1971. No. 37714.

1. **Injunctions: Municipal Corporations: Nuisances.** The Legislature has impliedly empowered a city of the metropolitan class to obtain a decree in equity abating a public nuisance without special damage to the city.
2. **Parties.** When a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.
3. ———. Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their rights, or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience.
4. **Parties: Injunctions: Nuisances.** Without additional facts in an equity suit to abate a public nuisance, possession of property owned by another may be insufficient to constitute the possessor an indispensable party.
5. **Injunctions: Nuisances.** The remedy in equity is purely preventive. The chancellor does not punish a defendant for what he has done; that is left to criminal courts.

Appeal from the district court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Paul E. Watts and Samuel A. Boyer, Jr., for appellant.

Herbert M. Fitle and James E. Fellows, for appellee City of Omaha.

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

SMITH, J.

The district court found that use of the land and building located at 2602 O Street, Omaha, constituted a public nuisance. It authorized plaintiff City of Omaha to padlock the building for 6 months, enjoining defendants from using the property during the period. It permanently enjoined (1) Artice Danner from using the

property for business purposes and (2) other defendants from using the property as long as Danner used it under a tenancy. Danner appeals. He contends: (1) Plaintiff is not a proper party in equity to abate a public nuisance without special damage; (2) there was nonjoinder of an indispensable party; and (3) the decree was too harsh.

Judgment went by default against all defendants except Danner, and on appeal no one has appeared for any other defendant. Record title to the property was vested in 10 defendants named Hoffman, Rohmeyer, Baudo, Drabek, Hetmanek, Blessie, and Smith. None of them was in actual possession.

Danner, either as an individual or as a representative, had the actual possession. He held city permits in his individual name, but he may have been acting as president of The Brotherhood Club, a nonprofit fraternal organization. Admission to the building was gained by a card that read: "MEMBERSHIP CARD . . . Donation $1.50 . . . BROTHERHOOD CLUB . . . Artice Danner, President . . . Everyone Must be Searched . . . Good for 30 days only." Nothing indicated what interest Danner or the club possessed in the property. The club was not a party defendant, the omission going unmentioned in the trial court.

A public nuisance on the property arose over a long period of time from these activities: Sales of beer and alcoholic liquor after hours and without a license, gambling with dice on pool tables, and solicitations by prostitutes. The lieutenant in charge of the vice detail of the Omaha police force named the property one of four trouble spots in South Omaha. The degree of police surveillance and the frequency of arrests there ran high.

Plaintiff, a city of the metropolitan class, possesses statutory authority to sue and to suppress nuisances. It may make ordinances, bylaws, rules, regulations, and resolutions not inconsistent with state law for promoting public safety, morals, and welfare of its inhabi-

tants. §§ 14-101, 14-102.01, and 14-103, R. R. S. 1943. The Legislature has impliedly empowered plaintiff to obtain a decree in equity abating a public nuisance without special damage to plaintiff. Cf. City of Lyons v. Betts, 184 Neb. 746, 171 N. W. 2d 792 (1969); Village of Kenesaw v. Chicago, B. & Q. R.R. Co., 91 Neb. 619, 136 N. W. 990 (1912).

Danner contends the club was an indispensable party. The applicable rules are settled. When a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in. § 25-323, R. R. S. 1943. Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their rights, or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience. Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N. W. 2d 630 (1956). Without additional facts in an equity suit to abate a public nuisance, possession of property owned by another may be insufficient to constitute the possessor an indispensable party. Cf. State ex rel. Lamey v. Young, 72 Mont. 408, 234 P. 248 (1925). In this suit the club was not an indispensable party.

The remedy in equity is purely preventive. The chancellor does not punish a defendant for what he has done; that is left to criminal courts. State ex rel. Hunter v. The Araho, 137 Neb. 389, 289 N. W. 545 (1940). The decree relating to Danner was broad. However, he had demonstrated a proclivity for maintaining this public nuisance. Effective prevention demanded strong measures. The decree was correct.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS HUGGINS, REAL NAME UNKNOWN, APPELLANT.
185 N. W. 2d 849

Filed April 16, 1971. No. 37715.

1. **Criminal Law: Searches and Seizures: Affidavits.** An affidavit for a search warrant may be based on hearsay information and need not reflect the direct observations of the affiant so long as the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions.
2. ———: ———: ———. Affidavits for search warrants must be tested in a common sense, realistic fashion.
3. ———: ———: ———. The correct test is whether a warrant, if sought, could have been obtained by law enforcement agency application which disclosed its corporate information, not whether any one particular officer could have obtained it on what information he individually possessed.

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

Jack R. Knicely, for appellant.

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

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

McCOWN, J.

The defendant was found guilty by a jury on three counts of burglary. He was sentenced to 1 to 3 years in the Penal and Correctional Complex on each count, sentences to run concurrently.

The defendant assigns as error the overruling of a motion to suppress evidence. The evidence was seized from the defendant's automobile under a search warrant issued on March 29, 1970, by the county judge of Cheyenne County, upon the affidavit of Allan L. Anderson, an officer of the Nebraska State Patrol.

We think it appropriate to refer to some of the facts set out in the affidavit. The affiant stated that a building owned and occupied by Foster Lumber Co., situated at

Sidney, Cheyenne County, Nebraska, was broken into and entered on or about the 28th day of March 1970. Property stolen included masking tape, drill bits, tools, and $175 in cash. The affiant also stated that at approximately 11 p.m., two Sidney, Nebraska, police officers contacted a 1958 Chevrolet station wagon, light blue-green in color, bearing Nebraska license plates 68-E536, which license plates were issued to the defendant and his mother as joint owners; that the car was parked adjacent to the Sidney High School cafeteria; that the officers instructed the driver of the vehicle to leave; and that later that same night, the same police officers found several drill bits matching the description of the drill bits stolen from the Foster Lumber Co. near the location where said vehicle had been parked.

The affiant further stated that at approximately 3:45 o'clock a.m., he responded to a call from Lodgepole, Cheyenne County, Nebraska, on another breaking and entering; that while he was investigating the crime, he observed a 1958 Chevrolet station wagon, light blue-green in color, bearing license plates 68-E536 (Nebraska), and upon looking in the window of said vehicle, he observed a roll of masking tape with a price tag from Foster Lumber Co. on it; that said vehicle was located approximately 100 yards from the building in Lodgepole that was broken into and entered; and that he also observed in said vehicle, among other things, miscellaneous crescent wrenches, electrician's pliers, a hacksaw, a hammer, miscellaneous screwdrivers, and miscellaneous box-end wrenches.

The warrant issued and the officers searched the vehicle pursuant to the warrant and seized the described articles, plus numerous other articles of the same character, as well as three billfolds belonging to the defendant and two companions.

Although defendant's motion to suppress was filed after the regular time provided by section 29-822, R. R. S. 1943, the court permitted the filing, heard the motion,

and overruled it. The State contends that the motion to suppress was out of time without good cause and that objections to the use of the evidence seized should be deemed waived. We think the trial court's action in permitting the filing and hearing of defendant's motion to suppress after trial began was correct, but we do not find it necessary to pass on that issue here.

The defendant contends that the affidavit for the search warrant was somehow insufficient because it failed to name the informants or identify the source for the information obtained outside the affiant's personal observation. These contentions are completely untenable. The affidavit here is a thorough and complete affidavit. The information obtained by personal observation of the officer who made the affidavit would have been sufficient in itself to establish probable cause, but he included also information from persons identified only as fellow officers. It has long been held that an affidavit may be based on hearsay information and need not reflect the direct observations of the affiant so long as the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions. See United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684.

Affidavits for search warrants must be tested in a common sense, realistic fashion. State v. LeDent, 185 Neb. 380, 176 N. W. 2d 21; State v. Waits, 185 Neb. 780, 178 N. W. 2d 774. The authority of an individual officer should not be circumscribed by the scope of his firsthand knowledge of facts concerning a crime, and observations of fellow officers of the government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number. The correct test is whether a warrant, if sought, could have been obtained by law enforcement agency application which disclosed its corporate information, not whether any one particular officer could have obtained it on what information he individually possessed. See, Smith v. United States, 358 F. 2d 833; United States v. Ven-

tresca, *supra*. Probable cause is to be evaluated by the courts on the basis of the collective information of the police reflected in the affidavit rather than being limited to the firsthand knowledge of the officer who executes the affidavit.

The action of the district court in overruling the motion to suppress evidence was correct. The judgment is affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

ROBERT M. LOSKILL, APPELLANT, V. BOARD OF EQUALIZATION OF ADAMS COUNTY, NEBRASKA, ET AL., APPELLEES.
185 N. W. 2d 852

Filed April 16, 1971. No. 37718.

1. **Taxation: Appeal and Error.** The action of a county board of equalization with respect to actual value of property will be affirmed on appeal to district court, unless (1) the action of the board is unreasonable or arbitrary or (2) the property of the appellant is assessed too low.
2. **Taxation.** A county board of equalization in a valuation proceeding ought to look through form to substance to prevent unconscionable avoidance of taxation of property.

Appeal from the district court for Adams County: NORRIS CHADDERDON, Judge. Affirmed.

Ronald R. Fitzke, for appellant.

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

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

SMITH, J.

The Board of Equalization for Adams County valued farmland of plaintiff Robert M. Loskill for taxation in the year 1969. Increasing the actual valuation from

$175 to $290 an acre, the board decided that the land was irrigated, not dry or nonirrigated. On appeal the district court upheld the board. Robert appeals.

Robert owned 38.15 acres described as the northwest quarter of the northwest quarter of a section. His wife, Bonnie, owned 30 acres of irrigated land and 9 acres of dry land—the northeast quarter of the northwest quarter of the section. Her parents possessed life estates in the south half of the quarter section which contained 78 acres of irrigated land. Bonnie owned the remainder interest. The quarter section was farmed by Robert as part owner and tenant.

For a number of years immediately prior to 1969 and in 1969 Robert irrigated his tract of 38.15 acres. He did so under a revocable license to draw water from a well located on the south half of the quarter section. Details relating to the well, the underground water supply, or the terms of the tenancy were not offered in evidence.

Robert argues as follows: Subterranean water in its natural state is real property. Impounded and reduced to possession under circumstances such as those in evidence, it becomes personal property. Appropriation of water from the well effected irrigation of Robert's land, but he possessed no right of appropriation. His land was unlike the 78 acres of irrigated land located with the well in the south half of the quarter section. The basis of marketability was dry, not irrigated land. It ought to have been valued accordingly.

The action of a county board of equalization with respect to actual value of property will be affirmed on appeal to district court, unless (1) the action of the board is unreasonable or arbitrary or (2) the property of the appellant is assessed too low. See § 77-1511, R. S. Supp., 1969.

The relationship of the Loskills and the Kissingers was close. No one suggested that Robert had dealt with the others at arm's length. A county board of equaliza-

tion in a valuation proceeding ought to look through form to substance to prevent unconscionable avoidance of taxation of property. We stop there without intimating whether or not Robert's argument is otherwise sound.

The judgment is affirmed.

AFFIRMED.

CARTER and BOSLAUGH, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V. ALMER BULLARD, APPELLANT.
185 N. W. 2d 864

Filed April 16, 1971. No. 37725.

1. **Informations: Evidence: Criminal Law.** A variance between the allegations in the information and the evidence is not fatal unless it is material to the merits of the case or prejudicial to the defendant.
2. **Trial: Evidence: Criminal Law.** Proof that an exhibit was in the custody of law enforcement officers or in the mail in a sealed envelope until received at the laboratory for analysis is sufficient to prove a chain of possession.

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

Stephen E. Cannon, 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.

BOSLAUGH, J.

The defendant, Almer Bullard, appeals from a conviction for the unlawful sale of narcotic drugs.

The record shows that the defendant sold a package of heroin hydrochloride to a federal narcotics agent in Omaha, Nebraska, on September 11, 1969. The defendant admitted the sale but testified that the package con-

tained sugar instead of heroin. The State's evidence if believed was clearly sufficient to sustain the conviction.

The defendant contends that there was a fatal variance in that the information charged a sale of heroin but the evidence showed a sale of heroin hydrochloride. The contention is without merit.

The statute prohibits the sale of narcotic drugs and defines narcotic drugs to include opium, heroin, and any compound, manufacture, salt, derivative, or preparation of opium. §§ 28-451 and 28-452, R. S. Supp., 1969. Heroin is a derivative of opium. Heroin hydrochloride is the principal compound of heroin and has the same characteristics as heroin. See, The Merck Index (8th Ed.), p. 337; Dorland's Illustrated Medical Dictionary (23rd Ed.), pp. 377 and 613; Gonzales, Vance, Helpern & Umberger, Legal Medicine, Pathology and Toxicology (2d Ed.), p. 849. The variance was not material to the merits of the case or prejudicial to the defendant. State v. Nelson, 182 Neb. 31, 152 N. W. 2d 10.

The defendant also contends that the evidence did not show a complete chain of possession of the package of heroin from the time of the sale until its analysis at the federal laboratory in Chicago. The record shows that the package was in the possession of the agents in Omaha until it was mailed in a sealed envelope to the laboratory in Chicago where it was received with the seal intact. This evidence as to the possession of the package after the sale was sufficient. State v. Tatreau, 176 Neb. 381, 126 N. W. 2d 157.

The defendant also contends that exhibit 5 should not have been received in evidence. The exhibit was a morgue photograph of a witness who had been present at the time of the sale by the defendant. The State was entitled to explain why this witness had not been called, and a photograph was necessary to establish his identity. However, there was no prejudice to the defendant since the exhibit was withdrawn by the court and not shown to the jury.

The judgment of the district court is affirmed.

AFFIRMED.

CITY OF GRAND ISLAND, APPELLANT, V. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, ET AL., APPELLEES.
185 N. W. 2d 860

Filed April 16, 1971. No. 37762.

1. **Constitutional Law: Pleadings.** A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time question its constitutionality.
2. **Appeal and Error: Labor and Labor Relations.** The review in the Supreme Court of proceedings before the Court of Industrial Relations is in the manner provided by law for equity cases.
3. **Labor and Labor Relations.** In determining what is an appropriate employee unit for the purpose of collective bargaining, consideration may be given to the mutuality of interest in wages, hours, and working conditions; the duties and skills of the employees; the extent of union organization among the employees; and the desires of the employees.
4. ———. Individuals who are authorized to responsibly direct other employees are supervisory employees and should be excluded from an employee bargaining unit.

Appeal from the Court of Industrial Relations. Affirmed as modified.

Nelson, Harding, Marchetti, Leonard & Tate and William A. Harding, for appellant.

Kelly & Kelly and David D. Weinberg, for appellees.

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

BOSLAUGH, J.

This is a proceeding before the Court of Industrial Relations brought by the City of Grand Island, Nebraska, the employer. The other parties are The American Federation of State, County and Municipal Em-

ployees, AFL-CIO (AFSCM); The International Brotherhood of Electrical Workers, AFL-CIO (IBEW); and The International Association of Firefighters, Local 647, AFL-CIO (IAFF).

The three labor organizations, which are described in the pleadings as petitioners, sought recognition from the employer as collective bargaining agents for certain groups of its employees. The parties were unable to agree as to the appropriate employee unit for bargaining purposes and as to whether certain employees should be excluded as supervisory employees. The employer then invoked the jurisdiction of the Court of Industrial Relations to obtain a determination as to these matters.

In its brief filed in this court, the city contends that the 1969 amendment to section 48-816, R. R. S. 1943 (Laws 1969, c. 407, § 5, p. 1408), is unconstitutional. The issue cannot be raised by the city in this proceeding.

Before 1969, a city had no legal authority to bargain with a labor organization. International Brotherhood of Electrical Workers v. City of Hastings, 179 Neb. 455, 138 N. W. 2d 822. The 1969 amendment specifically authorizes public employers to recognize employee organizations, to negotiate collectively, and to enter into written agreements with them. § 48-816, R. S. Supp., 1969.

This proceeding was commenced by the city to obtain a determination as to the appropriate employee bargaining unit for the purpose of negotiating collectively. If the 1969 amendment is unconstitutional, there is no purpose or basis for this proceeding. A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit of it and at the same time question its constitutionality. Shields v. City of Kearney, 179 Neb. 49, 136 N. W. 2d 174.

The parties entered into three stipulations which have simplified and narrowed the issues in the proceeding. The principal issue remaining is whether there should be a single bargaining unit consisting of all the employees of the city or three units consisting of the utilities de-

partment employees; the fire division employees; and employees of the parks and recreation, public safety (excluding the fire division), and public works departments. A secondary issue is whether the captains and lieutenants of the fire department should be excluded from any bargaining unit.

The Court of Industrial Relations found that there should be three units for bargaining purposes consisting of the employees of the fire division; the utilities department; and the parks and recreation, public safety (exclusive of fire division), and public works departments; and that the captains and lieutenants should be included in the fire division employee unit. The city has appealed. There is no cross-appeal.

The review in this court is "in the manner provided by law for disposition of equity cases." § 48-812, R. R. S. 1943. We are required to reach an independent conclusion as to disputed issues of fact. § 25-1925, R. R. S. 1943.

The city contends that there should be only one bargaining unit for all city employees. The three labor organizations contend there should be three bargaining units.

There is evidence that, insofar as possible, the city has established uniform policies applicable to all employees on a city-wide basis in regard to rules, regulations, wage scales, sick leave, vacations, general leave, hospitalization insurance, grievances, and transfers. Discipline and retirement benefits apply to all nonuniform employees equally. The city argues that a single bargaining unit would promote a greater efficiency and conform to the centralization of management functions that is characteristic of its council-manager form of government.

The record also shows that Local 647, IAFF, was organized more than 20 years ago and that 33 of the 40 employees in the fire division, exclusive of the chief, want to be represented by that organization. The record

further shows that the employees of the fire division are required to have special skills and have working conditions which are different from those in any other division or department. Local 647, IAFF, argues that there is little or no community of interest between the employees of the fire division and the other employees of the city.

IBEW seeks only the representation of the employees of the utilities department and disclaims any interest in the representation of any other employees of the city. The employees of the utilities department are required to have special skills and there is no interchange of employees between this department and other city departments. Approximately 98 percent of the employees who would comprise the bargaining unit have requested representation by IBEW.

AFSCM seeks representation of the employees in the parks and recreation department, public works department, and public safety department exclusive of the fire division and disclaims any interest in representation of the utilities department employees or firefighters. Approximately 55 percent of the employees who would comprise this bargaining unit have requested representation by AFSCM.

In reaching its decision the Court of Industrial Relations found that decisions under the National Labor Relations Act were helpful but not controlling upon the court. We think this is a correct statement as to the consideration to be given to the decisions under the federal law.

In determining what is an appropriate bargaining unit under the federal law, consideration has been given to mutuality of interest in wages, hours, and working conditions; the duties and skills of the employees; the extent of union organization among the employees; and the desires of the employees. See, Continental Baking Co. v. Baker's Negotiating Group, 99 NLRB 777; 48 Am. Jur. 2d, Labor and Labor Relations, § 446, p. 325; Labor

Relations, CCH, Vol. 2, para, 2605, p. 6706. We think these factors support a determination that there should be three bargaining units consisting of the utilities department employees; the fire division employees; and the employees of the parks and recreation, public safety (excluding fire division), and public works departments.

The Court of Industrial Relations found that the chief and assistant chiefs should be excluded from the fire division unit but that the captains and lieutenants should be included. The city contends that the captains and lieutenants should have been excluded from the bargaining unit.

The federal law excludes supervisors from employee units, and it is generally held that supervisors should not be included in a collective bargaining unit. See 48 Am. Jur. 2d, Labor and Labor Relations, § 454, p. 331. Supervisors are defined in the federal law as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Title 29 U.S.C.A., § 152 (11), p. 233; 48 Am. Jur. 2d, Labor and Labor Relations, § 422, p. 306.

The fire division consists of the chief, 3 assistant chiefs, 6 captains, 3 lieutenants, and 27 unranked personnel classified as firefighters. An assistant chief is in direct control of each shift while it is on duty. There are two fire stations, and a captain is in charge of the station to which he is assigned while he is on duty. The lieutenants are in charge of the ladder company which is based at Station No. 1. The job specifications for the captains and lieutenants appear to be the same although the education and experience requirements are somewhat different.

The record shows that the captains have general charge of the personnel assigned to their station, and in the event of an alarm are in command until relieved by a superior officer. The lieutenants have similar authority but are not usually in charge of a station. In this respect it may be said that the captains and lieutenants have authority to "responsibly direct" the other firefighters. Although the captains and lieutenants have no authority, generally, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline the other firefighters, it is not essential that they possess such authority to be classified as supervisors.

As we view the record the captains and lieutenants should be classified as supervisory personnel and excluded from the employee bargaining unit of the fire division. The order of the Court of Industrial Relations should be modified accordingly. The order as modified is affirmed.

AFFIRMED AS MODIFIED.

DIANE PETERSON, A MINOR, BY WARREN E. PETERSON, HER FATHER AND NEXT FRIEND, APPELLANT, V. SANDRA I. DEAN ET AL., APPELLEES.

186 N. W. 2d 107

Filed April 23, 1971. No. 37680.

1. **Trial: Evidence.** Under the law of Iowa, upon a defendant's motion for directed verdict at the close of plaintiff's evidence, the evidence must be considered in the light most favorable to plaintiff regardless of whether it is contradicted.
2. **Motor Vehicles: Statutes: Negligence.** Under the Iowa guest statute, I. C. A., § 321.494, the elements of recklessness are: (1) No care, coupled with a disregard for consequences; (2) there must be evidence of defendant's knowledge, actual or chargeable, of danger and proceeding without any heed of, or concern for, consequences; and (3) the consequences of the actions of the driver are such that the occurrence of injury is a probability rather than a possibility.

3. **Motor Vehicles: Statutes: Evidence: Negligence.** Under the Iowa guest statute, I. C. A., § 321.494, showing of a persistent course of conduct is a matter of evidence ordinarily shown to establish recklessness. It is not in itself an essential element. It is, in most instances, merely a helpful yardstick or guide by which to determine recklessness as opposed to negligence.

4. ———: ———: ———: ———. Under the Iowa guest statute, I. C. A., § 321.494, conduct arising from momentary thoughtlessness, inadvertence, or from error of judgment, does not indicate a reckless disregard of the rights of others and does not constitute recklessness within the meaning of the law.

5. **Motor Vehicles: Statutes: Evidence: Trial: Negligence.** Under the Iowa guest statute, I. C. A., § 321.494, whether a motorist is reckless is a question of law for the court if reasonable minds, having before them all the evidence on the question, could reach but one conclusion, and is a question of fact for the jury if, under the proved or admitted facts, different minds might reasonably reach different conclusions.

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Reversed and remanded for further proceedings.

Warren C. Schrempp of Schrempp, Rosenthal & Bruckner, for appellant.

John R. Douglas of Cassem, Tierney, Adams & Henatsch, for appellees.

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

McCOWN, J.

This is an action for personal injuries sustained by a guest passenger in a one-car accident. At the close of the plaintiff's evidence, the trial court granted defendant's motion to dismiss. The sole issue on appeal is whether the evidence of the plaintiff was sufficient to raise a jury issue on the liability of the defendant under the Iowa guest statute.

The plaintiff, Diane Peterson, and the defendant, Sandra Dean, lived and worked in Omaha, Nebraska. On Friday evening, August 9, 1968, they drove from Omaha,

Nebraska, to North Sioux City, South Dakota. At around 10 p.m., they arrived at The Dunes Club. There they met John Otto, a friend of the plaintiff. They danced and talked with friends at the club until it closed at 11:45 p.m. The plaintiff and the defendant and John Otto left the club together. John Otto was to ride with them as far as the Sloan exit on Interstate Highway No. 29 south of Sioux City, Iowa. This was the highway the plaintiff and defendant had used in driving between Omaha and Sioux City. It was raining enough that it was necessary to turn on the windshield wipers. It rained intermittently and was raining hard at times before they reached the Sloan exit, which was 27 miles south of North Sioux City. During this portion of the trip, the plaintiff asked the defendant to slow down because it was raining too hard. Mr. Otto also asked defendant to slow down, but the defendant did not decrease her speed. They reached the Sloan exit and stopped at a gas station just off the exit where John Otto's friends were waiting for him. They stayed there a few minutes and then the two girls continued their trip to Omaha alone. The defendant, Sandra Dean, was still driving and the plaintiff, Diane Peterson, was sitting in the right front seat. After they returned to the Interstate highway, it started raining harder. Approximately 9½ miles south of the Sloan exit, after passing one car, the defendant came up behind a truck. Her speed was between 65 and 70 miles per hour. The speed limit at that point was 65 miles per hour. The defendant pulled into the left-hand lane and started to go around the truck. When she was approximately 10 feet from the truck, water started splashing up over her windshield. The wipers did not help and there was no visibility at all. The defendant kept on going and when they were a little in front of the rear tires of the truck, she threw up her arms, told the plaintiff to take the wheel, and fell over on the plaintiff with her head in the plaintiff's lap. The car went off the road to the left

and rolled over several times. The plaintiff was thrown out of the car and seriously injured.

The accident occurred in the State of Iowa and the plaintiff was a guest passenger. Under the Iowa guest statute, the owner or operator of a motor vehicle is not liable for any damages to a guest passenger unless the damages are "caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him of such motor vehicle." I.C.A., § 321.494.

There is no issue of intoxication. The sole issue is whether there was evidence of "reckless operation" sufficient to go to the jury. The law of Iowa is that upon a defendant's motion for directed verdict at the close of the plaintiff's evidence, the evidence must be considered in the light most favorable to plaintiff regardless of whether it is contradicted. See Vipond v. Jergensen, 260 Iowa 646, 148 N. W. 2d 598. The Supreme Court of Iowa said in that case: "Consistently we have concluded it is not the court's duty to determine whether defendant was reckless, but we are required to examine the evidence to determine whether there is sufficient evidence from which a jury might reasonably draw an inference of reckless operation."

Until 1970, the Iowa court had said: "Reckless operation of a motor vehicle as used in our 'guest statute', section 321.494, Code 1962, means more than negligence, more than want of ordinary care. It means, proceeding with no care coupled with disregard for the consequences, the acts must manifest a heedless disregard for or indifference to the rights of others in the face of apparent danger or so obvious the operator should be cognizant of it, when the consequences of such actions are such that an injury is a probability rather than a possibility. Recklessness may include willfulness or wantonness, but if the conduct is more than negligence it may be reckless without being willful and wanton. The elements of recklessness are: (1) No care coupled with disregard of con-

sequences, (2) there must be evidence of defendant's knowledge, actual or chargeable, of danger and proceeding without any heed of or concern for consequences, and (3) the consequences of the actions of the driver are such that the occurrence of injury is a probability rather than a possibility. We have required evidence of a persistent course of conduct to show no care with disregard of consequences. If it were not so required we would be allowing an inference of recklessness from every negligent act." Shoop v. Hubbard, 259 Iowa 1362, 147 N. W. 2d 51. See, also, Vipond v. Jergensen, *supra*.

The district court in the case now before us found that the evidence failed to establish a persistent course of conduct and failed to show no care with disregard of consequences as a matter of law.

In March 1970, the Iowa Supreme Court decided Winkler v. Patten, 175 N. W. 2d 126. In that case, the Iowa court held: "Showing of a persistent course of conduct is a matter of evidence ordinarily shown to establish recklessness. It is not in itself an essential element. It is in most instances merely a helpful yardstick or guide by which to determine recklessness as opposed to negligence."

It should be noted that the Winkler case also approved an instruction which included language that "Conduct arising from momentary thoughtlessness, inadvertence, or from error of judgment, does not indicate a reckless disregard of the rights of others and does not constitute recklessness within the meaning of the law." The court in the Winkler case also said that "juries have found more and more situations to be within the definition of recklessness," and that "our court has applied a very loose rein on such findings."

In Winkler, while the facts are not in any sense comparable, the court quoted from Lewis v. Baker, 251 Iowa 1173, 104 N. W. 2d 575: "It is not for us to say whether there was recklessness, but only whether rea-

sonable minds, such as in theory at least are found in our juries, might so conclude."

The decisions under the Iowa guest statute have dealt in legal semantics almost as frequently as our own. Decisions may be found which support either side of almost any case arising under the statute. See Lewis v. Baker, *supra,* at p. 1176.

In the posture of the case here, the plaintiff is entitled to have the evidence given the most favorable construction it will reasonably bear. With the benefit of that rule, inferences might be drawn that the defendant had operated her automobile over a considerable distance at a rate of speed exceeding the maximum speed limit, and that speed was maintained at night and in a heavy rain and over the protest of passengers. The jury might also find that in passing a truck at a speed of 70 miles per hour in a heavy rain she continued her speed after her vision was completely obscured by water, and finally voluntarily took her hands from the wheel, directed the passenger to take the wheel, and then lay down in a position to prevent anyone having control of the vehicle.

Under the Iowa guest statute, I.C.A., § 321.494, whether a motorist is reckless is a question of law for the court, if reasonable minds, having before them all the evidence on the question, could reach but one conclusion, and is a question of fact for the jury if, under the proved or admitted facts, different minds might reasonably reach different conclusions. Mescher v. Brogan, 223 Iowa 573, 272 N. W. 645. Under modern standards of driving operation, we do not think it may be said as a matter of law that no reasonable minds could find such operation to be "reckless" within the meaning of the Iowa guest statute. Reasonable jurors might reasonably reach different conclusions as to whether the defendant was "reckless" and that issue was not a question of law for the court but was a question of fact for the jury.

The judgment of the district court is reversed and the

cause is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DELENE M. MAXWELL, APPELLANT, V. NETTIE OPAL PUGH LEWIS, APPELLEE.
186 N. W. 2d 119

Filed April 23, 1971. No. 37709.

1. **Trial: Evidence.** A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the person against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence.** Negligence is ordinarily defined as the doing of some act under the circumstances surrounding the accident involved, which a man of ordinary prudence would not have done, or the failure to do some act or to take some precaution which a man of ordinary prudence would have done or taken.
3. **Negligence: Liability of Inviter.** A landowner should not be held liable for defects which an investigation might reveal unless the situation suggests an investigation, and the facts indicate to a reasonably prudent man the likelihood of existence of some hidden danger to persons lawfully on the premises.
4. ———: ———. A business inviter owes the duty to exercise ordinary care to keep the approaches to his place of business in a reasonably safe condition for the use of the patrons and customers properly on the premises. In this respect, an inviter must exercise ordinary care in the light of what he knows or reasonably should know to protect an invitee from danger or to notify him of such danger while he is rightfully on the premises and engaged in the proper performance of the purpose of his presence.
5. ———: ———. If conditions and circumstances are such that an invitee has knowledge of a condition in advance or should have knowledge comparable to that of the inviter, it may not be said that the inviter is guilty of actionable negligence.
6. **Negligence: Trial: Evidence.** Where different minds may reasonably draw different conclusions or inferences from the evidence adduced concerning the issues of negligence or contribu-

tory negligence and the degree thereof when one is compared with the other, such issues must be submitted to the jury.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded for trial.

Eisenstatt, Higgins, Miller & Kinnamon, for appellant.

Pilcher, Howard & Dustin, for appellee.

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

SPENCER, J.

This is an action for personal injuries suffered in a fall on an icy stairway leading to defendant's place of business. At the close of all the evidence, the trial court sustained defendant's motion for dismissal. We reverse the judgment.

A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the person against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820.

Defendant's place of business is located at 2556 Ellison Avenue in Omaha, Nebraska. It is a one-story frame dwelling, the front porch of which had been converted into a beauty parlor operated solely by the defendant. There are six cement steps from the street level to a cement sidewalk running a few feet in a north-south direction, to four precast cement steps which provide the entrance to the shop. These steps have raised nodules to provide some protection against slipping. The steps are 6 feet wide, with a handrail on the east side.

Plaintiff had been a regular customer of defendant's beauty shop for a number of years and had a standing Saturday afternoon appointment. At approximately 4

p.m., on January 11, 1969, accompanied by her sister, she went to the shop to have her hair fixed. When she ascended the steps into the shop, she noticed they were wet and damp, but no ice was present. The temperature that afternoon was warm and although the snow which had fallen earlier in the week was melting, it had all been cleared from the sidewalks.

Plaintiff started to leave the premises at approximately 5:15 p.m. She opened the door and looked generally at the house steps before she attempted to descend, but saw no ice. When she stepped out the door onto the top step, her foot slipped and she slid down the steps. At that time her sister was behind her at the door, and the defendant was directly behind the sister. Defendant immediately checked the steps and found a thin coat of transparent ice. She then put Ice-Away, which she kept near the front door, on the steps before the sister descended. The ice disappeared on contact with the Ice-Away.

Because snow was thawing on the slant roof of the house, and the gutter which drained the area was immediately above the steps, some water occasionally dripped on the steps from the overflow of the gutter. Defendant knew that ice would form in the area when the temperature dropped below freezing. The only time it had been necessary to put Ice-Away on the steps that day was before the shop opened in the morning. Defendant did this to remove the ice which had accumulated during the night. A patron of the defendant's shop, who was present when plaintiff arrived and who left the premises about 4:30 p.m., did not see any ice. She did note, however, that the house steps were wet, as had the plaintiff when she arrived. Defendant had noticed water dripping from the roof during the afternoon, but did not say anything to the plaintiff about the hazard of ice because the day had been warm and she did not know that the temperature was dropping.

Defendant urges that the judgment of dismissal should

be sustained under the authority of Kozloski v. Modern Litho, Inc., 182 Neb. 270, 154 N. W. 2d 460. In that case, we held: "Negligence is ordinarily defined as the doing of some act under the circumstances surrounding the accident involved, which a man of ordinary prudence would not have done, or the failure to do some act or to take some precaution which a man of ordinary prudence would have done or taken.

"In order to impose liability for injury to an invitee, the dangerous condition must have been known to the owner or occupant or have existed for such time that it was his duty in the exercise of ordinary care to know of it.

"A landowner should not be held liable for defects which an investigation might reveal unless the situation suggests an investigation, and the facts indicate to a reasonably prudent man the likelihood of existence of some hidden danger to persons lawfully on the premises."

Kozloski v. Modern Litho, Inc., *supra,* is readily distinguishable from the instant case. There we were dealing with the recessed area constituting the entrance to the building. No ice had ever been observed at that point previous to the morning of the accident, and it conclusively appeared that defendant did not have notice of the condition before the accident. In the instant case the defendant had had a problem with ice during the winter and had sprinkled Ice-Away the morning of the accident to clear the steps of ice and had observed water dripping on the steps through the course of the afternoon.

A business inviter owes the duty to exercise ordinary care to keep the approaches to his place of business in a reasonably safe condition for the use of the patrons and customers properly on the premises. In this respect, an inviter must exercise ordinary care in the light of what he knows or reasonably should know to protect an invitee from danger or to notify him of such danger while he is rightfully on the premises and engaged in the

proper performance of the purpose of his presence. Nance v. Ames Plaza, Inc., 177 Neb. 88, 128 N. W. 2d 564. The Ames case is also authority for the rule that if conditions and circumstances are such that an invitee has knowledge of a condition in advance or should have knowledge comparable to that of the inviter, it may not be said that the inviter is guilty of actionable negligence.

Where different minds may reasonably draw different conclusions or inferences from the evidence adduced concerning the issues of negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to the jury.

The evidence would indicate the steps, which were a "dirty gray," had a very thin coat of transparent ice at the time of the plaintiff's fall. In addition to other questions suggested hereafter, a jury could find this transparent ice was not apparent to a person exercising ordinary care under the circumstances.

The record seems relatively clear that the defendant did not have actual knowledge of the icy conditions of the steps at the time in question. However, she had seen water dripping onto the steps from the overflow of the gutter and although it had not turned to ice through the day, and the ice was not discovered until after the fall, a question is presented as to whether defendant should not have realized that the temperature in early January does drop toward evening when the sun begins to set, and with a dropping temperature there would be a possibility of water collected on steps freezing. Equally, while plaintiff may not have noticed the dripping of the water, she had seen water collected on the steps when she went on the premises at 4 p.m., and could be supposed to have the same knowledge as defendant that early in January temperatures do drop toward evening. Plaintiff did casually examine the steps when she started to leave, thought them to be dry, and started to descend without using the hand rail. Whether or not

the defendant had or should have had superior knowledge of the condition of the steps before the fall occurred, and whether the plaintiff herself could be charged with sufficient knowledge to put her on a par with the defendant are questions that should have been submitted to the jury under proper instructions.

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

REVERSED AND REMANDED FOR TRIAL.

WHITE, C. J., concurring in result.

In my opinion the decision reached herein is correct but it overrules Kozloski v. Modern Litho, Inc., 182 Neb. 270, 154 N. W. 2d 460, and we should therefore say so.

The cases cannot be distinguished. In Kozloski, there was glare ice at the entryway of a downtown office building for 10 hours before the accident and for 2 hours after the 7 a.m. opening of the building and the presence of the maintenance man on duty. A general 4-inch snow had covered the area and the buildings, roofs, ledges, and other accessible places 4 days before the accident. This condition remained the same under constant freezing conditions until 2 p.m. the preceding afternoon. The temperature then went above freezing and melting conditions prevailed from 2 p.m. to 11 p.m. and then the temperature went below freezing until the time of the accident. It could not be disputed but that the icy condition resulted from a foreseeable sequence of natural weather conditions and remained unattended for a period of over 2 hours after the maintenance man appeared the morning of the accident.

And yet in Kozloski we reversed a jury verdict and directed a judgment for the defendant because there was not sufficient evidence of negligence. And now on the facts in this case the court holds that a jury question was presented. The two results are irreconcilable. This case overrules Kozloski, as it should, but the court should say so.

NEWTON, J., concurring.

I concur in the opinion of Spencer, J., but cannot agree with the statement of White, C. J., that the case of Kozloski v. Modern Litho, Inc., 182 Neb. 270, 154 N. W. 2d 460, is thereby overruled. Obviously this is incorrect. As pointed out in the majority opinion, the facts of that case are substantially different from those in the present one. In Kozloski there was no notice of a condition conducive to the formation of ice as here nor did it appear conditions were such that the ice could reasonably have been expected to be discovered. The only similarity is in weather conditions. Here the defendant was aware that ice had been forming and that the conditions producing it persisted. In other words, she knew of the dangerous condition and took no steps to abate it or warn against it. The primary distinction is in what a reasonably prudent person should anticipate.

SCHOOL DISTRICT NO. 74 OF HALL COUNTY, NEBRASKA, ET AL., APPELLEES, V. SCHOOL DISTRICT OF THE CITY OF GRAND ISLAND, OF THE COUNTY OF HALL, IN THE STATE OF NEBRASKA, APPELLANT.

186 N. W. 2d 485

Filed April 23, 1971. No. 37720.

1. **Schools and School Districts: Common Law.** At common law, when a school district was divided, or a part of its territory detached and included in another district, the old district retained all its funds and property.
2. **Schools and School Districts.** A school district in the State of Nebraska has no territorial integrity but is subject to the reserve power of the state exercised through the administrative authority of the state to make changes according to educational needs and principles.
3. ———. The state may change or repeal all powers of a school district, take its property without compensation, expand or restrict its territorial area, unite the whole or a part thereof with another subdivision or agency of the state, or destroy the district with or without the consent of the citizens.

4. **Schools and School Districts: Statutes.** When the literal wording of a statute leads to an absurdity, or to an illogical or unjust conclusion, the intention of the Legislature, as gathered from the entire act, will prevail.
5. **Statutes.** The real intent of the Legislature when ascertained will always prevail over the literal sense of the language used in a statute.
6. ———. In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.

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

Richard L. DeBacker, for appellant.

William L. Walker and Earl Ludlam, for appellees.

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

NEWTON, J.

This action was brought to determine the ownership of the schoolhouse and other assets plaintiff School District No. 74 of Hall County, Nebraska, a Class I district, owned at the time the city of Grand Island annexed a portion of School District No. 74, thereby making the annexed portion a part of the defendant Class III district. We find that there must be an apportionment of the assets of plaintiff school district between the two districts. We reverse the judgment of the district court permitting retention by plaintiff of all its assets, real and personal.

The facts are simple. The record is comprised of a stipulation of the parties and certain exhibits. Involved are the assets, both real and personal, of plaintiff school district. Included in the territory annexed by the city of Grand Island, and consequently by the city school district, is the schoolhouse of School District No. 74.

The question presented is, who is entitled to the assets of plaintiff school district?

At common law, when a school district was divided, or a part of its territory detached and included in another district, the old district retained all its funds and property. See, 78 C. J. S., Schools and School Districts, § 73, p. 799; Ridgeland School Dist. No. 14 v. Biesmann, 71 S. D. 82, 21 N. W. 2d 324; People ex rel. Hagler v. Chicago, B. & Q. R.R. Co., 380 Ill. 120, 43 N. E. 2d 989; County School Board v. School Board of the City of Covington, 197 Va. 845, 91 S. E. 2d 654.

In this state the common law rule has been displaced by legislative act. It is now recognized that: "A school district in the State of Nebraska has no territorial integrity but is subject to the reserve power of the state exercised through the administrative authority of the state to make changes according to educational needs and principles.

"The state may change or repeal all powers of a school district, take its property without compensation, expand or restrict its territorial area, unite the whole or a part thereof with another subdivision or agency of the state, or destroy the district with or without the consent of the citizens." Board of Education v. Winne, 177 Neb. 431, 129 N. W. 2d 255.

Section 79-801, R. S. Supp., 1969, applicable to Class III districts, provides: "The territory embraced within the corporate limits of each incorporated city or village * * *, *together with such additional territory and additions* to such city or village as may be added thereto, * * * having a population of more than one thousand and not more than fifty thousand inhabitants, including such adjacent territory as now is or hereafter may be attached for school purposes shall constitute a school district of the third class * * *. * * * *The title to all school buildings or other property, real or personal, owned by any school district within the corporate limits* of any city or village, *shall, upon the organization of the*

district, vest immediately in the new district; * * *." (Emphasis supplied.)

Section 79-801.01, R. R. S. 1943, provides that when another district is merged into a Class III district, the latter shall not assume the bonded indebtedness of the former.

Other sections applicable to all schools, including Class III schools, are also pertinent. Section 79-414, R. R. S. 1943, provides: "When a new district is formed in whole or in part from one or more districts possessed of a schoolhouse or other property of a dissolved district, the county superintendent, at the time of forming such new district or as soon thereafter as may be, shall ascertain and determine the amount justly due to such new district from any dissolved district or districts out of which it may have been, in whole or in part, formed. The amount shall be ascertained and determined as nearly as practicable according to the relative value of the taxable property in the respective parts of such former district or districts with the whole value thereof at the time of such division. The fact that the schoolhouse or other property is not paid for shall not deprive such new district of its proportionate share of the value thereof. Such new district shall remain bound for such indebtedness to the same extent as though the new district had not been formed, unless in case of indebtedness not bonded, the same shall be adjusted as provided in section 79-418. When a new district embraces all of one or more former districts, the new district shall succeed to all the properties and other assets and be responsible for all unbonded indebtedness of such former dissolved district or districts."

Section 79-415, R. R. S. 1943, provides: "All money on hand and arising from the sale of schoolhouse and site, and all other funds of the divided districts, shall be divided among the several districts created in whole or part from the divided districts as nearly as practicable in proportion to the assessed valuation of the taxable

property attached to the districts formed in whole or in part by such division."

Section 79-416, R. R. S. 1943, provides: "Whenever, due to the division of any district or to a district, or any part thereof, being taken over by the United States for any defense, flood control, irrigation, or war project, the schoolhouse, schoolhouse site, or other property of such district is no longer conveniently located for school purposes or desired to be retained by the district in which it may be situated, the county superintendent of the county, in which such schoolhouse, schoolhouse site, or other property is located, may, when ordered by the district, advertise and sell the same at public or private sale and apportion the proceeds; Provided, when sold at private sale, the sale shall not be binding until approved by the district interested."

Section 79-402, R. S. Supp., 1969, provides, in part, as follows: "When a district is dissolved by petitions, and the area is attached to two or more districts said petitions shall specify the disposition to be made of assets and unbonded indebtedness of the districts; Provided, when a portion or portions of a district are attached to another district or districts the remaining portion of the original district shall retain the identity, assets, and unbonded obligations of the original district."

Section 79-801, R. S. Supp., 1969, and section 79-402, R. S. Supp., 1969, appear to arrive at contradictory solutions for the disposition of district property. The latter section is designed to apply when changes are effected by petition and the former, when changes are brought about by annexation. Section 79-801, R. S. Supp., 1969, by its language appears to be primarily directed at a transfer of school property at the time of the organization of the Class III district and not later. It states: "The title to all school buildings or other property, real or personal, owned by any school district within the corporate limits of any city or village, *shall, upon the organization of the district,* vest immediately in the new

district; * * *." (Emphasis supplied.) Insofar as the disposition of property is concerned, it does not specifically apply to a situation involving the partial annexation of an adjoining district *after the organization of a city district.*

The statutes mentioned were originally adopted in 1881. See Laws 1881, chapter 78. At that time Nebraska was thinly populated but a growth in population was becoming apparent, more schools were becoming necessary, and large districts were being split up. The laws then adopted were directed toward requiring that the assets of old school districts be apportioned and shared with the new districts. The statutes remain substantially the same and have not been sufficiently altered to meet all modern conditions. Now the reverse is true. Instead of school districts dividing, they are merging or consolidating. The literal wording of some of the statutes may not specifically require that the annexing districts, into which others are partially merged, be subjected to the plan for apportionment of the assets of the split-up districts. Yet, it is evident that in the event of the division of a school district, the overall intent of the Legislature was to promote an apportionment of the school assets as provided for in section 79-414, R. R. S. 1943. Section 79-402, R. S. Supp., 1969, is limited in its disposition of school property to instances of dissolution by petition and section 79-801, R. S. Supp., 1969, appears to be limited, in effect, to the time of *organization* of a Class III district. If the latter were construed as defendant suggests, it would provide a one-way street whereby the annexing district could strip an adjoining district of its school facilities and property by a partial annexation of its territory. Section 79-414, R. R. S. 1943, is apparently designed to cover all instances of partial or complete merging but from a literal standpoint is limited to instances where a new district is created.

All this would indicate that the common law governs

in the present instance, but it appears the intent of the Legislature was to override the common law and provide a different solution in all instances. We are therefore convinced that in major cases of partial merger or annexation, where not otherwise specifically directed, it was the legislative intent to require an apportionment of assets as indicated in section 79-414, R. R. S. 1943. When the literal wording of a statute leads to an absurdity, or to an illogical or unjust conclusion, the intention of the Legislature, as gathered from the entire act, will prevail. See, Ray v. School District of Lincoln, 105 Neb. 456, 181 N. W. 140; Halstead v. Rozmiarek, 167 Neb. 652, 94 N. W. 2d 37. The real intent of the Legislature when ascertained will always prevail over the literal sense of the language used in a statute. See State ex rel. Davis v. Farmers State Bank, 112 Neb. 597, 200 N. W. 173. In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. Johnson v. School Dist. of Wakefield, 181 Neb. 372, 148 N. W. 2d 592.

The assets, both real and personal, of plaintiff should be ascertained, their value arrived at and apportioned by the district court on the basis of the relative value of the taxable property in the respective parts of former School District No. 74 as now constituted. Indebtedness, other than bonded indebtedness, of School District No. 74, existing at the time the merger became effective, should be taken into account. The real property of School District No. 74, as formerly constituted, which now lies within the boundaries of defendant school district, is awarded to the defendant subject to apportionment of its value as directed. Costs are taxed to defendant.

The judgment of the district court is reversed and the

cause remanded for further proceedings as herein directed.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., not participating.

BLUE FLAME GAS ASSOCIATION, A NONPROFIT CORPORATION, APPELLANT, V. MCCOOK PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, ET AL., APPELLEES.

186 N. W. 2d 498

Filed April 23, 1971. No. 37723.

1. **Constitutional Law: Statutes.** A holding by this court that an act of the Legislature is constitutional or unconstitutional determines its validity only on the questions considered and determined by the court. Silence by the court does not have the effect of validating a section of the act not brought in issue and determined by the court.
2. ———: ———. The provisions of subsections (5) and (6) of section 59-1202, R. R. S. 1943, are so indefinite and uncertain as to be arbitrary and unreasonable and are therefore unconstitutional and invalid.
3. ———: ———. In the absence of a severability clause, the provisions of subsections (5) and (6) of section 59-1202, R. R. S. 1943, are such an integral and vital part of the Unfair Sales Act that the unconstitutionality of those sections necessarily makes the entire act unconstitutional.

Appeal from the district court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

James D. Conway, Elmer J. Jackson, and Wade Stevens, for appellant.

Lyons, Wood & Carroll, for appellees.

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

MCCOWN, J.

This is an action by plaintiff, Blue Flame Gas Association for an injunction against the defendant, McCook

Public Power District, to enjoin alleged violations of the Unfair Sales Act of Nebraska. A temporary injunction against the defendant was modified and thereafter a demurrer by the defendant was sustained.

The evidence and testimony at the hearing on the temporary injunction is included in the bill of exceptions and is part of the record here. The plaintiff is a nonprofit Nebraska corporation whose members engage in the sale of natural gas and liquefied petroleum gas at wholesale and retail in various parts of Nebraska. The defendant is a public corporation and political subdivision of the State of Nebraska engaged in the purchase, transmission, and sale of electrical energy at retail to customers in its service area comprised of portions of Gosper, Frontier, Hayes, Hitchcock, Lincoln, and Red Willow Counties, Nebraska. It serves rural customers almost exclusively.

The defendant purchased its wholesale power from the Nebraska Public Power System. The contract contained a demand provision, sometimes referred to as a penalty ratchet clause. This provision required the defendant in each month of the year to pay for at least 70 percent of the amount of electric energy used in its peak demand month, which was August. In the winter months particularly, the defendant was required to pay for wholesale energy for which it did not have a retail demand.

In the late spring of 1969, the defendant by advertisements offered to install a complete electric heating system in any home in its service area free upon the agreement of the customer to heat his home electrically for 5 calendar years. The equipment became the property of the customer after he had used it for the required 5 years, but if he failed to fulfill the agreement, the district had the right to remove the equipment. The defendant's objective was to stimulate the use of electricity in the winter months when the wholesale power contract required it to pay for electricity even though

it was not needed or used by retail customers. The offer was open to customers until July 1, 1969.

In the spring and summer of 1969, the defendant had 1,467 domestic customers in its service area. Prior to the offer, 57 of these customers had used electric heating. One hundred fifteen customers signed contracts during the time the offer was open. By late August 1969, 23 of the new installations had been completed and 7 were partially completed. The balance had not been started. The average cost of material on those completed was $450.75 and the average labor cost was $191.98. There was no evidence as to the amount of electricity ordinarily required for domestic heating nor as to the quantity of electricity purchased by defendant but previously unsold during the winter months.

The petition alleged that defendant's actions were intended to divert trade from other heating fuels and were contrary to the Unfair Sales Act. §§ 59-1201 to 59-1206, R. R. S. 1943. Irreparable damage was alleged. The district court initially granted a temporary injunction and after a hearing it was dissolved except as to future advertising. Thereafter the court sustained the defendant's demurrer. The basis was unconstitutionality of subsections (5) and (6) of section 59-1202, R. R. S. 1943, of the act. Those provisions were held to be nonseverable and the act was therefore declared unconstitutional.

The Unfair Sales Act, broadly speaking, provides that any advertising, offer to sell, or sale of any merchandise at less than cost as defined in the act with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor, is unfair competition and contrary to public policy. The act is civil in nature with the right to recover damages extended to persons damaged by a violation, including trade associations. §§ 59-1201 to 59-1206, R. R. S. 1943.

Section 59-1202, R. R. S. 1943, contains the critical definitions of terms. Subsection (5) of that section reads: "The term cost to the retailer as defined in subsection

(1) hereof, means bona fide costs; and purchases made by retailers at prices which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer." Subsection (6), in essentially identical words, applies to wholesalers.

The district court held that those particular provisions were so vague, general, and indefinite as to be incapable of practical application and therefore arbitrary and unreasonable. The plaintiff relies on the fact that the Unfair Sales Act was held to be constitutional by this court in Hill v. Kusy, 150 Neb. 653, 35 N. W. 2d 594 (1949). In that case, however, the particular provisions under attack here were not challenged nor were they considered by the court. A holding by this court that an act of the Legislature is constitutional or unconstitutional determines its validity only on the questions considered and determined by the court. Silence by the court does not have the effect of validating a section of the act not brought in issue and not determined by the court. Stanton v. Mattson, 175 Neb. 767, 123 N. W. 2d 844.

The specific provisions challenged here have been considered by several courts. So far as we can determine, wherever the constitutionality has been challenged on the ground of vagueness, generality, and indefiniteness, it has on each occasion been held void. See, Avella v. Almac's Inc., 100 R. I. 95, 211 A. 2d 665 (1965); McIntire v. Borofsky, 95 N. H. 174, 59 A. 2d 471; Daniel Loughran Co., Inc. v. Lord Baltimore Candy & Tobacco Co., Inc., 178 Md. 38, 12 A. 2d 201; State v. Walgreen Drug Co., 57 Ariz. 308, 113 P. 2d 650; State v. Consumers Warehouse Market, Inc., 183 Kan. 502, 329 P. 2d 638.

The challenged provisions set no standards for determining prices which are "justified by prevailing market conditions within this state." Such prices are not ordinarily susceptible of consistent, accurate determination. It is equally possible that prevailing marketing conditions may be greatly different in different localities of the state. A retailer should not be required to speculate

or guess as to which price he may use in determining "costs." We therefore hold that the provisions of subsections (5) and (6) of section 59-1202, R. R. S. 1943, are so indefinite and uncertain as to be arbitrary and unreasonable and are, therefore, unconstitutional and invalid.

The effect of that invalidity on the entire act remains to be determined. The Nebraska Unfair Sales Act contains no severability clause. In most of the states in which this particular provision has been declared unconstitutional, there was a severability clause. In those states, the courts held that the invalid provision was, therefore, separable and did not affect the remainder of the act.

In Maryland, however, there was no severability clause and the court's comment is appropriate here. The court said: "It is apparent that this provision, relating to the method of computing cost, is a vital part of the foundation of the legislative structure; and therefore, without regard to the other provisions, if it be held unconstitutional by reason of the uncertainty of its application, and its potential inequities, the other sections die with it. Such clauses sometimes cause more mischief than they were intended to avoid." Daniel Loughran Co., Inc. v. Lord Baltimore Candy & Tobacco Co., Inc., *supra*.

In recent years, efforts to regulate or control prices have been subjected to increasing scrutiny by courts and lawmakers as well as by the purchasing public. Without indicating any views as to the legal advisability of such legislation, we hold, as did the district court, that subsections (5) and (6) of section 59-1202, R. R. S. 1943, are an essential part of the method of computing cost set out in the Unfair Sales Act and that act is therefore unconstitutional.

The remaining contention of the plaintiff is that the actions of the defendant involved the giving of credit of the State of Nebraska in violation of the Constitution. This contention is untenable on the facts before us.

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

AFFIRMED.

DAPHNE Y. HAYNES, APPELLANT, V. COUNTY OF CUSTER, APPELLEE.

186 N. W. 2d 483

Filed April 23, 1971. No. 37731.

1. **Trial.** Where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover.
2. **Trial: Evidence.** Circumstantial evidence is insufficient to warrant a recovery in a civil case unless the circumstances proved are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom.
3. **Trial: Appeal and Error.** In a case where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed.

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

Tedd C. Huston, for appellant.

Earl C. Johnson, Kenneth H. Elson, and James D. Livingston, for appellee.

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

NEWTON, J.

This is a personal injury action. Plaintiff drove onto a county bridge which had been previously broken down and received the injuries complained of. Following trial to a jury, verdict and judgment were entered for the defendant county. We affirm the judgment of the district court.

The accident occurred on October 14, 1966, when

plaintiff drove onto the bridge in a 1965 Chevrolet sedan. She did not see the bridge was down until too close to avoid driving on it. It was a 32-foot bridge, 20 feet in width, sustained by pilings and caps at each end and spanned by 14 stringers, 32 feet in length, 4 inches thick, and 16 inches wide, placed on edge. This would indicate the stringers were centered at approximately 18-inch intervals. The bridge was officially rated at 15-ton capacity and although it was known to regularly sustain traffic by heavy trucks, it was deemed by the county officials to be adequate and had, in fact, adequately sustained all traffic since its construction in 1936. It had been repaired occasionally and had been thoroughly inspected by the county bridge superintendent in March of 1966 at which time no defects or weaknesses were observed.

Inspection following the accident indicated all 14 of the stringers had been broken down at approximately the center of the bridge. A witness for plaintiff stated he observed, at that time, some old cracks in two of the stringers. The county bridge superintendent, bridge foreman, and two employees who dismantled the bridge and hauled away the broken timbers testified that the only breaks in the stringers were new breaks. The superintendent and the chairman of the county bridge committee testified that no complaints had been received regarding the condition of the bridge. One of plaintiff's witnesses stated that although he frequently used the bridge, he had not noticed any defects in it prior to the accident.

The allegations of negligence in plaintiff's petition charge only that the bridge was defective. There is no evidence whatsoever indicating what or who caused the bridge to collapse or when it occurred. There is no evidence to support a charge of negligence in failing to warn of the collapsed bridge or to repair it. Plaintiff necessarily relies on the allegations that it had been in a defective condition for some time and that this was

a proximate cause of its collapse. The only evidence in the record to support this theory is that of the witness who stated there were some old cracks in the two south stringers. Plaintiff necessarily relies on an inference that this was the cause of the bridge breaking down notwithstanding only 2 of 14 stringers are alleged to have been so affected and that the extent and seriousness of the alleged old cracks or splits do not appear. It is just as reasonable to infer, under the circumstances, that the bridge fell due to being subjected to an extraordinary and unforeseen stress. It is not shown that these alleged defects were, prior to the breaking of the timbers, of an apparent, as distinguished from a latent, nature nor that they had existed for such a length of time that they might reasonably have been expected to be discovered.

In Popken v. Farmers Mutual Home Ins. Co., 180 Neb. 250, 142 N. W. 2d 309, it is said: "Where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover." In that case it was further said: "Circumstantial evidence is insufficient to warrant a recovery in a civil case unless the circumstances proved are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom." See, also, Howell v. Robinson Iron & Metal Co., 173 Neb. 445, 113 N. W. 2d 584; J. R. Watkins Co. v. Wiley, 184 Neb. 144, 165 N. W. 2d 585. We are unable to agree that the evidence is sufficient to establish that the defendant negligently maintained a defective bridge and that this was a proximate cause of the accident. Defendant's motion for a directed verdict might well have been sustained.

In view of the foregoing conclusion, any error resulting from the exclusion of evidence by the trial court of the county officials having been told that "the bridge

needed fixed (sic)" is not prejudicial but harmless in nature. This evidence would only serve to show notice to the defendant of a possible defect in the bridge but is insufficient to establish the existence or nature of any defect proximately causing the collapse of the bridge. Likewise, error, if any, in the giving or refusal of instructions is immaterial.

"In a case where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed." Everett v. Hening, 174 Neb. 573, 118 N. W. 2d 639.

The judgment of the district court is affirmed.

AFFIRMED.

EMIL ERICKSON ET AL., APPELLANTS, V. LUCILE TYLER ET AL., APPELLEES.
186 N. W. 2d 123

Filed April 23, 1971. No. 37740.

1. **Appeal and Error: Trial: Evidence.** Actions in equity are triable de novo in this court. Where, however, the trial court has made a personal inspection of the premises and the physical facts, and where the oral evidence is conflicting and in many important respects cannot be reconciled, this court will consider the fact that such examination was made and considered by the trial court, as well as the fact that the trial court observed the witnesses and their demeanor in testifying and must have accepted one version of the facts rather than the other.
2. **Waters.** Surface water is a common enemy, and the owner of real estate in the interest of good husbandry and in the absence of negligence or evidence of diversion to the injury of the lower landowner, may accelerate its flow in the natural course of drainage without liability to the lower owner.

Appeal from the district court for Hamilton County: H. EMERSON KOKJER, Judge. Affirmed.

Kelly & Kelly, for appellants.

Sampson & Armatys and Adams & Carstenson, for appellees.

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

SPENCER, J.

Plaintiffs Emil Erickson and Elna Erickson brought this action to enjoin defendant Lucile Tyler from maintaining a ditch constructed on her land to carry surface water. She impleaded defendants Mildred Randahl Holtorf and Carl Holtorf. The trial court dismissed the action. We affirm.

Plaintiffs are the owners of the east half of the southwest quarter of Section 24, Township 13 North, Range 6 West of the 6th P. M., in Hamilton County. Lucile Tyler is the owner of the northeast quarter of the northwest quarter of Section 25 in the same township, and the defendants Holtorf are the owners of the northwest quarter of the northwest quarter, which adjoins the Tyler 40 acres on the west. Plaintiffs' land is immediately north of the Tyler land, separated by State Highway No. 66, which runs east and west between the two tracts. The general drainage in the area is to the north.

The Tyler land receives drainage from some rough and hilly pasture land adjoining it on the south, which is referred to as the Heuring pasture land. Surface water had cut a drainageway from the Heuring pasture onto the Tyler land. The evidence would indicate that there were one main and two minor drainageways onto the Tyler land. There was a well-defined drainageway to the northwest across the southeast corner of the Tyler land. One of the principal disputes in the case is whether this drainageway left the Tyler land and extended across the Holtorf land as claimed by the plaintiffs. Defendants claimed, and the evidence is strong, that this drainageway never entered the Holtorf land, but after reaching the western edge of the Tyler land followed a road in that area until it spread out to the northeast over a large area of the Tyler land and emptied into the south ditch of highway No. 66.

Lucile Tyler acquired her land by purchase in 1966. That fall her husband, Donald W. Tyler, a farmer and irrigation engineer who will be hereinafter referred to as Tyler, leveled the land for irrigation. In doing so he filled the low spots on the land, including an acre and a half in the southwest corner which was about 1 foot lower than the surrounding area. He also filled the west drainageway and brought the main body of water from the Huering pasture along the south fence line 250 feet east to a new ditch which he refers to as a grassed waterway and which the plaintiffs refer to as a canal. This waterway runs directly north to the ditch on the south side of highway No. 66. There is and has been since the 1920's a double culvert under this highway east of where the water enters the highway ditch. Admittedly, Tyler straightened out the natural drainageway, but the evidence strongly indicates he has not diverted any water from it.

Emil Erickson testified that prior to the leveling in 1966, water from the Tyler land entered his land at the location of the culvert and then flowed off to the northwest corner. He testified that he had no water problems unless there was a heavy rain, but that occasionally water from the Tyler land flowing through the culvert would flood probably 10 acres of his land. His son testified that before the leveling of the Tyler land, water which ran onto the Erickson property left the Tyler land at approximately the place where Tyler constructed the new ditch. In 1967 water from this source flooded at least 10 acres of his parents' land. In the son's opinion, the leveling had increased the amount of water received from the Tyler land.

Defendants' evidence would indicate that water from the Tyler tract enters the highway ditch at the same place and leaves at approximately the same place as formerly, and that the Erickson land receives approximately the same amount of water as before.

The serious dispute herein is not that some water

from the Tyler tract flowed into the highway ditch, but rather whether the main body of the surface water flowed through the Holtorf tract or spread across the Tyler land and found its way into the highway ditch. The evidence on this point strongly predominates in favor of the defendants.

The decision in this case is controlled by the determination of questions of fact. It is an equity case. Actions in equity are triable de novo in this court. Where, however, as here, the trial court made a personal inspection of the premises and the physical facts, and where the oral evidence is conflicting and in many important respects cannot be reconciled, this court will consider the fact that such examination was made and considered by the trial court, and that the trial court observed the witnesses and their demeanor in testifying and must have accepted one version of the facts rather than the other. Lackaff v. Bogue, 158 Neb. 174, 62 N. W. 2d 889.

Surface water is a common enemy, and the owner of real estate in the interest of good husbandry and in the absence of negligence or evidence of diversion to the injury of the lower landowner, may accelerate its flow in the natural course of drainage without liability to the lower owner. Jorgenson v. Stephens, 143 Neb. 528, 10 N. W. 2d 337.

Plaintiffs call our attention to Linch v. Nichelson, 178 Neb. 682, 134 N. W. 2d 793, in which we said: "It is the law of this state that waters resulting from rainfall and melting snow are diffused waters which an owner may control on his own land. He may collect them, change their course, or pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another except in depressions, draws, swales, or other drainageways, through which such waters were wont to flow in a state of nature." That case gives no comfort to plaintiffs. The evidence herein supports a

finding that the water from the Tyler land formerly drained into the south highway ditch and ran onto the Erickson land through the double culvert to the east. While Tyler may have accelerated its flow by draining it into a new waterway, there was no diversion of any nature. The water still emptied into the same highway ditch and reached plaintiffs' land through the culvert. The 1967 rain which forms the basis for plaintiffs' claim of damage in this action was referred to in some of the questions as a 50-year rain, yet the flooding did not involve more than 10 acres of the Erickson land, which Emil Erickson testified was the approximate area occasionally flooded before the leveling.

For the reasons given, the judgment is affirmed.

AFFIRMED.

DEAN R. FINLEY, THROUGH AND BY HIS FATHER AND NEXT FRIEND, FRED F. FINLEY, APPELLANT, V. MARK BRICKMAN, APPELLEE.

186 N. W. 2d 111

Filed April 23, 1971. No. 37751.

1. **Negligence: Weapons and Firearms.** The general rule in Nebraska is that those who deal with firearms are required to exercise the closest of attention and to take the most careful precautions not only in preparing for their use but in using them.
2. ———: ———. A person is charged with the knowledge that a loaded gun is a dangerous instrumentality, and in dealing with it he is charged with the highest degree of care to prevent injuries to others.
3. **Negligence.** The doctrine of res ipsa loquitur proceeds on the theory that, under special circumstances which invoke its operation, the plaintiff is unable to specify the particular act of negligence which caused the injury, but if the petition alleges particular acts of negligence, then the plaintiff, in order to recover, must establish the specific negligence alleged, and the doctrine of res ipsa loquitur cannot be applied.

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

Kneifl, Kneifl & Byrne, for appellant.

Harold W. Kaufman and Albert G. Schatz of Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellee.

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

SPENCER, J.

This is an action for damages resulting from an accidental gunshot. The jury returned a verdict for the defendant. Plaintiff perfected an appeal, alleging six assignments of error: (1) Denial of plaintiff's motion for summary judgment; (2) failure to direct liability against the defendant; (3) submission of the issue of contributory negligence; (4) submission of plaintiff's specifications of negligence; (5) refusal to instruct the jury that defendant was liable unless he demonstrated he took all reasonable precautions and the rifle did not discharge as a result of his carelessness; and (6) the refusal to instruct the jury on the doctrine of res ipsa loquitur.

The accident occurred on a Saturday afternoon, May 4, 1968. Plaintiff, who was 15 years of age, and defendant, who was 16, were schoolmates and close friends. Plaintiff was spending the weekend at the home of the defendant, where, after he helped defendant with his chores the boys would swim in the Brickman pool or shoot a 22-caliber automatic rifle owned by the defendant at birds and targets in the woods on the Brickman acreage. This area was heavily wooded and overgrown with shrubs. Walking was mainly restricted to paths or deer trails. There is a dilapidated north-south, three-strand barbed wire fence to the west and near the edge of the wooded area.

After the boys finished swimming, sometime beween 3 and 4 p.m., they took the rifle into the wooded area and

alternately shot and reloaded it. Both boys had at least 50 shells. They passed the rifle back and forth between them without putting the safety on when the gun had a bullet in the chamber and was ready to fire. The rifle when fired automatically reloaded the chamber from the magazine and could be refired by simply pulling the trigger.

There is conflict in the testimony as to exactly how the accident happened. When the boys reached the barbed wire fence headed toward the house, plaintiff testified he sat down on a fallen tree which extended under the fence. He sat at a point approximately 3 feet east of the fence, which he said was old and kind of leaning, and reloaded the gun by putting in two shells. He then handed the gun to defendant who was on the other side of the fence. Defendant shot at a bird and handed the gun back to plaintiff, who was going to finish reloading it. Plaintiff's evidence would indicate that defendant handed the gun to plaintiff with his left hand, with the gun pointed toward plaintiff. Plaintiff said, "Mark, you shouldn't point it at me," and pushed toward the gun. He admitted, however, that in his deposition he said that he did not push the gun away so that it would not be pointed at him, but was just reaching up for the gun. When plaintiff put his right hand up, the rifle went off. It happened so fast plaintiff doesn't know whether or not he touched the gun. Defendant was handing the gun to him under the first strand of the fence, and from his sitting position plaintiff leaned toward the fence so that the gun was below his eye level, about shoulder height.

Defendant's version was that both boys were on the west side of the fence and were going east toward the house. Plaintiff had the rifle, put some shells in it, and handed it to him and he shot at a bird. Defendant kept the gun as they were going to cross the fence. Plaintiff went first and defendant held the fence for him by pushing down on the second strand of wire and

pulling up on the first. There was no tree under the fence and plaintiff did not sit down. The area around the fence had shrubbery but no branches or twigs. When plaintiff crossed the fence he turned around and defendant started to pass the gun to him. Defendant had the gun off to the side, pointed toward the ground. As he handed the gun to him, plaintiff leaned forward and reached out his hand to grab ahold of it, and then defendant felt a slight jerk and the gun went off. When he felt the slight jerk, he thought it was the plaintiff's hand. It could have been a bush. He doesn't know. At the time he handed the gun to the plaintiff, his fingers were at least 2 or 3 inches away from the trigger. He denies that plaintiff said anything to him about the position of the gun.

The bullet entered the plaintiff's body in line with his right breast nipple, and traversed in an oblique direction toward the abdomen from the upper right to the lower left. The bullet lodged in the hollow of the ilium, which is the big flat bone that constitutes one side of the pelvis. The bullet was not removed. Because of the nature of the issues presented, it is not necessary to detail the medical evidence other than to observe that the plaintiff made a remarkable recovery.

Obviously, plaintiff's motion for a summary judgment was properly overruled, and requires no discussion herein. Plaintiff's next four assignments will be considered together. There are essentially only two questions presented. If assumption of risk and contributory negligence are present, there is no merit to the other assignments.

The general rule in Nebraska is that those who deal with firearms are required to exercise the closest of attention and to take the most careful precautions not only in preparing for their use but in using them. Anderson v. Davis, 183 Neb. 326, 160 N. W. 2d 94.

Both the plaintiff and the defendant had been instructed in the use of guns, and were well aware of their

dangerous proclivities. Both boys were also familiar with the gun herein because they had used it on many previous occasions. Yet both were certainly negligent in handling this automatic rifle. They passed it back and forth with the safety off, without regard to the fact that it might accidentally discharge when it was in that condition. We said in Naegele v. Dollen, 158 Neb. 373, 63 N. W. 2d 165: "A person is charged with the knowledge that a loaded gun is a dangerous instrumentality, and in dealing with it he is charged with the highest degree of care to prevent injuries to others."

There is conflict in the testimony as to exactly how the accident occurred, but the resolution of the facts and the credibility of witnesses are the sole province of the jury. The verdict would suggest that the jury accepted the defendant's version of the facts rather than the plaintiff's, and we must consider the evidence on that premise.

While the gun was in the hands of the defendant when it discharged, how the accident actually happened is not known. The defendant's hand was not close enough to the trigger to fire the gun. We are left with three possibilities. The plaintiff in reaching for the gun could have touched the trigger or pushed it into a bush which discharged it, or the plaintiff could have brushed the trigger against a bush causing it to discharge. If plaintiff reached for the gun when it was pointed toward him, he would be negligent as well as careless of his own safety. He knew the gun had just been fired and that a bullet was in the chamber ready to be fired because he had put two shells into the gun. While he may not have been certain the safety on the gun was off, he was aware that on many such occasions it was. The evidence justified the submission of negligence and contributory negligence, and it was for the jury to determine its presence and degree.

Even if res ipsa loquitur were available herein, which it was not, plaintiff's last assignment of error, that the

trial court failed to instruct on res ipsa loquitur, ignores the nature of that plea. Plaintiff pleaded specific acts of negligence. As we said in Lund v. Mangelson, 183 Neb. 99, 158 N. W. 2d 223: "The doctrine of res ipsa loquitur proceeds on the theory that, under special circumstances which invoke its operation, the plaintiff is unable to specify the particular act of negligence which caused the injury, but if the petition alleges particular acts of negligence, then the plaintiff, in order to recover, must establish the specific negligence alleged, and the doctrine of res ipsa loquitur cannot be applied."

The judgment is affirmed.

AFFIRMED.

IN RE 1969-1970 COUNTY TAX LEVY.
FREDERICK H. MANN ET AL., APPELLANTS, V. WAYNE COUNTY BOARD OF EQUALIZATION, APPELLEE, SCHOOL DISTRICT OF WAYNE, WAYNE COUNTY, NEBRASKA, ET AL., INTERVENERS-APPELLEES.
186 N. W. 2d 729

Filed April 23, 1971. No. 37757.

1. **Constitutional Law: Statutes.** In construing an act of the Legislature, all reasonable doubt must be resolved in favor of constitutionality. Burdens imposed by statute are presumed to be reasonable. The burden of proving that a statute contains unlawful or unreasonable terms rests upon those assailing it.
2. **Constitutional Law: Statutes: Taxation: Schools and School Districts.** A statute which provides for the raising of revenue for nonresident high school tuition which places a substantially unequal tax burden on either the district which receives the nonresident students or the district which sends them would be discriminatory.
3. **Constitutional Law: Statutes: Taxation.** Section 79-4,102, R. S. Supp., 1969, does not violate constitutional requirements of tax uniformity nor constitute a commutation of taxes.
4. **Constitutional Law: Statutes.** Where the Legislature has provided reasonable limitations and standards for carrying out delegated duties, there is no unconstitutional delegation of legislative authority.

5. **Schools and School Districts: Taxation.** In setting nonresident high school tuition rates, the true test is that in compliance with statutory directions there shall be a reasonable and approximate estimate and determination made in the light of the known and reasonably ascertainable facts and also in the light of known and fairly anticipated conditions.
6. **Schools and School Districts: Trial: Evidence: Taxation.** The burden of proof is upon the taxpayer to show that a school levy was, in fact, excessive.
7. **Schools and School Districts: Taxation.** Section 79-4,102, R. S. Supp., 1969, allows each individual high school district receiving nonresident students to determine, as accurately as is possible, the per pupil cost of high school education in its district, and to certify a tuition rate for nonresident high school students based upon the average per pupil cost of high school education for the district, not less than the average per pupil cost for the preceding school year.

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

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

Donald R. Reed, for appellee.

B. B. Bornhoft, John V. Addison, Jewell, Otte & Pollock, Beech & Webster, Harry N. Larson, Patrick G. Rogers, Mark J. Fuhrman, and Raymond A. Jensen, for interveners-appellees.

Cline, Williams, Wright, Johnson & Oldfather and Kevin Colleran, for amicus curiae.

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

MCCOWN, J.

This action was brought by a group of individual taxpayers against the Wayne County Board of Equalization to declare all or portions of the Wayne County 1969-1970 nonresident high school tuition levy illegal and unauthorized. In the alternative, they prayed that section 79-4,102, R. S. Supp., 1969, be declared unconstitutional and void. The district court determined that no portion

of the levy was for an unlawful or unnecessary purpose; that section 79-4,102, R. S. Supp., 1969, was constitutional; and dismissed appellants' petition.

Some background may be advisable. The laws of Nebraska have long provided for a nonresident public high school education for Nebraska children residing in a public school district which does not maintain a high school course of study. Section 79-4,102, R. S. Supp., 1969, and its predecessor versions have provided methods of determining the number of qualified pupils in each county, and the amount of the nonresident high school tuition levy. That levy is applied to the property in the non-high school districts. Prior to 1969, the statutes had always provided that the high school district accepting nonresident pupils should receive a flat specified amount in dollars for specified periods of time. In the early part of this century, the amount was 75 cents per week per pupil. In 1967, it became $3.50 per day for the number of days the nonresident pupils were enrolled and school was in session.

In 1969, the Legislature again amended the statute and adopted section 79-4,102, R. S. Supp., 1969. Subsection (2) of that act provides: "The high school tuition rate for nonresident pupils shall be determined annually by the receiving district on a uniform basis for all pupils but such rate shall in no event be less than the average per pupil cost for the preceding school year determined as provided in subsection (3) of section 79-486. The superintendent of the receiving school shall certify such rate to the county superintendent on or before the second Monday in July of each year."

Subsection (3) of section 79-486, R. R. S. 1943, deals with contract prices between school districts for nonresident tuition. It provides in part: "The contract price for instruction referred to in subsections (1) and (2) of this section shall be the cost per pupil for the immediately preceding school year or the current year whichever appears more practical as determined by the

governing board of the district which accepts the pupils for instruction. The cost per pupil shall be determined by dividing the sum of the operational cost and debt service expense of the accepting district, except retirement of debt principal, plus three per cent of the insurable or present value of the school plant and equipment of the accepting district, by the average daily membership of pupils in the accepting district."

Pursuant to the statute, nine high school districts certified tuition rates for nonresident high school pupils to the Wayne County superintendent in 1969. Two of these high school districts were in Wayne County. The remaining seven districts were located in seven adjoining counties. The tuitions certified by the nine schools varied from $800 to $1,000. The average was $935. The two high school districts in Wayne County which certified rates were Wayne and Winside. The rates were $951 and $1,000 respectively. The annual finance report of the Wayne and Winside school districts showed the high school per pupil costs for the preceding school year to be $893.05 and $810.69 respectively. The Wayne County superintendent, pursuant to the statute, certified to the Wayne County Board that 240 Wayne County students had applied for free high school tuition privileges and that the amount necessary to pay the tuition for those pupils, in addition to the funds on hand in the high school tuition fund, was $174,148.80. The Wayne County Board of Equalization then set the Wayne County free high school levy at 10.98 mills for the 1969-70 school year.

The appellants' analysis of attendance figures for the first semester indicates that 115 of the 240 high school students attended Wayne High School; 32 attended Winside High School; and the balance of the students were attending out-of-county high schools. The certificate of the Wayne County superintendent shows that the total 1969 school levies for Wayne and Winside school districts were 61.47 and 53.29 mills respectively. The

school levies for the 30 non-high school districts in Wayne County, exclusive of the high school tuition levy, varied from 5.42 mills to 25.88 mills and averaged 12.6 mills. Including the high school tuition levy of 10.98, the average total school levy in the 30 school districts in Wayne County which did not maintain high schools was 23.58 mills. It will be noted that the average total school levy in the 30 school districts paying the high school tuition levy is less than one-half of the lowest levy of any district maintaining a high school in Wayne County. The appellants reside in some of the districts which do not maintain high schools.

The position of the appellants is that taxpayers of one taxing district cannot be required to pay taxes which are for the sole benefit of citizens in another taxing district. They assert that any nonresident tuition above the actual per pupil costs at the high schools attended is paid for the benefit of the taxpayers of the accepting district and is illegal. They assert that section 79-4,102, R. S. Supp., 1969, violates Article VIII, sections 1 and 4, Constitution of Nebraska, providing for uniformity of taxation and forbidding commutation of taxes, and that it also violates Article II, section 1, and Article III, section 1, Constitution of Nebraska, prohibiting improper delegation of legislative authority.

The challenge to constitutionality of the statute rests on the contention that the statute provides for only a minimum tuition rate but has no guidelines or standards or limitations as to a maximum. Therefore, the appellants contend that the receiving school district is free to charge any amount it wishes above the minimum and the statute is unconstitutional. The contention assumes improper motivation by both the state and the receiving district, and it also ignores the presumption of constitutionality.

In construing an act of the Legislature, all reasonable doubt must be resolved in favor of constitutionality. Schurmann v. Curtiss, 183 Neb. 277, 159 N. W. 2d 554;

State ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N. W. 2d 88.

The language of this court in a case involving a predecessor of this identical statute as far back as 1909 is appropriate here. "Legislative acts are presumed to be valid. Burdens imposed by statute are presumed to be reasonable. Courts should never assume that the lawmakers will deliberately attempt to spoliate one community for the benefit of another or pass laws without knowledge of existing conditions. In absence of proof to the contrary, courts ought to assume that the legislature acted with full knowledge of the facts upon which the legislation is based. The burden of proving that a statute contains unlawful or unreasonable terms rests upon those assailing it." Wilkinson v. Lord, 85 Neb. 136, 122 N. W. 699.

An analysis of our cases dealing with nonresident tuition as between school districts would indicate that a statute which provides for the raising of revenue for nonresident high school tuition which places a substantially unequal tax burden on either the district which receives the nonresident students or the district which sends them would be discriminatory. See, High School District v. Lancaster County, 60 Neb. 147, 82 N. W. 380; Wilkinson v. Lord, *supra;* State ex rel. Groves v. School District, 101 Neb. 263, 162 N. W. 640.

The legislative history of the enactment here shows a recognition of the fact that historically under a fixed tuition rate, it was cheaper for a taxpayer to live in a district which paid tuition than it was to live in the receiving district. The facts here show that assumption is still presumptively correct. The discriminatory effect of such a flat rate tuition provision and its questionable constitutional validity were specifically recognized by the Legislature, as well as the varying costs of high school education from district to district, and the possibilities of "shopping" for students.

The appellants assert that any variation between the

tuition rate and the actual per pupil cost creates a tax discrimination against either the receiving school district or the tuition paying district and is therefore unconstitutional as to one or the other. The logical result of this argument would be that any statute which might permit any variance at even one high school would be unconstitutional. Here nine high school districts in eight counties are involved, and the levy challenged is a composite one applied uniformly to all 30 non-high school districts in Wayne County. Under appellants' reasoning, a statute as to nonresident high school tuition which was constitutional would become a complete impossibility. Tuition rates are always prospective and in a period of rapidly increasing costs, even a complete and accurate cost figure is outdated before it becomes effective. Many cost items can only be determined by using figures which are, in some degree, arbitrary. Exact equalization is impossible to achieve in any area of taxation, but particularly in this sensitive area of school operations. Section 79-4,102, R. S. Supp., 1969, does not violate constitutional requirements of tax uniformity, nor constitute a commutation of taxes.

The appellants also assert that the challenged legislation unlawfully delegated the authority of the Legislature to the school districts without any reasonable limitations and standards. We cannot agree. A reasonable interpretation would be that the Legislature intended to allow the receiving district to compute the per pupil cost of operation under the formula set forth in section 79-486(3), R. R. S. 1943, and avoid a flat rate charge that might, in some instances, be more than compensatory to the receiving district and, in most instances, be less than compensatory to the receiving district.

If section 79-4,102, R. S. Supp., 1969, is read as tying the fixing of the tuition rate to a reasonably computed per pupil cost as specified in section 79-486(3), R. R. S. 1943, it seems clear that adequate standards and limitations have been placed upon the receiving district. Sec-

tion 79-486, R. R. S. 1943, clearly permits computation of per pupil costs by reference to either the immediately preceding school year or to the current year. Obviously, costs for the current year must be, in some degree, an estimate. Where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority. See Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566.

We believe a rule announced by this court long ago in a case involving the school district of the City of Omaha is applicable. "As is clearly apparent in a situation such as this the needs are not capable of exact ascertainment. In the very nature of things and as the pertinent statutes declare there may only be estimates, which of course negative any thought that accuracy must be attained. The true test is that there shall be a reasonable and approximate estimate and determination made in the light of the known and reasonably ascertainable facts and also in the light of known and fairly anticipated conditions." C.R.T. Corp. v. Board of Equalization, 172 Neb. 540, 110 N. W. 2d 194.

The appellants have also contended that the nonresident taxpayer does not receive credit for his federal and state tax dollar which return to the receiving high school district in the form of federal and state aid which, in turn, creates additional discrimination. Nothing in section 79-4,102, R. S. Supp., 1969, and nothing in the formula contained in section 79-486(3), R. R. S. 1943, precludes consideration of state and federal aid. Nothing in the record indicates that credits were not given or, if not given, to what extent any adjustments should be made.

The rule is well established that the burden of proof is on the appellants to show that a school levy was, in fact, excessive. C.R.T. Corp. v. Board of Equalization, *supra*. This they have not done.

A reasonable interpretation of section 79-4,102, R. S.

Supp., 1969, is that it allows each individual high school district receiving nonresident students to determine, as accurately as is possible, the per pupil cost of high school education in its district and to certify a tuition rate for nonresident high school students based upon the average per pupil cost of high school education for the district, not less than the average per pupil cost for the preceding school year.

Because of the determinations already set out, we do not reach the issues of whether or not appellant taxpayers may maintain a class action under the facts here nor whether they have sufficiently pleaded or proved what proportion or amount of the challenged levy is claimed to be illegal or excessive.

For the reasons stated, no portion of the 1969-1970 Wayne County nonresident high school tuition levy was for an unlawful or unnecessary purpose and section 79-4,102, R. S. Supp., 1969, is constitutional. The determination of the district court was correct and its judgment is affirmed.

AFFIRMED.

GEORGE ASMUS ET AL., APPELLEES, V. NEBRASKA PUBLIC POWER DISTRICT (FORMERLY CONSUMERS PUBLIC POWER DISTRICT), A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.
186 N. W. 2d 480

Filed April 23, 1971. No. 37909.

Appeal from the district court for Saline County: ERNEST A. HUBKA, Judge. On motion for extension of time. Motion sustained.

Ted L. Schafer of Wilson, Barlow & Watson, for appellant.

Christensen, Glynn & Hendricks and Ach & Ach, for appellees.

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

PER CURIAM.

The motion for further extension of time for preparation of bill of exceptions is sustained. In many cases of which this is one, on motion almost as a matter of course we have been extending due dates for filing of briefs and bills of exceptions. The number of cases pending on our docket is increasing rapidly. Yet our monthly call has on occasion been unfilled for lack of cases ready for submission. We therefore announce that, effective September 1, 1971, we will strictly enforce our rules relating to such extensions except under unusual circumstances. For example, the press of any other business upon counsel or trial court reporter will be no ground for extension.

Effective September 1, 1971, Rule 7f, Revised Rules of the Supreme Court, 1967, is amended to read as follows: Where a bill of exceptions has been ordered according to law by the timely filing of a praecipe, and the court reporter fails to prepare and file the bill of exceptions with the clerk of the district court within the time fixed by Rule 7d, the Supreme Court may, on the motion of any party accompanied by a proper showing, grant additional time for the preparation and filing of the bill of exceptions under such conditions as the court may require. A request for extension must be made within the time originally prescribed or within an extension previously granted.

EDWARD PRIGGE, APPELLANT, V. LARRY C. JOHNS, DIRECTOR OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, ET AL., APPELLEES.
186 N. W. 2d 497

Filed April 30, 1971. No. 37693.

Administrative Law: Motor Vehicles: Implied Consent Law: In-

toxicating Liquors. At a hearing before the Director of Motor Vehicles to revoke an operator's license under the implied consent law, findings of fact are sufficient to support a revocation order if they concisely state conclusions favorable to the order upon each contested issue of fact.

Appeal from the district court for Otoe County: WALTER H. SMITH, Judge. Affirmed.

William B. Brandt and Healey, Healey, Brown & Burchard, for appellant.

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

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

SMITH, J.

The district court dismissed an appeal by Edward Prigge from the Director of Motor Vehicles. The director had revoked the operator's license of Prigge under the implied consent law. See, §§ 39-727.08 to 39-727.11 and 60-420, R. R. S. 1943. The court concluded that the findings of fact and the conclusions of law by the director sustained the order of revocation. Prigge appeals. He asserts that the findings by the director do not support the order.

The director made findings like those we reviewed in Doran v. Johns, 186 Neb. 321, 182 N. W. 2d 900 (1971). There we affirmed dismissal of the operator's petition on appeal to district court. We decided that findings of fact by the director are sufficient to support a revocation order if they concisely state conclusions favorable to the order upon each contested issue of fact. The findings against Prigge are sufficient.

Other assignments of error are reviewed against the following background. In Prigge v. Johns, 184 Neb. 103, 165 N. W. 2d 559 (1969), we reviewed a revocation order based upon the same evidence that is now before us. We said: "The judgment of the district court is

reversed and the cause remanded with directions to the district court to remand the case to the director of motor vehicles to make findings of fact and conclusions of law supporting the order which he may issue." The district court complied. Although our mandate precluded a new evidentiary hearing, the director conducted one. The evidence, however, was the same as that received at the former hearing. We look through form to substance to determine that there has been one proceeding, not two.

Some of the other assignments of error were considered when the cause was before us in 1969. The rest of them come too late in light of our narrow mandate in 1969.

The judgment is affirmed.

AFFIRMED.

GIBREAL AUTO SALES, INC., A CORPORATION, DOING BUSINESS AS GIBREAL LEASING CO., APPELLANT, V. MISSOURI VALLEY MACHINERY CO. ET AL., APPELLEES.

186 N. W. 2d 719

Filed April 30, 1971. No. 37710.

1. **Security Interest: Leases or Consignments.** Unless a lease or consignment is intended as security, reservation of title thereunder is not a security interest.
2. **Liens: Bailments: Replevin.** A mechanic who has made repairs to an automobile, at the request of one who has possession thereof under a bailment lease, does not have a lien on the automobile for his services, against the real owner, and the latter is entitled to repossess himself of his property in an action of replevin.
3. **Liens: Contracts.** Whenever a workman or artisan by his labor or skill increases the value of personal property placed in his possession to be improved he has a lien upon it for his proper charges until paid, but in order to charge a chattel with this lien, the labor for which the lien is claimed must have been done at the request of the owner or under circumstances from which his assent can be reasonably implied.
4. **Replevin: Evidence: Trial.** Facts that transpire after the institution of a replevin action are immaterial in the consideration and determination of the merits of the case.

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

Floersch & Floersch, for appellant.

Swarr, May, Royce, Smith, Anderson & Ross, for appellee Missouri Valley Machinery Co.

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

WHITE, C. J.

This is an appeal from a district court judgment and jury verdict dismissing plaintiff's action in replevin and awarding damages to the defendant, Missouri Valley Machinery Company, by way of a lien for work done and material furnished on a 1967 over-the-road tractor. We reverse the judgment of the district court.

On July 5, 1968, the plaintiff entered into a written agreement with one Ronald Welty, who is now deceased and not a party to this action, whereby Welty agreed to lease a 1967 over-the-road tractor that was owned by the plaintiff. The lease was for 36 months with an option to purchase at the end of the term. It is undisputed that Welty received the tractor in good condition but that during the lease period it became damaged and was taken to the defendant for repairs. It is also undisputed that the plaintiff never expressly authorized the repairs the defendant made to the vehicle, nor did Welty or the defendant attempt to get the plaintiff's consent to the repairs or the work done by the defendant.

Under the lease agreement, Welty was required to furnish full maintenance and to return the tractor to the plaintiff in as good a condition as when he received it, ordinary wear and tear excepted. During the course of the lease Welty became delinquent in his payments and as a result the plaintiff has brought this action of replevin to recover possession of the tractor from the defendant, Missouri Valley Machinery Company, which

is claiming a lien for repairs under section 52-201, R. R. S. 1943. After hearing the evidence the district court dismissed the plaintiff's petition and submitted to the jury only the issue of the value of the defendant's right to possession. The jury found for the defendant in the sum of $4,764.31.

The first question necessary to decide is whether the agreement between the plaintiff and Welty was in fact a lease or, as the plaintiff contends, a sale with a purchase money security interest, that is, what was known prior to the Uniform Commercial Code as a conditional sales contract. We examine the specific provisions of the contract in order to determine the underlying intent of the parties as expressed in the lease agreement. Under the contract, which was expressly termed a lease agreement, Welty was to pay $1,000 a month for 36 months. At the end of that time he could purchase the equipment if he paid the additional and substantial sum of $8,580. Title to the vehicle at all times remained in the plaintiff. At all times the plaintiff had the right to terminate the agreement if the vehicle had either been "converted to uses other than for the purposes and in the territory intended at the time of signing" of the agreement or was being "abused by improper care or driving." In addition, and very significantly, the plaintiff had the right to change motor vehicles of like make and equipment at its discretion. It also appears from the record that both parties at the trial of this case consistently referred to the agreement as a lease and apparently tried it on the theory that it was a lease. It might appear that the question involved here is a close one, but an inspection of section 1-201(37), U.C.C., is the clue to our answer in this case. This section states in part: " 'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation. * * * Unless a lease or consignment is intended as security, reservation of title thereunder is not a 'security interest' * * *. Whether a lease is intended as security

is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property *for no additional consideration* or for a *nominal consideration* does make the lease one intended for security." (Emphasis supplied.)

We have little question as to what the correct solution of this issue is. It is clearly a lease agreement. The amount of consideration at the end of the lease period on the option was substantial. It was not nominal. There was no identification of a property interest in Welty since the plaintiff under the lease agreement could interchange and substitute a new tractor at any time. He was to receive possession and use for a definite period of time, and not indefinitely, and at the end of that period he could become the owner only by paying an amount equal to one-quarter of the total rent already paid. The totality of the circumstances demonstrate that the parties intended the transaction to be that which they said it was, a lease with an option to buy, and not a sale with a purchase money security interest. Therefore, it is clear that the Uniform Commercial Code provisions thereto do not apply. The plaintiff was entitled, as owner, to immediate possession of the vehicle on default of performance of the lease agreement.

The next question presented is whether the defendant, as an artisan, and furnishing the repairs to the vehicle that it did, is entitled to a lien under section 52-201, R. R. S. 1943. This section provides that if an artisan repairs a vehicle, *"at the request of or with the consent of the owner,"* the artisan has a lien on the vehicle to the extent of the work furnished. If his lien is valid, it follows that he has a right to retain the vehicle until the charges are paid, and this replevin action must fail. Welty, of course, could not have recovered the tractor from the defendant artisan, but the problem presented

here is between the plaintiff, the true owner of the property, and the artisan which performed the repair services. There being no specific request by the plaintiff to make the repairs in question nor no notice to the plaintiff of the nature and extent of the repairs, the question becomes whether, under the contract, the plaintiff had impliedly consented to the repairs the defendant made on the vehicle as well as the use of the vehicle as security for the repairs. The trial court accepted this theory, found that the plaintiff had impliedly consented to the repairs, and submitted the issue of the amount of damages to the jury. We do not agree.

The record shows that at all times the plaintiff was the legal owner of the vehicle and there was proper evidence on the vehicle itself by the registration certificate. The certificate of title at all times was in the possession of the plaintiff as the legal owner. It was clear that Welty was not an agent of the plaintiff, nor did he have any express authority to create a lien for repairs of the vehicle. While the contract did require Welty to furnish "full maintenance" and to return the vehicle in as good a condition as it was received, this does not reach the level of "consent" of the owner to subject the vehicle to a lien under section 52-201, R. R. S. 1943. Our research has discovered a case that is almost exactly in point. Bankers' Commercial Security Co., Inc. v. Brennan & Levy, 75 Pa. Super. 199 (1920). In that case the court set out the facts as follows: "This is an action of replevin for an automobile truck, upon which appellant, the intervening defendant, claims a lien by reason of work done by him upon it.

"The plaintiff is the owner of the truck. It was left with the appellant for repairs by Brennan, the defendant in the action, who was in possession under a contract of lease or bailment with the right to purchase on certain terms, which were unperformed and in default at the time the writ issued. *The contract provided that the lessee was to keep the truck in good order and repair*

and surrender the same at the expiration of the lease, or upon default in performance of any condition or covenant thereof, in as good condition as when received by the lessee, ordinary wear and tear excepted. While in Brennan's possession the truck was damaged by fire and he delivered it to the appellant to be repaired, without —so far as appears by the affidavit of defense filed by the appellant—the knowledge or authority of the owner. * * * In our opinion this case is governed by the decision in Meyers & Bro. v. Bratespiece, 174 Pa. 119. It is there held: 'Whenever a workman or artisan by his labor or skill increases the value of personal property placed in his possession to be improved he has a lien upon it for his proper charges until paid, but in order to charge a chattel with this lien, the labor for which the lien is claimed must have been done at the request of the owner or under circumstances from which his assent can be reasonably implied. It does not extend to one not in privity with the owners.' " (Emphasis supplied.)

Moreover the evidence in this case shows that the defendant made the repairs on the credit of Ronald Welty and not on the security of the tractor. The evidence shows that the repairs were charged to Welty, and not to the plaintiff. The defendant apparently made no attempt to determine the true owner of the vehicle even though it must be presumed that the registration certificate of the tractor was present and plainly visible on the vehicle. The registration certificate was an effective means by which the artisan could easily determine the status of its customer's title. Without further extension of this argument, it appears from the law, authority, and evidence in this case that the plaintiff was at all times the true owner of the vehicle in question and that it at no time gave either express or implied consent to have the repairs made, for which the damages were awarded. We conclude that the defendant did not have an effective artisan's lien against the plaintiff.

Therefore, by way of summary, it appears that the

plaintiff was the true owner of the property and as such owner was entitled to the possession on the default of Welty's lease obligation and that the defendant is in no better legal position than Welty was. It is not necessary in a lease agreement of this nature that there be a specific agreement to recover the vehicle in case of default.

It is true that the plaintiff returned the tractor to Welty after instituting this replevin action. However, that fact is not a relevant consideration for determination of this case since, under our law, facts that transpire after the institution of a replevin action are immaterial in the consideration and determination of the merits of the case. Alliance Loan & Investment Co. v. Morgan, 154 Neb. 745, 49 N. W. 2d 593 (1951).

For the reasons given, the judgment of the trial court is reversed and the cause remanded with directions to enter judgment for the plaintiff for the possession of the vehicle.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM MAURICE ANDERSON, APPELLANT.
186 N. W. 2d 479

Filed April 30, 1971. No. 37721.

1. **Criminal Law: Post Conviction.** Without a substantial basis a claim of prejudice from substitution of appointed counsel for defendant in a criminal prosecution is no ground for post conviction relief.
2. **Criminal Law: Post Conviction: Trial: Witnesses.** A decision by counsel to call or not to call a witness forms part of trial tactics, and ordinarily a mistaken decision in that respect is not sufficient for post conviction relief.

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

Walter Matejka and J. Patrick Green, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold S. Salter, for appellee.

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

SMITH, J.

The district court after an evidentiary hearing overruled a motion of defendant for post conviction relief. Defendant appeals. He contends that substitution of counsel appointed to represent him was ineffective.

Defendant and others were tried together in prosecutions for robbery. After a jury verdict of guilty defendant appealed. We affirmed. See State v. Anderson, 184 Neb. 868, 173 N. W. 2d 38 (1969). Defendant had been represented by counsel who had withdrawn the day prior to trial in order to represent another accused. Counsel feared a conflict of interest that was not to develop. Trial counsel was appointed the same day.

The record is clear that defendant related to trial counsel two or three alibis of which one came the morning of trial. Defendant supplied the name and address of a bartender who supposedly would support the first alibi. Investigation disclosed that the bartender recollected nothing favorable to defendant. No means of locating the other persons were furnished by defendant. None of those possible witnesses testified at the trial or the post conviction hearing, and their absence from the latter hearing went unexplained.

Without a substantial basis a claim of prejudice from substitution of appointed counsel for defendant in a criminal prosecution is no ground for post conviction relief. See, Chambers v. Maroney, 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970); State v. Putnam, 182 Neb. 185, 153 N. W. 2d 456 (1967). A decision by counsel to call or not to call a witness forms part of trial tactics, and ordinarily a mistaken decision in that respect is not sufficient for post conviction relief. See State v. Moss,

185 Neb. 536, 177 N. W. 2d 284 (1970). See, also, Eller v. Peyton, 210 Va. 454, 171 S. E. 2d 671 ((1970).

The denial of relief to defendant was correct.

AFFIRMED.

WARREN E. HAYES, APPELLANT, V. ANDERSON CONCRETE COMPANY, INC., A CORPORATION, ET AL., APPELLEES.
186 N. W. 2d 477

Filed April 30, 1971. No. 37741.

1. **Motor Vehicles: Negligence.** A driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving, even though he has the right-of-way. When one being in a place of safety sees, or could have seen, the approach of a moving vehicle in close proximity to him and moves from the place of safety into the path of such vehicle, and is struck, his own conduct constitutes contributory negligence.
2. **Trial: Instructions: Appeal and Error.** Instructions must be taken as a whole and construed together, and where the instructions covered the issues and fairly submitted the case to the jury, the jury's verdict will not be disturbed unless it is clearly erroneous.

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

Martin A. Cannon of Matthews, Kelley, Cannon & Carpenter, for appellant.

Walsh, Walentine, Wolfe, Miles & Katskee, for appellee Anderson Concrete Co., Inc.

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

McCOWN, J.

This is an action for personal injuries arising out of a collision between two trucks at an intersection. The issues were submitted to the jury and the verdict was for the defendant. We affirm the judgment.

The accident occurred at the intersection of 132nd

and L Streets in the outskirts of Omaha, Nebraska, on November 9, 1967, on a clear, dry afternoon. There are four lanes for through traffic, two in each direction, on both 132nd Street and L Street. There are traffic islands in the center of both streets in both directions from the intersection. The intersection is protected by traffic lights, but without left-turn signals. L Street is a divided highway at this point and the posted maximum speed limit on L Street, both east and west of 132nd Street, was 60 miles per hour. L Street runs generally east and west at the intersection, curving to the north some distance west of the intersection. At the intersection, 132nd Street runs generally north and south. There are left-turn holding lanes next to the traffic islands on L Street, both east and west of the intersection.

Plaintiff, Warren E. Hayes, was the driver of a truck owned by Ready Mixed Concrete Company. The truck was empty at the time. He was driving west on L Street and preparing to turn left at 132nd Street. The defendant's semi-trailer truck, loaded with 39,000 pounds of gravel, was being driven east on L street in the outside lane for through traffic. The driver was Forest Rainey, Jr. As the defendant's truck came around the curve to the west of the intersection, the traffic light was red. Defendant's driver began slowing down. His speed dropped to about 30 to 35 miles per hour as he approached the intersection. The light then turned green and he shifted gears and commenced to accelerate. Meanwhile, the plaintiff had followed another concrete-mixer truck driven by a fellow employee into the left-turn lane to the east of the intersection. That truck was stopped and waiting for the red traffic light. There was another truck driver behind the plaintiff in the left-turn lane. Both the driver ahead of the plaintiff and the one behind testified that while they were approaching or waiting at the red light, they saw the defendant's truck approaching from the west. When the light turned green, the driver in the truck ahead of the plaintiff pulled into the

intersection, turned left on 132nd Street, and drove out of the intersection without incident.

The plaintiff entered the intersection, began his left turn, and proceeded to the point of collision. The plaintiff testified that he had no recollection of any of the events after he started into the intersection. He testified that his turn signals were on. Several other witnesses did not see any turn-signal lights on plaintiff's truck. His speed was categorized as "just barely moving" or 3 or 4 miles an hour. There were no obstructions to vision for either driver.

The defendant's driver saw the first truck complete its left turn and drive out of the intersection; saw the plaintiff in the left-turn lane; and saw him moving forward. It appeared to him that the plaintiff had stopped and was waiting for him. He looked to his right and when he next saw the plaintiff's truck, it was almost in front of him. His speed was then 40 to 45 miles per hour. He put on his brakes, veered to the right and the two trucks collided in the southwest portion of the intersection.

The plaintiff's assignments of error are directed primarily at instructions omitted, refused, or given. The complaints as to instructions may be summarized as charging that the court refused to instruct the jury that the plaintiff had the right-of-way as a matter of law; that the defendant was negligent as a matter of law; or that the plaintiff was free from contributory negligence as a matter of law. The plaintiff's position, in reality, is that a left-turning motorist who was first in an intersection has an absolute right-of-way without any duty of lookout. Such a rule would only promote a blind race for an intersection and is clearly erroneous.

A driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving, even though he has the right-of-way. When one being in a place of safety sees, or could have seen, the approach of a moving vehicle in close proximity to him and moves

from the place of safety into the path of such vehicle, and is struck, his own conduct constitutes contributory negligence. Thomas v. Owens, 169 Neb. 369, 99 N. W. 2d 605.

The court fully instructed the jury as to right-of-way, signaling, and lookout, including the statutory provisions involved. The instructions fully and fairly submitted all of the issues to the jury. Instructions must be taken as a whole and construed together, and where the instructions covered the issues and fairly submitted the case to the jury, the jury's verdict will not be disturbed unless it is clearly erroneous. See Marquardt v. Nehawka Farmers Coop. Co., 186 Neb. 494, 184 N. W. 2d 617.

The plaintiff asserts that his motion for directed verdict should have been granted and that on the evidence here, the defendant was guilty of negligence as a matter of law and the plaintiff was not guilty of contributory negligence as a matter of law. Under any of these contentions, the defendant, as the successful party, was entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. See, Marquardt v. Nehawka Farmers Coop. Co., *supra;* Thomas v. Owens, *supra.* The issues were clearly for the jury and they were determined by the jury.

The judgment is affirmed.

AFFIRMED.

VERNON LAAKER, APPELLANT, V. CECIL L. HARTMAN, DOING BUSINESS AS HARTMAN CONSTRUCTION COMPANY, APPELLEE.
186 N. W. 2d 494

Filed April 30, 1971. No. 37750.

1. **Inviter and Invitee: Independent Contractors: Negligence.** One going upon another's property as an independent contractor is in the position of an invitee.
2. **Inviter and Invitee: Negligence.** While the owner of premises

owes the duty to an invitee to exercise ordinary care to have the premises in a reasonably safe condition for use in a manner consonant with the purposes of the invitation, generally, there is no duty on the part of an inviter owner to protect an invitee against hazards which are known to the invitee or are so apparent that he may reasonably be expected to discover them and protect himself.

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

John J. Higgins, Jr., and J. Patrick Green of Eisenstatt, Higgins, Miller & Kinnamon, and Charles A. Nanfito of Nanfito & Nanfito, for appellant.

Richard P. Jeffries, for appellee.

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

NEWTON, J.

This is a personal injury action brought by an independent subcontractor against a general contractor. Recovery is sought for injuries sustained as the result of a fall from a ladder in a house under construction. Plaintiff received a verdict which was set aside upon motion of defendant for judgment notwithstanding the verdict. We affirm the judgment of the district court for defendant.

Defendant, a general contractor, was engaged in building a two-story house with basement. The stairwells to the basement and second story were both L-shaped. A portable extension ladder, placed on the basement landing, was used to gain access to the second floor. The ladder was used by all the workmen including carpenters, electricians, plumbers, etc., and was moved as each saw fit. Plaintiff, a drywall contractor, examined the premises on October 20, 1967, and entered into a contract with defendant to do all drywall work for a set price. Plaintiff's men commenced work and it was substantially completed on November 6, 1967, when plaintiff, with

one of his men, appeared to finish the work and remove scraps. Plaintiff was told, if he wished, he could throw the scraps from the second floor out a window and, although it was muddy out, could pick them up later or could carry them out a window and over the garage roof which had a pitch of 4 inches per foot. He elected to carry them down the ladder and on the third or fourth trip, the ladder tipped to one side as he reached to pick up scraps and he fell. It is not contended that the ladder was in any way defective.

Plaintiff charges negligence in that the ladder was not fastened at the top and also because it was the custom to erect temporary stairs in lieu of a ladder. Plaintiff had observed the lack of stairs, and that the ladder was in use, when he entered into the contract, and had subsequently used the ladder on several occasions. He was fully aware of the conditions of which he complains. He elected to carry the scrap down the ladder rather than move it out a window or drop or lower it down the stairwell.

He relies on sections 48-425 and 48-435, R. R. S. 1943, which provide that a ladder, scaffold, etc., must be erected in a "safe, suitable and proper manner" and that in the event of a violation, an employee continuing in his employment does not assume the risk of such employment. He also relies on the provisions of the American Standard Safety Code for Building Construction which states ladders should be nailed or otherwise securely fastened. Plaintiff concedes that in the finished stairwell, it was impractical to fasten the top of the ladder as it would damage the completed drywalls.

The ladder was supplied by defendant for the use of any of the workmen wanting it. It was not defective and could be moved or placed in any area or manner desired by plaintiff. He was thoroughly familiar with ladders and their usage, knew the existing conditions, made no complaint, and made use of the ladder in the place and in the manner he desired. In doing so, he was

free to comply with the provisions of the safety code, and was, as an independent contractor, charged with taking any precautions deemed necessary in using the ladder for his own safety as well as that of his men. We do not believe the statutes are applicable in the circumstances presented. It was impractical to secure the ladder as suggested by the safety code, but if a duty devolved upon anyone to secure it, that duty was plaintiff's as an independent contractor, and he cannot foist it upon the defendant who supplied the means, i.e., the ladder, but not the manner of its usage.

One going upon another's property as an independent contractor is in the position of an invitee. See, 41 Am. Jur. 2d, Independent Contractors, § 27, p. 781; Long Construction Co. v. Fournier, 190 Okla. 361, 123 P. 2d 689; Braun v. Wright, 100 Ga. App. 295, 111 S. E. 2d 100; Niemeyer v. Forburger, 172 Neb. 876, 112 N. W. 2d 276.

"While the owner of premises owes the duty to an invitee to exercise ordinary care to have the premises in a reasonably safe condition for use in a manner consonant with the purposes of the invitation, generally, there is no duty on the part of an inviter owner to protect an invitee against hazards which are known to the invitee or are so apparent that he may reasonably be expected to discover them and protect himself." Costello v. Simon, 180 Neb. 35, 141 N. W. 2d 412. See, also, Crawford v. Soennichsen, 175 Neb. 87, 120 N. W. 2d 578; Annotation, 44 A. L. R. 894.

In the present instance, the absence of temporary stairs and the use of the ladder were apparent. Plaintiff was very familiar with ladders, their usage, and their failings. Any attendant hazard was open and obvious. It was one of which plaintiff was aware and with which he was familiar. We are unable to ascertain wherein the defendant was guilty of any negligence. To the contrary, it appears that any negligence attendant upon the accident was necessarily that of the palintiff.

The judgment of the district court is affirmed.

AFFIRMED.

MARGARET MUNSON, APPELLANT, V. BISHOP CLARKSON MEMORIAL HOSPITAL, A CORPORATION, APPELLEE.
186 N. W. 2d 492

Filed April 30, 1971. No. 37763.

1. **Negligence: Words and Phrases.** The maxim volenti non fit injuria means: If one, knowing and comprehending the danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom.
2. **Negligence.** The maxim volenti non fit injuria is applicable to negligence actions in this jurisdiction and is not inconsistent with the defense of contributory negligence.
3. **Trial: Instructions.** It is the duty of the trial court to submit to the jury all material issues which are presented by the pleadings and supported by evidence.

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

Harold W. Kauffman and Eugene P. Welch of Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellant.

John B. Henley of Cassem, Tierney, Adams & Henatsch, for appellee.

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

NEWTON, J.

Plaintiff seeks to recover for personal injuries sustained in a fall while crawling out over the foot of a hospital bed. Verdict and judgment were entered for defendant. On appeal, the only question presented is the propriety of an instruction on assumption of risk. We affirm the judgment of the district court.

The propriety of the instruction on assumption of risk depends upon the evidence. Was there evidence,

although not undisputed, to support it? Plaintiff maintains that shortly after 9 p.m. on April 22, 1967, while in a hospital bed with the side rails raised, she found it necessary to urinate and pushed the button to energize the signal light and call for assistance. She says she waited 30 or 40 minutes until her situation became urgent and help not having arrived, she attempted to get out over the foot of the bed. She further states that she fell, injured her hip, and accidentally urinated on the floor.

Another lady, occupying the same room, saw plaintiff fall and helped her back into bed. She says plaintiff did not first go to the toilet before returning to bed and she does not mention any urination on the floor or change of night clothing. Nothing was said about the call light or a failure to answer it and she did not observe that it was on.

The hospital records, verified by nurses making the entries, disclose that at 9 p.m. on the evening in question a nurse attended plaintiff, spent 15 to 30 minutes preparing her for sleep, and had her urinate so that a sample could be obtained. When the call light is operated, it lights a light in the patient's room, one over the door, one in the utility room, and one at the nurses' station. It also activates a buzzer at the nurses' station which can only be shut off in the patient's room. It is the practice to answer calls as quickly as practicable and generally within 3 to 5 minutes.

The evidence would support a finding contrary to plaintiff's asserted urgent need to go to the toilet and to her assertion that her call was ignored. There is also evidence that plaintiff had been warned several times to call for assistance when she desired to leave her bed and not to attempt it by herself. In view of the warnings she had received, the jury could find she was aware of the risk in getting out of bed as she did. It could also find that she deliberately and unnecessarily assumed that risk.

"The maxim 'volenti non fit injuria' means: If one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom." The maxim is applicable to negligence actions in this jurisdiction and is not inconsistent with the defense of contributory negligence. O'Brien v. Anderson, 177 Neb. 635, 130 N. W. 2d 560. See, also, Kaufman v. Tripple, 180 Neb. 593, 144 N. W. 2d 201.

As pointed out above, there was evidence submitted in the trial of this case sufficient, if believed, to establish all the elements inherent in the defense of assumption of risk. It was not error to instruct on this defense. It is the duty of the trial court to submit to the jury all material issues which are presented by the pleadings and supported by evidence. Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531, 82 A. L. R. 2d 714; Stillwell v. Schmoker, 175 Neb. 595, 122 N. W. 2d 538.

The judgment of the district court is affirmed.

AFFIRMED.

IDA M. SIMS, APPELLANT AND CROSS-APPELLEE, V. IRVIN SIMS, APPELLEE AND CROSS-APPELLANT.
186 N. W. 2d 491

Filed April 30, 1971. No. 37772.

1. **Divorce.** An award of alimony in the technical sense cannot be made to a husband.
2. **Divorce: Contracts.** An antenuptial agreement containing no provision to the contrary is not affected by a divorce of the parties.

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

Andrew J. McMullen, for appellant.

Nye, Wolf & Hove, for appellee.

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

BOSLAUGH, J.

The plaintiff, Ida M. Sims, appeals from a judgment granting her an absolute divorce from the defendant, Irvin Sims, and awarding the defendant a judgment against her in the amount of $6,446.09 less costs and attorney's fees.

This is a second appeal. On the first trial the action was dismissed at the close of plaintiff's evidence. The judgment was reversed and the cause remanded for a new trial in Sims v. Sims, 185 Neb. 479, 176 N. W. 2d 683. No issue is raised on this appeal concerning the divorce granted to the plaintiff.

The parties were married for the second time on January 27, 1966. Previously they had been married to each other and to third parties. On January 26, 1966, the parties entered into an antenuptial agreement in which each party waived all rights in the property of the other except that the defendant was to have the plaintiff's home, her automobile, and $10,000 if he should survive her. The agreement as originally drafted further provided that in the event of a divorce between the parties, the agreement would be void. The defendant objected to this provision and it was lined out before the agreement was executed.

The defendant's answer prayed, in the event a divorce was granted, that a division of property be made in accordance with the agreement. The trial court found that the value of the residence property was $10,000; that the total value of the property due the defendant under the agreement was $20,000; that its present value was $6,446.09; and that the defendant should have judgment against the plaintiff in the amount of $6,446.09.

The plaintiff contends that the trial court erred in making any award of property to the defendant. By cross-appeal the defendant contends that the trial court

should have awarded him $20,000, or $10,000 and the residence.

In White v. White, 112 Neb. 850, 201 N. W. 662, it was held that an antenuptial contract is not a limitation upon the amount of alimony that can be awarded to a wife but that it should be considered with the other evidence in the case. In Kroger v. Kroger, 153 Neb. 265, 44 N. W. 2d 475, an antenuptial agreement was considered in fixing the amount of alimony to be awarded to the wife. The defendant in this case is the husband to whom an award of alimony in the technical sense cannot be made. Greene v. Greene, 49 Neb. 546, 68 N. W. 947; Bristol v. Bristol, 107 Neb. 321, 185 N. W. 972.

The general rule is that an antenuptial agreement containing no provision to the contrary is not affected by a divorce of the parties. As stated in Crise v. Smith, 150 Md. 322, 133 A. 110, 47 A. L. R. 467: "So, the general rule, deducible from the great weight of authority, is that a marriage settlement, which was valid in its formation and which was not fraudulently induced in contemplation of the subsequent marital misconduct, is not abrogated by the divorce of the parties for marital misconduct arising after the marriage, unless the language of the instrument or contract contains an express provision against the conduct in question." See, also, Annotations, 47 A. L. R. 473, 95 A. L. R. 1469.

The circumstances in this case show that the parties intended that the agreement should remain effective in the event of divorce. In the absence of circumstances compelling some other result, this intention should be given effect, but this does not entitle the defendant to an award of property at this time based upon the agreement.

The judgment of the district court is modified by deleting that part which grants the defendant a judgment against the plaintiff in the amount of $6,446.09. As modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD LEE LINCOLN, APPELLANT.

186 N. W. 2d 490

Filed April 30, 1977. No. 37788.

1. **Post Conviction: Appeal and Error.** 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.
2. **Post Conviction: Appeal and Error: Trial.** Where the facts and issues which are the grounds of a motion for post conviction relief were known to the defendant and his counsel, and were raised, heard, and determined at the time of the trial resulting in his conviction but were not raised in his direct appeal, those issues will not ordinarily be considered in a post conviction review.

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

Edward Lee Lincoln pro se.

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

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

McCOWN, J.

The defendant appeals from the denial of an evidentiary hearing on his motion for post conviction relief. His original conviction and sentence were affirmed on direct appeal in State v. Lincoln, 183 Neb. 770, 164 N. W. 2d 470.

The motion is essentially directed to three issues which provide the alleged grounds for relief: (1) Overruling of a motion for continuance based on a delayed endorsement of witnesses and advance of trial date; (2) denial of a motion for mistrial based on statements made by the prosecuting attorney in opening argument; and (3) an allegedly erroneous instruction to the jury.

The matters involved in the first two issues were

known to defendant and his counsel at the time of trial. They were fully objected to, heard, and determined at the time by the trial court. These two issues were not raised in the direct appeal. The third issue was raised in the direct appeal and specifically passed on by this court.

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.

Where the facts and issues which are the grounds of a motion for post conviction relief were known to the defendant and his counsel, and were raised, heard, and determined at the time of the trial resulting in his conviction but were not raised in his direct appeal, those issues will not ordinarily be considered in a post conviction review. For cases related in principle, see, State v. Losieau, 182 Neb. 367, 154 N. W. 2d 762; State v. LaPlante, 185 Neb. 816, 179 N. W. 2d 110.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM MCMILLIAN ET AL., APPELLANTS.

186 N. W. 2d 481

Filed April 30, 1971. No. 37793.

Criminal Law: Post Conviction: Pardons and Paroles. A committed offender is eligible for release on parole upon completion of his minimum term less reductions, or upon completion of the minimum sentence provided by law less reductions if approved by the sentencing judge or his successor.

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

William McMillian pro se.

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

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

BOSLAUGH, J.

The defendants, William McMillian and Benjamin Brock, pleaded guilty to burglary and were each sentenced to 5 years' imprisonment. They seek post conviction relief on the ground that their pleas were involuntary because they were not advised that they would be ineligible for parole if they received "flat" sentences instead of "split" sentences.

Under section 83-1,110, R. S. Supp., 1969, the defendants are eligible for release on parole upon completion of their minimum terms less reductions, or upon completion of the minimum sentences provided by law less reductions if approved by the sentencing judge or his successor in office.

The judgment denying post conviction relief is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD WELLINGTON RAPP, APPELLANT.

186 N. W. 2d 482

Filed April 30, 1971. No. 37804.

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 Douglas County: LAWRENCE C. KRELL, Judge. Affirmed.

Harold Wellington Rapp pro se.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

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

NEWTON, J.

Defendant, pursuant to a plea of guilty, was convicted of the offense of burglary. See State v. Rapp, 184 Neb. 156, 165 N. W. 2d 715. This is the second of two post conviction proceedings brought by defendant. At the time of his conviction, he was represented by counsel. It is now his contention that plea bargaining was entered into, that he was thereby assured of a lesser sentence than the one received, and that his counsel was ineffective. We affirm the judgment of the district court dismissing defendant's motion.

The record discloses that defendant had been previously convicted of felonies on five occasions. At the time of his arraignment, he assured the court that there had not been any plea bargaining and that he had been effectively represented by counsel. He was informed by the court that in the event there had been any plea bargaining, the court was not a party to it and it would not be binding on the court. This he stated he understood. It is evident that defendant was not deceived in any manner, was ably represented, and that his constitutional rights were not infringed upon. "In a post conviction proceeding, petitioner has the burden of establishing a basis for relief." State v. Raue, 182 Neb. 735, 157 N. W. 2d 380.

The judgment of the district court is affirmed.

AFFIRMED.

MARTHA A. AVERY HIDDLESTON ET AL., APPELLANTS, V. NEBRASKA JEWISH EDUCATION SOCIETY, A CORPORATION, ET AL., APPELLEES.

186 N. W. 2d 904

Filed May 7, 1971. No. 37736.

1. **Deeds: Estates.** **Circumstances in which grantors convey land**

may indicate an intent to create an estate in fee simple determinable and not an estate in fee simple absolute.

2. **Constitutional Law: Statutes: Contracts.** Constitutionality of a retroactive statute under the contract and due process clauses of the United States and the Nebraska Constitutions generally depends upon reasonableness. Relevant factors are the nature and strength of the public interest, the extent of modification of the asserted preenactment right, and the nature of the right altered by the statute.
3. **Constitutional Law: Statutes: Contracts: Eminent Domain.** Section 76-2,102, R. R. S. 1943, of the reverter act, either on its face or in its application to plaintiffs, did not violate the due process or the contract clause of the United States or the Nebraska Constitution or the eminent domain provision of the latter Constitution.

Appeal from the district court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Hunter, Venteicher, Caniglia & Kasher, for appellants.

D. C. Bradford and Howard Fredrick Hahn of Monsky, Grodinsky, Cohen, Garfinkle & Zweiback, for appellees.

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

SMITH, J.

In this quiet title suit plaintiffs alleged that (1) their predecessors had conveyed to predecessors of defendants an estate in fee simple determinable; (2) the event stated in the conveyance had occurred, terminating defendants' interest; and (3) a statute providing for retroactive invalidity of possibilities of reverter such as that claimed by plaintiffs was unconstitutional. Defendants demurred, arguing the conveyance of an estate in fee simple absolute and the constitutionality of the reverter statute. From an order of dismissal on the demurrer plaintiffs appeal.

Plaintiffs are the heirs-at-law of Hiram R. and Minnie Avery, deceased. The Averys once owned an acre of land square in form and located in the corner of a section. On June 20, 1891, for a consideration of $100,

they conveyed the parcel by warranty deed to trustees of School District No. 60. Plaintiffs and defendants attach no signigifance to the trust, treating the conveyance as one directly to the district.

In the description of the land the Averys' deed stated: "This Deed is to become null and void as soon as the land ceases to be used as school property." No other language in the deed indicated conveyance of an estate lesser than a fee simple absolute. The land was used as school property until November 1968. The School District of Omaha, successor in interest to School District No. 60, then sold the land as surplus to the highest bidder.

An estate in fee simple determinable is created by any limitation which, in an otherwise effective conveyance of land, (1) creates an estate in fee simple; and (2) provides that the estate shall automatically expire upon the occurrence of a stated event. It requires a special limitation which causes the created interest automatically to expire upon the occurrence of a stated event, and thus provides for a terminability in addition to that normally characteristic of such interest. Dell v. City of Lincoln, 170 Neb. 176, 187, 102 N. W. 2d 62 (1960); Ohm v. Clear Creek Drainage Dist., 153 Neb. 428, 45 N. W. 2d 117 (1950). Circumstances in which grantors convey land may indicate an intent to create an estate in fee simple determinable and not an estate in fee simple absolute. Restatement, Property, § 44, Comment m, p. 129.

Defendants argue that the Averys simply set forth the purpose of the conveyance without limiting the estate conveyed. They cite what was then Article VIII (now Article VII), section 2, Constitution of Nebraska: "All lands, money or other property granted, or bequeathed, or in any manner conveyed to this state for educational purposes, shall be used and expended in accordance with the terms of such grant, bequest, or conveyance."

At the time of the Averys' deed a school district had power to purchase, hold, and sell such property as the law allowed. Laws 1881, c. 78, subdiv. I, §§ 2, 13, and 14, pp. 331, 335, and 336. From 1881 to 1905 its power of eminent domain was limited: "The school board . . . may . . . occupy the land as long as the district desires to use it for district purposes; but should the same cease to be used for school purposes it will revert back to the owner of the fee simple of the land from which it was taken on the payment by him of the amount originally paid for the land without interest. . . . When land is thus taken without the consent of the owner, it shall not be more in amount than one acre . . .." Laws 1881, c. 78, subdiv. XII, §§ 2 and 3, pp. 371 and 372. In 1905 a provision authorized city school districts to acquire an estate in fee simple absolute by eminent domain. Laws 1905, c. 136, pp. 567 to 570.

Averys' deed was subject to two statutory rules of construction. An otherwise effective conveyance transferred the entire interest which the grantor had power to convey, unless an intent to transfer a lesser interest was effectively manifested. Courts in construing deeds were to effect the true intent collectible from the instrument and consistent with rules of law. See Comp. St. 1887, c. 73, §§ 50 and 53, p. 579.

The constitutional provision for schools and the provision in the Averys' deed were nowise comparable. The deed conveyed an estate in fee simple determinable.

Section 76-2,102, R. R. S. 1943, whose constitutionality was challenged by plaintiffs, had been enacted by Laws 1959, c. 350, § 4, p. 1237. It provided: "Neither possibilities of reverter nor rights of entry or reentry for breach of condition subsequent, whether heretofore or hereafter created, where the condition has not been broken shall be valid for a longer period than thirty years from the date of the creation of the condition or possibility of reverter. If such a possibility of reverter or right of entry or reentry is created to endure for a

longer period than thirty years, it shall be valid for thirty years."

Constitutionality of a retroactive statute under the contract and due process clauses generally depends upon reasonableness. Relevant factors are the nature and strength of the public interest, the extent of modification of the asserted preenactment right, and the nature of the right altered by the statute. See, City of El Paso v. Simmons, 379 U. S. 497, 506 to 509, 85 S. Ct. 577, 13 L. Ed. 2d 446 (1965); Veix v. Sixth Ward Bldg. & Loan Assn., 310 U. S. 32, 60 S. Ct. 792, 84 L. Ed. 1061 (1940); Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 74 L. Ed. 413, 88 A. L. R. 1481 (1934). See, also, Hochman, "The Supreme Court and the Constitutionality of Retroactive Legislation," 73 Harv. L. Rev. 692 (1960); Note, 65 Colum. L. Rev. 1272 (1965). "The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line . . . are fixed by decisions that this or that concrete case falls on the nearer or farther side." Hudson Water Co. v. McCarter, 209 U. S. 349, 355, 28 S. Ct. 529, 52 L. Ed. 828 (1908).

Statutes somewhat similar to the one before us were invalid in Biltmore Village, Inc. v. Royal, 71 So. 2d 727, 41 A. L. R. 2d 1380 (Fla., 1954); and Board of Education of Central School Dist. No. 1 v. Miles, 15 N. Y. 2d 364, 207 N. E. 2d 181 (1965). On the other hand, the Supreme Court of Illinois in an opinion by Mr. Justice Schaefer in Trustees of Schools of Township No. 1 v. Batdorf, 6 Ill. 2d 486, 130 N. E. 2d 111 (1955) upheld a statute similar to ours. The Illinois court pointed out that possibilities of reverter were not voluntarily alienable inter vivos without indicating that the rule was crucial. See, also, Hijos v. Feliciano, 260 F. 2d 500, (1st Cir., 1958).

The value of possibilities of reverters as a class has been slight. Maturity of the interest in English common law was so rare that the courts did not expressly

decide whether a holder of a possibility of reverter might voluntarily alienate his interest inter vivos. Analogies of the law of rights of reentery and executory interests pointed to inalienability. I American Law of Property, § 4.65, p. 521 (1952). Contingent interests in land became alienable under 8 and 9 Victoriae, c. 106, § VI (1845), but our adoption of the English common law did not embody those statutes. Brooks v. Kimball County, 127 Neb. 645, 256 N. W. 501 (1934). Plaintiffs' possibility of reverter in the year 1959 had no such value that the eminent domain provision of the Constitution of Nebraska protected them. See State v. County of Cheyenne, 157 Neb. 533, 60 N. W. 2d 593 (1953).

The Legislature may reasonably have intended the reverter act to increase utility of land and marketability of titles by methods that were certain, uniform, and inexpensive. See Note, 65 Colum. L. Rev. 1272 (1965). Section 76-2,102, R. R. S. 1943, either on its face or in its application to plaintiffs, did not violate the due process or the contract clause of the United States or the Nebraska Constitution. The possibility of reverter was not protected by the eminent domain provision of the Constitution of Nebraska.

The judgment was correct.

AFFIRMED.

NEWTON, J., concurring.

I concur with the opinion of Smith, J. This case is one dealing with a fee simple determinable and a possibility of reverter. Whether or not a possibility of reverter consists of a vested or unvested interest in realty, it is clear that the contract or conveyance setting it up has provided for certain contract rights which vested upon the execution and delivery of the deed. In the past, such contract rights have ordinarily been held to be constitutionally protected against invasion by retrospective legislation. See Dell v. City of Lincoln, 170 Neb. 176, 102 N. W. 2d 62. It is a well-recognized rule that property and contract rights may not be interfered

with unless such interference can be justified under the police power. Unless so justified, the retrospective features of section 76-2,102, R. R. S. 1943, are clearly unconstitutional.

Changing or modern conditions have a direct bearing upon the interpretation of the police power. In Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 74 L. Ed. 413, 88 A. L. R. 1481, it is said: "The great clauses of the Constitution must be considered in the light of our whole experience, and not merely as they would be interpreted by its framers in the conditions and with the outlook of their time." It is further stated that the contract clause must be construed in harmony with the reserved power of the state to safeguard the vital interests of her people. Reservation of such essential sovereign power is read into contracts. The legislation is to be tested, not by whether its effect upon contracts is direct or is merely incidental, but upon whether the end is legitimate and the means reasonable and appropriate to the end.

Possibilities of reverter or reentry when incorporated in real estate conveyances frequently, as in the case before us, extend over long periods of time and from generation to generation. As a result, the present-day owners of such possibilities often cannot be ascertained or located and it becomes impossible to obtain releases in the ordinary manner. In the meantime, the use of affected property is restricted, its merchantability is destroyed, improvement and development are prohibited, it may run afoul of zoning regulations, and an entire community may be detrimentally affected. Determinable fees are akin to various types of restraints on alienation. Such restraints are contrary to public policy, are subject to strict construction, and frequently voided. Formerly, when this nation consisted primarily of rural areas and small villages, little if any harm resulted from such restrictive conveyances. With the increase in population and the growth of our cities, a different pic-

ture is presented. Were we to set down in the center of a modern city a 1-acre tract of land, the use of which was so circumscribed, it can be readily seen that the development of the city could be restricted and delayed.

Until the occurrence of the event which converts a fee simple determinable or possibility of reverter into a fee simple, the owner of the possibility has something of very little value, yet the damage to the community by reason of the existence of the determinable fee may be great. The benefits to be derived from the alleviation of such conditions, the correction of titles, and the restoration of affected properties to the market would appear to far outweigh the loss sustained by the individual holders of possibilities of reverter. Such legislation is in the public interest and promotes the public welfare. It is within the purview of and a reasonable exercise of the police power. The discretion of the Legislature is very large in the exercise of the police power, both in determining what the interests of the public require and what measures and means are reasonably necessary for the protection of such interests. Whether an exercise of the police power bears a real and substantial relation to the public interest and welfare, and whether it is reasonable or arbitrary are questions committed in the first instance to the Legislature and its decisions will not be interfered with by the courts unless clearly erroneous. See, 16 Am. Jur. 2d, Constitutional Law, § 281, p. 544, and § 282, p. 548.

LLOYD V. PESTER ET AL., APPELLEES, V. AMERICAN FAMILY MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLANT.

186 N. W. 2d 711

Filed May 7, 1971. No. 37754.

1. **Appeal and Error. The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and**

will not be disturbed on appeal unless clearly wrong.

2. **Waiver: Insurance.** A waiver is the voluntary and intentional relinquishment of a known right and may be established by acts and conduct from which an intention to waive may reasonably be inferred.

3. **Estoppel: Insurance.** The essential elements of equitable estoppel are: As to party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

4. ———: ———. A party is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith relied thereon.

5. **Forfeitures and Penalties: Insurance.** Where a custom of giving notice of the due date of premiums has been definitely established, the insured has a right to rely on such notice, and in the absence thereof, a policy may not be terminated or forfeited for nonpayment of premiums without notice to the insured that the custom has been abandoned.

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

Chambers, Holland, Dudgeon & Beam, for appellant.

M. J. Bruckner of Marti, O'Gara, Dalton & Bruckner, for appellees.

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

NEWTON, J.

This is a declaratory judgment action instituted for

the purpose of determining whether or not a policy of insurance issued by defendant had terminated prior to the occurrence of events otherwise establishing liability under the policy. A jury was waived and plaintiffs recovered judgment in the district court. We affirm the judgment so entered.

For a number of years plaintiffs had carried policies of automobile liability insurance with the defendant company. One policy covering a Chevrolet station wagon was paid up to January 30, 1966. Premiums fell due at 6-month intervals. The policy was a continuing one containing the following provisions: "Subject to the company's consent, this policy may be continued in force for successive policy periods by the payment of the required premium for each such period on or before the effective date of each such period. If such premium is not paid when due, this policy shall terminate at the end of the last policy period for which the premium was paid. Each such policy period shall begin and end at 12:01 A.M., standard time at the address of the named insured as stated in the declarations." In the past, plaintiffs had regularly received notice of premiums due from defendant. On February 8, 1966, plaintiffs were involved in an accident. The Chevrolet was demolished and plaintiffs injured. The operator of the other vehicle was not insured and plaintiffs seek to recover under the uninsured motorist coverage provided by the policy. The premium due on January 30, 1966, remained unpaid until payment was tendered to defendant's agent on February 11, 1966. Defendant offered to accept the payment on a new policy but refused to apply it on a renewal of the old policy. Plaintiffs rejected the new policy. The premium due January 30, 1966, had increased over the former premium.

The evidence is conflicting in regard to whether or not plaintiffs received a notice of premium falling due on January 30, 1966. This being a law action, we are constrained to follow the findings of fact made by the trial

court. "The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong." State Farm Mutual Automobile Ins. Co. v. Kersey, 171 Neb. 212, 106 N. W. 2d 31. "A verdict of a jury in a law action based upon conflicting evidence will not be disturbed on appeal unless clearly wrong." Countryman v. Ronspies, 180 Neb. 76, 141 N. W. 2d 425.

The court found that defendant was estopped to assert that the policy had lapsed and, in so doing, necessarily found that plaintiffs had not received the usual notice of premium due with reference to the one accruing on January 30, 1966; that plaintiffs relied and depended upon receipt of such notice; and that they could and would have paid the premium without defaulting had the notice been received.

It is clear that plaintiffs were in default and that the policy had lapsed unless defendant's conduct, by reason of waiver or estoppel, precludes a forfeiture of the policy. Defendant relies upon two Nebraska cases which, under their respective facts, are not applicable to the present case. In Peterson v. State Automobile Ins. Assn., 160 Neb. 420, 70 N. W. 2d 489, the policy involved was not a continuing type of policy. It was issued for one year and could not be extended, only replaced by a new policy. In Siewerdsen v. United States F. & G. Co., 184 Neb. 870, 173 N. W. 2d 27, the same situation is presented. There the insured sought to recover on a renewal policy which had been prepared but never delivered to him.

Under the policy now before us, defendant was not obligated to notify the plaintiffs of the accrual of premiums. Does the fact that it did so waive objection to a late payment of the premium or estop it from asserting a lapse of the policy? There is some conflict in the cases on this question. See, Annotations, 52 A. L. R. 2d 1157, 85 A. L. R. 2d 1410. It appears to be the majority rule that in cases where the amount of the premium

varies and is not fixed for the life of the policy, or where it is customary for the insurer to forward notices of premiums accruing, or where such notice is required by statute, a failure to give such notice precludes a forfeiture of the policy. See 43 Am. Jur. 2d, Insurance, §§ 553, 554, and 555, pp. 570 and 571. See, also, Seavey v. Erickson, 244 Minn. 232, 69 N. W. 2d 889, 52 A. L. R. 2d 1144; Minnick v. State Farm Mutual Auto. Ins. Co., 54 Del. 125, 174 A. 2d 706.

As previously noted, the policy in question did not require the defendant to notify the plaintiffs of the pendency of premuim-due dates or make demand for the premiums. Defendant had the right to require the plaintiffs to assume the burden of keeping track of premium-due dates. Notwithstanding this situation, defendant elected to give notice to the plaintiffs of the amount of each premium and the due date. This practice was followed over a period of many years. It is a common practice followed by insurance companies with a view to retaining and furthering their business. It is likewise a practice with which the general public is familiar and upon which it has come to depend. In the present case, plaintiffs were no different from others. They were familiar with the long established practice and had come to rely on it. The necessity for issuance of a notice of premium due is particularly apparent where, as here, there has been a change in the amount due. Until plaintiffs received word of the sum due, they were not in position to pay it. We can only conclude that defendant knowingly and intentionally waived the right to require the plaintiffs to ascertain the premium-due dates and make payments without any notice or demand from defendant. A waiver is the voluntary and intentional relinquishment of a known right and may be established by acts and conduct from which an intention to waive may reasonably be inferred. See, 28 Am. Jur. 2d, Estoppel and Waiver, §§ 154 and 160, pp. 836 and 845; Lipe v. World Ins. Co., 142 Neb. 22, 5 N. W. 2d 95.

What then is the effect of such a waiver and of plaintiffs' reliance thereon? The plaintiffs had learned that they would be notified of each premium accruing, the amount due, and the date due, in time to pay it and avoid the lapsing of their policy. They relied upon this practice and made no effort to otherwise ascertain or keep track of the times when premiums fall due. If, as the trial court found in the present case, the practice is inadvertently not followed, the plaintiffs remain unaware that a premium is due and fail to pay it in time to prevent a lapse of their policy. The lapse occurs through no fault of the plaintiffs who are ready and able to pay and desirous of doing so. On the contrary, the lapse is due solely to the inadvertent failure of the defendant to adhere to its prior practice. Does this estop defendant from asserting a lapse of the policy by reason of nonpayment of premium?

The elements of estoppel are present. Waiver of the contract right to forebear notice of premiums falling due conveys the impression that without such notice a forfeiture will not be declared and is inconsistent with defendant's present position. It was intended that the practice of giving notice would influence the plaintiffs and be acted on and defendant was at all times aware of all pertinent facts. Plaintiffs had no knowledge of the amount of the premium due or of defendant's intent to deny its waiver of the right to forebear giving notice of premiums due and insist upon a forfeiture. They relied in good faith on defendant's established practice and, if defendant's contention is upheld, find themselves without insurance and without a possibility of reimbursement for injuries and damage sustained. The essential elements of equitable estoppel are: As to the party estopped, "* * * (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;

(2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts." As to the other party, "* * *(4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice." 28 Am. Jur. 2d, Estoppel and Waiver, § 35, p. 640. See, also, Bastian v. Weber, 150 Neb. 709, 35 N. W. 2d 791; John Deere Co. v. Conet, 185 Neb. 135, 174 N. W. 2d 85. A party is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith relied thereon. See, May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448; National Union Fire Ins. Co. v. Bruecks, 179 Neb. 642, 139 N. W. 2d 821.

We are prone to agree with the statement found in 43 Am. Jur. 2d, Insurance, § 1143, p. 1067, which is as follows: "Where a custom of giving notice of the due date of premiums has been definitely established, the insured has a right to rely on such notice, and in the absence thereof, a policy may not be terminated or forfeited for nonpayment of premiums without notice to the insured that the custom has been abandoned." Decisions adhering to this proposition are: Minnick v. State Farm Mutual Auto. Ins. Co., 54 Del. 125, 174 A. 2d 706; Seavey v. Erickson, 244 Minn. 232, 69 N. W. 2d 889, 52 A. L. R. 2d 1144; Knoebel v. North American Acc. Ins. Co., 135 Wis. 424, 115 N. W. 1094; Truck Ins. Exch. v. Industrial Acc. Com., 36 Cal. 2d 646, 226 P. 2d 583.

The judgment of the district court is affirmed.

AFFIRMED.

CARTER, J., not participating.

JAMES BROWN, APPELLANT, V. MAURICE H. SIGLER, WARDEN, NEBRASKA PENAL COMPLEX, APPELLEE.

186 N. W. 2d 735

Filed May 7, 1971. No. 37765.

1. **Criminal Law: Pardons and Paroles: Constitutional Law: Penal Institutions.** A committed offender while on parole shall remain in the legal custody and control of the Board of Parole. The board may at any time revoke the parole of an offender or recommit him to the custody of the Division of Corrections, with or without cause.
2. ———: ———: ———: ———. A state is not required to provide for parole and, if it does, it may stipulate terms and conditions under which it may be granted or revoked.
3. ———: ———: ———: ———. Constitutional due process does not require the Board of Parole to conduct an adversary hearing to revoke parole, nor does it require appointment of counsel for indigent parolees or compulsory process.
4. ———: ———: ———: ———. The good time reductions provided in section 83-1,107, R. S. Supp., 1969, are used to determine eligibility for release on parole or supervision and are subject to forfeiture.

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

James Brown pro se.

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

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

SPENCER, J.

James Brown, a parole violator, appeals from the denial of an application for a writ of habeas corpus. He premises his right to a writ on three grounds: (1) Failure of the State to provide him counsel at the parole revocation hearing; (2) failure to provide compulsory process; and (3) forfeiture of institutional good time previously earned.

Petitioner, in impliedly questioning the constitution-

ality of the revocation proceeding, has apparently confused revocation of parole with revocation of probation. They are not the same. Petitioner, after being validly sentenced, was incarcerated. He was later paroled as a matter of legislative grace and not constitutional right. The Legislature saw fit to give the Board of Parole the absolute right to conditionally grant parole, and, as set out later, to revoke it with or without cause. When the parole was revoked petitioner was not given a new sentence but rather was reincarcerated to serve the balance of the sentence previously imposed.

Petitioner's first two assignments of error, his right to appointed counsel and compulsory process, are based on his erroneous assumption that a judicial hearing with its attendant due process is required before the Board of Parole. We do not so construe the statute.

Section 83-1,121, R. S. Supp., 1969, provides: "A committed offender while on parole shall remain in the legal custody and control of the Board of Parole. The board may at any time revoke the parole of an offender or recommit him to the custody of the Division of Corrections, with or without cause."

Petitioner was provided a prompt informal or administrative hearing, which is the most the law contemplates. While he was on parole he was in the legal custody of the Board of Parole and subject at any time for any reason satisfactory to the board and at its sole discretion to be reimprisoned. This has long been the rule in this jurisdiction. See Owen v. Smith, 89 Neb. 596, 131 N. W. 914.

The applicable law is well stated by the United States Court of Appeals for the Sixth Circuit in Hinkle v. Ohio Parole Authority, 419 F. 2d 130: "A state is not required to provide for parole and, if it does, it may stipulate terms and conditions under which it may be granted or revoked. Moreover, a parolee has no constitutional right to a hearing on the reason for revocation of parole. Rose v. Haskins, 388 F. 2d 91, 95 (6th

Cir. 1968); Cox v. Maxwell, 366 F. 2d 765, 767 (6th Cir. 1966)."

Petitioner's first two assignments of error were answered in the negative in Hyser v. Reed, 318 F. 2d 225, United States Court of Appeals, District of Columbia Circuit, in an opinion by Judge, now Chief Justice Burger. While that case involved federal parole revocation proceedings, it is pertinent herein because it holds constitutional due process does not require the board to conduct adversary hearings in the nature of a nonjury trial in order to revoke parole and does not require appointment of counsel for indigent parolees, cross-examination of sources of information, discovery of the board's files, or compulsory process.

Petitioner's third assignment of error does not indicate what good time was taken away or how it may have been earned. Because he was released on parole subsequent to the passage of Legislative Bill 1307 (Laws 1969, c. 817, p. 3071), and refers in a footnote to one of the provisions of section 83-1,107, R. S. Supp., 1969, contained in that act, we assume he refers to that section. It is clearly evident from a reading of the section, however, that the reductions provided for therein are used to determine eligibility for release on parole or supervision, and they are subject to forfeiture.

The judgment is affirmed.

AFFIRMED.

JOHN J. KUBICEK ET AL., APPELLEES, V. EDWARD M. KUBICEK ET AL., APPELLANTS.
186 N. W. 2d 923

Filed May 7, 1971. No. 37787.

1. **Frauds, Statute of: Contracts: Sales.** Every contract for the leasing for a longer period than one year, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made.

2. ———: ———: ———. Section 36-105, R. R. S. 1943, clearly contemplates that the contract, or note, or memorandum thereof in writing, shall contain within itself all of the essential elements which go to make up a contract, and, when essential elements of the contract are lacking, the contract must fail, because essential elements cannot be supplied by parol testimony.

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

Gerald J. Hallstead, for appellants.

Jack L. Craven, for appellees.

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

SPENCER, J.

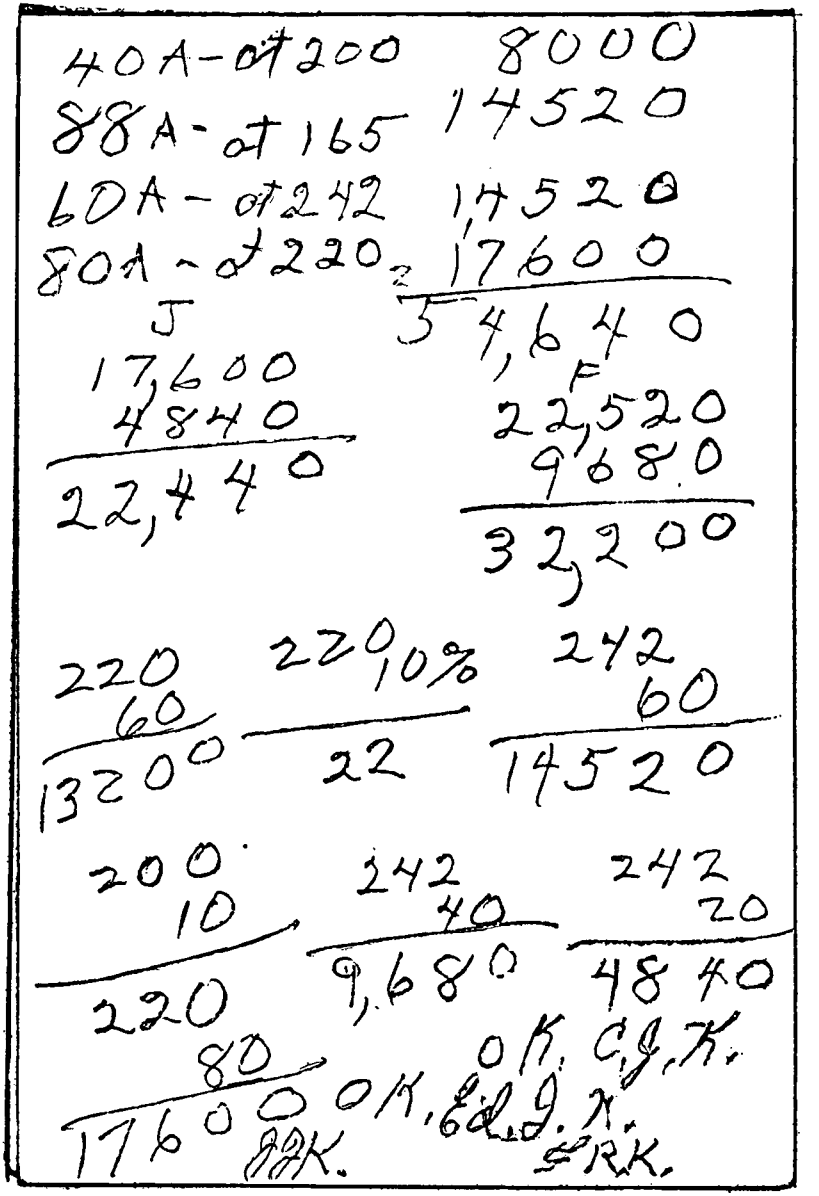
Defendants, Edward M. and Frank R. Kubicek, appeal from the granting of partition of 268¼ acres of land in Saline County, Nebraska, and the dismissal of their cross-petition for specific performance of an alleged agreement for voluntary partition. Plaintiffs are John J. Kubicek, a brother of the defendants, and his wife. The parties will be hereinafter referred to by their Christian names. Frank owns an undivided one-half interest, and John and Edward each an undivided one-fourth interest in the land in question. We affirm.

A part of the land has been the Kubicek home since 1881. It was inherited from their father by the three brothers and by another brother, Charles, who sold his undivided one-fourth interest to Frank before the filing of this action. The property was subject to a life estate in the mother who had just died, and to certain payments to other heirs.

On September 24, 1967, shortly after the mother's death, the Kubicek heirs met at the mother's former residence in Crete, Nebraska, to dispose of the personal property of the estate amongst themselves. The four brothers then went to the basement to see if it was possible to work out an amicable agreement to divide the

property so as to keep it in the Kubicek family. The family relationships had always been amicable. The three involved herein had often exchanged work, and jointly owned farm machinery.

Testimony on behalf of the defendants would indicate that Charles, who did not farm, and Edward, who owned his own land, were interested in selling their undivided interest in the land to Frank and John who farmed the land. John lived on the premises and farmed 121 acres. According to defendants' evidence, John was to take 100 acres which was to be the 80 on which he lived and 20 acres adjoining it on the southeast. Frank would take the rest. In order to arrive at the value of the land, the brothers used an estate inheritance tax appraisal, but slightly increased the value of a portion of it. On this occasion, Charles made a record of suggested values on a page in the notebook which had been used by the family in the distribution of the personal property. This is the only memorandum of the transaction and consists entirely of mathematical figures, a few letters, and the initials of the four brothers. It is as follows:


40A-at 200 8000
88A-at 165 14520
60A-at 242 14520
80A-at 220 17600
54,640
17,600
4840
22,440
22,520
9680
32,200
220
60
13200
220 10%
22
242
60
14520
200
10
220
242
40
9,680
242
20
4840
80
17600
OK. C.J.K.
OK. Ed. J.K.
JJK.
RK.

John contends no agreement was reached as to exactly what land he was to receive on September 24, 1967. He contends the agreement was a preliminary one and the parties were to meet in the law office of defendants' counsel to see if they could work out an agreement. John's testimony is corroborated in part by Charles, who testified he did not hear any such discussion nor did he have any conversation with John as to what part of the land John wanted if there was a division.

The following testimony by Frank would indicate that the parties expected to finalize an agreement at the subsequent meeting in the attorney's office: "A Well, on that September 24th we was all there we was going to meet the following Saturday at Hallstead's in Crete to come up with the division and if Hallstead couldn't make it John told Charles J. he'd call him up and tell him which Saturday to appear so it wouldn't interfere with his work at Havelock shop. * * * Q And what then occurred between the four of you? A Well, we met with Hallstead * * * A Well, we came to Hallstead's office and we went to the room up there, sit down to the table, start visiting, and I says, Hallstead's got other work to do we should get on to business. Well, now, how are we going to arrive from where, and I pulled out this book and handed over on Hallstead's desk and I said, we can start from here, and that's where John stood up and he says, 'I ain't going to go along,' and he took off. We followed and had a talk up there and each went off by our own way." The parties met later but could not arrive at an agreement, and several months later Charles sold his undivided interest in the farm to Frank.

The question presented is whether the memorandum is sufficient to comply with section 36-105, R. R. S. 1943, which is as follows: "Every contract for the leasing for a longer period than one year, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made."

In Barkhurst v. Nevins, 106 Neb. 33, 182 N. W. 563, we said with respect to the statute: "This section of the statute clearly contemplates that the contract, or note, or memorandum thereof in writing, shall contain within itself all of the essential elements which go to make up a contract, and, when essential elements of the contract are lacking, the contract must fail, because essential elements cannot be supplied by parol testimony. * * * The very purpose of the statute was to prevent such contracts from resting in parol."

The figures appearing on the memorandum with the letter "A" can be interpreted to refer to acres, and when these figures are added together, they total 268 acres. The figures following the preposition "at" could readily be interpeted to show a value set on that particular area. The initials obviously can be interpreted to refer to the brothers. Everything else essential to the agreement, however, must be supplied by parol.

Assuming that "J" and "F" refer to John and Frank, exactly what property are they taking? There is no legal description for any of it. John was actually farming 121 acres. The memorandum obviously does not point out which 100 acres he would take. Edward testified that subsequent to September 24, 1967, John wanted all the land north of the road, or approximately 140 acres. What are the terms of sale if John and Frank are the buyers? Did John and Frank actually agree to buy the property? There is an "O.K." preceding the initials of Charles and Edward who according to the testimony would be selling their undivided interests, but none before those of John and Frank. Was the memorandum intended as an agreement to purchase, or was it merely an offer by Charles and Edward who are the only two to initial the letters "O.K."? Or is the memorandum merely an indication by Charles and Edward of their willingness to sell their undivided interest in the property which was to be effectuated by a further agreement at a subsequent meeting to be held

in the attorney's office? These are essential elements and if the statute means what it says should be covered in some manner by the memorandum.

In Mercer v. Payne & Sons Co., 115 Neb. 420, 213 N. W. 813, we said: "A court of equity will not enforce a contract, unless it is complete and certain in all its essential elements. The parties themselves must agree upon the material and necessary details of the bargain, and if any of these be omitted, or left obscure or indefinite, so as to leave the intention of the parties uncertain respecting the substantial terms, the case is not one for specific performance. It is not the function of a court of equity to make a contract for the parties, or to supply any of the material stipulations thereof."

Defendants cite Ruzicka v. Hotovy, 72 Neb. 589, 101 N. W. 328, to support their position on the sufficiency of the memorandum. That case is of no help to the defendants. The land in that case was sufficiently described by the memorandum. It was described as "¼ Sc. 7, T. 13, R. 4." The vendor owned only the southeast quarter in the described section so no other land could have been intended, and the purchase price and the terms were stated in the memorandum. That case was overruled by Heine v. Fleischer, 184 Neb. 379, 167 N. W. 2d 572, to the extent that it was in conflict with that opinion. To the extent that Ruzicka inferred that all material terms of the contract need not appear in the memorandum, it has previously been impliedly overruled by subsequent cases. The following from Heine leaves no doubt on that point: "The memorandum required by the statute of frauds must contain the essential terms of the contract. Ord v. Benson, 163 Neb. 367, 79 N. W. 2d 713; Restatement, Contracts, § 207, p. 278."

While the briefs of the parties ignore the fact, we do observe that John's wife is a party plaintiff herein. While her interest is only that of a spouse, by virtue of that relationship she does have a marital interest in an undivided one-fourth of the 268¼ acres. She did not

participate in the alleged agreement in any manner.

We hold the memorandum is insufficient and the agreement claimed by defendants is within the inhibition of the statute of frauds. This holding obviates any necessity to discuss other issues raised by the defendants.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD HUFFMAN, APPELLANT.

186 N. W. 2d 715

Filed May 7, 1971. No. 37802.

1. **Post Conviction: Appeal and Error: Constitutional Law.** A defendant in a post conviction proceeding under sections 29-3001 to 29-3004, R. S. Supp., 1969, may not raise questions which could have been raised on the direct appeal and which do not involve questions making the judgment of conviction void or voidable under the state or federal Constitutions.
2. **Post Conviction: Appeal and Error: Constitutional Law: Sentences.** Post conviction remedies are intended to provide relief in those cases where a miscarriage of justice may have occurred and are not intended as a procedure to secure a review for a defendant dissatisfied with his sentence.
3. **Forgery: Indictments and Informations: Double Jeopardy: Sentences.** Forging and fraudulently uttering and publishing the same instrument if done by the same person constitute only one crime and if the two acts are charged in separate counts and conviction results on both counts only one sentence may be imposed.
4. **Constitutional Law: Post Conviction: Double Jeopardy: Sentences.** Imposing two sentences for one offense constitutes a violation of due process of law and is ground for relief under the post conviction proceeding statutes.
5. **Trial: Constitutional Law: Double Jeopardy: Sentences.** One trial upon two counts growing out of a single transaction and for which only one sentence may be imposed does not violate constitutional provisions against double jeopardy. In such cases where two concurrent equal sentences are imposed one will be regarded as surplusage and be vacated.

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

Harold Huffman pro se.

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

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

CLINTON, J.

This is a post conviction proceeding under the provisions of sections 29-3001 to 29-3004, R. S. Supp., 1969.

Defendant Huffman had been convicted by a jury in the district court for Hall County on four counts. Count I was for forgery of a $42 check. Count II was for uttering the same check. Count III was for forgery of a $15 check. Count IV was for uttering the $15 check. Following the jury verdict, evidence was received on Count XI which charged the defendant with being a habitual criminal and the defendant was found to be a habitual criminal. The record in that case discloses four prior felony convictions. The district court sentenced the defendant as follows: On Count I, 20 years and a fine of $1; on Count II, 20 years and a fine of $1; and on Count III, 20 years and a fine of $1. All of the above sentences were to run concurrently and to commence upon the completion of a sentence as a result of a 1966 conviction. On Count IV, the defendant was sentenced to a term of 22 years commencing forthwith.

The defendant appealed the convictions to this court and the judgment of the trial court was affirmed. State v. Huffman, 185 Neb. 417, 176 N. W. 2d 506.

The defendant Huffman, on April 24, 1970, filed in the district court for Hall County a motion to vacate and set aside these sentences and convictions. The district court appointed counsel for the defendant and set the matter for evidentiary hearing. Process was issued for witnesses. Hearing was held at which the defendant

was represented by counsel and both the defendant and the State produced evidence. The district court took the matter under advisement and then made detailed findings of fact and law and overruled the motion. The defendant appeals to this court.

In his brief the defendant makes 18 assignments of error. Most of the grounds stated in the motion and the assignments of error involve questions which were or could have been raised on the direct appeal. A defendant in a post conviction proceeding under sections 29-3001 to 29-3004, R. S. Supp., 1969, may not raise questions which could have been raised on the direct appeal and which do not involve questions making the judgment of conviction void or voidable under the state or federal Constitutions. State v. Reizenstein, 183 Neb. 376, 160 N. W. 2d 208; State v. LaPlante, 185 Neb. 816, 179 N. W. 2d 110. We therefore take note only of those matters assigned which involve possible constitutional infringements.

The principal ground of the defendant's complaint and the only one on which he introduced evidence at the evidentiary hearing involves the claims the substance of which are that the State knowingly used the false and perjured testimony of one Faye Boersen and that there existed a conspiracy between the law enforcement officials of two counties to wrongfully convict the defendant of the charges.

At the trial before the jury the chief witness against the defendant was Faye Boersen, who was his consort and his accomplice in the alleged crime. Faye Boersen will hereafter be referred to as the witness.

At the post conviction hearing the court received in evidence on behalf of the defendant a machine copy of an alleged affidavit of the witness in which she purportedly recants the testimony given at the trial and states it was "in fact, false and perjured testimony" given under coercion by the county attorneys of two counties and that the testimony was also "the product of

mistaken memory in this matter." The purported affidavit recites, among other things, that she was told what to say; that she would be prosecuted on check charges if she did not testify as told; and that she could be "sentenced * * * to a total of (200) two hundred years and maybe more if Hall County decided to prosecute me for Bigamy." The purported affidavit recites that she alone was responsible for the forgeries and the utterings. The affidavit further recites: "I am giving this Recantation at this time and have not told me what to say herein, as this Recantation has been prepared for me by my attorney, (naming him)." The evidence disclosed that the attorney named in the affidavit as the witness' attorney was severely ill on the purported date of the affidavit, April 21, 1969, and had not represented her after about the middle of March. It also discloses that neither that attorney nor the attorney representing her at the evidentiary hearing, a member of the same law firm, prepared the affidavit.

The defendant Huffman claims that this copy of the affidavit was mailed to him at the state penitentiary.

At the evidentiary hearing the witness unequivocally denied that she had signed or made the affidavit or had sent the copy of the affidavit to the defendant. She admitted her complicity in the offenses of which the defendant was convicted and on cross-examination by the defendant's attorney acknowledged that she had been promised immunity and that this promise had been kept. Further, in response to a suggestion by the defendant's counsel, "the next day you decided it was Harold who wrote the checks at Conoco?" the witness stated, "No, because I know he wrote them," and "No, I decided to tell the truth."

The witness acknowledged that she had earlier told a contradictory story to the sheriff of Hamilton County at the time of her arrest, but later after a polygraph test told the truth. At the time of this test and the promise of immunity she was represented by her own

counsel, since deceased, but who was a member of the same firm as her present attorney.

The copy of the affidavit, exhibit 1 in the bill of exceptions, is dated April 21, 1969. The witness testified she did not see the notary, who works in the Hall County sheriff's office, on that date and was not in the Hall County jail at that time. Neither the defendant nor the State called this notary as a witness. No reason appears in the record.

The purported affidavit has what appears to be the filing mark of the clerk of the district court of Hall County. However, the evidence discloses that the original affidavit is not in the file in case No. 3877, Hall County, nor is there a duplicate in the transcript in this court. The appearance docket in the office of the clerk of the district court of Hall County contains no filing entry for such an instrument.

On behalf of the defendant an affidavit of one Burnside, an associate of the defendant, was received in evidence. It recites that the witness told Burnside that she and not the defendant forged and passed the checks. The witness denied this and other actions attributed to her in the affidavit of Burnside.

The witness was represented by her own counsel throughout the evidentiary hearing and in response to questions by him testified that everything she said at the trial and at the evidentiary hearing was the whole truth.

The district court, after the post conviction hearing, found: "The so-called recantation is not an original, was denied by the witness Faye Boersen, and although it purports to have been filed on April 21, 1969, seven days before Defendant was sentenced, it does not appear in the court files or records. Although inquiry was made of the Defendant prior to sentencing, neither Defendant nor his counsel made any reference to the alleged recantation. The court finds that the alleged recantation is

itself a forgery and composite of other papers and instruments."

A post conviction proceeding is civil in nature. § 29-3001, R. S. Supp., 1969. The burden is upon the defendant to establish that the prosecution knowingly used perjured or false evidence in securing the conviction of the defendant. State v. Howard, 182 Neb. 411, 155 N. W. 2d 339. The jury at the trial accepted the testimony of the witness. The district judge in the post conviction proceedings accepted as true her testimony. Under the evidence in this case we see no reason to disturb the finding of the district court in this respect. The statements of the defendant at the sentencing clearly show that the defendant's basic dissatisfaction was the length of the sentence. Post conviction proceedings are not intended to secure a review for a defendant dissatisfied with the length of his sentence. State v. Snyder, 180 Neb. 787, 146 N. W. 2d 67.

The defendant further contends that he was at the trial deprived of the effective assistance of counsel because his attorney was incompetent. An examination of the record in that case shows that the defendant was vigorously defended by competent counsel in an able manner.

The defendant contends that he has been placed in double jeopardy because Counts I and II involve but one instrument and transaction and constitute one crime only. He contends likewise to Counts III and IV. He cites State v. Leekins, 81 Neb. 280, 115 N. W. 1080. That case does hold that forging and fraudulently uttering the same instrument if done by the same person constitute but one crime and only one sentence may be imposed for such offense. This court has so held in In re Walsh, 37 Neb. 454, 55 N. W. 1075, and Marshall v. State, 116 Neb. 45, 215 N. W. 564. The State in this case substantially concedes in its brief that only one sentence may be imposed on Counts I and II and one sentence on Counts III and IV.

It does not follow, however, and the State does not concede, that the defendant has been placed in double jeopardy. In such case where two equal concurrent sentences have been imposed, one may be regarded as surplusage and vacated. United States v. Goldman, 352 F. 2d 263. We cannot tell from the record whether or not the sentences on Counts III and IV will terminate at the same time. One concurrent 20-year sentence and the 22-year sentence therefore will be vacated. The other two concurrent 20-year sentences are affirmed.

AFFIRMED AS MODIFIED.

WHITE, C. J., not participating.

IN RE APPLICATION OF GREGORY AUSTIN FOR A WRIT OF HABEAS CORPUS.

GREGORY AUSTIN, APPELLANT, V. KERMIT BRUMBAUGH, SHERIFF OF CHEYENNE COUNTY, NEBRASKA, APPELLEE.

186 N. W. 2d 723

Filed May 7, 1971. No. 37872.

1. **Criminal Law: Extradition: Statutes.** In an extradition proceeding the requisition may refer to, annex, and authenticate accompanying papers and if together they meet statutory requirements that is sufficient.
2. **Criminal Law: Extradition: Constitutional Law: Statutes.** The federal Constitution and federal statutes control exradition in fugitive from justice cases and state statutes are merely ancillary thereto and may permit the Governor to surrender the prisoner on terms less exacting than those imposed by Congress.
3. **Criminal Law: Extradition: Words and Phrases.** The term authenticate, as used in extradition statutes, simply means a statement that the documents are what they purport to be.
4. **Criminal Law: Extradition: Evidence: Habeas Corpus: Trial.** A statement in the requisition and authenticated, accompanying papers that the person sought to be extradited was in the demanding state on the date of the offense charged is prima facie evidence of the truth of the allegation, and the burden of proof is on the applicant in a habeas corpus proceeding in resistance of the extradition to conclusively prove otherwise.

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

Guy F. Bush, for appellant.

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

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

CLINTON, J.

This is a habeas corpus action commenced in the district court for Cheyenne County against the sheriff of that county. The action is in resistance of a warrant of extradition issued by the Governor of the State of Nebraska upon a requisition of the Governor of Michigan. The trial court sustained the respondent's motion quashing the writ. The petitioner appeals.

The petitioner alleged: "The imprisonment and restraint of petitioner are illegal in that: (1) the papers on which the said warrant was issued by the Governor are insufficient in law to support it; (2) there is no such crime as 'Parole Violation (Uttering and Publishing)' in Michigan; (3) petitioner was not present in the demanding State on the 2nd day of August, 1970, when the said crime is alleged to have been committed, and hence is not a fugitive from the justice of that State; * * *."

The petitioner contends that the requisition and the evidence do not meet the requirements of section 29-731, R. R. S. 1943, of the Uniform Criminal Extradition Act. The evidence introduced before the trial court which is pertinent to the disposition here was: (1) The requisition and the accompanying papers; (2) a copy of certain Michigan statutes upon which the petitioner relied; and (3) the testimony of a deputy sheriff of Cheyenne County that the accused was taken into custody in Cheyenne County for a local offense sometime dur-

ing the evening of August 2 or the night hours of August 2-3, 1970.

The petitioner contends: (1) The requisition does not meet the requirements of the law which requires an allegation that the petitioner was present in the demanding state at the time of the alleged offense and that the proof shows his presence in Cheyenne County on the pertinent date. (2) The requisition is deficient in that it is not accompanied by one of the following instruments: (a) A copy of an information supported by affidavit, or (b) a copy of an affidavit made before a magistrate of the demanding state, together with a copy of any warrant issued thereon, or (c) a copy of a judgment of conviction or a sentence imposed, together with a statement of the Executive Authority of Michigan that the person claimed has escaped from confinement or has broken the terms of his probation, bail, or parole. § 29-731, R. R. S. 1943. (3) The requisition is deficient in that it does not allege the petitioner has committed a crime under the laws of Michigan and consequently cannot be a fugitive.

We affirm the trial court's action in sustaining the motion to quash the writ.

The requisition of the Governor of Michigan states: "It appears by Application and Papers in Support Thereof which are hereunto annexed, and which I certify to be authentic and duly authenticated, in accordance with the laws of this State, that Gregory Austin stands charged with the crime of Parole Violation (Uttering and Publishing) which I certify to be a crime under the laws of this State, * * *."

Petitioner's position is in part founded upon the premise that the words "parole violation (uttering and publishing)" do not allege a crime under the laws of the State of Michigan. No doubt such words would be insufficient in an information or complaint. However, the papers attached to and accompanying the requisition and which the Michigan Governor certifies are "authentic

and duly authenticated" include, among other things: (1) A certified copy of judgment of conviction showing that Gregory Austin was convicted on June 1, 1966, in the State of Michigan of the crime of "Uttering and Publishing A Forged Check" on April 3, 1966, and was sentenced under the Michigan Penal Code to prison for a period of not less than 1½ years nor more than 14 years. (2) An application for requisition signed by the deputy director, State Department of Corrections, which states that Gregory Austin was placed on parole for the above offense on February 11, 1970, and on *August 2, 1970*, violated the provisions of his parole prior to the termination of his sentence. Part of the application is an affidavit of the deputy director setting forth the circumstances of the parole violation which includes a statement: "In that on or about August 2, 1970," Austin left the State of Michigan without permission.

We hold: (1) The certification and authentication by the Governor of the accompanying papers, to wit, the judgment of conviction and the statement in the application of the deputy director is a sufficient compliance with the provisions of section 29-731, R. R. S. 1943, requiring a statement of the Executive Authority, that is, the Governor, that the terms of probation have been violated. This complies with one of the alternative provisions of the statute. (2) The requisition sufficiently charges a crime under the laws of Michigan because the requisition refers to as "authentic" the certified copy of the information which is among the accompanying papers and charges the commission of the crime of uttering and publishing a certain forged check. The accompanying copy of the information, although not supported by an affidavit, is sufficient statement of the Executive Authority of the nature of the crime charged since it is stated to be authentic in the requisition itself. There is no requirement in the statute that the Governor's statement of the crime charged must be made in affidavit form.

This court long ago held that the requisition in an extradition proceeding may refer to accompanying papers and if together they meet statutory requirements that is sufficient. Chandler v. Sipes, 103 Neb. 111, 170 N. W. 604. In this case the requisition refers to, annexes, and authenticates the accompanying papers. See, also, Ex parte Albright v. Clinger, 290 Mo. 83, 234 S. W. 57; People ex rel. Higley v. Millspaw, 281 N. Y. 441, 24 N. E. 2d 117.

The federal Constitution and federal statutes control extradition in fugitive from justice cases and state statutes are merely ancillary thereto and may permit the Governor to surrender the prisoner on terms less exacting than those imposed by Congress. 35 C. J. S., Extradition, § 3, p. 383; People ex rel. Matochik v. Baker, 306 N. Y. 32, 114 N. E. 2d 194; Ex parte Riccardi, 68 Ariz. 180, 203 P. 2d 627. The Uniform Criminal Extradition Act offers alternative provisions to the federal statutes, 18 U.S.C.A., § 3182, p. 127, and if complied with is sufficient to meet the requirements of the federal Constitution and statutes.

The petitioner contends that the affidavit made by the deputy director should have been sworn to before a magistrate and that the provision of the statute: "or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon" has not been met. The petitioner's evidence in the form of the Michigan statutes was offered for the purpose of showing that a notary public is not a magistrate under Michigan law. However, the provision referred to is a requirement of the statute alternative to the one we hold has been met so we do not need to decide this question.

The petitioner next contends that the evidence shows that he was in the State of Nebraska on August 2, 1970; that the proof shows the allegations of the requisition and the accompanying papers that petitioner had violated his parole on or about August 2 is false; and that

the provision of the statute requiring an allegation in the requisition: "that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state," fails of proof.

The petitioner's contention in this respect must fail for the following reasons: (1) A statement in the requisition and the authenticated, accompanying papers that the person sought to be extradited was in the demanding state on the date of the offense charged is prima facie evidence of the truth of the allegation, and the burden of proof is on the applicant in a habeas corpus proceeding in resistence of the extradition to prove otherwise. Levy v. Splain, 267 F. 333; People ex rel. Higley v. Millspaw, *supra;* In re Sanders, 154 Minn. 41, 191 N. W. 391. The proof shows only that at some time on the evening of August 2, 1970, or the night of August 2-3, 1970, the petitioner was in Cheyenne County. It does not show where he was earlier that day. (2) The requisition and accompanying papers show, and petitioner introduced no contradictory evidence, that the petitioner is wanted to serve an unexpired term for uttering and publishing a forged check, which offense occurred at the time hereinbefore stated and that petitioner at that time was in the State of Michigan as shown in the papers accompanying the requisition. The statement in the requisition that about August 2, 1970, the petitioner violated his parole obviously means, in the light of the accompanying papers, that on that date the petitioner was in violation of his parole.

In Ex parte Albright v. Clinger, *supra*, the Supreme Court of the State of Missouri, considering a similar situation, stated: "The right of the State of Ohio to the relator's return was, therefore, based upon the unsatisfied judgment of conviction against him which entailed imprisonment. Upon a showing of these facts without more, the issuance of the requisition would have been authorized and the incident that he was at large

physically, instead of being indurance when he forfeited his right to clemency, was a matter with which the Governor of this State need not concern himself." See, also, People ex rel. Banks v. Farner, 39 Ill. 2d 176, 233 N. E. 2d 360.

The essential requirements of section 29-731, R. R. S. 1943, have been met and this is all that is required. Petitioner cites in support of his position United States ex rel. McCline v. Meyering, 75 F. 2d 716. That was a case in which the demanding Governor was attempting to comply with the requirements of the federal statute and did not do so. The requisition in this case does meet the less demanding requirements of the Nebraska law. See Johnson v. State, 45 Ala. App. 40, 222 So. 2d 370, in which the facts are substantially the same as here.

The action of the trial court quashing the writ was correct and its judgment is affirmed.

AFFIRMED.

IN RE APPEAL OF LEXINGTON BUILDING CO., INC. LEXINGTON BUILDING CO., INC., APPELLANT, V. BOARD OF EQUALIZATION IN AND FOR THE COUNTY OF DAWSON, NEBRASKA, APPELLEE.

187 N. W. 2d 94

Filed May 14, 1971. No. 37653.

1. **Taxation: Trial.** The burden of proof is upon a taxpayer to establish his contention that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property resulting in a discriminatory, unjust, and unfair assessment.
2. **Taxation: Appeal and Error.** Where the evidence shows that the assessed value of real property has been determined by a formula in substantial compliance with section 77-112, R. S. Supp., 1969, which has been uniformly and impartially applied, such assessed value will not ordinarily be disturbed on appeal

on evidence indicating a mere difference of opinion as to such valuation.

3. **Taxation: Trial: Evidence.** To secure a reduction in the assessed value of real property it must be demonstrated by evidence that the assessment is grossly excessive or that its value has not been fairly and proportionately equalized, and is a result of arbitrary or unlawful action. The evidence must be such as to indicate the exercise of arbitrary action or the failure of plain legal duty, and not a mere error in judgment.

Appeal from the district court for Dawson County: HUGH STUART, Judge. Affirmed.

Cook & Cook, for appellant.

Willard Weinhold and Berreckman & Nelsen, for appellee.

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

WHITE, C. J.

The only question involved in this case is the valuation for tax purposes of the reconstructed portion of the old Centennial Building in downtown Lexington. The district court valued the reconstructed portion of the new Centennial Building and its land at $116,449. On appeal by the owner we affirm the judgment of the district court.

In an appeal to the county board of equalization or to the district court, and from the district court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. Newman v. County of Dawson, 167 Neb. 666, 94 N. W. 2d 47; LeDioyt v. County of Keith, 161 Neb. 615, 74 N. W. 2d 455.

Our statute, section 77-112, R. S. Supp., 1969, prescribes the following formula, where applicable, for determining the actual value of property for assessment purposes. The criteria are: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; and (6) market value in the ordinary course of trade.

The property involved is centrally located in downtown Lexington. The property consists of one new commercial building and a reconstruction of a portion of what was known as the old Centennial Building, now known as the McDonald Building. The evidence shows that the county assessor accepted the appraisal of this new portion of the building that was made by the Justin H. Haynes Appraisal Company, professional appraisers hired by the county board of commissioners to complete the reappraisal of all lands in Dawson County, required by section 77-1301.06, R. R. S. 1943. Such appraisal was mandatory. The precise issue presented here is the valuation for the year 1968. The new portion of the Centennial Building was constructed and finished in the fall of 1967. The evidence shows that with relation to the earning capacity of the *entire* property the gross rental income for 1968 was $9,036.96. The 1968 expenses that were properly deductible, excluding depreciation, of $4,302.64, leave a net income of $4,734.32. In the year 1969 a minimum gross rental income under the contract for the use of the property to the McDonald Company and Platte Valley Products, Inc., was $11,100, less expenses of $4,303.54, excluding depreciation, resulting in a net income of $6,796.46, or a net return of 0.0498 percent based on the trial court's total valuation. Particularly significant in this case is the fact that the appellant, under no compulsion to do so, elected to contract for the construction of this new building for the sum of $142,000 knowing at the time under the rental

contract the exact earning power the building would have. The appellant now complains when the county assessor fixes the actual value of the building at $101,449.

The rental contract referred to and entered into prior to the construction of the building was with the J. M. McDonald Company with a guaranteed annual rental of $9,000 plus 2½ percent of the annual gross sales in excess of $360,000. The president of the appellant, Mr. Stuckey, testified that the value of the building and the land that it sat on was in the sum of $85,000. The expert witness appellant called first testified that the market value of the property was $90,000 or $5,000 more than the president of appellant testified, and then he testified that the fair market value of the land under the new building was $17,300, the fair market value of the old portion of the Centennial Building was $20,000 and the fair market value of the newly constructed Centennial Building was $75,000 making a total appraised value of $112,300.

The evidence shows that this is a commercial property and is situated at a prime location in the middle of downtown Lexington. It is located at the northwest corner of the intersection of Sixth and Washington Streets, which is the principal intersection in the City of Lexington, Nebraska.

In the third factor of desirability and functional use the evidence shows that the property is located in an excellent location and that the lease contract binds the McDonald Company for 10 years from the possession date. The McDonald Company also has the option to renew the lease for 3 additional 5-year periods. The president of appellant himself testified to the above-average quality of the construction of the new Centennial Building. The evidence shows that this new portion of the building has better lighting, better arrangement, better grade of interior finish, better grade of heating and air conditioning, and better quality generally

than the surrounding buildings or commercial buildings in the City of Lexington.

It is undisputed that the total cost of the new Centennial Building project was $142,316.91. This does not include the cost of the land and the already existing office building, that was valued originally at $44,631 by the county assessor and reduced by the trial court to $35,000.

The valuation of the remainder of the existing building and the other portions of the property in the appraisal are not at issue in this appeal as the appellee has filed no cross-appeal.

The evidence shows that under the Justin Haynes appraisal, which was accepted by the county board and the county assessor, the value was fixed at $101,449, this amount being *$40,867.91* less than the appellant's *actual cost.* The appellant's expert witness, one Floyd Housel, compared the sale value and the value for tax purposes and the value of some surrounding properties. The effect of his testimony was to establish that the tax value was higher than sale value. This is not controlling under the statute. There is no testimony on behalf of the appellant in which an effort is made to compare and relate the subject property of the new Centennial Building with other properties of known or recognized value. The president of appellant himself in his testimony mentioned five other commercial properties in the vicinity but made no effort to compare them in value to the new Centennial Building or the other buildings involved in the Justin Haynes appraisal. In the record in this case the only testimony in which such a comparison is made is by the appellee. The appellee's expert witness, Mr. Hilyard, established without dispute the comparative superior quality of the appellant's property, as we have mentioned heretofore.

The most elusive of all the criteria, the fair market value, is difficult to establish in this case because of the lack of any comparative sales in the vicinity or in the

City of Lexington. The president of appellant testified that the property was worth $85,000. Significant here is the testimony of the appellant's expert witness Mr. Housel. In his testimony he first appraised the property at $90,000, $5,000 more than the president of appellant, and in direct and cross-examination in breaking down the separate values of the land, the new building, and the older portion of the Centennial Building for the court, his values totaled $112,300. In other words it is apparent from the record that the testimony of appellant's expert witness is contradictory and self-conflicting.

As in all cases relating to valuation of property for tax purposes, there is a wealth of dispute and conflict as to the different details of valuation. The main thrust of the appellant's contention in this case is that the return on the investment does not warrant the county assessor's valuation and, therefore, is excessive. He relies primarily on the "earning capacity" factor in the statutory formula. Our court has rejected this single-minded approach to the valuation of property under section 77-112, R. S. Supp., 1969. In Josten-Wilbert Vault Co. v. Board of Equalization, 179 Neb. 415, 138 N. W. 2d 641, we held that no single factor or element of value standing alone is conclusive. A sale price, or an earning capacity of property, may be, in some circumstances, a very important factor in determining actual value or fair market value, but it is only evidence to be considered along with all of the other evidence. Significant here, however, is the fact that the appellant constructed a building, the actual cost of which was $142,316.91. It is extremely difficult to follow the appellant's contention in the light of the fact that its president himself felt the earning capacity of the building warranted the primary construction cost in excess of $142,000.

From what we have said, it is apparent the appellant's evidence in this case has fallen far short of the burden imposed upon a complaining taxpayer to establish by clear and convincing evidence that the valuation placed

upon the property is grossly excessive and the result of a systematic exercise of intentional will or failure of plain legal duty. LeDioyt v. County of Keith, *supra;* Newman v. County of Dawson, *supra.* The net effect of the appellant's evidence is the mere showing of the difference of opinion, and a comparatively small one, as to valuation. We can find nothing about the professional appraisal that is unreasonable, arbitrary, or capricious, nor can we find any error in the assessor accepting the result of this mandatory appraisal and fixing the valuation of this property.

The second contention of the appellant, which overlaps the first, is that the valuation of January 1, 1968, for tax purposes was disproportionately higher than property of equal value. As we have mentioned, this property was valued by a professional appraiser, Justin Haynes Company, in a county-wide reappraisal. It is apparent that this statutory and mandatory requirement for a county-wide appraisal was designed to secure a uniformity of fixing valuations and the assessment of property within the taxing jurisdiction of Dawson County. There is no evidence in this record, short of mere conclusion or expression of opinion by the president of appellant and its expert witness, Mr. Housel, that this property was assessed at a value too high in proportion to the values placed on other business properties in the City of Lexington. Here applicable is what this court said in Newman v. County of Dawson, *supra,* as follows: "The witnesses for the taxpayer do not fix the values of the properties with which his property is compared. The evidence is nothing more than the expression of opinions that plaintiff's property is disproportionately assessed to his injury."

In the record presented here the appellant has failed to lay any type of sufficient foundation for a mere conclusion that there was a disproportionate or nonuniform assessment of its property.

Summarizing, in determining the actual value for tax

purposes the district court carefully analyzed the evidence and considered every aspect of the formula. There is no dispute about the valuation of the remainder of the property. The valuation of the appellant was accepted by the court.

The district court was correct in reaching the actual valuation it did in the sum of $101,449 for the McDonald Building and $15,000 for the land on which it was situated. The judgment is correct and is affirmed.

AFFIRMED.

CARTER, J., not participating.

IN RE ESTATE OF JOSEPH PICK, INCOMPETENT. WILLARD W. BURNEY, GUARDIAN OF JOSEPH PICK, INCOMPETENT, APPELLEE, V. FRANK A. PICK, SR., ET AL., APPELLANTS.

186 N. W. 2d 919

Filed May 14, 1971. No. 37737.

1. **Property: Estates.** One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it.
2. **Property: Estates: Restraints on Alienation.** The conveyance of real estate is of such importance to the state that one will not be permitted to become whimsical and unreasonable after creating an estate recognized by the law, such as an estate in fee simple, by attaching conditions repugnant to the estate created.
3. ———: ———: ———. A testator or grantor may not create a vested fee simple estate and at the same time effectively forbid its alienation.
4. **Guardian and Ward: Mortgages: Statutes.** The provisions of section 30-1201, R. R. S. 1943, relating to mortgages executed by guardians prohibit an incompetent's estate from incurring a new debt and does not prohibit the inclusion of interest already due in executing a renewal mortgage.

Appeal from the district court for Cedar County: JOSEPH E. MARSH, Judge. Affirmed.

Olds & Reed, for appellants.

Paul Robinson and Addison & Addison, for appellee.

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

WHITE, C. J.

This is an action by a guardian in the district court for authority to execute a renewal extension of an existing mortgage and to pay the interest on it. The issues involved are: First, whether the conditions inserted in a deed to the ward were void because of imposing an illegal restraint on alienation, and second, may the guardian execute a renewal mortgage increasing the indebtedness on the ward's property to include the past interest due under the provisions of section 30-1201, R. R. S. 1943. The district court found that the deed and the mortgage based thereon were valid and that the guardian was authorized to execute a renewal extension of the mortgage for a period of 5 years. We affirm the judgment of the district court.

On May 15, 1924, Ottillia Pick deeded a fee simple interest in the land involved herein in Cedar County, Nebraska, to her son, (Frank) Joseph Pick, the ward herein. The first essential question involved in this case is the construction and interpretation of the following restriction contained in the deed: "Provided, however, that (Frank) Joseph Pick, the grantee herein, shall not have the right or power to sell or mortgage or in any way encumber the above described land and premises, excepting and provided he shall first secure the written consent of his brothers, Louis Pick, William Pick, John Pick and Frank A. Pick, or such of said brothers as may survive so to do."

At the institution of this action, (Frank) Joseph Pick, the ward herein, was a bachelor of advanced years. Beginning in 1961, several guardians were appointed for Joseph, the most recent one being Willard W. Burney, the appellee herein. On February 28, 1971, while the action was pending in this court, Joseph died and Wil-

lard W. Burney was appointed special administrator of his estate and continues as the appellee in this action.

On January 27, 1970, the appellee filed his petition in the district court alleging that his ward, Joseph Pick, was the owner of the land described in the 1924 deed containing the condition above described. The land was encumbered by a $21,620.63 mortgage dated December 21, 1959, wherein William H. Pick was the mortgagee. This mortgage was assigned on January 3, 1970, to William H. Pick, Jr., and Wilma C. Pick, as joint tenants with right of survivorship. On December 23, 1965, this mortgage was renewed in the sum of $27,200 by the then guardian of Joseph Pick, said mortgage being executed and renewed pursuant to an order of the county court of Cedar County, Nebraska. Neither of these two mortgages was obtained with the consent of any of Joseph's brothers as was required by the condition of the original deed as recited herein. The issue arose here because of the appellee Willard W. Burney's petition in the district court stating that there were insufficient funds in Joseph's estate to redeem or release the mortgages and requested that a new or extension mortgage be executed to encroach the past due interest on the previous one.

It is undisputed that the consent of the brothers of Joseph Pick was not secured in the execution of the deed or mortgage. It is the contention of the appellants that the deeds and mortgages are therefore invalid. This presents the issue of whether the restriction by way of condition on Joseph Pick on mortgaging or selling the property is valid. It is first observed that the restriction on alienation in this case, as distinguished from the restriction by way of conditional limitation in Cast v. National Bank of Commerce T. & S. Assn., on rehearing, 186 Neb. 385, 183 N. W. 2d 485, is a direct restraint against the grantee to convey or mortgage in any manner without securing the consent of the named persons, the named persons not having any interest in the property itself. The deed purported and did grant an abso-

lute fee simple interest to the grantee, Joseph Pick. We have no difficulty in coming to the conclusion that this direct restraint on alienation was illegal, invalid, and against the public policy of the State of Nebraska. We will not repeat herein the extensive discussion of the reasoning behind and the public policy of the State of Nebraska forbidding illegal and unreasonable restraints against alienation. A full discussion of this will be found in the opinion in Cast v. National Bank of Commerce T. & S. Assn., *supra,* recently decided by this court. Our fundamental holdings therein as to the principles involved in illegal restraint and alienation govern this case. We are not required to pass upon any distinctions between conditions, condition limitations, or indirect restraints. The restraint here is directly on Joseph Pick and forbids him to do anything with reference to alienating the property unless the consent is secured of his brothers who have no interest in the property, by the very terms of the deed itself. Where a grantor or testator grants or devises a fee simple title, he is not permitted to fetter the title that he created with inconsequential and unreasonable conditions otherwise valid. The conveyance of real estate is of such importance to the state that one will not be permitted to become whimsical and unreasonable *after creating an estate recognized by the law,* such as an estate in fee simple, by attaching conditions repugnant to the estate created. Cast v. National Bank of Commerce T. & S. Assn., *supra;* Andrews v. Hall, 156 Neb. 817, 58 N. W. 2d 201; Watson v. Dalton, on rehearing, 146 Neb. 86, 20 N. W. 2d 610.

The grantor in this case specifically gave Joseph Pick a fee simple interest in the land. She then attempted to unreasonably limit the grantee's right to deed or encumber the property by requiring him to obtain his brothers' consent. In other words, a testator or grantor may not create a vested fee simple estate and at the same time forbid its alienation. This is because the con-

ditions which restrict alienation are repugnant to the very estate that the grantor or testator has created. Cast v. National Bank of Commerce T. & S. Assn., *supra*. In the present case, not only is the restraint on alienation a direct one against the named grantee in an absolute fee simple deed, but it is not coupled with or attached with any interest on the part of the brothers of Joseph Pick, and there is no time limitation or special conditions relating to the conveyance of the property from which it could possibly be argued that the restriction was reasonable. The right to deed, convey, encumber, or alienate property is one of the fundamental elements of a fee simple title. As was pointed out in Cast v. National Bank of Commerce T. & S. Assn., *supra*, it is one of the rights that has been carefully protected by the public policy of the State of Nebraska and the law of real property. The grantee, Joseph Pick, became the owner of the property and yet was forbidden forever, either by deed or by will, to dispose of the property. The title, the use of his property, and its productive use was made to depend upon the unknown and perhaps whimsical consent of brothers who in turn had no power in themselves to effectively convey, use, or make productive the original unlimited fee simple title granted to Joseph Pick. We said in Cast v. National Bank of Commerce T. & S. Assn., *supra*, as follows: "One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a testator may not create a fee simple estate to vest at his death and at the same time restrict its alienation. This is because conditions which restrict alienation are repugnant to the very estate the testator has created." The district court was correct in declaring the deed condition in question as an invalid and illegal restraint against alienation, void, and against public policy.

We come to the conclusion that the first mortgage exe-

cuted in 1959 between Joseph Pick and William H. Pick was valid.

The next contention of the appellants is that the county court was without power in 1964 when it authorized a renewal of this assigned mortgage in the sum of $27,200. The original mortgage was for $21,620.63.

On March 27, 1961, the assignees of the mortgage, William H. Pick, Jr., and Wilma C. Pick, and Frank's guardian at the time, Dwight Rissler, entered into a stipulation that the amount of the mortgage would be reduced to $20,000. On December 23, 1965, this $20,000 mortgage was renewed by the guardian in the sum of $27,200 pursuant to a county court order. This increased sum represented the original $20,000 mortgage plus 6 percent interest for 6 years ($7,200), which was then due.

Section 30-1201, R. R. S. 1943, provides: "Upon petition supported by competent testimony, showing that the best interests of the estate demand it, the county judge may grant to the executors, administrators, guardians and trustees of estates, whether such trustee be testamentary or appointed by the court, authority to mortgage, or extend the time of payment of any note or notes secured by a mortgage on any real estate belonging to such estate, for a period to be fixed by the county judge when mortgages existing on such real estate are due, or about to become due, and there is no money belonging to such estate with which to pay or redeem such mortgages, by proper written agreement duly executed, witnessed and acknowledged; *Provided, in no instance shall authority be granted by such county judge to executors, administrators, trustees or guardians to mortgage such real estate for a greater sum than the amount secured by the original mortgage;* nor shall authority be granted if there is personal property belonging to the estate, from which sufficient money can be realized by the sale thereof, beneficial to the estate, to pay or redeem such mortgage." (Emphasis supplied.)

Appellants claim the emphasized proviso clause of the statute limits a renewal mortgage to the original mortgage figure, with absolutely no right to include the amount of the interest due. We do not agree.

The proviso clause prohibits the incompetent's estate from *incurring a new debt.* However, to include the interest already due in determining the amount of a renewal mortgage does not mean incurring a new debt. The amount due on the original mortgage included the principal plus any interest accrued. When the guardian is able to show that there is no money in the estate to meet the original mortgage obligation and the interest due, the court should be able to set the renewal mortgage amount so as to cover not only the original mortgage figure but the interest as well. A proper interpretation of section 30-1201, R. R. S. 1943, permits such a procedure. The trial court was correct in upholding the validity of the renewal mortgage.

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

AFFIRMED.

CARTER, J., not participating.

EVEREN MACKEY, APPELLANT, V. MIDWEST SUPPLY COMPANY, A CORPORATION, APPELLEE.

186 N. W. 2d 916

Filed May 14, 1971. No. 37766.

1. **Property: Common Law.** Under the common law no duty devolved upon an abutting owner to keep the sidewalks adjacent to his property in a safe condition.
2. **Property: Municipal Corporations.** The law of this state imposes upon the various municipal corporations thereof the duty to keep their streets and sidewalks in a reasonably safe condition for travel by the public.
3. **Property: Municipal Corporations: Ordinances.** Where the provisions of an ordinance impose upon property owners the performance of a part of the duty of the municipality to the public

and are for the benefit of the municipality as an organized government, and not for the benefit of the individuals comprising the public, a breach of such ordinance is remediable only at the instance of the municipal government, and no right of action accrues to an individual citizen especially injured thereby.

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

Charles Ledwith, for appellant.

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

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

SPENCER, J.

This is an action by Everen Mackey, plaintiff, to recover for personal injuries sustained in a fall on a public sidewalk adjoining property owned by defendant, Midwest Supply Company. The trial court dismissed the action at the close of plaintiff's evidence. We affirm.

On February 8, 1969, plaintiff, who was 78 years of age, walked from his residence at 4508 North 21st Avenue, Omaha, Nebraska, to shop at a grocery store located between 24th and 25th Streets on the south side of Ames Avenue. His residence is the second house north of Ames Avenue on 21st Avenue. He went south on 21st Avenue to the south side of Ames Avenue, thence west to the store. It was twilight as plaintiff started his return journey. Street lights had just come on. When he reached the southwest corner of 24th Street and Ames Avenue, the traffic light changed and he crossed to the north side and started east along the north side of Ames Avenue. When plaintiff stepped from the street onto the north sidewalk he could see it was covered with ice and snow. The area was well lighted, and he became concerned about how slippery it was and tested it by putting his foot up from the street. He walked between 30 and 39 feet east when he reached some

glazed ice and his feet suddenly went out from under him and he fell on the frozen snow.

Plaintiff fell on a public sidewalk crossing that had formerly been a driveway, but which along with the rest of the adjoining property was fenced off with a 10-foot chain link fence set 6 inches inside the property line. After plaintiff fell he noticed for the first time that about 3 feet of snow was piled inside and against the fence.

The evidence clearly indicates that the north sidewalk was completely covered with ice and snow and this condition, which had existed most of the winter, was very apparent. Plaintiff knew that this condition prevailed the entire length of defendant's property. He also was aware of the fact that the sidewalk was generally slippery on the north side. Plaintiff in his brief states: "The plaintiff knew that there was snow and ice generally in the area of 24th and Ames prior to February 8, 1969 (54:20). That this condition existed was confirmed by the two eye witnesses, namely Martha M. Loftin, who testified that there was a lot of snow and ice everywhere that winter (87:13), and Monroe Stevenson, who also testified that there was a lot of snow and ice everywhere (95:17)."

Plaintiff had traversed the south side of Ames Avenue on his way to the store and had no problem. He usually walked down the south side because it was safer than the north side which was generally slippery, but on February 8, 1969, there was snow on both sides of the street.

Plaintiff complains of the exclusion by the trial court of the Omaha city ordinance pertaining to the duty of occupants and owners of adjacent real estate to clear ice and snow from sidewalks. There is no merit to plaintiff's assignment of error. Hanley v. Fireproof Building Co., 107 Neb. 544, 186 N. W. 534, involved a similar complaint with reference to the Omaha city ordinance as it existed in 1920. That case held under the common law no duty devolved upon an abutting owner to keep

the sidewalk adjacent to his property in a safe condition and that the law of this state imposes upon the various municipal corporations the duty of keeping streets and sidewalks in a reasonably safe condition for travel by the public. That case further held: "Where the provisions of an ordinance impose upon property owners the performance of a part of the duty of the municipality to the public and are for the benefit of the municipality as an organized government and not for the benefit of the individuals comprising the public, a breach of such ordinance is remediable only at the instance of the municipal government, and no right of action accrues to an individual citizen especially injured thereby."

The Hanley case was reaffirmed in Stump v. Stransky, 168 Neb. 414, 95 N. W. 2d 691, in which the plaintiff alleged she slipped on a coating of ice which was negligently caused by defendants in allowing rain or melting snow to flow upon the sidewalk and congeal thereon. Plaintiff there relied on a Lincoln city ordinance requiring occupants or owners to remove ice and snow. The holding in these cases is the general rule in most of the jurisdictions of the United States, with the possible exception of West Virginia. See Annotation at 82 A. L. R. 2d 998.

Plaintiff alleges the ice on which he fell was formed by the refreezing of water melted from snow which had been piled against the fence on the adjoining property. Even if this issue had been established, there is a question as to liability, a point we are not called upon to decide. See the Annotation, covering the deposit of snow causing ice or slippery conditions, at 71 A. L. R. 2d 794. It is not necessary to meet this issue because there simply is no evidence that the plaintiff's fall resulted from the freezing of runoff water from the accumulated snow against the fence. No one testified to the condition of the walk where plaintiff fell. There was no evidence the condition at that spot was any different from the rest of the sidewalk. There is no competent evidence

that water from the accumulated snow created the ice on the sidewalk at the point where the plaintiff fell. Plaintiff's evidence is fairly conclusive that there was ice at the corner where there was no accumulation of snow.

It is true plaintiff's witness Stevenson testified defendant piled snow against the fence and that on warm days it would melt, but there was not one iota of testimony that this had occurred within any relevant period. Actually, the undisputed testimony was that the weather around February 8, 1969, was otherwise. The witness Loftin testified it had snowed and was real cold. The evidence is clearly insufficient to support a charge of negligence against the defendant. Plaintiff's witnesses were agreed it had been a bad winter. There had been considerable snow and ice, and the witness Stevenson testified there was ice and snow from before Christmas up into March. The motion to dismiss was properly sustained.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. REGGIE L. ONDRAK, APPELLANT.
186 N. W. 2d 727

Filed May 14, 1971. No. 37768.

1. **Trial: Attorneys at Law: Post Conviction: Criminal Law. Court appointed counsel should be given a wide latitude in the adoption of trial or argument strategy.**
2. **———: ———: ———: ———. One of the primary duties of an attorney is to represent a client zealously within the bounds of the law.**

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

Davies, Cheuvront & Sutter, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

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

WHITE, C. J.

This is a post conviction action in which the defendant claims he was ineffectively represented by counsel at the proceedings leading to his conviction and sentence. The district court denied the motion. On appeal we affirm the judgment of the district court dismissing the action.

In the district court in 1968, the defendant was charged with burglary. The court appointed to represent him counsel of his own choosing. He was acquainted with the lawyer involved, and the lawyer had represented him in several legal matters in the past. The defendant pled not guilty originally to the charge but this was subsequently changed to a guilty plea. It is not contended herein in this case that the guilty plea was anything other than freely and voluntarily given. The defendant was properly advised by the district court, after his guilty plea, that a presentence investigation as required by law would be made before sentence was passed.

At the time of the sentencing the record shows that the defendant was asked if there was anything he wanted to say before sentence was pronounced and he said "No, sir." The lawyer whose representation is now attacked then made the following statement: "I have thought about this a long time, Your Honor. I really don't know what to say except this is a very unfortunate situation. We have a young man here who, according to the tests, has a lot of abilities, but he doesn't seem to so far have found himself, found the backbone to stand on his feet and stay at useful employment. And as I see it, his drinking enters in and runs throughout the entire picture. Of course he is the one that did the drinking; no one poured it down his throat. That is

part of the problem and I think it was involved in this, because it was the reason for the burglary. I believe all of the men were drinking prior to the time they went there. As the Court indicated, there is a Municipal Court record of I don't know how many entries of simple intoxication. I don't know what the answer is. I simply suggest to the Court he would certainly be dried out if he was placed in either the reformatory or penitentiary. I cannot as an officer of this Court seriously recommend probation. I do not think that a long term would be of any particular value either. I think that probably is part of the trouble to start with; the fact this young man spent considerable time behind bars prior to the time he was ever convicted of any offense, simply as a juvenile delinquent; that enters the picture too. The recommendation I can make is virtually none. The Court has all the information before it. I have had the same information. I have thought about this for a long time and there is nothing I can really say to the Court." The statute provides for a maximum sentence of 10 years to the charge. The court pronounced an indeterminate sentence of 2 to 4 years. In essence, the defendant's attack is the suggestion that his lawyer should have demanded and argued for placing him on probation. This was a matter of trial strategy on the part of the lawyer. It would appear from the record that his representation and handling of this situation was quite effective. This was because the defendant had previously been on probation and considering his previous record, the judgment was made that an attempt to obtain or argue for probation again was not only not a realistic possibility, but might be considered as offensive by the sentencing judge. This was not only a logical and practical decision but it may have had some bearing upon the fact that the defendant, despite his record, was given an indeterminate sentence of 2 to 4 years. In the context of the situation that the trial counsel was faced with he should be given a wide lati-

tude in the adoption of the strategy involved. See 2 Amsterdam, Segal & Miller, Trial Manual for the Defense of Criminal Cases, § 467 (1967). We feel that the evidence in this case shows affirmatively a very adequate representation by the trial counsel. We observe that the defendant's drinking and its impact on his conduct were effectively presented to the trial court on the theory that the court would be more lenient and give a smaller sentence to a man who committed a crime while drinking than one who did it in the cold calculation of sobriety. The defendant's youth was emphasized and also it was pointed out to the court that a long term would not serve the ends of justice.

ABA Code of Professional Responsibility, Canon 7, states that one of the primary duties of an attorney is to represent a client "zealously within the bounds of the law." The record in this case demonstrates that the lawyer involved did just that. We can only characterize the publication in the briefs and the allegations of the petition herein being an irresponsible attack on a lawyer who did the best he could for a defendant in an almost impossible situation and accomplishing a result which is perhaps better than he could hope for. The defendant's best interests were served by not pursuing an impossible approach; rather his best interests were served by pursuing the few elements in the defendant's past record that seemed to have a chance of success in influencing the sentencing judge.

The judgment of the district court in dismissing the petition for post conviction relief is correct and is affirmed.

AFFIRMED.

JACOB J. RUTT, ALSO KNOWN AS J. J. RUTT, APPELLANT, V. NADINE ROEENE FRANK, FORMERLY NADINE ROEENE RUTT, ET AL., APPELLEES.

186 N. W. 2d 911

Filed May 14, 1971. No. 37775.

1. **Mortgages: Equity.** A mortgagee who, without consideration and at the request of the mortgagor, releases his mortgage solely for the purpose of giving priority to another lien is in equity entitled to have his mortgage reinstated after the other lien attaches, provided the rights of an innocent purchaser for value have not intervened.
2. **Pleading: Equity: Laches.** The facts constituting laches should normally be pleaded, but a court of equity may in some circumstances on its own motion deny relief on this ground.
3. **Equity: Laches.** What constitutes laches is to be determined in the light of the circumstances of the particular case.
4. **Mortgages: Equity: Laches: Pleading.** In an action in equity for reinstatement of a mortgage where relief is denied because of laches the court may nonetheless render judgment on the note, where such alternative relief is included in the prayer.

Appeal from the district court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed in part, and in part reversed and remanded with directions.

Russell & Colfer and Lyons, Wood & Carroll, for appellant.

Sarah Jane Cunningham, for appellees Frank.

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

CLINTON, J.

This is an action in equity to reinstate a real estate mortgage which had been released by the plaintiff mortgagee, Jacob J. Rutt, prior to payment in full, and to foreclose the mortgage as reinstated or in the alternative to have judgment on the promissory note which the mortgage secured. The mortgagors and makers are the defendants Nadine Frank and Kenneth Rutt who, at the time of the making of the note and mortgage and the

giving and recording of the mortgage release, were husband and wife. Nadine filed an action for divorce against Kenneth on April 21, 1966, and they were thereafter divorced on August 8, 1966. Nadine remarried and is now the wife of the defendant Robert Frank. Jacob J. Rutt and Kenneth are father and son. Nadine became the owner of the property on which the mortgage had been given by virtue of the divorce settlement and later conveyed the same to herself and Robert as joint tenants. Jacob J. Rutt will hereafter be referred to as plaintiff. The others will be referred to by their Christian names. The term defendants when herein used will, unless the context otherwise indicates, refer to Nadine and Kenneth.

The trial court entered judgment denying reinstatement of the mortgage but giving the plaintiff the "election as to whether to proceed further in this action on the note, or file a new action." The plaintiff appealed, contending that the mortgage should have been reinstated, but if not that the trial court should be directed to enter judgment against Nadine and Kenneth on the note.

We affirm that portion of the judgment of the trial court denying reinstatement of the mortgage, reverse that portion of the judgment giving plaintiff election to proceed on the note or file a new action, and we remand the cause with directions to enter judgment on the note.

The evidence discloses that on October 14, 1953, the plaintiff loaned to Kenneth and Nadine the sum of $9,500 for which they gave a promissory note payable at $58 per month together with the mortgage in question which covered a duplex residential property which they owned in McCook, Nebraska. The mortgage was duly recorded and was second to a mortgage to a lending agency which will be referred to herein as the association. Payments were made by Nadine and Kenneth from their joint earnings and account upon the note and mortgage

on a more or less regular basis from 1953 to August 2, 1965. In 1963, Kenneth applied to the association to borrow additional money and at that time the plaintiff, at the request of Kenneth and to meet the requirements of the association on the new loan, executed and delivered on January 18, 1963, a release of the mortgage which was duly recorded.

Plaintiff in his amended petition alleges an oral agreement by Kenneth and Nadine to give a substitute mortgage after the association's new mortgage was recorded. The association made the new loan in the amount of $10,000 and its mortgage was recorded. No substitute mortgage was given by Kenneth and Nadine, nor was the plaintiff's original mortgage re-recorded. Plaintiff alleges that this was because of inadvertence and oversight by all the parties.

Plaintiff, in paragraph 6 of his amended petition, alleges: "It was not the intention of any of the parties herein that the plaintiff should release and relinquish his mortgage lien * * * without having the security of a mortgage lien for the amount due him." He alleges in paragraph 6 a failure of consideration by reason of the failure of the defendants to give a new mortgage and also alleges certain conclusions of law. The allegations of this paragraph were not traversed by the defendants Nadine and Robert. Kenneth filed no answer and was in default. He did testify at the trial on behalf of the plaintiff.

The balance owing on the note is denied on information and belief by the other defendants. The evidence is undisputed on the payments made and the trial court made detailed findings on this which are not challenged by the defendants. The note and mortgage show the method of payment. The balance owing can be determined merely by mathematical computation.

As to Kenneth the evidence is uncontradicted that he agreed to give a substitute mortgage. The evidence is in direct and irreconcilable conflict as to whether

Nadine made such a promise. The plaintiff testified positively that she did but the evidence does not show whether the alleged promise was made before the giving of the release or afterward. Nadine flatly and positively denied that she made such a promise. Kenneth testified he did not know whether or not she did. The evidence is clear that Nadine knew of the release and that its purpose was to make possible the borrowing of additional money from the association. She signed the necessary note and mortgage to the association.

The plaintiff pleaded in his petition that Nadine had become the owner of the property by virtue of the property settlement agreement which provided that Nadine would "assume and pay the balance due and owing on any incumbrances upon said property." This was admitted in the answer of Nadine and Robert and they specifically pleaded in their answer a part of the property settlement agreement as follows: "It is further agreed by and between the parties, that any and all business indebtedness resulting from the business known as Willow Lanes, McCook, Nebraska, or due and owing Jack Rutt shall be paid by the second party without any recourse to first party." The settlement agreement was admitted into evidence over objection.

The evidence discloses that the $10,000 loan from the association was used as follows: $4,000 was paid to Willow Lanes, Inc. (the bowling alley enterprise), as an investment in the business; and $4,947.87 of the proceeds went to the association to pay the balance on its previous mortgage. The use of the balance of the $10,000 is not disclosed by the evidence.

The plaintiff commenced this action on January 24, 1969. The evidence showed without contradiction that following the release of the mortgage the plaintiff never pressed Nadine and Kenneth for the substitute mortgage. He testified he made inquiry of Kenneth about it, and also he assumed it had been made and put in his safe by Kenneth before Kenneth left town. He testi-

fied to an understanding with Kenneth that after the substitute mortgage was recorded Kenneth would return "it to me (and) I was to give him the old mortgage." He knew at all times, however, that he still had the old mortgage and had never surrendered it. He knew of the divorce pending between Kenneth and Nadine and was aware that it had been granted but did not know the details of any settlement between them. The evidence does not show whether or not he knew that Nadine went into possession of and received the duplex property but the parties were living in the same town. He made no investigation to see if the substitute mortgage had been executed and recorded. In fact, he knew this mortgage had not been given. He made subsequent loans to his son without security. No payments on any of this indebtedness were made after August 2, 1965.

At the time of the divorce, Nadine accepted a quit claim deed from Kenneth to the property in consummation of the divorce settlement and this was at a time when only the association mortgage appeared of record. She checked the records at the time she recorded the deed. She testified that Kenneth never mentioned the other mortgage to her. She did, of course, know of the making of the mortgage and note as she signed them and she did know of the release by the plaintiff and that it was for the purpose of getting the additional loan from the association.

After Nadine's marriage to Robert, the property was placed in joint tenancy with him. They repainted one side of the duplex in order to rent it and replaced some light switches and some stair treads. The cost was about $400 to $500, although the evidence is vague on this. Robert did the work. Nadine and Robert received the rentals from the property and put these in their joint account together with the earnings from the property and from this paid the cost of repairs and the payments on the association mortgage and the insurance and taxes.

This case being in equity is for trial de novo in this

court. The trial court made detailed fact findings and stated its conclusions of law and it is apparent that it founded its decision denying reinstatement of the mortgage primarily on the basis of what it determined to be laches on the part of the plaintiff. We hold that under the particular circumstances of this case laches on the part of the plaintiff does exist and does bar whatever right he may originally have had to have the mortgage reinstated.

The defendants Nadine and Robert did not plead laches as such in their answer but merely pleaded the portion of the property settlement agreement we have previously mentioned. The evidence as we have noted does show: The unexplained failure of the plaintiff to earlier insist upon the replacement mortgage; the irreconcilable conflict in the evidence as to whether Nadine was a party to the promise to give a substitute mortgage or to an understanding that such a mortgage would be given; her acceptance as a part of the property settlement agreement of a quit claim deed to the property in question at a time when the plaintiff's mortgage stood released of record; and that the plaintiff's cause of action accrued not later than the date of the recording of the association's new mortgage which was about January 25, 1963. As previously noted plaintiff pleaded in his petition that through inadvertence and oversight of all of the parties a new mortgage was not given to the plaintiff.

Normally all of the facts constituting laches should be pleaded. However, when the admissible evidence together with the plaintiff's pleading shows laches, the court on its own motion may deny relief on this ground. Baxter v. National Mtg. Loan Co., 128 Neb. 537, 259 N. W. 630; 30A C. J. S., Equity, § 132, p. 99.

What constitutes laches is to be determined in the light of circumstances of the particular case. Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131. In this case the plaintiff's unexplained and unreasonable delay in asserting his rights; the effect of this delay on the proof

in connection with the alleged promise of Nadine to execute a new mortgage; and the acceptance by Nadine of property as part of the property settlement at a time when the plaintiff's mortgage stood released of record, all taken together constitute laches. See 30A C. J. S., Equity, §§ 115 to 117, pp. 37 to 65. If the proof of a promise by Nadine were clear and convincing the result might be different. This action is analogous to an action for specific performance of a contract to give a mortgage. In such case the proof should be clear and convincing. 81 C. J. S., Specific Performance, § 143, p. 727.

The plaintiff points out that the defendants have not denied the allegation of the petition that it was the intention of the parties (defendants Kenneth and Nadine) that a substitute mortgage be given. We accept as undisputed that Nadine knew the release was without consideration and its purpose was to give priority to the new loan by the association. We hold that even without a promise on Nadine's part, under the circumstances stated in this paragraph, when the purpose of the release was merely to give priority to another lien and not to satisfy the debt, the plaintiff would have been entitled to a reinstatement of his mortgage absent laches. 55 Am. Jur. 2d, Mortgages, § 506, p. 499.

The defendant Robert contends that he is an innocent party whose intervening rights would be affected by the reinstatement of the mortgage. This is founded upon his expenditures and labors previously mentioned. It appears that expenditures for repairs and maintenance as distinguished from improvments substantially increasing the value of the property made by a person who acquires the property without payment of other consideration and who is receiving the use of and income from the property do not give rise to equities which would prevent reinstatement of the mortgage. Robert is not an innocent purchaser as he did not acquire the property for a valuable consideration. Campbell v. Ohio

National Life Ins. Co., 161 Neb. 653, 74 N. W. 2d 546.

We next turn to consideration of plaintiff's prayer for alternative relief in the form of judgment against the defendants on the note.

The court in its findings of fact gives permission to the plaintiff under the provisions of section 25-2140, R. R. S. 1943, to proceed for recovery on the note, but as already noted, gave the plaintiff the election either to proceed in this action or to file a new action. This court has many times held that once a court of equity has acquired jurisdiction it may proceed to give full relief. Ready Sand & Gravel Co. v. Cornett, 184 Neb. 726, 171 N. W. 2d 775. The trial court therefore should proceed to determine the balance due on the note and enter judgment for the plaintiff against the makers for the amount due. The rights and liabilities of Nadine and Kenneth as between themselves by virtue of the property settlement agreement as it relates to the obligation to the plaintiff will, of course, have to be determined in another action.

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

STATE OF NEBRASKA, APPELLEE, V. HAROLD WILLIAM ADELS, APPELLANT.
186 N. W. 2d 908

Filed May 14, 1971. No. 37784.

1. **Witnesses: Evidence: Intoxicating Liquors.** A nonexpert witness may testify from his observations as to whether or not another is intoxicated and the weight and sufficiency of this evidence is for a jury to decide.
2. **Statutes: Indictments and Informations: Witnesses: Criminal Law.** Section 29-1602, R. R. S. 1943, does require the endorsement of the names of witnesses on an information, and the failure in a contested case to endorse those known at the time the information is filed is error, but not necessarily prejudicial error.

Appeal from the district court for Scottsbluff County: TED R. FIEDLER, Judge. Affirmed.

Robert M. Harris, for appellant.

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

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

WHITE, C. J.

This is a criminal prosecution for third offense drunk driving. The defendant appellant challenges the competence of the State's witnesses to express an opinion as to intoxication, the failure to endorse on the information the names of the witnesses who testified as to his prior convictions in drunk driving, and the sufficiency of the evidence to convict the defendant. On review we affirm the judgment and sentence of the district court.

Only the background facts necessary for an understanding of the issues in this case will be recited in this opinion. In the early evening of November 29, 1969, the defendant was returning a borrowed International pickup truck to the Great Western Sugar factory in Gering, Nebraska. He was followed from the south edge of Scottsbluff, Nebraska, to Gering, Nebraska, by state trooper Marvin Jenson where he was arrested for drunken driving. The arrest took place at approximately 7:15 p.m. Adels, 33 years of age, divorced, had finished his regular shift at the Great Western Sugar factory in Gering about 4 p.m. When he completed his shift he and some friends went to his apartment and consumed alcoholic liquor. Adels testified that during this whole period of time he had only two cans of Budweiser beer. He testified that he had no other beer or no hard liquor. He testified that he used the truck to take his clothing and personal effects to a new apartment. In any event, immediately prior to 7:15 p.m. he left the apartment to

return the pickup truck to the sugar factory in Gering. He testified generally that lime in the room in which he worked at the sugar factory caused his eyes to be sore and red for a long period of time and also that many years before he had suffered a crushed ankle and the leg impediment was still bothering him. He also testified that he had trouble with the pickup on returning it because of the gear shift. The defendant's contention in this case is that the officers who testified as to intoxication had no proper foundation for their opinion. This contention, fairly stated in the context of this case, is that the officers failed to testify as to many factors which could have supported a conclusion of drunkenness, and they failed to negative many items in the defendant's conduct which would furnish a foundation for a conclusion as to intoxication. For example, the defendant contends that the officers should have testified as to any other physical defects besides a pale face and bloodshot eyes which would indicate intoxication, and the failure of the officers to testify whether Adels was talkative, profane, hilarious, sleepy, or bellicose. He contends that in order to establish a foundation for the conclusion of intoxication the officers should have testified as to whether he stuttered when talking, whether his speech was slurred, and whether his conversation was responsive to questions, nonsensical, or disorganized; whether the defendant had difficulty in writing; whether his pupils reacted to strong light; and whether his clothing was untidy, soiled, or disarranged, etc. No authority is cited or are we aware of any that requires an affirmative showing by the State covering each one of these issues and the many others recited by the defendant in order to establish a foundation for intoxication. We go to the record to discover the evidence that was introduced which was the basis of the opinion conclusion of the trooper that the defendant was intoxicated at the time of the arrest. Trooper Marvin Jenson testified that the defendant's motor ve-

hicle was weaving and crossing the centerline on the bypass near the south edge of Scottsbluff. He testified that the vehicle turned south on State Highway No. 71 and that after he turned on his red light the defendant finally stopped some 2 or 3 miles down the road. During this period of 2 or 3 miles, the defendant continued to weave back and forth and over onto the shoulder of the median that divides the driving lanes on the highway. Jenson testified that he was fearful of causing a wreck if he pulled up alongside the defendant's pickup truck. After both cars were finally stopped, as the defendant got out of his car he staggered. He had a strong odor of liquor about him. At that time, the trooper asked him to perform some balance tests and he weaved and staggered when trying to perform them. He then was placed under arrest for drunk driving and taken to the county sheriff's office. In the sheriff's office in the observation of Jenson, the defendant staggered when he was asked to walk the line, nearly fell on a balance test, his face was pale, and his eyes were bloodshot. Based on these observations and 4 years' experience as a highway patrolman, the trooper testified he was of the opinion that the defendant was intoxicated or drunk.

It is obvious, without a further recital of the details of the trooper's testimony, that the foundation was sufficient for a conclusion that the defendant was intoxicated. A nonexpert witness may testify from his observations as to whether or not another is intoxicated and the weight and sufficiency of this evidence is for a jury to decide. State v. Lewis, 177 Neb. 173, 128 N. W. 2d 610; Lemmon v. State, 173 Neb. 387, 113 N. W. 2d 525; Pribyl v. State, 165 Neb. 691, 87 N. W. 2d 201. The foundation for the other officer's testimony was sufficient for the same reasons we have recited herein as to Jenson's. There is no merit to this contention.

We turn now to the last two assignments of error which relate to the hearing required by the statute, after a conviction of drunken driving, to determine the prior

convictions necessary to authorize the court to sentence under the statute for third offense drunken driving, which is a felony. This contention is that the names of witnesses who were testifying as to the identification of the defendant on prior drunk driving convictions were not endorsed upon the information. Section 29-1602, R. R. S. 1943, requires the prosecuting attorney in a criminal prosecution to endorse on the information the names of all witnesses known to him. The names of the two witnesses who established the prior convictions on drunken driving were not endorsed on the information. The difficulty with defendant's position is that no objection was made that their names were not endorsed on the information. We observe further than at no time did the defendant ask for a continuance of the cause, nor does he now suggest that he was not, in fact, previously convicted as the evidence from the lips of these two witnesses established. Nor at any time in the hearing did he deny that he was the same person convicted of the offenses shown in exhibits 1 and 2 in the record, or that sheriff Bradt and trooper Guzman, the arresting officers, were not in fact the ones who arrested him and identified him. The question involved in this type of an attack upon a conviction is whether the failure to endorse the names of the witnesses was prejudicial error. Waite v. State, 169 Neb. 113, 98 N. W. 2d 688. A similar contention was made in the recent case of Nicholson v. Sigler, 183 Neb. 24, 157 N. W. 2d 872, cert. den. 393 U. S. 876, 89 S. Ct. 174, 21 L. Ed. 2d 148. We held in disposing of a substantially similar contention with reference to the failure to endorse on the information the names of the complaining witnesses as follows: "Section 29-1602, R. R. S. 1943, does require the endorsement of the names of witnesses on an information, and the failure in a contested case to endorse those known at the time the information is filed is error, but not necessarily prejudicial error. Even if appellants had not pled guilty herein and had gone to trial on the present

information, the description in the informations, in the absence of motions, would have been sufficient. See Waite v. State, 169 Neb. 113, 98 N. W. 2d 688." There is no merit to this contention of the defendant.

The defendant also asserts that the evidence was insufficient to show the prior convictions of the defendant for drunken driving. We have reviewed the evidence in this respect. The defendant again does not question the authenticity of the certificates of the prior convictions from the county court of Kimball County as shown in exhibits 1 and 2. The defendant was positively identified in court, by the two officers who had actually arrested him, as being the same person who had been convicted and sentenced in proceedings in Kimball County. We can find no merit in this contention of the defendant.

The record is free from prejudicial error, and the judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

ROY J. SHELHAMER, APPELLEE, V. JAMES O'NEILL ET AL., APPELLANTS.
187 N. W. 2d 83

Filed May 14, 1971. No. 37791.

1. **Trial: Evidence: Contracts.** Preliminary negotiations leading to the execution of an integrated agreement of uncertain meaning are admissible for the purpose of determining the intentions of the parties, the conditions existing at the time, and the objects thereby to be accomplished, but not to vary plain terms of the instrument.
2. **Specific Performance: Contracts.** Specific performance of a contract will not be decreed unless the minds of the parties to the contract have met.

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

Norman Gonderinger and Thomas E. Brogan, for appellants.

William W. Griffin, for appellee.

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

WHITE, C. J.

This is an appeal from a district court judgment granting specific performance of a real estate contract. We reverse the judgment of the district court.

In the early part of September 1968, defendant James O'Neill purchased from a Mrs. Summers the land involved in this lawsuit, approximately 33 acres located on the outskirts of O'Neill, Nebraska. Shortly thereafter, Mr. O'Neill was approached by the other defendant, David Eby, as to the possibility of selling the property to Eby. At that time, O'Neill was operating a cafe on premises which he leased from Eby. O'Neill owned the fixtures, equipment, and inventory in the cafe. O'Neill told Eby he would sell the land to Eby in a "package deal"—Eby to buy the land for $26,000 which included the assumption of a mortgage, and O'Neill's interest in the cafe for $8,000. O'Neill wanted to move to California and thus get out of the cafe business. Eby agreed to buy both the land and the cafe interest if he could raise the money, which he subsequently did. All of the proposed sale negotiations between the two defendants were oral.

On October 28, 1968, plaintiff, accompanied by a real estate broker, went to O'Neill's home to see about buying the property in question. O'Neill told the plaintiff that the property was already sold to Eby. Plaintiff then asked him if Eby didn't take it, would O'Neill sell it to the plaintiff for $28,000, including the assumption of the mortgage. O'Neill said he would, *provided Eby did not take the property.* Plaintiff then requested that they put it all down in writing to protect against a fluctuation

in price. It is this written agreement that is in dispute here. At the trial, the original contract was never produced, the trial court accepting a carbon copy instead since it was alleged by the plaintiff that the original could not be found.

The contract provides that O'Neill agrees to sell the property in question to the plaintiff. Although the agreement does not give a full description of the property involved or who the buyer is, we believe that under prior case law, the contract, taken as a whole, is adequate in these regards. Wright v. Negus, 111 Neb. 260, 196 N. W. 148 (1923); Frahm v. Metcalf, 75 Neb. 241, 106 N. W. 227 (1905); Campbell v. Kewanee Finance Co., 133 Neb. 887, 277 N. W. 593 (1938).

The contract first came to O'Neill to sign. At that point he inserted the following clauses: "(1) To be sold with Stipulation of no Truck stop, Cafe or Auto Dealership for period of 3 years. (2) David Eby to have 1st choice at purchase of the property at the above (illegible)." O'Neill then signed the agreement and passed it on to the plaintiff. Plaintiff objected to the second inserted clause which concerned Eby's purchase of the property. According to O'Neill's testimony, plaintiff said to cross off that clause now and it would be put on a new contract the following Saturday, in the event Eby did not buy the property by Friday, November 1st. There is some dispute as to who actually crossed out the clause, O'Neill contending that either the plaintiff or the real estate agent did, and plaintiff claiming that O'Neill crossed out the lines. After the clause was deleted plaintiff signed the agreement. O'Neill's testimony was to the effect that he was signing a conditional agreement—plaintiff's right to purchase being conditional on Eby's failure to complete the transaction. Plaintiff also admitted at the trial that he knew of the previous transactions with Eby and of O'Neill's insistence that Eby have first option on the property.

Three days after making the disputed contract, O'Neill

completed sale of the property to Eby. Plaintiff brought this action for specific performance after unsuccessfully attempting to pay O'Neill some consideration on the October 28th contract.

Defendants contend that the contract between O'Neill and the plaintiff is unenforceable because it was not founded upon the mutual assent of the parties to all the material terms of the agreement. In order to determine if there was a mutual assent, we must look at the surrounding circumstances, the discussion and actions at the time of signing the contract, and the objects to be accomplished. Such an examination is needed to determine the true nature of the transaction, not to vary any of the terms of the written instrument. See, Stillinger & Napier v. Central States Grain Co., Inc., 164 Neb. 458, 82 N. W. 2d 637 (1957); Fitzsimons v. Frey, 153 Neb. 124, 43 N. W. 2d 531 (1950); Bradway v. Higgins, 152 Neb. 724, 42 N. W. 2d 627 (1950); 3 Corbin on Contracts, §§ 537, 538 (1960).

It is clear that O'Neill never intended to sell the property to the plaintiff unless Eby was unable to buy it first. O'Neill wanted to sell the cafe equipment and Eby was willing to take it and the land as a "package." Throughout the negotiations prior to signing the contract, O'Neill pointed out to the plaintiff that he had already sold the land to Eby. Plaintiff was fully aware of this, and yet he insisted that a contract be drawn up so that he could buy the land in case Eby should be unable to make the purchase.

The negotiations surrounding the contract clearly show that the parties did not agree on what the effect of the contract was to be. Plaintiff understood that Eby was still going to get the land if he wanted it, even though the clause explicitly stating this was deleted. It is abundantly clear that the failure of a sale to Eby was a condition precedent to O'Neill's responsibility to sell the property to the plaintiff. In part, it was the plaintiff's representations that led to this mistake on

O'Neill's part. In addition, O'Neill's actions after the contract substantiate his position. When Eby came forward to close the transaction, O'Neill immediately complied, even though he was selling the land for $2,000 less than he would receive from the plaintiff. We believe the cumulative effect of all these facts shows that O'Neill felt he was under a continuing obligation to sell the property to Eby, if Eby could raise the money.

This is not a case where one party misunderstands his rights or duties under a contract because he has not read the agreement. The important issues here center around what the parties said and did as evidence of what effect the contract was to have. Defendants were able to show that O'Neill was laboring under such a mistaken belief, a belief which was in part brought about by plaintiff's actions and representations, that a court of equity must refuse to give specific performance. Specific performance of a contract will not be decreed unless the minds of the parties to the contract have met. Krum v. Chamberlain, 57 Neb. 220, 77 N. W. 665 (1898); Stanton v. Driffkorn, 83 Neb. 36, 118 N. W. 1092 (1908); Mercer v. Payne & Sons Co., 115 Neb. 420, 213 N. W. 813 (1927); Horn v. Stuckey, 146 Neb. 625, 20 N. W. 2d 692 (1945); Herrin v. Johnson Cashway Lumber Co., 153 Neb. 693, 46 N. W. 2d 111 (1951). The plaintiff was not entitled to specific performance and the district court should have so ruled.

The judgment of the district court is reversed and the cause remanded with directions to dismiss the plaintiff's petition.

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7. Cited statute not violative of Constitution of Nebraska, but on contrary is reasonable and valid exercise of police power. Central Markets West, Inc. v. State ---------- 79
8. Courts will not hold statutes unconstitutional unless necessary to proper disposition of case. Norlanco, Inc. v. County of Madison ---------- 100
9. Constitutional question must be raised at earliest practical opportunity in a court of competent jurisdiction. Norlanco, Inc. v. County of Madison ---- 100
10. Statute presumed to be constitutional and judgment entered on unconstitutional statute not void, but voidable only. Norlanco, Inc. v. County of Madison 100
11. Judgment based on unconstitutional statute is not for that reason subject to collateral attack. Norlanco, Inc. v. County of Madison ---------- 100
12. Judgment in court of competent jurisdiction which has become final, based on statute, is as binding on parties as any other judgment even though such statute subsequently declared unconstitutional. Norlanco, Inc. v. County of Madison ---------- 100
13. Passage of 5 months time between arrest and trial, standing alone, does not demonstrate violation of constitutional guarantee of speedy trial. State v. Ford ---------- 109
14. Revocation of motorist's license to operate motor vehicle for refusal to take test of body fluids for alcoholic content as required by implied consent law on ground that he had been denied services of legal counsel is not deprivation of constitutional rights. Rusho v. Johns ---------- 131
15. Trial strategy adopted by counsel without prior consultation with accused will preclude accused from asserting constitutional claims in absence of exceptional circumstances. State v. Haynes ---------- 238
16. In criminal prosecution, State may not make use of evidence unconstitutionally obtained to make a case for jury; but a case having been so made, State may use evidence unconstitutionally obtained to impeach credibility of defendant on collateral matters not ultimately involved in issue of guilt. State v. Ross 280
17. Not required there be direct waiver of each and

every constitutional right involved; only that plea waiving such rights be voluntarily and intelligently entered. State v. Starr ---------- 327
18. Definition of crimes and penalties for their violation are statutory in this state; statute which has effect of delegating to private person punishment to be assessed for crime subject to constitutional objection. State v. Goodseal ---------- 359
19. Cited statute unconstitutional and void in that it delegates to person asserting self-defense determination of amount and extent of force to be used in defending his person as legal justification for crime. State v. Goodseal ---------- 359
20. Where unconstitutional statute is relied on to sustain position of one or more of parties, Supreme Court will, in proper case, notice plain error in premise on which case was tried and declare unconstitutionality of act even though that issue was not raised by parties. State v. Goodseal ---------- 359
21. City directing credit to public purpose with incidental benefit to private corporation not violative of constitutional prohibition against state and its subdivisions lending credit to private corporation. Cosentino v. City of Omaha ---------- 407
22. Where statute susceptible of two constructions, one which renders it constitutional and other unconstitutional, duty of Supreme Court to adopt construction which without doing violence to fair meaning of statute will render it valid. State v. Workman 467
23. Questions of public policy, convenience, and welfare, as related to creation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, or any change in boundaries thereof, are of purely legislative cognizance; when delegated to public body having legislative power, action in regard thereto not within due process clause of either state or federal Constitution. Syfie v. Tri-County Hospital Dist. ---------- 478
24. Statutes which provide for creation of district to encompass land in two or more counties may constitutionally allow county board of one of counties involved to act as competent tribunal before which question of setting boundaries of district may be heard. Syfie v. Tri-County Hospital Dist. ---------- 478
25. Competent for Legislature to authorize creation of governmental agencies for enforcement of its police power and clothe county commissioners, supervisors,

or other administrative officers or boards with authority to establish districts for implementation of such purposes. Syfie v. Tri-County Hospital Dist. 478
26. Fact that bodies of land may extend into two or more counties does not render Legislature powerless to include contiguous tracts into one district for more convenient exercise of police power. Syfie v. Tri-County Hospital Dist. ---------- 478
27. Domestic corporations are subject to provisions of cited section of Constitution. State ex rel. Neff v. Christian Brotherhood of America Burial Assn. 525
28. Domicile in state is alone sufficient to bring absent defendant within reach of state's jurisdiction for purposes of personal judgment by means of appropriate substituted service; personal service of summons adequate to meet requirements of due process of law. Stucky v. Stucky ---------- 636
29. In personam jurisdiction may be acquired over nonresident defendant in divorce action by extraterritorial personal service of process made in accordance with statute of this state if there exist sufficient contacts between defendant and this state relevant to cause of action to satisfy traditional notions of fair play and substantial justice. Stucky v. Stucky ---------- 636
30. Property of state and its governmental subdivisions exempt from taxation under cited section of Constitution. Sioux City & New Orleans Barge Lines, Inc. v. Board of Equalization ---------- 690
31. Improvements on real estate constituting Missouri River port area under control and supervision of Dock Board of City of Omaha, and owned by city, exempt from taxation. Sioux City & New Orleans Barge Lines, Inc. v. Board of Equalization ---------- 690
32. Litigant who invokes provisions of statute may not challenge its validity; may not seek benefit of it and at same time question its constitutionality. City of Grand Island v. American Federation of S. C. & M. Employees ---------- 711
33. Holding that act of Legislature is constitutional or unconstitutional determines its validity only on questions considered and determined by Supreme Court; silence by Supreme Court does not have effect of validating section of act not brought in issue and determined therein. Blue Flame Gas Assn. v. McCook P. P. Dist. ---------- 735
34. Provisions of subsections (5) and (6) of section

59-1202, R. R. S. 1943, so indefinite and uncertain as to be arbitrary and unreasonable and are therefore unconstitutional and invalid. Blue Flame Gas Assn. v. McCook P. P. Dist. ---------- 735

35. In absence of severability clause, provisions of subsections (5) and (6) of section 59-1202, R. R. S. 1943, are such integral and vital part of Unfair Sales Act that unconstitutionality of those subsections necessarily makes entire act unconstitutional. Blue Flame Gas Assn. v. McCook P. P. Dist. ------ 735

36. In construing act of Legislature, all reasonable doubt must be resolved in favor of constitutionality; burdens imposed by statute are presumed reasonable; burden of proving statute contains unlawful or unreasonable terms rests upon those assailing it. Mann v. Wayne County Board of Equalization 752

37. Statute which provides for raising revenue for nonresident high school tuition which places substantially unequal tax burden on either district which receives nonresident students or on district which sends them would be discriminatory. Mann v. Wayne County Board of Equalization ---------- 752

38. Cited statute does not violate constitutional requirements of tax uniformity nor constitute commutation of taxes. Mann v. Wayne County Board of Equalization ---------- 752

39. Where Legislature has provided reasonable limitations and standards for carrying out delegated duties, no unconstitutional delegation of legislative authority. Mann v. Wayne County Board of Equalization ---------- 752

40. Constitutionality of retroactive statute under contract and due process clauses of United States and Nebraska Constitutions generally depends upon reasonableness; relevant factors are nature and strength of public interest, extent of modification of asserted preenactment right, and nature of right altered by statute. Hiddleston v. Nebraska Jewish Education Soc. ---------- 786

41. Cited section of reverter act, either on its face or in its application to plaintiffs, did not violate due process or contract clause of United States or Nebraska Constitution or eminent domain provision of latter Constitution. Hiddleston v. Nebraska Jewish Education Soc. ---------- 786

42. Committed offender while on parole shall remain in legal custody and control of Board of Parole; board

may at any time revoke parole of offender or recommit him to custody of Division of Corrections, with or without cause. Brown v. Sigler ---------- 800

43. A state is not required to provide for parole and, if it does, it may stipulate terms and conditions under which it may be granted or revoked. Brown v. Sigler ---------- 800

44. Constitutional due process does not require Board of Parole to conduct adversary hearing to revoke parole, nor does it require appointment of counsel for indigent parolees or compulsory process. Brown v. Sigler ---------- 800

45. Good time reductions provided in cited statute used to determine eligibility for release on parole or supervision and subject to forfeiture Brown v. Sigler ---------- 800

46. Defendant in post conviction proceeding may not raise questions which could have been raised on direct appeal and which do not involve questions making judgment of conviction void or voidable under state or federal Constitutions. State v. Huffman 809

47. Post conviction remedies intended to provide relief in those cases where miscarriage of justice may have occurred; not intended as procedure to secure review for defendant dissatisfied with his sentence. State v. Huffman ---------- 809

48. Imposing two sentences for one offense constitutes violation of due process of law and is ground for relief under post conviction proceeding statute. State v. Huffman ---------- 809

49. One trial upon two counts growing out of single transaction for which only one sentence may be imposed does not violate constitutional provisions against double jeopardy. In such cases where two concurrent equal sentences imposed, one will be regarded as surplusage and be vacated. State v. Huffman ---------- ---------- 809

50. Federal Constitution and statutes control extradition in fugitive from justice cases; state statutes merely ancillary thereto and may permit Governor to surrender prisoner on terms less exacting than those imposed by Congress. Austin v. Brumbaugh 815

Continuances.

Not error for trial court to deny motion for continuance because of absence of witness where no showing made as to evidence he will give, its mate-

riality, diligence employed to have witness present, and unavailability of other evidence to eliminate need for such witness. Metschke v. Department of Motor Vehicles ---------- 197

Contracts.

1. Contracts made in violation of Securities Exchange Act of 1934, or of any rule or regulation thereunder, not void but merely voidable at option of innocent party. J. Cliff Rahel & Co., Inc. v. Roper ---------- 34
2. Interpretation given contract by parties themselves while engaged in performance of contract is one of best indications of true intent. Enterprise Co., Inc. v. Nettleton Business College ---------- 183
3. Ordinarily, acceptance of performance after default in performance waives right to rely upon default. Peckham v. Deans ---------- 190
4. General rule is that demand for performance not necessary unless required by terms of contract or its peculiar nature. Peckham v. Deans ---------- 190
5. Law favors and encourages settlements, and in absence of fraud or mutual mistake they should not be set aside. Peckham v. Deans ---------- 190
6. Lease to be construed as any other contract. Omaha Country Club v. Dworak ---------- 336
7. Intent of parties to be determined from whole instrument and is controlling if consistent with rules of law. Omaha Country Club v. Dworak ---------- 336
8. Written contract, couched in clear and unambiguous language, not subject to construction other and different from that which flows from language used. Omaha Country Club v. Dworak ---------- 336
9. Proper construction of written contract question of law to be determined by court. Durand Associates, Inc. v. Guardian Inv. Co. ---------- 349
10. Architect bound to make full disclosures of all matters of which he had or should have had knowledge which it was important his clients should know. Durand Associates, Inc. v. Guardian Inv. Co. ---------- 349
11. Architect or engineer may breach his contract for architectural services by underestimating construction costs of proposed structure. Durand Associates, Inc. v. Guardian Inv. Co. ---------- 349
12. Rule to be applied is that cost of construction must reasonably approach that stated in estimate unless owner orders changes which increase cost of construction. Durand Associates, Inc. v. Guardian Inv. Co. 349

13. Ordinarily for jury to say whether actual cost within reasonable range of estimated cost unless excess so great that court can deal with it as matter of law. Durand Associates, Inc. v. Guardian Inv. Co 349
14. Recovery cannot be had on a quantum meruit by party who breaches contract against one receiving no benefit from performance of services for which recovery sought. Durand Associates, Inc. v. Guardian Inv. Co. 349
15. Benefit to firm generally held insufficient basis on which to predicate firm liability for transaction entered into by partner in individual capacity. Ogallala Fertilizer Co. v. Salsbery ---------- 537
16. Where partners are disclosed and known to party contracting, and contract signed by only one partner who contracts in own behalf, other partners not bound thereby. Ogallala Fertilizer Co. v. Salsbery 537
17. If contract prepared by insurer reasonably open to different interpretations, one favorable to insurer and one advantageous to insured, one favorable to insured will be adopted. American Standard Ins. Co. v. Tournor ---------- 585
18. Person with notice of limitation of agent's authority cannot subject principal to liability upon transaction with agent if he should know agent is acting improperly. Dembowski v. Central Constr. Co. ---- 624
19. Innocent principal can, by contract with another, relieve himself of liability for deceit because of unauthorized fraud by servant or other agent upon other party. Dembowski v. Central Constr. Co. -- 624
20. Time not generally considered as essence of contract, unless expressly provided or appears was intention of parties that should be of essence thereof. Kingery Constr. Co. v. Scherbarth Welding, Inc. -- 653
21. Security interest continues in collateral notwithstanding sale, exchange, or other disposition thereof by debtor, unless action authorized by secured party in security agreement or otherwise; also continues in any identifiable proceeds including collections received by debtor. Garden City Production Credit Assn. v. Lannan ---------- 668
22. Provision in security agreement granting security interest in proceeds of collateral, as well as in collateral itself, does not amount to written consent to dispose of collateral but only provision that should sale, exchange, or other disposition occur, proceeds also would be covered by security agreement. Garden City Production Credit Assn. v.

Lannan ---------- 668
23. Failure to rebuke or object alone by lender to sale of collateral does not amount to written consent to dispose of collateral free of lender's security interest. Garden City Production Credit Assn. v. Lannan -- 668
24. Coupling of provision prohibiting disposition of collateral without written consent, together with reservation of security interest in proceeds of sale, are provisions primarily designed for further protection of security holder and not provisions to expand rights of purchaser. Garden City Production Credit Assn. v. Lannan ---------- 668
25. Trier of fact to determine question of interpretation of integrated agreement if question depends on credibility of extrinsic evidence or on choice among reasonable inferences from extrinsic evidence. Andersen v. Blondo Plaza, Inc. ---------- 682
26. Damage caused by breach of restriction on competition rarely susceptible of accurate proof. Andersen v. Blondo Plaza, Inc. ---------- 682
27. When workman or artisan by his labor or skill increases value of personal property placed in his possession to be improved he has lien upon it for his proper charges until paid; in order to charge chattel with this lien, labor for which lien is claimed must have been done at request of owner or under circumstances from which his assent can be reasonably implied. Gibreal Auto Sales, Inc. v. Missouri Valley Machinery Co. ---------- 763
28. Antenuptial agreement containing no provision to contrary not affected by divorce of parties. Sims v. Sims ---------- 780
29. Constitutionality of retroactive statute under contract and due process clauses of United States and Nebraska Constitutions generally depends upon reasonableness; relevant factors are nature and strength of public interest, extent of modification of asserted preenactment right, and nature of right altered by statute. Hiddleston v. Nebraska Jewish Education Soc. ---------- 786
30. Cited section of reverter act, either on its face or in its application to plaintiffs, did not violate due process or contract clause of United States or Nebraska Constitution or eminent domain provision of latter Constitution. Hiddleston v. Nebraska Jewish Education Soc. ---------- 786
31. Every contract for leasing for longer period than

one year, or for sale of any lands, void unless contract or some note or memorandum thereof in writing and signed by party by whom lease or sale to be made. Kubicek v. Kubicek ---------- 802

32. Cited statute clearly contemplates that contract, note, or memorandum thereof in writing shall contain within itself all essential elements which go to make up contract, and when essential elements of contract are lacking, contract must fail, because essential elements cannot be supplied by parol testimony. Kubicek v. Kubicek ---------- 802

33. Preliminary negotiations leading to execution of integrated agreement of uncertain meaning admissible for purpose of determining intentions of parties, conditions existing at time, and objects thereby to be accomplished, but not to vary plain terms of instrument. Shelhamer v. O'Neill ---------- 854

34. Specific performance of contract will not be decreed unless minds of parties to contract have met. Shelhamer v. O'Neill ---------- 854

Corporations.

Domestic corporations are subject to provisions of cited section of Constitution. State ex rel. Neff v. Christian Brotherhood of America Burial Assn. -- 525

Costs.

1. Taxation of costs of jury under provisions of cited statute requires finding by district court supported by evidence that appeal was frivolous or capricious. State v. Stanosheck ---------- 17

2. Determination that all costs are taxed to party means only costs of appeal to Supreme Court; direction does not include costs in trial court save in those situations where, by appropriate language, trial court costs as well as appeal costs are taxed in order of Supreme Court. Muff v. Mahloch Farms Co., Inc. 151

3. Cost or expense of bill of exceptions taxed in district court. Muff v. Mahloch Farms Co., Inc. -------- 151

4. Award of costs in judgment is part of judgment, and power of court to change such award is coextensive with its power to vacate or modify judgment. Muff v. Mahloch Farms Co., Inc. --------- 151

5. Costs may be retaxed at subsequent term when court has failed to follow mandatory statutory duty to tax costs, in event of clerical error or failure to perform ministerial act, and in instances authorized

by cited statute, for vacation or modification of judgment at subsequent term. Muff v. Mahloch Farms Co., Inc. ---------- 151
6. Award of costs cannot ordinarily be changed by court after term at which made except in instances where statutes permit vacation or modification of judgment at subsequent term. Muff v. Mahloch Farms Co., Inc. ---------- 151
7. Architect bound to make full disclosures of all matters of which he had or should have had knowledge which it was important his clients should know. Durand Associates, Inc. v. Guardian Inv. Co. ------ 349
8. Architect or engineer may breach his contract for architectural services by underestimating construction costs of proposed structure. Durand Associates, Inc. v. Guardian Inv. Co. ---------- 349
9. Rule to be applied is that cost of construction must reasonably approach that stated in estimate unless owner orders changes which increase cost of construction. Durand Associates, Inc. v. Guardian Inv. Co. ---------- 349
10. Ordinarily for jury to say whether actual cost within reasonable range of estimated cost unless excess so great that court can deal with it as matter of law. Durand Associates, Inc. v. Guardian Inv. Co. ------ 349

Counties.

1. Questions of public policy, convenience, and welfare, as related to creation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, or any change in boundaries thereof, are of purely legislative cognizance; when delegated to public body having legislative power, action in regard thereto not within due process clause of either state or federal Constitution. Syfie v. Tri-County Hospital Dist. ---------- 478
2. Statutes which provide for creation of district to encompass land in two or more counties may constitutionally allow county board of one of counties involved to act as competent tribunal before which question of setting boundaries of district may be heard. Syfie v. Tri-County Hospital Dist. -------- 478
3. Competent for Legislature to authorize creation of governmental agencies for enforcement of its police power and clothe county commissioners, supervisors, or other administrative officers or boards with authority to establish districts for implementation of

such purposes. Syfie v. Tri-County Hospital Dist. 478
4. Fact that bodies of land may extend into two or more counties does not render Legislature powerless to include contiguous tracts into one district for more convenient exercise of police power. Syfie v. Tri-County Hospital Dist. ---------- 478

Courts.
1. Provisions of cited statute dealing with certificate or proof of service of notice of appeal from municipal court to district court not mandatory and jurisdictional, but directory only; defective proof of service may be corrected or amended with permission. Havelock Meats, Inc. v. Roberts ---------- 73
2. Where court of equity has obtained jurdisdiction of case for any purpose, it will retain it for all and will proceed to final determination of case, adjudicate all matters in issue, and thus avoid unnecessary litigation. Central Savings Bank v. First Cadco Corp. ---------- 112

Criminal Law.
1. All instructions must be read together; if instructions taken as whole correctly state law, are not misleading, and adequately cover issues, there is no prejudicial error. State v. Jackson ---------- 22
2. Corroboration of prosecutrix in rape case sufficient if there are material facts and circumstances which tend to support her testimony and from which, together with her testimony as to principal fact, inference of guilt may be drawn. State v. Wagner 37
3. When any court suspends sentence and places defendant on probation it shall determine conditions and period of probation, and conditions of probation shall be such as court shall in its discretion prescribe. State v. Duitsman ---------- 39
4. Supreme Court will not interfere with sentence imposed by lower court unless it appears to be result of abuse of discretion. State v. Duitsman 39
5. Package shipped by air mail parcel post subject to inspection by postal authorities; inspection of such package in presence of postal authorities and while package is in their custody not illegal search. State v. Collins ---------- 50
6. Objects in plain view subject to seizure by officer who has right to be in position to have that view. State v. Collins ---------- 50

7. Guilty knowledge may be proved by circumstantial evidence. State v. Collins ---------- 50
8. In larceny prosecution, corpus delicti may be established by circumstantial evidence; sufficient if circumstances consistent with crime, even though they also may be consistent with innocence. State v. Nydegger ---------- 61
9. Larceny corpus delicti may be proved by evidence property has been taken and removed without owner's knowledge or consent. State v. Nydegger ---------- 61
10. Possession of recently stolen property when coupled with lack of satisfactory explanation, or false explanation or other incriminating circumstances or conduct, sufficient to support verdict of guilty. State v. Nydegger ---------- 61
11. Ordinarily sufficient if property found in possession of accused or shown to have been disposed of by him is of same character and appearance as that stolen, and circumstantial evidence with respect thereto admissible. State v. Nydegger ---------- 61
12. Cited statute provides specifically in criminal cases that Supreme Court shall have jurisdiction of case when notice of appeal filed with clerk of district court. State v. Moore ---------- 71
13. Motion in arrest of judgment must be made and disposed of after verdict and before court pronounces final judgment and sentence; where motion made after judgment and sentence, it is void in absence of order vacating judgment and sentence. State v. Moore ---------- 71
14. One to whom complaining witness has complained may testify to fact and nature of complaint if complaint made voluntarily and without inconsistent delay. State v. Deardurff ---------- 92
15. Defendant may effectively waive right to counsel at custodial interrogation, provided he does so voluntarily, knowingly, and intelligently. State v. Deardurff ---------- 92
16. Mere fact that accused upon plea of guilty receives sentence greater than sentence anticipated is insufficient to render plea involuntary or assistance of counsel ineffective. State v. Busse ---------- 99
17. Passage of 5 months time between arrest and trial, standing alone, does not demonstrate violation of constitutional guarantee of speedy trial. State v. Ford ---------- 109
18. If court has instructed jury generally on law of case

and not withdrawn any essential issue from consideration of jury, error cannot be predicated on failure to charge on some particular phase of case unless proper instruction requested by party complaining. State v. Ford ---------- 109

19. Where no evidence to show what information considered by judge in passing sentence, and record on its face reflects nothing to indicate sentence excessive, sentence imposed within statutory limits will not be disturbed. State v. Gaston ---------- 140

20. Supreme Court may reduce sentence when in its opinion sentence excessive. State v. Dixon ---------- 143

21. Where items of personal property are bought and sold by dealers in regular course of business, evidence of dealers' wholesale price is evidence of fair and reasonable market value for purpose of distinguishing between grand and petit larceny. State v. Carroll ---------- 148

22. When following plea of guilty in criminal action and institution of post conviction action, court finds from record of in-court examination of defendant that plea was voluntary, was free from coercion, was fairly advised by counsel, and that counsel was effective, subsequent contention that plea coerced and counsel ineffective will not be entertained. State v. Sargent ---------- 155

23. Defendant may request that presentence report be made part of record and included in bill of exceptions. State v. Walker ---------- 156

24. Boy of sane mind under age of 18 years, upon conviction of any crime, except murder or manslaughter, in any court of record, may be committed to Boys' Training School. State v. Pinkerton ---------- 225

25. Failure to object promptly to offer of evidence ordinarily waives objection. State v. Haynes ---------- 238

26. Trial strategy adopted by counsel without prior consultation with accused will preclude accused from asserting constitutional claims in absence of exceptional circumstances. State v. Haynes ---------- 238

27. Right to new trial for newly discovered evidence depends upon facts and circumstances of each case. State v. Haynes ---------- 238

28. Motion for new trial is addressed to sound discretion of trial court and unless abuse of discretion shown, its determination will not be disturbed. State v. Haynes ---------- 238

29. New cumulative evidence tendered in support of

motion for new trial must be so potent that new trial would probably result in different verdict. State v. Haynes ---------- 238
30. New trial will not ordinarily be granted for newly discovered evidence which would simply impeach a witness. State v. Haynes ---------- 238
31. Where sentence has been imposed by district court within statutory limits it will not be disturbed in absence of abuse of discretion. State v. Gamron 249
State v. McDonnell ---------- 316
State v. Trout ---------- 477
32. Voluntary drunkenness of one accused of crime does not mitigate offense, although it may have bearing on his turpitude and quality of his crime, and be considered on question of punishment. State v. Gamron ---------- 249
33. It is general rule that plain evidentiary errors not presented to trial court will not be reviewed. State v. Waters ---------- 257
34. Supreme Court may grant new trial for plain evidentiary errors under exceptional circumstances that deprived defendant of fair and impartial trial, although no one presented matter to trial court. State v. Waters ---------- 257
35. In criminal prosecution, State may not make use of evidence unconstitutionally obtained to make a case for jury; but a case having been so made, State may use evidence unconstitutionally obtained to impeach credibility of defendant on collateral matters not ultimately involved in issue of guilt. State v. Ross 280
36. While penal statutes must be construed strictly, it is not proper to give them strained or unnatural construction. State v. Reich ---------- 289
37. Penal statutes should be construed so as to give effect to plain meaning of words employed, and where of doubtful meaning, or application, court should adopt sense that best harmonizes with context and apparent policy and objects of Legislature. State v. Reich ---------- 289
38. In prosecution under cited statute, touching, fondling, rubbing, or feeling of body, members or private parts of minor under age of 16 years, with intent of arousing, appealing to, and gratifying lusts, passions, and sexual desires of either minor or accused, constitutes offense charged, even though such touching, fondling, rubbing, or feeling was through clothing of minor. State v. Reich ---------- 289

39. Each case must be considered on its own facts; conviction based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if photographic identification procedure so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Randolph -- 297
40. Where criminal statute amended by mitigating punishment, after commission of prohibited act but before final judgment, punishment is that provided by amendatory act unless Legislature has specifically provided otherwise. State v. Randolph ------ 297
41. Lesser included offense is one which includes some of elements of crime charged without addition of any element irrelevant to crime charged. State v. Jones ---------- 303
42. Where court has instructed generally as to elements of offense charged, failure to charge on some particular phase of case not error in absence of request for more specific instruction. State v. Jones 303
43. Argument which is based on evidence and inferences drawn therefrom ordinarily not misconduct. State v. Jones ---------- 303
44. Statement obtained from defendant in criminal prosecution who had received Miranda warnings not inadmissible because defendant not advised as to what charges might be brought against him. State v. Wilbur ---------- 306
45. Photographs, although of gruesome nature, admissible in evidence if are relevant and true representation of what they purport to represent. State v. Wilbur ---------- 306
46. Autopsy not critical stage of prosecution; no right to representation by counsel at autopsy. State v. Wilbur ---------- 306
47. Where prosecutrix 15 or over, her previous chastity essential element of offense of statutory rape. State v. Vicars ---------- 311
48. While general criminal intent involved in crime of statutory rape, no intent requisite other than that evidenced by doing of act consitituting offense. State v. Vicars ---------- 311
49. Not violative of due process for Legislature in framing its criminal laws to cast upon public duty of care or extreme caution. State v. Vicars ------ 311
50. Question of previous chastity of prosecutrix one for jury to determine under proper instructions.

State v. Vicars ---------- 311
51. Mistake or lack of information as to victim's chastity no defense to crime of statutory rape. State v. Vicars ---------- 311
52. Chaste female within meaning of cited statute is one who has never had unlawful sexual intercourse with a male prior to intercourse with which prisoner stands indicted. State v. Vicars ---------- 311
53. No general principle fixes exact time within which trial must be had to satisfy requirement of speedy trial; right to speedy trial necessarily relative. State v. McDonnell ---------- 316
54. Party may not predicate error on admission of evidence to which no objection made at time offered or adduced. State v. Weiland ---------- 325
55. Fact that responsive answer elicited by defense in cross-examining prosecution witness damaging to defense not ordinarily proper ground for granting mistrial. State v. Weiland ---------- 325
56. Essential to validity of plea of guilty that it be entered intelligently and voluntarily, and that record disclose this fact. State v. Starr ---------- 327
57. Not required there be direct waiver of each and every constitutional right involved; only that plea waiving such rights be voluntarily and intelligently entered. State v. Starr ---------- 327
58. When materials in automobile which are indicative of criminal offense in plain sight of officer looking into automobile from outside, search justified and legal. State v. Rys ---------- 341
59. Generally held that when motorist stopped or arrested for violation of traffic or motor vehicle laws, exploratory search of vehicle for purpose of obtaining evidence of other offenses unwarranted. State v. Rys ---------- 341
60. Search of automobile made in connection with violation for which it is stopped, ordinarily held lawful search although results in discovery of evidence of some other offense. State v. Rys ---------- 341
61. Ordinarily, when liquor, narcotics, or contraband materials found on defendant's premises or in automobile owned and operated by him, evidence of unlawful possession deemed sufficient to sustain conviction in absence of any other reasonable explanation for its presence. State v. Rys ---------- 341
62. Definition of crimes and penalties for their violation are statutory in this state; statute which has

effect of delegating to private person punishment to be assessed for crime subject to constitutional objection. State v. Goodseal ---------- 359

63. Cited statute unconstitutional and void in that it delegates to person asserting self-defense determination of amount and extent of force to be used in defending his person as legal justification for crime. State v. Goodseal ---------- 359

64. Killing in self-defense grounded upon necessity; exists only in extremity where no other practical means exists to avoid death or great bodily harm apparent to person resorting to it. State v. Goodseal 359

65. In order to excuse or justify killing in self-defense, accused must not only have entertained belief that his life was in danger or that he was in danger of suffering great bodily harm, but belief must have been reasonable and in good faith. State v. Goodseal 359

66. Whether or not accused killed in fear of death or great bodily harm, or whether or not killing was motivated by anger, punishment, or vengeance is issue of fact to be determined by jury. State v. Goodseal ---------- 359

67. Bad character of accused and fact she was acknowledged prostitute does not deprive her of right of self-defense, but such facts are circumstances to be considered in determining necessity for and extent and reasonableness of force used in connection with other evidence in case. State v. Goodseal ---- 359

68. Province of jury to determine circumstances surrounding crime charged; if, assuming as proved, facts which evidence tends to establish can be accounted for upon no rational theory which does not include guilt of accused, proof cannot, as matter of law, be said to have failed. State v. Goodseal ---- 359

69. After jury has considered evidence in light of rule regarding circumstantial evidence and returned verdict of guilty, verdict on appeal may not, as matter of law, be set aside for insufficiency of evidence if evidence sustains some rational theory of guilt. State v. Goodseal ---------- 359
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70. Cited statute applies toward eligibility for parole or release under supervision rather than for absolute discharge as under previous statutes. Von Bokelman v. Sigler ---------- 378

71. Evidentiary hearing in post conviction proceeding not required where files and records in case show

prisoner entitled to no relief. State v. Gero ------ 379
72. In absence of statute, district court after commitment of prisoner possesses no authority to set aside sentence and place prisoner on probation. Housand v. Sigler ---------- 414
73. Director of Corrections may refuse to release prisoner for work under cited statute notwithstanding favorable recommendation by Board of Parole. Housand v. Sigler ---------- 414
74. Law clear that accused person entitled to counsel at every critical stage of criminal proceeding. State v. Journey ---------- 416
75. Plea of guilty must not only be intelligent and voluntary to be valid but record must affirmatively disclose defendant entered his plea understandingly and voluntarily. State v. Turner ---------- 424
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76. Standards Relating to Pleas of Guilty promulgated by American Bar Association outline what should be minimum procedure in taking of pleas of guilty. State v. Turner ---------- 424
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77. Insanity as bar to imposition of sentence presents factual issue for determination of court. State v. Anderson ---------- 435
78. If, after commission of offense, appears accused may have become insane, and examination had by psychiatrist who reports she is presently sane and mentally competent, in absence of request therefor, formal hearing not required. State v. Anderson ---------- 435
79. Function of district court to impose sentences upon persons convicted of crime in accordance with applicable statute; in absence of abuse of discretion, such sentences will not ordinarily be disturbed on appeal. State v. Walker ---------- 439
80. Sufficient where elements of crime or offense defined by statute set out in information or complaint. State v. Matejka ---------- 454
81. Where words appear in information or complaint which might be stricken out, leaving crime or offense sufficiently charged, such words do not tend to negative any essential averments; may be treated as surplusage and entirely rejected. State v. Matejka ---------- 454
82. Evidence which tends to impeach witness for State

in criminal prosecution ordinarily admissible to discredit credibility of witness and weight to be given his testimony. State v. Matejka ---------- 454
83. Duty of court upon request of accused to instruct jury upon his theory of case, if there is evidence to support it. State v. Matejka ---------- 454
84. No judgment shall be set aside on grounds of misdirection of jury in criminal case if Supreme Court considers that no substantial miscarriage of justice actually occurred. State v. Fronning ---------- 463
85. Rule regarding defendant's issue on right of confrontation cited. State v. Workman ---------- 467
86. All defects that may be excepted to by motion to quash information will be taken to be waived by defendant pleading general issue. State v. Workman 467
87. Successive prosecutions by federal and Nebraska governments in exercise of concurrent jurisdiction over substantially same offense not prohibited by double jeopardy clauses of federal and Nebraska Constitutions. State v. Pope ---------- 489
88. Double jeopardy clauses of federal and Nebraska Constitutions do not prevent Nebraska fixing higher standards by statute or in absence of statute by judicial decision. State v. Pope ---------- 489
89. Whether at common law federal conviction bars prosecution by Nebraska with concurrent jurisdiction over substantially same offense depends upon vindication of public policy of state. State v. Pope ------ 489
90. When following plea of guilty in criminal action, court finds from record of in-court examination of defendant that his plea was voluntary, free from coercion, fairly advised by his counsel, and his counsel effective, subsequent contention that his plea was coerced and his counsel ineffective will not be entertained. State v. Smith ---------- 506
91. In criminal case, Supreme Court will not interfere with verdict of guilty based upon evidence unless so lacking in probative force that it can say as matter of law that evidence insufficient to support verdict of guilty beyond reasonable doubt. State v. Bayless ---------- 530
92. Objection to admission of evidence cannot be considered by Supreme Court for some reason not properly and timely raised at trial. State v. Bayless 530
93. Although record shows formal court appointment of counsel and arraignment of defendant occurred on same day, does not establish defendant deprived of

effective assistance of counsel. State v. Norgard -- 535
94. Fact that interviews with defendant conducted by different attorneys on public defender's staff prior to arraignment does not establish ineffective assistance of counsel. State v. Norgard ---------- 535
95. In determining admissibility of a state witness' in-court identification of accused after identification by same witness at illegal police lineup, proper test whether evidence objected to has been come at by exploitation of illegality or by means sufficiently distinguishable to be purged of primary taint. State v. Oziah ---------- 541
96. Rule for application of in-court identification after prior illegal police lineup stated. State v. Oziah -- 541
97. Where in-court identification shows identification had origin independent of illegal lineup, in-court identification proper to be received in evidence. State v. Oziah ---------- 541
98. Effectiveness of counsel not to be judged by hindsight. State v. Phillips ---------- 547
99. For post conviction relief on ground of ineffective counsel, must appear that counsel's assistance so grossly inept as to shock conscience of court. State v. Phillips ---------- 547
100. Ineffectiveness of counsel not inferable from single fact of shortness of time between appointment of counsel and commencement of trial, must be some showing of prejudice; amount of time which elapses between appointment of counsel and commencement of trial not per se sufficient to carry that burden. State v. Phillips ---------- 547
101. Late appointment of counsel not erroneous as matter of law; appellant has burden of proving late appointment erroneous as matter of fact. State v. Phillips ---------- 547
102. In post conviction proceedings, burden of proof on movant to establish basis for relief; where such burden not met, denial of relief required. State v. Phillips ---------- 547
103. Rule stated when leave should be given to withdraw plea of guilty. State v. Journey ---------- 556
104. Person charged with crime may be convicted on circumstantial evidence only. State v. Coleman -- 571
105. To justify conviction on circumstantial evidence, necessary for jury to find facts and circumstances essential to conclusion sought proved by competent evidence beyond reasonable doubt; facts and cir-

cumstances taken together must be of such character as to be consistent with each other and with hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence. State v. Coleman ---------- 571

106. Scope of cross-examination of witness rests largely in discretion of trial court; its ruling will be upheld unless abuse of discretion shown. State v. Coleman ---------- 571

107. No right for defense counsel in criminal prosecution to inspect or compel production of evidence in possession of State unless valid reason exists; no inherent right for defendant to invoke such means of examining State's evidence merely in hope that something may be uncovered to aid defense. State v. Coleman ---------- 571

108. Instructions to jury which fully and fairly submit issues in criminal case not subject to attack in absence of showing that manner of submission prejudicial to rights of defendant. State v. Coleman -- 571

109. Argument by prosecuting attorney, based on evidence and inferences drawn therefrom, not misconduct by prosecution. State v. Coleman ---------- 571

110. Remarks of prosecutor in summations of evidence to jury which do not mislead and unfairly influence jury toward verdict on basis not supported by or inferred from evidence not ordinarily misconduct. State v. Coleman ---------- 571

111. Error in trial to court in criminal case or action to recover penalty under city ordinance for trial court to view premises where alleged offenses occurred without having given defendant and counsel for both parties opportunity to be present when view made by judge. State v. Rutherford ---------- 581

112. Where evidence shows that trial judge in trial to court made unauthorized inspection of scene where offenses allegedly committed, must be shown to vitiate judgment, that it related to matter in dispute and could have influenced court in making finding of guilt. State v. Rutherford ---------- 581

113. Order by district court purporting to vacate sentence legally pronounced in criminal action for purpose of placing defendant on probation is nullity. State v. Carpenter ---------- 605

114. Motion for post conviction relief not substitute for appeal. State v. Carpenter ---------- 605

115. When offenses charged are of same or similar

character or are based on same act or transaction or on two or more acts or transactions connected together or constituting parts of common scheme or plan, they may be joined. State v. Rodgers ------ 633
116. If appears that joinder would prejudice defendant, court may order election for separate trials of counts. State v. Rodgers ---------- 633
117. Question of election between counts and advisability of joint or separate trials one directed to sound discretion of trial court. State v. Rodgers -------- 633
118. Affidavit for search warrant may be based on hearsay information and need not reflect direct observations of affiant so long as magistrate informed of some of underlying circumstances supporting affiant's conclusions. State v. Huggins ---------- 704
119. Affidavits for search warrants must be tested in common sense, realistic fashion. State v. Huggins 704
120. Correct test is whether warrant, if sought, could have been obtained by law enforcement agency application which disclosed its corporate information, not whether any one particular officer could have obtained it on what information he individually possessed. State v. Huggins ---------- 704
121. Variance between allegations in information and evidence not fatal unless material to merits of case or prejudicial to defendant. State v. Bullard 709
122. Proof that exhibit in custody of law enforcement officers or in mail in sealed envelope until received at laboratory for analysis sufficient to prove chain of possession. State v. Bullard ---------- 709
123. Without substantial basis, claim of prejudice from substitution of appointed counsel for defendant in criminal prosecution no ground for post conviction relief. State v. Anderson ---------- 769
124. Decision by counsel to call or not to call witness forms part of trial tactics; ordinarily mistaken decision in that respect not sufficient for post conviction relief. State v. Anderson ---------- 769
125. Committed offender eligible for release on parole upon completion of minimum term less reduction, or upon completion of minimum sentence provided by law less reductions if approved by sentencing judge or his successor. State v. McMillian ---------- 784
126. In post conviction proceeding, petitioner has burden of establishing basis for relief. State v. Rapp -- 785
127. Committed offender while on parole shall remain in legal custody and control of Board of Parole;

board may at any time revoke parole of offender or recommit him to custody of Division of Corrections, with or without cause. Brown v. Sigler ---- 800

128. A state is not required to provide for parole and, if it does, it may stipulate terms and conditions under which it may be granted or revoked. Brown v. Sigler ---- 800

129. Constitutional due process does not require Board of Parole to conduct adversary hearing to revoke parole, nor does it require appointment of counsel for indigent parolees or compulsory process. Brown v. Sigler ---- 800

130. Good time reductions provided in cited statute used to determine eligibility for release on parole or supervision and subject to forfeiture. Brown v. Sigler ---- 800

131. In extradition proceeding, requisition may refer to, annex, and authenticate accompanying papers; sufficient if together they meet statutory requirements. Austin v. Brumbaugh ---- 815

132. Federal Constitution and statutes control extradition in fugitive from justice cases; state statutes merely ancillary thereto and may permit Governor to surrender prisoner on terms less exacting than those imposed by Congress. Austin v. Brumbaugh ---- 815

133. Term authenticate, as used in extradition statutes, simply means a statement that documents what they purport to be. Austin v. Brumbaugh ---- 815

134. Statement in requisition and authenticated, accompanying papers that person sought to be extradited was in demanding state on date of offense charged prima facie evidence of truth of allegation; burden of proof on applicant in habeas corpus proceeding in resistance of extradition to conclusively prove otherwise. Austin v. Brumbaugh ---- 815

135. Court appointed counsel should be given wide latitude in adoption of trial or argument strategy. State v. Ondrak ---- 838

136. One of primary duties of attorney to represent client zealously within bounds of law. State v. Ondrak ---- 838

137. Cited statute requires endorsement of names of witnesses on information; failure in contested case to endorse those known at time information filed error, but not necessarily prejudicial error. State v. Adels ---- 849

Damages.

1. Knowledge that accident occurred and personal injuries inflicted may be established by circumstantial evidence. In re Interest of Moore ---------- 67
2. Carrier in interstate commerce may contract to limit its liability to agreed value made to adjust rates of carriage. Sky Harbor Air Service v. North American Van Lines ---------- 194
3. Validity of limitation of liability not ordinarily impaired by these circumstances: Shipper, with reasonable notice that he might increase liability of carrier for loss by payment of correspondingly greater charge, failed to do so. Sky Harbor Air Service v. North American Van Lines ---------- 194
4. Clause embodied in uninsured motorist insurance policy prorating liability not enforceable in these circumstances: Adjudicated damages to named insured and dependent son equal or exceed aggregate liability of two policies naming same insured and issued by same insurer for separate premium on coverage in each policy. Bose v. American Family Mut. Ins. Co. ---------- 209
5. Amount of damages sustained by landowner in proceeding in eminent domain is peculiarly of local nature and is ordinarily to be determined by jury; such verdict will not be set aside unless clearly wrong. Bowley v. Airport Authority ---------- 292
6. Caterer furnishing food for hire impliedly warrants food wholesome and fit for human consumption and liable for injuries proximately caused by breach of warranty. Wintroub v. Abraham Catering Service 450
7. Caterer not liable for damages caused by foreign object in food unless foreign object in food at time food left exclusive possession and control of caterer. Wintroub v. Abraham Catering Service ---------- 450
8. Damage caused by breach of restriction on competition rarely susceptible of accurate proof. Andersen v. Blondo Plaza, Inc. ---------- 682

Death.

Where both parties involved in accident are deceased, disabled, or lack memory, creating offsetting presumptions of due care, resolution must rest upon proper inferences to be drawn from whatever circumstantial evidence available to trier of fact. Merritt v. Reed ---------- 561

Deeds.

Circumstances in which grantors convey land may indicate intent to create estate in fee simple determinable and not estate in fee simple absolute. Hiddleston v. Nebraska Jewish Education Soc. ---- 786

Default.

Ordinarily, acceptance of performance after default in performance waives right to rely upon default. Peckham v. Deans ---------- 190

Depositions and Discovery.

Report prepared by expert appraiser is generally not subject to discovery by adverse party in absence of strong showing of good cause. Bowley v. Airport Authority ---------- 292

Dismissal and Nonsuit.

1. Dismissal of petition of wife for divorce where, at trial on cross-examination into extra-marital sexual relations by her, she successfully asserted privilege against self-incrimination, correct. Schrad v. Schrad ---------- 462
2. Right of plaintiff to dismiss cause of action before submission to court is statutory right and not matter of judicial grace or discretion. Werner v. Werner ---------- 558
3. In action for divorce, until trial court enters order imposing some obligation, plaintiff has unqualified right to dismiss petition without leave of court, regardless of nature of pleadings on file. Werner v. Werner ---------- 558

Divorce.

1. When evidence on material question of fact in irreconcilable conflict, Supreme Court, in determining weight of evidence, will consider fact that trial court observed witnesses and manner of testifying and must have accepted one version of facts rather than other. Hutchinson v. Hutchinson ---------- 24
2. In divorce action, if evidence principally oral and in irreconcilable conflict and determination of issues depends to reasonable extent upon reliability of respective witnesses, conclusions of trial court as to such reliability will be carefully regarded by Supreme Conurt on review. Buchanan v. Buchanan -- 89
3. Divorce action triable de novo in Supreme Court,

which cannot ignore fact that trial court had opportunity to observe parties and accepted one version of evidence rather than another. Dodendorf v. Dodendorf ---------- 144
4. Not possible to delineate general rule as to degree of corroboration in divorce action; each case must be decided on own facts and circumstances. Dodendorf v. Dodendorf ---------- 144
5. Rule for division of property in divorce case stated. Sanchez v. Sanchez ---------- 427
Fry v. Fry ---------- 521
6. Provisions for support of minor children in divorce proceeding stated. Sanchez v. Sanchez ---------- 427
Fry v. Fry ---------- 521
7. Dismissal of petition of wife for divorce where, at trial on cross-examination into extra-marital sexual relations by her, she successfully asserted privilege against self-incrimination, correct. Schrad v. Schrad ---------- 462
8. Determination of what constitutes reasonable visitation rights within discretion of trial court; such determination will not be disturbed except for abuse of discretion. Fry v. Fry ---------- 521
9. Fixing of amount of alimony rests, in each case, upon sound discretion of court. Wegner v. Wegner 554
10. In action for divorce, until trial court enters order imposing some obligation, plaintiff has unqualified right to dismiss petition without leave of court, regardless of nature of pleadings on file. Werner v. Werner ---------- 558
11. Statutes of Colorado provide that orders regarding custody of children may be changed after entry of divorce decree as circumstances may warrant. Copple v. Copple ---------- 696
12. Whatever effect full faith and credit clause may have with respect to custody decrees, clear that state of forum has at least as much leeway to disregard judgment, qualify it, or depart from it as does state where rendered. Copple v. Copple -- 696
13. Child custody provisions of divorce decree entered in sister state have no extraterritorial effect upon questions of proper custody arising under circumstances materially changed with reference to welfare of children. Copple v. Copple ---------- 696
14. When child has been surreptitiously removed from state which fixed custody pursuant to divorce decree, courts of sister state very reluctant to refuse

comity and will do so only under extraordinary circumstances. Copple v. Copple ---------- 696
15. Award of alimony in technical sense cannot be made to husband. Sims v. Sims ---------- 780
16. Antenuptial agreement containing no provision to contrary not affected by divorce of parties. Sims v. Sims ---------- 780

Domicile.

1. A state has judicial jurisdiction over individual domiciled in the state. Stucky v. Stucky ---------- 636
2. Domicile once established continues until superseded by new domicile. Stucky v. Stucky ---------- 636
3. Domicile in state is alone sufficient to bring absent defendant within reach of state's jurisdiction for purposes of personal judgment by means of appropriate substituted service; personal service of summons adequate to meet requirements of due process of law. Stucky v. Stucky ---------- 636
4. In personam jurisdiction may be acquired over nonresident defendant in divorce action by extraterritorial personal service of process made in accordance with statute of this state if there exist sufficient contacts between defendant and this state relevant to cause of action to satisfy traditional notions of fair play and substantial justice. Stucky v. Stucky ---------- 636
5. Jurisdiction of a state to regulate custody of infants found within its territory not dependent upon domicile of child, but arises out of power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and custody that will best meet its needs and wants; residence within state suffices even though domicile may be in another jurisdiction. Copple v. Copple 696

Double Jeopardy.

1. Forging and fraudulently uttering and publishing same instrument if done by same person constitute only one crime and if two acts charged in separate counts and conviction results on both counts, only one sentence may be imposed. State v. Huffman 809
2. Imposing two sentences for one offense constitutes violation of due process of law and is ground for relief under post conviction proceeding statute. State v. Huffman ---------- 809
3. One trial upon two counts growing out of single

transaction for which only one sentence may be imposed does not violate constitutional provisions against double jeopardy. In such cases where two concurrent equal sentences imposed, one will be regarded as surplusage and be vacated. State v. Huffman ---------- 809

Due Process.

Not violative of due process for Legislature in framing its criminal laws to cast upon public duty of care or extreme caution. State v. Vicars ---------- 311

Elections.

Voters at election are entitled to such information as will enable them to consider, weigh, discuss, and vote upon actual merits of proposition; if unfounded facts set out which obscure issues or mislead voters on material questions of fact, election will be held null and void. Geer-Melkus Constr. Co., Inc. v. Hall County Museum Board ---------- 615

Electricity.

Power companies engaged in the transmission of electricity are not insurers and not liable for damages in absence of negligence; standard of care stated. Omaha Nat. Bank v. Omaha P. P. Dist. ---------- 6

Eminent Domain.

1. Amount of damages sustained by landowner in proceeding in eminent domain is peculiarly of local nature and is ordinarily to be determined by jury; such verdict will not be set aside unless clearly wrong. Bowley v. Airport Authority ---------- 292
2. Cited section of reverter act, either on its face or in its application to plaintiffs, did not violate due process or contract clause of United States or Nebraska Constitution or eminent domain provision of latter Constitution. Hiddleston v. Nebraska Jewish Education Soc. ---------- 786

Equity.

1. Where court of equity has obtained jurisdiction of case for any purpose, it will retain it for all and will proceed to final determination of case, adjudicate all matters in issue, and thus avoid unnecessary litigation. Central Savings Bank v. First Cadco Corp. ---------- 112

2. Principal prohibiting party from mending hold after commencement of litigation ordinarily applicable only if some previous conduct on his part would render present assertion of right unjust. Enterprise Co., Inc. v. Nettleton Business College -- 183
3. Courts of equity are always reluctant to make a decree which will effect a forfeiture. Kirby v. Bergfield 242
4. It is practice of courts of equity, when jurisdiction of case once obtained, to administer all relief which nature of case and facts demand and bring such relief down to close of litigation between parties. Geer-Melkus Constr. Co., Inc. v. Hall County Museum Board ---------- 615
5. Mortgagee who, without consideration and at request of mortgagor, releases his mortgage solely for purpose of giving priority to another lien is in equity entitled to have his mortgage reinstated after other lien attaches, provided rights of innocent purchaser for value have not intervened. Rutt v. Frank ---------- 842
6. Facts constituting laches should normally be pleaded, but court of equity may in some circumstances on own motion deny relief on this ground. Rutt v. Frank ---------- 842
7. What constitutes laches to be determined in light of circumstances of particular case. Rutt v. Frank -- 842
8. In action in equity for reinstatement of mortgage where relief denied because of laches, court may nonetheless render judgment on note, where such alternative relief included in prayer. Rutt v. Frank 842

Estates.

1. In appeal from county court in probate proceeding under statute providing it shall be duty of probate judge, upon payment of fee therefor, to transmit to clerk of district court certified transcript of proceedings, probate judge may waive right to demand fee in advance for making of such transcript. Harte v. Gallagher ---------- 141
2. Where, on appeal in probate proceeding, notice of appeal given and bond filed as required by statute, it is mandatory duty of county judge to prepare and transmit transcript to district court and failure to do so will not defeat appeal. Harte v. Gallagher 141
3. Elements of testamentary capacity stated. Holman v. Morrison ---------- 159
4. Mere exclusion of relatives of testator not sufficient

to establish undue influence, but when appears from examination of terms of purported will itself there is inequality in distribution, unreasonableness, and unnaturalness, such factors may be taken into account in deciding effect of undue influence. Holman v. Morrison ---------- 159

5. Where estate in fee simple devised, attempt by testator to prevent alienation by attaching conditions subsequent ineffective and void for reason that conditions are repugnant to estate created. Cast v. National Bank of Commerce T. & S. Assn. ---------- 385

6. Restraint on alienation in form of condition subsequent, forfeiting or terminating fee simple estate, or providing for limitation over upon breach of condition, void as against public policy. Cast v. National Bank of Commerce T. & S. Assn. ---------- 385

7. Conditions subsequent attached to fee simple which restrain alienation void whether such restraint direct or indirect. Cast v. National Bank of Commerce T. & S. Assn. ---------- 385

8. Rule against perpetuities not applicable where conditions subsequent attached to fee simple estate restrain alienability, since such conditions subsequent void; where conditions subsequent do not limit alienation and conditions otherwise valid, rule against perpetuities may be applicable. Cast v. National Bank of Commerce T. & S. Assn. ---------- 385

9. Conditions subsequent to fee simple title which do not limit alienation and are otherwise valid, enforcible if reasonable and not adversely affect marketability of fee. Cast v. National Bank of Commerce T. & S. Assn. ---------- 385

10. Estate of decedent liable for attorneys' fees for services rendered at request of devisee or legatee, even when successful, only when services preserved estate, added to its value, or were otherwise beneficial to it. Cast v. National Bank of Commerce T. & S. Assn. ---------- 385

11. Circumstances in which grantors convey land may indicate intent to create estate in fee simple determinable and not estate in fee simple absolute. Hiddleston v. Nebraska Jewish Education Soc. ---------- 786

12. One of primary incidents of ownership of property in fee simple is right to convey or encumber it. Burney v. Pick ---------- 828

13. Conveyance of real estate of such importance to state that one will not be permitted to become

whimsical and unreasonable after creating estate recognized by law, such as estate in fee simple, by attaching conditions repugnant to estate created. Burney v. Pick ---------- 828

14. Testator or grantor may not create vested fee simple estate and at same time effectively forbid its alienation. Burney v. Pick ---------- 828

Estoppel.

1. Where defendant demurs to petition for misjoinder of parties plaintiff and stipulates that it be sustained on condition that necessary party plaintiff be added, which was done, defendant estopped to object on ground of misjoinder of parties plaintiff. Simmons v. Mutual Benefit Health & Acc. Assn. -- 26
2. Under doctrine of partnership by estoppel, essential to cause of action that party asserting liability against nonpartner must have been induced by misleading appearances to change his position to his detriment. Havelock Meats, Inc. v. Roberts ------ 73
3. In proper case, estoppel may be applied to prevent fraudulent or inequitable resort to statute of limitations; defendant may, by representations, promises, or conduct, be estopped where other elements of estoppel present. Luther v. Sohl ---------- 119
4. Where plaintiff has ample time to institute action after inducement for delay has ceased, he cannot excuse failure to act within statutory time on ground of estoppel. Luther v. Sohl ---------- 119
5. Principle prohibiting party from mending hold after commencement of litigation ordinarily applicable only if some previous conduct on his part would render present assertion of right unjust. Enterprise Co., Inc. v. Nettleton Business College ---------- 183
6. Ordinarily, to establish waiver of legal right must be clear, unequivocal, and decisive act of party showing such purpose, or act amounting to estoppel on his part. Garden City Production Credit Assn. v. Lannan ---------- 668
7. Essential elements of equitable estoppel stated. Pester v. American Family Mut. Ins. Co. -------- 793
8. Party 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. Pester v. American Family Mut. Ins. Co. ---------- 793

Evidence.

1. Parol evidence generally admissible when offered for purpose of explaining and showing true nature of transaction between parties. Central Constr. Co. v. Osbahr ---------- 1
2. Parol evidence always admissible to show, for purpose of invalidating written instrument, that execution was procured by fraud, or because of fraud, does not express true intentions of parties. Central Constr. Co. v. Osbahr ---------- 1
3. Rule for considering motion to dismiss stated. Omaha Nat. Bank v. Omaha P. P. Dist. ---------- 6
4. Rule of application of presumption of due care arising out of natural instinct of self-preservation stated. Omaha Nat. Bank v. Omaha P. P. Dist. -- 6
5. When evidence on material question of fact in irreconcilable conflict, Supreme Court, in determining weight of evidence, will consider fact that trial court observed witnesses and manner of testifying and must have accepted one version of facts rather than other. Hutchinson v. Hutchinson ------ 24
6. Corroboration of prosecutrix in rape case sufficient if there are material facts and circumstances which tend to support her testimony and from which, together with her testimony as to principal fact, inference of guilt may be drawn. State v. Wagner -- 37
7. Guilty knowledge may be proved by circumstantial evidence. State v. Collins ---------- 50
8. Triers of fact not compelled to accept as absolute verity every statement of witness not contradicted by direct evidence; persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony. Pignotti v. Coffee Time, Inc. ---------- 57
9. In larceny prosecution, corpus delicti may be established by circumstantial evidence; sufficient if circumstances consistent with crime, even though they also may be consistent with innocence. State v. Nydegger ---------- 61
10. Larceny corpus delicti may be proved by evidence property has been taken and removed without owner's knowledge or consent. State v. Nydegger -------- 61
11. Possession of recently stolen property when coupled with lack of satisfactory explanation, or false explanation or other incriminating circumstances or conduct, sufficient to support verdict of guilty. State v. Nydegger ---------- 61
12. Ordinarily sufficient if property found in possession

of accused or shown to have been disposed of by him is of same character and appearance as that stolen, and circumstantial evidence with respect thereto admissible. State v. Nydegger ---------- 61

13. Knowledge that accident occurred and personal injuries inflicted may be established by circumstantial evidence. In re Interest of Moore ---------- 67

14. Presumption not evidence and only relates to rule of law as to which party shall first go forward and produce evidence sustaining matter in issue; presumption will serve as and in place of evidence in favor of one party or other until prima facie evidence adduced by opposite party, but presumption should never be placed in scale to be weighed as evidence. Hannon v. J. L. Brandeis & Sons, Inc. 122

15. In prosecution for operating motor vehicle while under influence of intoxicating liquor, operation of motor vehicle is element of offense and may be established by circumstantial evidence. State v. Eckert ---------- 134

16. In absence of change of conditions, monthly rental is competent evidence of reasonable value of occupation and use of premises that tenant held over his term. Enterprise Co., Inc. v. Nettleton Business College ---------- 183

17. In appeal from order of district court granting new trial where plaintiff prays for reversal of order and reinstatement of verdict, contention of plaintiff that evidence was insufficient to submit issue of contributory negligence to jury will be deemed to have been waived upon holding that new trial was improvidently granted. Keller v. Wellensiek ---------- 201

18. Right to new trial for newly discovered evidence depends upon facts and circumstances of each case. State v. Haynes ---------- 238

19. New cumulative evidence tendered in support of motion for new trial must be so potent that new trial would probably result in different verdict. State v. Haynes ---------- 238

20. New trial will not ordinarily be granted for newly discovered evidence which would simply impeach a witness. State v. Haynes ---------- 238

21. Rule of liberal construction of Workmen's Compensation Act applies to the law but it is not applicable to evidence offered in support of claim made for benefits under the act. Parrish v. Karl Kehm & Sons Contractors ---------- 252

22. Burden of proof upon claimant to establish by preponderance of evidence to claim for benefits under Workmen's Compensation Act. Parrish v. Karl Kehm & Sons Contractors ---------- 252
23. Where evidence in workmen's compensation case is in irreconcilable conflict, Supreme Court on appeal will consider fact trial court observed demeanor of witnesses and gave credence to testimony of some rather than contrary testimony of others. Parrish v. Karl Kehm & Sons Contractors ---------- 252
24. In criminal prosecution, State may not make use of evidence unconstitutionally obtained to make a case for jury; but a case having been so made, State may use evidence unconstitutionally obtained to impeach credibility of defendant on collateral matters not ultimately involved in issue of guilt. State v. Ross ---------- 280
25. Each case must be considered on its own facts; conviction based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if photographic identification procedure so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Randolph -- 297
26. Photographs, although of gruesome nature, admissible in evidence if are relevant and true representation of what they purport to represent. State v. Wilbur ---------- 306
27. Party may not predicate error on admission of evidence to which no objection made at time offered or adduced. State v. Weiland ---------- 325
28. Fact that responsive answer elicited by defense in cross-examining prosecution witness damaging to defense not ordinarily proper ground for granting mistrial. State v. Weiland ---------- 325
29. Generally, where objection to evidence substantially identical with evidence admitted and not objected to, prejudicial error will not lie because of its admission. Meyer v. Moell ---------- 397
30. Generally, admission of collateral or cumulative evidence rests within sound discretion of trial court. Meyer v. Moell ---------- 397
31. Evidence which tends to impeach witness for State in criminal prosecution ordinarly admissible to discredit credibility of witness and weight to be given his testimony. State v. Matejka ---------- 454
32. In determining sufficiency of evidence to sustain

verdict, party entitled to resolution of all conflicts of evidence in his favor and all of reasonable inferences that can reasonably be deduced from the proof. Marquardt v. Nehawka Farmers Coop. Co. ---------- 494

33. Where appeal is from verdict for defendant in jury case on fact question, preponderance of evidence must be so clearly and obviously contrary to finding and verdict of jury that it is duty of Supreme Court to correct mistake. Marquardt v. Nehawka Farmers Coop. Co. ---------- 494

34. Where evidence is objected to which is substantially identical to evidence admitted and not objected to, or otherwise admissible, prejudicial error will not lie because of its admission into evidence. Marquardt v. Nehawka Farmers Coop. Co. -------- 494

35. Under cited statute, when part of act, declaration, conversation, or writing given in evidence by one party, whole of same subject may be inquired into by other. Marquardt v. Nehawka Farmers Coop. Co. 494

36. In testing sufficiency of evidence to support judgment, evidence must be considered in light most favorable to successful party. Haney v. L. R. Foy Constr. Co. ---------- 528

37. Payment is affirmative defense; party alleging it has burden of proof. Haney v. L. R. Foy Constr. Co. 528

38. In criminal case, Supreme Court will not interfere with verdict of guilty based upon evidence unless so lacking in probative force that it can say as matter of law that evidence insufficient to support verdict of guilty beyond reasonable doubt. State v. Bayless ---------- 530

39. In determining admissibility of a state witness' in-court identification of accused after identification by same witness at illegal police lineup, proper test whether evidence objected to has been come at by exploitation of illegality or by means sufficiently distinguishable to be purged of primary taint. State v. Oziah ---------- 541

40. Rule for application of in-court identification after prior illegal police lineup stated. State v. Oziah -- 541

41. Where in-court identification shows identification had origin independent of illegal lineup, in-court identification proper to be received in evidence. State v. Oziah ---------- 541

42. Claim of error on ground of ineffective assistance of counsel must be supported by record showing counsel's assistance so grossly inept as to jeopard-

ize rights of defendant and shock court by its inadequacy. State v. Oziah ---------- 541
43. In post conviction proceeding, burden of proof on movant to establish basis for relief; where such burden not met, denial of relief required. State v. Phillips ---------- 547
44. Persuasiveness of direct evidence may be destroyed by physical facts or other circumstantial evidence, even though not contradicted by direct evidence. Merritt v. Reed ---------- 561
45. Person charged with crime may be convicted on circumstantial evidence only. State v. Coleman -- 571
46. To justify conviction on circumstantial evidence, necessary for jury to find facts and circumstances essential to conclusion sought proved by competent evidence beyond reasonable doubt; facts and circumstances taken together must be of such character as to be consistent with each other and with hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence. State v. Coleman ---------- 571
47. After jury has considered evidence in light of rules relating to circumstantial evidence and returned verdict of guilty, verdict on appeal may not, as matter of law, be set aside for insufficiency of evidence if evidence sustains some rational theory of guilt. State v. Coleman ---------- 571
48. Scope of cross-examination of witness rests largely in discretion of trial court; its ruling will be upheld unless abuse of discretion shown. State v. Coleman 571
49. No right for defense counsel in criminal prosecution to inspect or compel production of evidence in possession of State unless valid reason exists; no inherent right for defendant to invoke such means of examining State's evidence merely in hope that something may be uncovered to aid defense. State v. Coleman ---------- 571
50. Error in trial to court in criminal case or action to recover penalty under city ordinance for trial court to view premises where alleged offenses occurred without having given defendant and counsel for both parties opportunity to be present when view made by judge. State v. Rutherford ---------- 581
51. Where evidence shows that trial judge in trial to court made unauthorized inspection of scene where offenses allegedly committed, must be shown to vitiate judgment, that it related to matter in dis-

pute and could have influenced court in making finding of guilt. State v. Rutherford ---------- 581
52. Burden of proof upon one claiming property exempt from taxation to establish its predominant use for one of purposes set out in cited statute. OEA Senior Citizens, Inc. v. County of Douglas ---------- 593
53. Claim of adverse possession must be proved by actual, open, exclusive, and continuous possession under claim of ownership for statutory period of 10 years. Hammerly v. County of Dodge ---------- 608
54. One seeking to recover from principal, for unauthorized act of agent, must establish that principal obtained knowledge of such act before it had changed its position. Dembowski v. Central Constr. Co. ---------- 624
55. If motorist fails to see automobile not shown to be in favored position, question of his contributory negligence ordinarily jury question. Jones v. Consumers Coop. Propane Co. ---------- 629
56. Before verdict can be directed against motorist for failing to see approaching automobile at nonprotected intersection, approaching automobile must be undisputably located in favored position. Jones v. Consumers Coop. Propane Co. ---------- 629
57. Introduction in evidence of map, chart, or diagram illustrating scene of transaction and relative location of objects rests in sound discretion of court. Jones v. Consumers Coop. Propane Co. ---------- 629
58. Trier of fact to determine question of interpretation of integrated agreement if question depends on credibility of extrinsic evidence or on choice among reasonable inferences from extrinsic evidence. Andersen v. Blondo Plaza, Inc. ---------- 682
59. Damage caused by breach of restriction on competition rarely susceptible of accurate proof. Andersen v. Blondo Plaza, Inc. ---------- 682
60. Where testimony given by witness on direct examination, from which inference arises favorable to party producing him, anything within knowledge of witness tending to rebut inference admissible on cross-examination; opposing party ordinarily entitled to pursue that line of cross-examination. Andersen v. Blondo Plaza, Inc. ---------- 682
61. Variance between allegations in information and evidence not fatal unless material to merits of case or prejudicial to defendant. State v. Bullard ---- 709
62. Proof that exhibit in custody of law enforcement officers or in mail in sealed envelope until received

at laboratory for analysis sufficient to prove chain of possession. State v. Bullard ---------- 709
63. Under law of Iowa, upon defendant's motion for directed verdict at close of plaintiff's evidence, evidence must be considered in light most favorable to plaintiff regardless of whether it is contradicted. Peterson v. Dean ---------- 716
64. Under Iowa guest statute, showing of persistent course of conduct is matter of evidence ordinarily shown to establish recklessness; not in itself essential element; in most instances, merely helpful yardstick or guide by which to determine recklessness as opposed to negligence. Peterson v. Dean -- 716
65. Under Iowa guest statute, conduct arising from momentary thoughtlessness, inadvertence, or from error of judgment, does not indicate reckless disregard of rights of others and does not constitute recklessness within meaning of law. Peterson v. Dean 716
66. Under Iowa guest statute, whether motorist reckless is question of law for court if reasonable minds, having before them all evidence on question, could reach but one conclusion; and is question of fact for jury if, under proved or admitted facts, different minds might reasonably reach different conclusions. Peterson v. Dean ---------- 716
67. Rule for consideration of motion for directed verdict stated. Maxwell v. Pugh ---------- 722
68. Where different minds may reasonably draw different conclusions or inferences from evidence adduced concerning issues of negligence or contributory negligence and degree thereof when one compared with other, such issues must be submitted to jury. Maxwell v. Pugh ---------- 722
69. Circumstantial evidence insufficient to warrant recovery in civil case unless circumstances proved of such nature and so related to each other that only one conclusion can be reasonably drawn therefrom. Haynes v. County of Custer ---------- 740
70. Rule for trial of equity case in Supreme Court stated. Erickson v. Tyler ---------- 743
71. Burden of proof upon taxpayer to show that school levy excessive. Mann v. Wayne County Board of Equalization ---------- 752
72. Facts that transpire after institution of replevin action immaterial in consideration and determination of merits of case. Gibreal Auto Sales, Inc. v. Missouri Valley Machinery Co. ---------- 763

73. Statement in requisition and authenticated, accompanying papers that person sought to be extradited was in demanding state on date of offense charged prima facie evidence of truth of allegation; burden of proof on applicant in habeas corpus proceeding in resistance of extradition to conclusively prove otherwise. Austin v. Brumbaugh ---------- 815

74. To secure reduction in assessed value of real property, must be demonstrated by evidence that assessment grossly excessive or that its value not fairly and proportionately equalized, and is result of arbitrary or unlawful action; evidence must be such as to indicate exercise of arbitrary action or failure of plain legal duty, and not mere error in judgment. Lexington Building Co., Inc. v. Board of Equalization 821

75. Nonexpert witness may testify from his observations as to whether or not another intoxicated; weight and sufficiency of this evidence for jury to decide. State v. Adels ---------- 849

76. Preliminary negotiations leading to execution of integrated agreement of uncertain meaning admissible for purpose of determining intentions of parties, conditions existing at time, and objects thereby to be accomplished, but not to vary plain terms of instrument. Shelhamer v. O'Neill ---------- 854

Extradition.

1. In extradition proceeding, requisition may refer to, annex, and authenticate accompanying papers; sufficient if together they meet statutory requirements. Austin v. Brumbaugh ---------- 815

2. Federal Constitution and statutes control extradition in fugitive from justice cases; state statutes merely ancillary thereto and may permit Governor to surrender prisoner on terms less exacting than those imposed by Congress. Austin v. Brumbaugh ------ 815

3. Term authenticate, as used in extradition statutes, simply means a statement that documents what they purport to be. Austin v. Brumbaugh ---------- 815

4. Statement in requisition and authenticated, accompanying papers that person sought to be extradited was in demanding state on date of offense charged prima facie evidence of truth of allegation; burden of proof on applicant in habeas corpus proceeding in resistance of extradition to conclusively prove otherwise. Austin v. Brumbaugh ---------- 815

Food.

1. Caterer furnishing food for hire impliedly warrants food wholesome and fit for human consumption and liable for injuries proximately caused by breach of warranty. Wintroub v. Abraham Catering Service 450
2. Caterer not liable for damages caused by foreign object in food unless foreign object in food at time food left exclusive possession and control of caterer. Wintroub v. Abraham Catering Service ---------- 450

Foreclosure.

Provision in mortgage assigning possession and rents to mortgagee, effective upon default, valid and enforceable; such provision may be enforced in foreclosure action upon application of mortgagee. Central Savings Bank v. First Cadco Corp. ---------- 112

Forfeitures and Penalties.

1. Courts of equity are always reluctant to make a decree which will effect a forfeiture. Kirby v. Bergfield 242
2. Where custom of giving notice of due date of premiums definitely established, insured has right to rely on such notice, and in absence thereof, policy may not be terminated or forfeited for nonpayment of premiums without notice to insured that custom has been abandoned. Pester v. American Family Mut. Ins. Co. ---------- 793

Forgery.

Forging and fraudulently uttering and publishing same instrument if done by same person constitute only one crime and if two acts charged in separate counts and conviction results on both counts, only one sentence may be imposed. State v. Huffman ---------- 809

Former Jeopardy.

1. Successive prosecutions by federal and Nebraska governments in exercise of concurrent jurisdiction over substantially same offense not prohibited by double jeopardy clauses of federal and Nebraska Constitutions. State v. Pope ---------- 489
2. Double jeopardy clauses of federal and Nebraska Constitutions do not prevent Nebraska fixing higher standards by statute or in absence of statute by judicial decision. State v. Pope ---------- 489
3. Whether at common law federal conviction bars prosecution by Nebraska with concurrent jurisdic-

tion over substantially same offense depends upon vindication of public policy of state. State v. Pope 489

Franchises.

Lease-purchase agreement relating to financing of waste disposal plant and authorized by law not franchise that violates cited statute. Cosentino v. City of Omaha ---------- 407

Fraud.

1. Parol evidence always admissible to show, for purpose of invalidating written instrument, that execution was procured by fraud, or because of fraud, does not express true intentions of parties. Central Constr. Co. v. Osbahr ---------- 1
2. Fraud must relate to present or preexisting fact and may not generally be predicated on inference concerning any event in future or acts to be done in future unless representations as to future acts are falsely and fraudulently made with intent to deceive. Central Constr. Co. v. Osbahr ---------- 1
3. One seeking to recover from principal, for unauthorized act of agent, must establish that principal obtained knowledge of such act before it had changed its position. Dembowski v. Central Constr. Co. -- 624

Frauds, Statute of.

1. Every contract for leasing for longer period than one year, or for sale of any lands, void unless contract or some note or memorandum thereof in writing and signed by party by whom lease or sale to be made. Kubicek v. Kubicek ---------- 802
2. Cited statute clearly contemplates that contract, note, or memorandum thereof in writing shall contain within itself all essential elements which go to make up contract, and when essential elements of contract are lacking, contract must fail, because essential elements cannot be supplied by parol testimony. Kubicek v. Kubicek ---------- 802

Garnishment.

Allegations which are proper in motion to dissolve attachment or garnishment may be included in special appearance without making general appearance. Conner v. Southern ---------- 164

Guardian and Ward.

Provisions of cited statute relating to mortgages executed by guardians prohibit incompetent's estate from incurring new debt and does not prohibit inclusion of interest already due in executing renewal mortgage. Burney v. Pick ---------- 828

Guilty Plea.

1. When following plea of guilty in criminal action and institution of post conviction action, court finds from record of in-court examination of defendant that plea was voluntary, was free from coercion, was fairly advised by counsel, and that counsel was effective, subsequent contention that plea coerced and counsel ineffective will not be entertained. State v. Sargent ---------- 155
2. Essential to validity of plea of guilty that it be entered intelligently and voluntarily, and that record disclose this fact. State v. Starr ---------- 327
3. Not required there be direct waiver of each and every constitutional right involved; only that plea waiving such rights be voluntarily and intelligently entered. State v. Starr ---------- 327
4. Plea of guilty must not only be intelligent and voluntary to be valid but record must affirmatively disclose defendant entered his plea understandingly and voluntarily. State v. Turner ---------- 424
   State v. Wade ---------- 442
   State v. Lindsay ---------- 443
5. Standards Relating to Pleas of Guilty promulgated by American Bar Association outline what should be minimum procedure in taking of pleas of guilty. State v. Turner ---------- 424
   State v. Wade ---------- 442
   State v. Lindsay ---------- 443
6. When following plea of guilty in criminal action, court finds from record of in-court examination of defendant that his plea was voluntary, free from coercion, fairly advised by his counsel, and his counsel effective, subsequent contention that his plea was coerced and his counsel ineffective will not be entertained. State v. Smith ---------- 506
7. Rule stated when leave should be given to withdraw plea of guilty. State v. Journey ---------- 556

Habeas Corpus.

1. To release person from sentence of imprisonment by

habeas corpus, must appear that sentence absolutely void. Rhodes v. Sigler ---------- 628
2. Habeas corpus will not lie to discharge person from sentence of penal servitude where court imposing sentence had jurisdiction of offense and of person of defendant, and sentence within power of court to impose. Rhodes v. Sigler ---------- 628
3. It is position of Supreme Court that when a court's jurisdiction invoked by habeas corpus petition seeking custody of child, child becomes ward of court and prime consideration is welfare of child. Copple v. Copple ---------- 696
4. Statement in requisition and authenticated, accompanying papers that person sought to be extradited was in demanding state on date of offense charged prima facie evidence of truth of allegation; burden of proof on applicant in habeas corpus proceeding in resistance of extradition to conclusively prove otherwise. Austin v. Brumbaugh ---------- 815

Highways.

1. Left-hand turn across public highway between intersections is inherently dangerous and one making such movement required to exercise degree of care commensurate with danger. Keller v. Wellensiek ---- 201
2. One who attempts to cross street between intersections without keeping constant lookout for own safety in all directions of anticipated danger ordinarily guilty of negligence of such character as will bar recovery as matter of law. Van Ornum v. Moran ---------- 418
3. Requirement "to look" means to look at time and place when to look would be effective. Van Ornum v. Moran ---------- 418
4. Crossing street between intersections not limited to curb-to-curb crossing of street; includes crossing from curb to safety zone, entering street and stopping or standing in line of traffic, and otherwise exposing his person to flow of vehicular traffic in absence of emergency justifying such action. Van Ornum v. Moran ---------- 418
5. Pedestrian who crosses street between intersections charged with exercise of greater degree of care than one who crosses street at crosswalk where protection afforded by giving pedestrian right-of-way. Merritt v. Reed ---------- 561
6. One who attempts to cross street between intersec-

tions without looking, guilty of such negligence as would bar recovery as matter of law. Merritt v. Reed ---------- 561

Homestead.

Mortgage upon real estate, other than homestead, executed and delivered by mortgagor valid between parties, even though not lawfully acknowledged or witnessed. Mitzner v. Putnam ---------- 664

Hospitals.

1. Questions of public policy, convenience, and welfare, as related to creation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, or any change in boundaries thereof, are of purely legislative cognizance; when delegated to public body having legislative power, action in regard thereto not within due process clause of either state or federal Constitution. Syfie v. Tri-County Hospital Dist. ---------- 478
2. Statutes which provide for creation of district to encompass land in two or more counties may constitutionally allow county board of one of counties involved to act as competent tribunal before which question of setting boundaries of district may be heard. Syfie v. Tri-County Hospital Dist. ---------- 478
3. Competent for Legislature to authorize creation of governmental agencies for enforcement of its police power and clothe county commissioners, supervisors, or other administrative officers or boards with authority to establish districts for implementation of such purposes. Syfie v. Tri-County Hospital Dist. 478
4. Fact that bodies of land may extend into two or more counties does not render Legislature powerless to include contiguous tracts into one district for more convenient exercise of police power. Syfie v. Tri-County Hospital Dist. ---------- 478

Implied Consent Law.

At hearing before Director of Motor Vehicles to revoke operator's license under implied consent law, findings of fact sufficient to support revocation order if they concisely state conclusions favorable to order upon each contested issue of fact. Prigge v. Johns 761

Independent Contractors.

One going upon another's property as independent

contractor in position of invitee. Laaker v. Hartman 774

Indictments and Informations.

1. Sufficient where elements of crime or offense defined by statute set out in information or complaint. State v. Matejka ---------- 454
2. Where words appear in information or complaint which might be stricken out, leaving crime or offense sufficiently charged, such words do not tend to negative any essential averments; may be treated as surplusage and entirely rejected. State v. Matejka 454
3. All defects that may be excepted to by motion to quash information will be taken to be waived by defendant pleading general issue. State v. Workman 467
4. Variance between allegations in information and evidence not fatal unless material to merits of case or prejudicial to defendant. State v. Bullard 709
5. Forging and fraudulently uttering and publishing same instrument if done by same person constitute only one crime and if two acts charged in separate counts and conviction results on both counts, only one sentence may be imposed. State v. Huffman -- 809
6. Cited statute requires endorsement of names of witnesses on information; failure in contested case to endorse those known at time information filed error, but not necessarily prejudicial error. State v. Adels ---------- 849

Infants.

1. Owner of motor vehicle who lends vehicle to minor who is forbidden by statute to operate motor vehicle because of age is guilty of negligence and liable for injuries caused by such minor in use of vehicle. Keller v. Wellensiek ---------- 201
2. Boy of sane mind under age of 18 years, upon conviction of any crime, except murder or manslaughter, in any court of record, may be committed to Boys' Training School. State v. Pinkerton ---- 225
3. Ordinarily, effect given to judgments of sister state fixing custody of minor children as matter of comity unless circumstances require change in interests of minors' welfare. Copple v. Copple ------ 696
4. Child custody provisions of divorce decree entered in sister state have no extraterritorial effect upon questions of proper custody arising under circumstances materially changed with reference to welfare of children. Copple v. Copple ---------- 696

5. When child has been surreptitiously removed from state which fixed custody pursuant to divorce decree, courts of sister state very reluctant to refuse comity and will do so only under extraordinary circumstances. Copple v. Copple ---------- 696
6. Children not to be punished for unlawful act of parent and when circumstances clearly indicate extraordinary detriment to children if comity extended, will be denied. Copple v. Copple ---------- 696
7. Welfare of minors not to be determined by legal technicalities, or by adversary rights as between parents or other custodians, or by contumacy or other reprehensible conduct of parents which does not have direct bearing on children's welfare. Copple v. Copple ---------- 696
8. It is position of Supreme Court that when a court's jurisdiction invoked by habeas corpus petition seeking custody of child, child becomes ward of court and prime consideration is welfare of child. Copple v. Copple ---------- 696
9. Jurisdiction of a state to regulate custody of infants found within its territory not dependent upon domicile of child, but arises out of power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and custody that will best meet its needs and wants; residence within state suffices even though domicile may be in another jurisdiction. Copple v. Copple ---------- 696

Injunctions.

1. Showing required to enjoin anticipated nuisance stated. Horn v. Community Refuse Disposal, Inc. -- 43
2. Cited statute, in providing that no injunction shall be granted by judge after motion therefor has been overruled on merits of application by court, simply establishes rule of practice. School Dist. of Omaha v. State Board of Education ---------- 179
3. Legislature impliedly empowered city of metropolitan class to obtain decree in equity abating public nuisance without special damage to city. City of Omaha v. Danner ---------- 701
4. Without additional facts in equity suit to abate public nuisance, possession of property owned by another may be insufficient to constitute possessor indispensable party. City of Omaha v. Danner ------ 701
5. Remedy in equity purely preventive; chancellor does

not punish defendant for what he has done, that left to criminal courts. City of Omaha v. Danner ____ 701

Insane Persons.

1. Insanity as bar to imposition of sentence presents factual issue for determination of court. State v. Anderson ____ 435
2. If, after commission of offense, appears accused may have become insane, and examination had by psychiatrist who reports she is presently sane and mentally competent, in absence of request therefor, formal hearing not required. State v. Anderson ____ 435

Instructions.

1. All instructions must be read together; if instructions taken as whole correctly state law, are not misleading, and adequately cover issues, there is no prejudicial error. State v. Jackson ____ 22
2. If court has instructed jury generally on law of case and not withdrawn any essential issue from consideration of jury, error cannot be predicated on failure to charge on some particular phase of case unless proper instruction requested by party complaining. State v. Ford ____ 109
3. Trial court not required to give proffered instruction upon subordinate issue, or which unduly emphasizes part of evidence in case. Bowley v. Airport Authority ____ 292
4. Where court has instructed generally as to elements of offense charged, failure to charge on some particular phase of case not error in absence of request for more specific instruction. State v. Jones ____ 303
5. Question of previous chastity of prosecutrix one for jury to determine under proper instructions. State v. Vicars ____ 311
6. Not error to refuse tendered instruction where its content is covered by other instructions given by court. State v. Goodseal ____ 359
7. Party may not properly complain of instruction given by court when such instruction more favorable to him than that to which he was entitled. State v. Goodseal ____ 359
8. Party requesting instructions on certain theory cannot be heard to complain on appeal that trial court gave other instructions on same theory; rule that party cannot complain of giving instruction in harmony with one which he requested. Meyer

v. Moell ---------- 397
9. Where meaning of instruction reasonably clear, when construed with other instructions, not prejudicially erroneous to give such instruction. Meyer v. Moell 397
10. In deciding whether or not error in particular sentence or phrase of instruction, it will be considered with instruction of which it is part and all of remainder of charge to jury. Meyer v. Moell ---------- 397
11. Duty of court upon request of accused to instruct jury upon his theory of case, if there is evidence to support it. State v. Matejka ---------- 454
12. Jury instructions must be considered collectively; even though single instruction, considered alone, might be incomplete, if charge as whole correctly states the law, verdict and judgment will not be reversed. State v. Davis ---------- 457
13. Repetition of instructions, or portion thereof, does not require reversal unless indicates that effect thereof misleads or confuses jury or gives undue prominence to aspect of case unfavorable to party claiming error. State v. Davis ---------- 457
14. Not error to refuse requested instruction if court on own motion has given substance of such request in actual charge to jury. State v. Davis ---------- 457
15. Duty of trial court to analyze and summarize different specific allegations of negligence in pleadings and to succinctly state and submit only allegations of negligence that are supported by competent evidence. Marquardt v. Nehawka Farmers Coop. Co. 494
16. Generally, improper practice for trial court to merely copy allegation of party's petition in his pleadings when submitting issues to jury. Marquardt v. Nehawka Farmers Coop. Co. ---------- 494
17. Instructions must be taken as whole and construed together; construction based upon isolated phrases or sentences should not be permitted. Marquardt v. Nehawka Farmers Coop. Co. ---------- 494
18. Trial court should eliminate immaterial and superfluous matters and submit to jury by instructions only matters properly to be decided by it in arriving at its verdict. Rogers v. Navajo Freight Lines, Inc. ---------- 502
19. Duty of trial court, on own motion, to submit to jury only issues upon which are controverted questions of fact which must be determined by jury in order to properly arrive at its verdict. Anthony v. Poppert ---------- 509

20. Instructions to jury which fully and fairly submit issues in criminal case not subject to attack in absence of showing that manner of submission prejudicial to rights of defendant. State v. Coleman ---- 571
21. Before verdict can be directed against motorist for failing to see approaching automobile at nonprotected intersection, approaching automobile must be undisputably located in favored position. Jones v. Consumers Coop. Propane Co. ---------- 629
22. Refusal of requested instruction substantially covered by charge given not error. Jones v. Consumers Coop. Propane Co. ---------- 629
23. Doctrine of sudden emergency not applicable where emergency caused in part by negligence of party claiming its benefit. Jones v. Consumers Coop. Propane Co. ---------- 629
24. Instructions must be taken as whole and construed together; where instructions covered issues and fairly submitted case to jury, jury's verdict will not be disturbed unless clearly erroneous. Hayes v. Anderson Concrete Co., Inc. ---------- 771
25. Duty of trial court to submit to jury all material issues presented by pleadings and supported by evidence. Munson v. Bishop Clarkson Memorial Hospital ---------- 778

Insurance.

1. Where automobile liability policy issued to truck owner, also a consignor, contains "severability of interests" clause and clause that excludes application of policy to employees of insured or to injuries for which insured may be held liable under workmen's compensation law, clauses do not exclude injury claims of truck owner's employee against consignee and employees of consignee who are omnibus insureds. Liberty Mut. Ins. Co. v. Iowa Nat. Mut. Ins. Co. ---------- 115
2. Unearned premiums and unearned commissions held by insurance agent held in fiduciary capacity for company and are recoverable for company in involuntary liquidation. United Benefit Fire Ins. Co. v. Earl ---------- 175
3. Clause embodied in uninsured motorist insurance policy prorating liability not enforceable in these circumstances: Adjudicated damages to named insured and dependent son equal or exceed aggregate liability of two policies naming same insured

and issued by same insurer for separate premium on coverage in each policy. Bose v. American Family Mut. Ins. Co. ---------- 209
4. Uninsured motorist law enacted for benefit of innocent victim of financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose. Protective Fire & Cas. Co. v. Woten ---- 212
5. Policy provisions which conflict with requirements of uninsured motorist statute will not be effective to reduce insured's recovery below amount necessary to fully indemnify him for his loss within limits of all applicable policies. Protective Fire & Cas. Co. v. Woten ---------- 212
6. Rule XI of Rules of Procedure of Workmen's Compensation Court requiring notice of cancellation of compensation insurance be filed within 10 days after cancellation of policy primarily for protection of claimants entitled to compensation. Neeman v. Otoe County ---------- 370
7. Where workmen's compensation insurance policy canceled and replaced by new policy issued and certified by another insurance company and effective on date of cancellation of old policy, failure to file notice of cancellation with Workmen's Compensation Court within time specified by Rule XI does not in and of itself invalidate cancellation. Neeman v. Otoe County ---------- 370
8. New compensation insurance carrier has no standing to complain of delay by former carrier in complying with Rule XI; new carrier should be held solely responsible for payment of workmen's compensation liability arising on or after effective date of its policy and after date of cancellation of replaced policy. Neeman v. Otoe County ---------- 370
9. Whenever condition of domestic insurance company determined to be such that further transaction of business hazardous to its policyholders, creditors, stockholders, or public, district court on application of Director of Insurance may order liquidation of company. State ex rel. Neff v. Christian Brotherhood of America Burial Assn. ---------- 525
10. If contract prepared by insurer reasonably open to different interpretations, one favorable to insurer and one advantageous to insured, one favorable to insured will be adopted. American Standard Ins. Co. v. Tournor ---------- 585
11 Waiver is voluntary and intentional relinquish-

ment of known right and may be established by acts and conduct from which intention to waive may reasonably be inferred. Pester v. American Family Mut. Ins. Co. ---------- 793

12. Essential elements of equitable estoppel stated. Pester v. American Family Mut. Ins. Co. ---------- 793

13. Party 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. Pester v. American Family Mut. Ins. Co. ---------- 793

14. Where custom of giving notice of due date of premiums definitely established, insured has right to rely on such notice, and in absence thereof, policy may not be terminated or forfeited for nonpayment of premiums without notice to insured that custom has been abandoned. Pester v. American Family Mut. Ins. Co. ---------- 793

Intervention.

1. Anyone having interest in result of pending litigation may intervene as matter of right. Geer-Melkus Constr. Co., Inc. v. Hall County Museum Board 615

2. Interest required as prerequisite of intervention is direct and legal interest of such character that intervener will lose or gain by direct operation and legal effect of judgment which may be rendered in action. Geer-Melkus Constr. Co., Inc. v. Hall County Museum Board ---------- 615

Intoxicating Liquors.

1. Where evidence shows facts existing at time of arrest for driving motor vehicle while intoxicated show reasonable basis for making arrest, not necessary that arresting officer summarize facts and give opinion that defendant was intoxicated in absence of evidence requiring expert knowledge. Preston v. Johns ---------- 14

2. Conditional or qualified refusal to take test to determine alcoholic content of body fluids under implied consent law not sanctioned by act and such refusal is refusal to submit to test within meaning of act. Preston v. Johns ---------- 14
Rusho v. Johns ---------- 131

3. For jury to determine, in case of conflicting evidence, whether defendant was operating motor ve-

hicle while under influence of intoxicating liquor or whether he was operating such motor vehicle in abnormal manner as result of epileptic seizure. State v. Stanosheck ---------- 17
4. Cited statute not violative of Constitution of Nebraska, but on contrary is reasonable and valid exercise of police power. Central Markets West, Inc. v. State ---------- 79
5. Refusal of request of arrested person to contact attorney before consenting to alcoholic test under implied consent law affords no reasonable ground for refusing to submit to test. Rusho v. Johns -- 131
Metschke v. Department of Motor Vehicles -------- 197
6. Revocation of motorist's license to operate motor vehicle for refusal to take test of body fluids for alcoholic content as required by implied consent law on ground that he had been denied services of legal counsel is not deprivation of constitutional rights. Rusho v. Johns ---------- 131
7. Conviction of defendant upon charge of intoxication does not bar subsequent prosecution for offense of operating motor vehicle while under influence of alcoholic liquor. State v. Eckert ---------- 134
8. In prosecution for operating motor vehicle while under influence of intoxicating liquor, operation of motor vehicle is element of offense and may be established by circumstantial evidence. State v. Eckert ---------- 134
9. In appeal from order of Director of Motor Vehicles revoking driver's license for 1 year for refusing body fluid test after arrest for operating motor vehicle while under influence of alcoholic liquor, it is necessary, when put in issue, for State to show that arresting officer had reasonable grounds to believe arrested person was driving motor vehicle while under influence of intoxicating liquor. Metschke v. Department of Motor Vehicles ---------- 197
10. Voluntary drunkenness of one accused of crime does not mitigate offense, although it may have bearing on his turpitude and quality of his crime, and be considered on question of punishment. State v. Gamron ---------- 249
11. Implied consent law does not sanction qualified or conditional consent; neither does it sanction dissent on ground that plaintiff has taken medicine which he feels could affect results of tests. Doran v. Johns -- 321
12. Licensed driver's request for counsel when requested

to submit to chemical analysis to determine intoxication cannot be considered basis for holding that driver did not in fact refuse to submit to test. Doran v. Johns ---------- 321
13. Ordinarily, when liquor, narcotics, or contraband materials found on defendant's premises or in automobile owned and operated by him, evidence of unlawful possession deemed sufficient to sustain conviction in absence of any other reasonable explanation for its presence. State v. Rys ---------- 341
14. At hearing before Director of Motor Vehicles to revoke operator's license under implied consent law, findings of fact sufficient to support revocation order if they concisely state conclusions favorable to order upon each contested issue of fact. Prigge v. Johns ---------- 761
15. Nonexpert witness may testify from his observations as to whether or not another intoxicated; weight and sufficiency of this evidence for jury to decide. State v. Adels ---------- 849

Inviter and Invitee.

1. One going upon another's property as independent contractor in position of invitee. Laaker v. Hartman 774
2. Duty of owner of premises to invitee stated. Laaker v. Hartman ---------- 774

Joinder.

1. When offenses charged are of same or similar character or are based on same act or transaction or on two or more acts or transactions connected together or constituting parts of common scheme or plan, they may be jointed. State v. Rodgers ------ 633
2. If appears that joinder would prejudice defendant, court may order election for separate trials of counts. State v. Rodgers ---------- 633
3. Question of election between counts and advisability of joint or separate trials one directed to sound discretion of trial court. State v. Rodgers -------- 633

Judgments.

1. Rules of res judicata stated. Simmons v. Mutual Benefit Health & Acc. Assn. ---------- 26
2. Judgment will not operate as res judicata unless it appears on face of record, or is shown by extrinsic evidence, that precise question raised and determined in former suit between parties or their privies.

Simmons v. Mutual Benefit Health & Acc. Assn. -- 26
3. Adjudication as to construction or validity of instrument is res judicata when it comes in issue and is determined in another action between same parties, although immediate subject matter of two actions is different. Simmons v. Mutual Benefit Health & Acc. Assn. ---------- 26
4. Doctrine of res judicata applicable to defenses, setoffs, and counterclaims; an issue so adjudicated as defense in prior action between parties may not be interposed in subsequent action as cause of action or defense. Simmons v. Mutual Benefit Health & Acc. Assn. ---------- 26
5. To justify entry of summary judgment, record must show no genuine issue as to any material fact and that moving party is entitled to judgment as matter of law. Simmons v. Mutual Benefit Health & Acc. Assn. ---------- 26
6. Entry of summary judgment proper when only question of law presented. Johns v. Haase ------- 55
7. Motion in arrest of judgment must be made and disposed of after verdict and before court pronounces final judgment and sentence; where motion made after judgment and sentence, it is void in absence of order vacating judgment and sentence. State v. Moore 71
8. District court has inherent power to vacate or modify its own judgment at any time during term at which rendered; such action rests in sound discretion of court, and, in absence of abuse of discretion, will not be interfered with. Buchanan v. Buchanan ---------- 89
9. A judgment is adjudication of all matters essential to support it and every proposition assumed or decided by court leading up to final conclusion and on which such conclusion is based is as effectually passed upon as ultimate question which is finally resolved. Norlanco, Inc. v. County of Madison ---- 100
10. Judgment based on unconstitutional statute is not for that reason subject to collateral attack. Norlanco, Inc. v. County of Madison ---------- 100
11. Judgment in court of competent jurisdiction which has become final, based on statute, is as binding on parties as any other judgment even though such statute subsequently declared unconstitutional. Norlanco, Inc. v. County of Madison ---------- 100
12. Award of costs in judgment is part of judgment, and power of court to change such award is coex-

tensive with its power to vacate or modify judgment. Muff v. Mahloch Farms Co., Inc. ---------- 151

13. Costs may be retaxed at subsequent term when court has failed to follow mandatory statutory duty to tax costs, in event of clerical error or failure to perform ministerial act, and in instances authorized by cited statute, for vacation or modification of judgments at subsequent term. Muff v. Mahloch Farms Co., Inc. ---------- 151

14. Award of costs cannot ordinarily be changed by court after term at which made except in instances where statutes permit vacation or modification of judgment at subsequent term. Muff v. Mahloch Farms Co., Inc. ---------- 151

15. Power to modify or set aside judgment ends with adjournment of term at which rendered, except as provided in cited statute. State v. Byrd ---------- 330

16. In action to vacate judgment after adjournment of term, applicant must allege and prove he exercised due diligence and his failure to secure proper decision not due to his fault or negligence. State v. Byrd ---------- 330

17. Judgment will not be reversed for error against party not entitled to succeed in any event. Van Ornum v. Moran ---------- 418

18. Judgment of trial court in action at law where jury waived has effect of verdict of jury and will not be set aside unless clearly wrong. American Standard Ins. Co. v. Tournor ---------- 585

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Order confirming judicial sale under decree foreclosing mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking descrepancy between value and sale price, and where there is no satisfactory evidence that higher bid could be obtained in event of another sale. Central Savings Bank v. First Cadco Corp. ---------- 112

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2. In determining what is appropriate employee unit for purpose of collective bargaining, consideration may be given to mutuality of interest in wages, hours, and working conditions; duties and skills of employees; extent of union organization among employees; and desires of employees. City of Grand Island v. American Federation of S. C. & M. Employees ---------- 711
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Laches.

1. Facts constituting laches should normally be pleaded, but court of equity may in some circumstances on own motion deny relief on this ground. Rutt v. Frank ---------- 842
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3. In action in equity for reinstatement of mortgage where relief denied because of laches, court may nonetheless render judgment on note, where such alternative relief included in prayer. Rutt v. Frank 842

Landlord and Tenant.

1. Where landlord notifies tenant for fixed term that in case latter holds over he must pay specified increased rental, tenant will become liable for such rental if he in fact holds over, and either remains silent with reference to notification, or fails to express nonassent to increase. Enterprise Co., Inc. v. Nettleton Business College ---------- 183
2. In absence of change of conditions, monthly rental is competent evidence of reasonable value of occupation and use of premises that tenant held over his

term. Enterprise Co., Inc. v. Nettleton Business College ---------- 183

Larceny.

Where items of personal property are bought and sold by dealers in regular course of business, evidence of dealers' wholesale price is evidence of fair and reasonable market value for purpose of distinguishing between grand and petit larceny. State v. Carroll 148

Leases or Consignments.

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Liability of Inviter.

1. Landowner should not be held liable for defects which investigation might reveal unless situation suggests investigation, and facts indicate to reasonably prudent man likelihood of existence of some hidden danger to persons lawfully on premises. Maxwell v. Pugh ---------- 722
2. Business inviter owes duty to exercise ordinary care to keep approaches to his place of business in reasonably safe condition for use of patrons and customers properly on premises; inviter must exercise ordinary care in light of what he knows or reasonably should know to protect invitee from danger or to notify him of such danger while rightfully on premises and engaged in proper performance of purpose of presence. Maxwell v. Pugh -------- 722
3. If conditions and circumstances such that invitee has knowledge of condition in advance or should have knowledge comparable to that of inviter, may not be said that inviter guilty of actionable negligence. Maxwell v. Pugh ---------- 722

Liens.

1. Mechanic who has made repairs to automobile, at request of one who has possession under bailment

lease, does not have lien on automobile for his services against real owner, and latter is entitled to repossess himself of his property in action in replevin. Gibreal Auto Sales, Inc. v. Missouri Valley Machinery Co. ---------- 763

2. When workman or artisan by his labor or skill increases value of personal property placed in his possession to be improved he has lien upon it for his proper charges until paid; in order to charge chattel with this lien, labor for which lien is claimed must have been done at request of owner or under circumstances from which his assent can be reasonably implied. Gibreal Auto Sales, Inc. v. Missouri Valley Machinery Co. ---------- 763

Master and Servant.

1. Joint employment and pro rata liability for compensation payments under cited statute exists only where there is agreement between employers as to salary, wages, hours of employment, and terms of service. Henning v. City of Hebron ---------- 381
2. Master is responsible for all acts done by servant in obedience to express orders or directions of master or in execution of master's business, within scope of employment; and for acts in any sense warranted by express or implied authority conferred upon him, considering nature of services required, instructions given, and circumstances under which act done. Rogers v. Navajo Freight Lines, Inc. -- 502
3. Where employee acts under direction of employer, employer liable, not merely under rule of respondeat superior, but also as joint participant in acts complained of; employees and company, in fact, principals and joint participants. S.M.S. Trucking Co. v. Midland Vet, Inc. ---------- 647
4. Employer regarded as joint tort-feasor having joint and several liability. S.M.S. Trucking Co. v. Midland Vet, Inc. ---------- 647
5. Mere fact that agent not, at exact time of accident, immediately pursuing principal's business purposes does not necessarily take him out of scope of employment; such question must be determined by looking at all relevant factors concerning nature of employment as well as purpose and degree of any alleged deviation. S.M.S. Trucking Co. v. Midland Vet, Inc. ---------- 647

Mortgages.

1. Provision in mortgage assigning possession and rents to mortgagee, effective upon default, valid and enforceable; such provision may be enforced in foreclosure action upon application of mortgagee. Central Savings Bank v. First Cadco Corp. ---------- 112
2. Mortgage upon real estate, other than homestead, executed and delivered by mortgagor valid between parties, even though not lawfully acknowledged or witnessed. Mitzner v. Putnam ---------- 664
3. Provisions of cited statute relating to mortgages executed by guardians prohibit incompetent's estate from incurring new debt and does not prohibit inclusion of interest already due in executing renewal mortgage. Burney v. Pick ---------- 828
4. Mortgagee who, without consideration and at request of mortgagor, releases his mortgage solely for purpose of giving priority to another lien is in equity entitled to have his mortgage reinstated after other lien attaches, provided rights of innocent purchaser for value have not intervened. Rutt v. Frank ------ 842
5. In action in equity for reinstatement of mortgage where relief denied because of laches, court may nonetheless render judgment on note, where such alternative relief included in prayer. Rutt v. Frank 842

Motor Carriers.

1. Carrier in interstate commerce may contract to limit its liability to agreed value made to adjust rates of carriage. Sky Harbor Air Service v. North American Van Lines ---------- 194
2. Validity of limitation of liability not ordinarily impaired by these circumstances: Shipper, with reasonable notice that he might increase liability of carrier for loss by payment of correspondingly greater charge, failed to do so. Sky Harbor Air Service v. North American Van Lines ---------- 194
3. Contract carrier is one who furnishes transportation service to meet special needs of individual shipper or shippers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 261
4. Generally, under law, State Railway Commission is required to weigh special needs of shippers desiring new contract carrier service against adequacy of existing common carrier service. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. 261
5. Cited statute requires finding by State Railway

Commisison that proposed operation of contract carrier to extent authorized by permit would be consistent with public interest. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 261

6. Term "consistent with the public interest," as used in cited statute, means that proposed contract carrier service does not conflict with legislative policy of state in dealing with transportation by motor vehicles. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 261
7. When application is made for common carrier certificate, heavier burden cast upon applicant than in case of contract carrier. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 261
8. Applicant for common carrier certificate must meet test that proposed service is or will be required by present or future public convenience and necessity, otherwise such application shall be denied. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 261
9. In determining public convenience and necessity, deciding factors are whether operation will serve useful purpose responsive to public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in specified operation without endangering or impairing operations of existing carriers contrary to public interest. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 261
10. Purpose of Motor Carrier Act regulation for public interest; purpose not to stifle legitimate competition but to foster it. Hunt Transportation, Inc. v. Yellow Cab, Inc. ---------- 518
11. Reference in cited statute to enlargement of competition over that then existing means substantial or material increase in competition. Hunt Transportation, Inc. v. Yellow Cab, Inc. ---------- 518

Motor Vehicles.

1. Where evidence shows facts existing at time of arrest for driving motor vehicle while intoxicated show reasonable basis for making arrest, not necessary that arresting officer summarize facts and give opinion that defendant was intoxicated in absence of evidence requiring expert knowledge. Preston v. Johns ---------- 14
2. Conditional or qualified refusal to take test to de-

termine alcoholic content of body fluids under implied consent law not sanctioned by act and such refusal is refusal to submit to test within meaning of act. Preston v. Johns ---------- 14
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3. For jury to determine, in case of conflicting evidence, whether defendant was operating motor vehicle while under influence of intoxicating liquor or whether he was operating such motor vehicle in abnormal manner as result of epileptic seizure. State v. Stanosheck ---------- 17

4. Revocation of license to operate motor vehicle under point system is ministerial act. Lutjemeyer v. Dennis ---------- 46

5. When records disclose that person has accumulated total of 12 or more points within 2 years, Director of Motor Vehicles is required by statute to summarily revoke license and privileges of such person to operate motor vehicle in this state. Lutjemeyer v. Dennis ---------- 46

6. Administrative authority vested in Director of Motor Vehicles by statute may be exercised in name of Director by properly designated subordinates. Lutjemeyer v. Dennis ---------- 46

7. Abstract for reports of violations of motor vehicles act sufficient if complies with requirements of cited statute. Lutjemeyer v. Dennis ---------- 46

8. Where automobile liability policy issued to truck owner, also a consignor, contains "severability of interests" clause and clause that excludes application of policy to employees of insured or to injuries for which insured may be held liable under workmen's compensation law, clauses do not exclude injury claims of truck owner's employee against consignee and employees of consignee who are omnibus insureds. Liberty Mut. Ins. Co. v. Iowa Nat. Mut. Ins. Co. ---------- 115

9. Refusal of request of arrested person to contact attorney before consenting to alcoholic test under implied consent law affords no reasonable ground for refusing to submit to test. Rusho v. Johns ---- 131
Metschke v. Department of Motor Vehicles -------- 197

10. Revocation of motorist's license to operate motor vehicle for refusal to take test of body fluids for alcoholic content as required by implied consent law on ground that he had been denied services of

legal counsel is not deprivation of constitutional rights. Rusho v. Johns ---------- 131
11. Conviction of defendant upon charge of intoxication does not bar subsequent prosecution for offense of operating motor vehicle while under influence of alcoholic liquor. State v. Eckert ---------- 134
12. In prosecution for operating motor vehicle while under influence of intoxicating liquor, operation of motor vehicle is element of offense and may be established by circumstantial evidence. State v. Eckert ---------- 134
13. In appeal from order of Director of Motor Vehicles revoking driver's license for 1 year for refusing body fluid test after arrest for operating motor vehicle while under influence of alcoholic liquor, it is necessary, when put in issue, for State to show that arresting officer had reasonable grounds to believe arrested person was driving motor vehicle while under influence of intoxicating liquor. Metschke v. Department of Motor Vehicles ---------- 197
14. Left-hand turn across public highway between intersections is inherently dangerous and one making such movement required to exercise degree of care commensurate with danger. Keller v. Wellensiek 201
15. Farm tractor is motor vehicle within meaning of statutes governing operation of motor vehicles on public highways of state. Keller v. Wellensiek ------ 201
16. When driver of motor vehicle turning across highway between intersections fails to look to front and rear for oncoming traffic at time and place when to look would be effective, or looks and negligently fails to see that which is in plain sight, or is in position where he cannot see, question of law for court is usually presented. Keller v. Wellensiek ---- 201
17. Owner of motor vehicle who lends vehicle to minor who is forbidden by statute to operate motor vehicle because of age is guilty of negligence and liable for injuries caused by such minor in use of vehicle. Keller v. Wellensiek ---------- 201
18. Clause embodied in uninsured motorist insurance policy prorating liability not enforceable in these circumstances: Adjudicated damages to named insured and dependent son equal or exceed aggregate liability of two policies naming same insured and issued by same insurer for separate premium on coverage in each policy. Bose v. American Family Mut. Ins. Co. ---------- 209

19. Uninsured motorist law enacted for benefit of innocent victim of financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose. Protective Fire & Cas. Co. v. Woten 212
20. Policy provisions which conflict with requirements of uninsured motorist statute will not be effective to reduce insured's recovery below amount necessary to fully indemnify him for his loss within limits of all applicable policies. Protective Fire & Cas. Co. v. Woten ---------- 212
21. Implied consent law does not sanction qualified or conditional consent; neither does it sanction dissent on ground that plaintiff has taken medicine which he feels could affect results of tests. Doran v. Johns 321
22. Licensed driver's request for counsel when requested to submit to chemical analysis to determine intoxication cannot be considered basis for holding that driver did not in fact refuse to submit to test. Doran v. Johns ---------- 321
23. Receipt in evidence of remainder of incomplete transcript on appeal from order of Director of Motor Vehicles revoking operator's license does not constitute prejudicial error. Doran v. Johns -------- 321
24. Findings of fact in order entered by Director of Motor Vehicles sufficient if consist of concise statement of conclusions upon each contested issue of fact. Doran v. Johns ---------- 321
25. When materials in automobile which are indicative of criminal offense in plain sight of officer looking into automobile from outside, search justified and legal. State v. Rys ---------- 341
26. Generally held that when motorist stopped or arrested for violation of traffic or motor vehicle laws, exploratory search of vehicle for purpose of obtaining evidence of other offenses unwarranted. State v. Rys ---------- 341
27. Search of automobile made in connection with violation for which it is stopped, ordinarily held lawful search although results in discovery of evidence of some other offense. State v. Rys ---------- 341
28. Ordinarily, when liquor, narcotics, or contraband materials found on defendant's premises or in automobile owned and operated by him, evidence of unlawful possession deemed sufficient to sustain conviction in absence of any other reasonable explanation for its presence. State v. Rys ---------- 341
29. One who attempts to cross street between inter-

sections without keeping constant lookout for own safety in all directions of anticipated danger ordinarily guilty of negligence of such character as will bar recovery as matter of law. Van Ornum v. Moran 418

30. Requirement "to look" means to look at time and place when to look would be effective. Van Ornum v. Moran ---------- 418

31. Crossing street between intersections not limited to curb-to-curb crossing of street; includes crossing from curb to safety zone, entering street and stopping or standing in line of traffic, and otherwise exposing his person to flow of vehicular traffic in absence of emergency justifying such action. Van Ornum v. Moran ---------- 418

32. In automobile accident case, not ordinarily prejudicial error for court to exclude cross-examination of witness for defendant to prove these facts: Witness made claim against defendant for damage sustained in accident and defendant paid claim. Bravo v. Lacz ---------- 449

33. Under Iowa guest statute, elements of recklessness are: (1) No care, coupled with disregard for consequences; (2) must be evidence of defendant's knowledge, actual or chargeable, of danger and proceeding without any heed of, or concern for, consequences; and (3) consequences of actions of driver are such that occurrence of injury is probability rather than possibility. Peterson v. Dean 716

34. Under Iowa guest statute, showing of persistent course of conduct is matter of evidence ordinarily shown to establish recklessness; not in itself essential element; in most instances, merely helpful yardstick or guide by which to determine recklessness as opposed to negligence. Peterson v. Dean ------ 716

35. Under Iowa guest statute, conduct arising from momentary thoughtlessness, inadvertence, or from error of judgment, does not indicate reckless disregard of rights of others and does not constitute recklessness within meaning of law. Peterson v. Dean ---------- 716

36. Under Iowa guest statute, whether motorist reckless is question of law for court if reasonable minds, having before them all evidence on question, could reach but one conclusion; and is question of fact for jury if, under proved or admitted facts, different minds might reasonably reach different conclusions. Peterson v. Dean ---------- 716

37. At hearing before Director of Motor Vehicles to revoke operator's license under implied consent law, findings of fact sufficient to support revocation order if they concisely state conclusions favorable to order upon each contested issue of fact. Prigge v. Johns ---------- 761

38. Driver of motor vehicle has duty to keep proper lookout and watch where he is driving, even though he has right-of-way. When one being in place of safety sees, or could have seen, approach of moving vehicle in close proximity to him and moves from place of safety into path of such vehicle, and is struck, his own conduct constitutes contributory negligence. Hayes v. Anderson Concrete Co., Inc. 771

Municipal Corporations.

1. Municipal corporation in fixing rates to be charged by public utility acts in legislative rather than judicial capacity. Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney ---------- 168

2. Test of legitimacy is existence of real and substantial relationship between exercise of those powers in particular manner, and peace, public health, public morality, public safety, or general welfare of city. Stahla v. Board of Zoning Adjustment ---------- 219

3. What is for public good as it relates to zoning ordinances affecting use of property is, primarily, matter lying within discretion and determination of municipal body to which power and function is committed, and, unless an abuse of discretion has been clearly shown, it is not province of courts to interfere. Stahla v. Board of Zoning Adjustment -- 219

4. Where validity of legislative classification for zoning purposes is fairly debatable, legislative judgment is controlling. Stahla v. Board of Zoning Adjustment ---------- 219

5. Cited statute provides that mayor and council may by ordinance, at any time include within corporate limits of city any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character, and in such direction as may be deemed proper; such grant of power shall not be construed as conferring power to extend limits of city of first class over any agricultural lands which are rural in character. Voss v. City of Grand Island 232

6. Under provisions of cited statute, police officer of city of second class has same powers and duties

as sheriff or constable and has duty to apprehend and arrest felons and disturbers of peace and to keep and preserve peace within whole area of his respective county. Henning v. City of Hebron ---- 381

7. Under provisions of cited statute, sheriff has power to summon to his assistance, in arrest of felons, police officers of cities of second class. Henning v. City of Hebron ---------- 381

8. Lease-purchase agreement relating to financing of waste disposal plant and authorized by law not franchise that violates cited statute. Cosentino v. City of Omaha ---------- 407

9. City directing credit to public purpose with incidental benefit to private corporation not violative of constitutional prohibition against state and its subdivisions lending credit to private corporation. Cosentino v. City of Omaha ---------- 407

10. Requirements for competitive bidding strictly construed against public authorities. Cosentino v. City of Omaha ---------- 407

11. Where process or article patented, public authorities may specify its use without complying with competitive bidding requirements in these circumstances: The process or article in their judgment possesses such exceptional superiority it would be public injury for authorities not to use it. Cosentino v. City of Omaha ---------- 407

12. Voters at election are entitled to such information as will enable them to consider, weigh, discuss, and vote upon actual merits of proposition; if unfounded facts set out which obscure issues or mislead voters on material questions of fact, election will be held null and void. Geer-Melkus Constr. Co., Inc. v. Hall County Museum Board ---------- 615

13. Word "airport" as used in cited statute means airport qualified and licensed for public use. Bruns v. City of Seward ---------- 658

14. Property of state and its governmental subdivisions exempt from taxation under cited section of Constitution. Sioux City & New Orleans Barge Lines, Inc. v. Board of Equalization ---------- 690

15. Under circumstances involved, barge line operating and leasing portion of port area of City of Omaha not "owner" of improvements on port area within meaning of cited statute. Sioux City & New Orleans Barge Lines, Inc. v. Board of Equalization -------- 690

16. Improvements on real estate constituting Missouri

River port area under control and supervision of Dock Board of City of Omaha, and owned by city, exempt from taxation. Sioux City & New Orleans Barge Lines, Inc. v. Board of Equalization ---------- 690

17. Legislature impliedly empowered city of metropolitan class to obtain decree in equity abating public nuisance without special damage to city. City of Omaha v. Danner ---------- 701

18. Law of this state imposes upon various municipal corporations thereof duty to keep their streets and sidewalks in reasonably safe condition for travel by public. Mackey v. Midwest Supply Co. ------ 834

19. Where provisions of ordinance impose upon property owners performance of part of duty of municipality to public and for benefit of municipality as organized government, and not for benefit of individuals comprising public, breach of such ordinance remediable only at instance of municipal government; no right of action accrues to individual citizen especially injured thereby. Mackey v. Midwest Supply Co. ---------- 834

Negligence.

1. Power companies engaged in the transmission of electricity are not insurers and not liable for damages in absence of negligence; standard of care stated. Omaha Nat. Bank v. Omaha P. P. Dist. -- 6

2. One capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid open and obvious defects and dangers is negligent or contributorily negligent. Omaha Nat. Bank v. Omaha P. P. Dist. ---------- 6

3. Want of due care does not require that person should have anticipated exact risk which occurred, or that peril was deadly one; sufficient that he has placed himself in position of known danger where there was no need to be or that he knew or should have known that substantial injury was likely to result. Omaha Nat. Bank v. Omaha P. P. Dist. ---------- 6

4. Rule of application of presumption of due care arising out of natural instinct of self-preservation stated. Omaha Nat. Bank v. Omaha P. P. Dist. ---- 6

5. When driver of motor vehicle turning across highway between intersections fails to look to front and rear for oncoming traffic at time and place when to look would be effective, or looks and negligently fails to see that which is in plain sight, or is in

position where he cannot see, question of law for court is usually presented. Keller v. Wellensiek -- 201

6. Owner of motor vehicle who lends vehicle to minor who is forbidden by statute to operate motor vehicle because of age is guilty of negligence and liable for injuries caused by such minor in use of vehicle. Keller v. Wellensiek ---------- 201

7. Storekeeper has duty to use due care to keep his premises reasonably safe for use of an invitee, but he is not insurer of safety of customers who patronize his place of business. Bahe v. Safeway Stores, Inc. ---------- 228

8. It is storekeeper's responsibility to exercise due care to see that merchandise is stacked in reasonably safe manner on his shelves; where he or his employees know of dangerous condition, or if it has existed for such period of time that they should know of it, then liability attaches. Bahe v. Safeway Stores, Inc. ---------- 228

9. In determining what constitutes reasonable and ordinary care, skill, and diligence, on part of doctor in particular community, test is that which physicians and surgeons in same neighborhood and similar communities, engaged in same or similar lines of work, would ordinarily exercise and devote to benefit of their patients. Meyer v. Moell ---------- 397

10. One who attempts to cross street between intersections without keeping constant lookout for own safety in all directions of anticipated danger ordinarily guilty of negligence of such character as will bar recovery as matter of law. Van Ornum v. Moran ---------- 418

11. Requirement "to look" means to look at time and place when to look would be effective. Van Ornum v. Moran ---------- 418

12. Crossing street between intersections not limited to curb-to-curb crossing of street; includes crossing from curb to safety zone, entering street and stopping or standing in line of traffic, and otherwise exposing his person to flow of vehicular traffic in absence of emergency justifying such action. Van Ornum v. Moran ---------- 418

13. Duty of trial court to analyze and summarize different specific allegations of negligence in pleadings and to succinctly state and submit only allegations of negligence that are supported by competent evidence. Marquardt v. Nehawka Farmers Coop. Co. 494

14. Where facts adduced to sustain issue of negligence such that reasonable minds can draw but one conclusion therefrom, duty of court to decide question as matter of law rather than submit it to jury for determination. Anthony v. Poppert ---------- 509
15. Pedestrian who crosses street between intersections required to keep constant lookout in all directions of anticipated danger for own safety. Merritt v. Reed 561
16. Where both parties involved in accident are deceased, disabled, or lack memory, creating offsetting presumptions of due care, resolution must rest upon proper inferences to be drawn from whatever circumstantial evidence available to trier of fact. Merritt v. Reed ---------- 561
17. Pedestrian who crosses street between intersections charged with exercise of greater degree of care than one who crosses street at crosswalk where protection afforded by giving pedestrian right-of-way. Merritt v. Reed ---------- 561
18. One who attempts to cross street between intersections without looking, guilty of such negligence as would bar recovery as matter of law. Merritt v. Reed ---------- 561
19. Duty to sound signal or horn depends upon circumstances of particular case. Merritt v. Reed ------ 561
20. If motorist fails to see automobile not shown to be in favored position, question of his contributory negligence ordinarily jury question. Jones v. Consumers Coop. Propane Co. ---------- 629
21. Doctrine of sudden emergency not applicable where emergency caused in part by negligence of party claiming its benefit. Jones v. Consumers Coop. Propane Co. ---------- 629
22. Under Iowa guest statute, elements of recklessness are: (1) No care, coupled with disregard for consequences; (2) must be evidence of defendant's knowledge, actual or chargeable, of danger and proceeding without any heed of, or concern for, consequences; and (3) consequences of actions of driver are such that occurrence of injury is probability rather than possibility. Peterson v. Dean -------- 716
23. Under Iowa guest statute, showing of persistent course of conduct is matter of evidence ordinarily shown to establish recklessness; not in itself essential element; in most instances, merely helpful yardstick or guide by which to determine recklessness as opposed to negligence. Peterson v. Dean -------- 716

24. Under Iowa guest statute, conduct arising from momentary thoughtlessness, inadvertence, or from error of judgment, does not indicate reckless disregard of rights of others and does not constitute recklessness within meaning of law. Peterson v. Dean ---------- 716
25. Under Iowa guest statute, whether motorist reckless is question of law for court if reasonable minds, having before them all evidence on question, could reach but one conclusion; and is question of fact for jury if, under proved or admitted facts, different minds might reasonably reach different conclusions. Peterson v. Dean ---------- 716
26. General definition of negligence stated. Maxwell v. Pugh ---------- 722
27. Landowner should not be held liable for defects which investigation might reveal unless situation suggests investigation, and facts indicate to reasonably prudent man likelihood of existence of some hidden danger to persons lawfully on premises. Maxwell v. Pugh ---------- 722
28. Business inviter owes duty to exercise ordinary care to keep approaches to his place of business in reasonably safe condition for use of patrons and customers properly on premises; inviter must exercise ordinary care in light of what he knows or reasonably should know to protect invitee from danger or to notify him of such danger while rightfully on premises and engaged in proper performance of purpose of presence. Maxwell v. Pugh -- 722
29. If conditions and circumstances such that invitee has knowledge of condition in advance or should have knowledge comparable to that of inviter, may not be said that inviter guilty of actionable negligence. Maxwell v. Pugh ---------- 722
30. Where different minds may reasonably draw different conclusions or inferences from evidence adduced concerning issues of negligence or contributory negligence and degree thereof when one compared with other, such issues must be submitted to jury. Maxwell v. Pugh ---------- 722
31. General rule in Nebraska that those who deal with firearms required to exercise closest of attention and take most careful precautions not only in preparing for their use but in using them. Finley v. Brickman ---------- 747
32. Person charged with knowledge that loaded gun

dangerous instrumentality and in dealing with it charged with highest degree of care to prevent injuries to others. Finley v. Brickman ---------- 747

33. Theory of doctrine of res ipsa loquitur explained. Finley v. Brickman ---------- 747

34. Driver of motor vehicle has duty to keep proper lookout and watch where he is driving, even though he has right-of-way. When one being in place of safety sees, or could have seen, approach of moving vehicle in close proximity to him and moves from place of safety into path of such vehicle, and is struck, his own conduct constitutes contributory negligence. Hayes v. Anderson Concrete Co., Inc. 771

35. One going upon another's property as independent contractor in position of invitee. Laaker v. Hartman 774

36. Duty of owner of premises to invitee stated. Laaker v. Hartman ---------- 774

37. Maxim volenti non fit injuria means: If one, knowing and comprehending danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed risk and is precluded from recovery for injury resulting therefrom. Munson v. Bishop Clarkson Memorial Hospital ---------- 778

38. Maxim volenti non fit injuria applicable to negligence actions in this jurisdiction and not inconsistent with defense of contributory negligence. Munson v. Bishop Clarkson Memorial Hospital ---------- 778

New Trial.

1. In order to obtain review of alleged errors occurring during trial, such errors must be pointed out to trial court in motion for new trial and ruling obtained thereon. State v. Stanosheck ---------- 17

2. Supreme Court will not review testimony in form of affidavits used in trial court on hearing of motion for new trial unless such affidavits included in and presented by bill of exceptions. Metschke v. Department of Motor Vehicles ---------- 197

3. In appeal from order of district court granting new trial where plaintiff prays for reversal of order and reinstatement of verdict, contention of plaintiff that evidence was insufficient to submit issue of contributory negligence to jury will be deemed to have been waived upon holding that new trial was improvidently granted. Keller v. Wellensiek ---------- 201

4. Right to new trial for newly discovered evidence

depends upon facts and circumstances of each case. State v. Haynes ---------- 238
5. Motion for new trial is addressed to sound discretion of trial court and unless abuse of discretion shown, its determination will not be disturbed. State v. Haynes ---------- 238
6. New cumulative evidence tendered in support of motion for new trial must be so potent that new trial would probably result in different verdict. State v. Haynes ---------- 238
7. New trial will not ordinarily be granted for newly discovered evidence which would simply impeach a witness. State v. Haynes ---------- 238
8. Supreme Court may grant new trial for plain evidentiary errors under exceptional circumstances that deprived defendant of fair and impartial trial, although no one presented matter to trial court. State v. Waters ---------- 257

Nuisances.

1. Showing required to enjoin anticipated nuisance stated. Horn v. Community Refuse Disposal, Inc. 43
2. Refuse disposal operation not nuisance per se but may become nuisance in fact as result of manner in which operated. Horn v. Community Refuse Disposal, Inc. ---------- 43
3. Burden rests on one complaining to establish that use to be made of property must necessarily create nuisance. Horn v. Community Refuse Disposal, Inc. 43
4. Legislature impliedly empowered city of metropolitan class to obtain decree in equity abating public nuisance without special damage to city. City of Omaha v. Danner ---------- 701
5. Without additional facts in equity suit to abate public nuisance, possession of property owned by another may be insufficient to constitute possessor indispensable party. City of Omaha v. Danner -- 701
6. Remedy in equity purely preventive; chancellor does not punish defendant for what he has done, that left to criminal courts. City of Omaha v. Danner 701

Ordinances.

Where provisions of ordinance impose upon property owners performance of part of duty of municipality to public and for benefit of municipality as organized government, and not for benefit of individuals comprising public, breach of such ordinance remediable

only at instance of municipal government; no right of action accrues to individual citizen especially injured thereby. Mackey v. Midwest Supply Co. ---- 834

Pardons and Paroles.

1. Cited statute applies toward eligibility for parole or release under supervision rather than for absolute discharge as under previous statutes. Von Bokelman v. Sigler ---------- 378
2. In absence of statute, district court after commitment of prisoner possesses no authority to set aside sentence and place prisoner on probation. Housand v. Sigler ---------- 414
3. Director of Corrections may refuse to release prisoner for work under cited statute notwithstanding favorable recommendation by Board of Parole. Housand v. Sigler ---------- 414
4. Committed offender eligible for release on parole upon completion of minimum term less reduction, or upon completion of minimum sentence provided by law less reductions if approved by sentencing judge or his successor. State v. McMillian ---------- 784
5. Committed offender while on parole shall remain in legal custody and control of Board of Parole; board may at any time revoke parole of offender or recommit him to custody of Division of Corrections, with or without cause. Brown v. Sigler ---------- 800
6. A state is not required to provide for parole and, if it does, it may stipulate terms and conditions under which it may be granted or revoked. Brown v. Sigler ---------- 800
7. Constitutional due process does not require Board of Parole to conduct adversary hearing to revoke parole, nor does it require appointment of counsel for indigent parolees or compulsory process. Brown v. Sigler ---------- 800
8. Good time reductions provided in cited statute used to determine eligibility for release on parole or supervision and subject to forfeiture. Brown v. Sigler ---------- 800

Parent and Child.

1. Amount to be awarded as child support rests within sound discretion of court; in each instance depends upon needs of child or children, financial condition and earning ability of father, family standard of living, and all other relevant facts and circum-

stances. Sanchez v. Sanchez ---------- 427
2. Statutes of Colorado provide that orders regarding custody of children may be changed after entry of divorce decree as circumstances may warrant. Copple v. Copple ---------- 696
3. Whatever effect full faith and credit clause may have with respect to custody decrees, clear that state of forum has at least as much leeway to disregard judgment, qualify it, or depart from it as does state where rendered. Copple v. Copple ------ 696
4. Children not to be punished for unlawful act of parent and when circumstances clearly indicate extraordinary detriment to children if comity extended, will be denied. Copple v. Copple ---------- 696
5. Welfare of minors not to be determined by legal technicalities, or by adversary rights as between parents or other custodians, or by contumacy or other reprehensible conduct of parents which does not have direct bearing on children's welfare. Copple v. Copple ---------- 696
6. Jurisdiction of a state to regulate custody of infants found within its territory not dependent upon domicile of child, but arises out of power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and custody that will best meet its needs and wants; residence within state suffices even though domicile may be in another jurisdiction. Copple v. Copple 696

Parties.

1. Where defendant demurs to petition for misjoinder of parties plaintiff and stipulates that it be sustained on condition that necessary party plaintiff be added, which was done, defendant estopped to object on ground of misjoinder of parties plaintiff. Simmons v. Mutual Benefit Health & Acc. Assn. 26
2. Anyone having interest in result of pending litigation may intervene as matter of right. Geer-Melkus Constr. Co., Inc. v. Hall County Museum Board 615
3. Interest required as prerequisite of intervention is direct and legal interest of such character that intervener will lose or gain by direct operation and legal effect of judgment which may be rendered in action. Geer-Melkus Constr. Co., Inc. v. Hall County Museum Board ---------- 615
4. Domicile in state is alone sufficient to bring absent defendant within reach of state's jurisdiction for

purposes of personal judgment by means of appropriate substituted service; personal service of summons adequate to meet requirements of due process of law. Stucky v. Stucky ---------- 636

5. In personam jurisdiction may be acquired over nonresident defendant in divorce action by extra-territorial personal service of process made in accordance with statute of this state if there exist sufficient contacts between defendant and this state relevant to cause of action to satisfy traditional notions of fair play and substantial justice. Stucky v. Stucky ---------- 636
6. When determination of controversy cannot be had without presence of other parties, court must order them brought in. City of Omaha v. Danner ------ 701
7. Indispensable parties to suit are those who not only have interest in subject matter of controversy, but also have interest of such nature that final decree cannot be made without affecting their rights, or leaving controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience. City of Omaha v. Danner -- 701
8. Without additional facts in equity suit to abate public nuisance, possession of property owned by another may be insufficient to constitute possessor indispensable party. City of Omaha v. Danner -- 701

Partnerships.

1. Under doctrine of partnership by estoppel, essential to cause of action that party asserting liability against nonpartner must have been induced by misleading appearances to change his position to his detriment. Havelock Meats, Inc. v. Roberts ---- 73
2. Benefit to firm generally held insufficient basis on which to predicate firm liability for transaction entered into by partner in individual capacity. Ogallala Fertilizer Co. v. Salsbery ---------- 537
3. Where partners are disclosed and known to party contracting, and contract signed by only one partner who contracts in own behalf, other partners not bound thereby. Ogallala Fertilizer Co. v. Salsbery 537

Payment.

1. Cited statute does not contemplate that presentment of personal check drawn on bank be made by telephone; payment of personal check or refusal of payment and dishonor by drawee bank necessitate ex-

hibition or delivery of instrument under current banking practices. Kirby v. Bergfield ---------- 242
2. Where personal check is taken for an underlying obligation, obligation is suspended pro tanto until presentment of check; if check is not paid on due presentment, right to sue on, or otherwise enforce, obligation is "revived." Kirby v. Bergfield ------ 242
3. Payment is affirmative defense; party alleging it has burden of proof. Haney v. L. R. Foy Constr. Co. 528

Penal Institutions.

1. Committed offender while on parole shall remain in legal custody and control of Board of Parole; board may at any time revoke parole of offender or recommit him to custody of Division of Corrections, with or without cause. Brown v. Sigler ---------- 800
2. A state is not required to provide for parole and, if it does, it may stipulate terms and conditions under which it may be granted or revoked. Brown v. Sigler ---------- 800
3. Constitutional due process does not require Board of Parole to conduct adversary hearing to revoke parole, nor does it require appointment of counsel for indigent parolees or compulsory process. Brown v. Sigler ---------- 800
4. Good time reductions provided in cited statute used to determine eligibility for release on parole or supervision and subject to forfeiture. Brown v. Sigler 800

Perpetuities and Restraints on Alienation.

1. Where estate in fee simple devised, attempt by testator to prevent alienation by attaching conditions subsequent ineffective and void for reason that conditions are repugnant to estate created. Cast v. National Bank of Commerce T. & S. Assn. ---- 385
2. Restraint on alienation in form of condition subsequent, forfeiting or terminating fee simple estate, or providing for limitation over upon breach of condition, void as against public policy. Cast v. National Bank of Commerce T. & S. Assn. -------- 385
3. Conditions subsequent attached to fee simple which restrain alienation void whether such restraint direct or indirect. Cast v. National Bank of Commerce T. & S. Assn. ---------- 385
4. Rule against perpetuities not applicable where conditions subsequent attached to fee simple estate restrain alienability, since such conditions subsequent

void; where conditions subsequent do not limit alienation and conditions otherwise valid, rule against perpetuities may be applicable. Cast v. National Bank of Commerce T. & S. Assn. ---------- 385

5. Conditions subsequent to fee simple title which do not limit alienation and are otherwise valid, enforcible if reasonable and not adversely affect marketability of fee. Cast v. National Bank of Commerce T. & S. Assn. ---------- 385

Physicians and Surgeons.

In determining what constitutes reasonable and ordinary care, skill, and diligence, on part of doctor in particular community, test is that which physicians and surgeons in same neighborhood and similar communities, engaged in same or similar lines of work, would ordinarily exercise and devote to benefit of their patients. Meyer v. Moell ---------- 397

Pleadings.

1. Where defendant demurs to petition for misjoinder of parties plaintiff and stipulates that it be sustained on condition that necessary party plaintiff be added, which was done, defendant estopped to object on ground of misjoinder of parties plaintiff. Simmons v. Mutual Benefit Health & Acc. Assn. 26
2. Filing of amended petition after demurrer to original petition filed, but before ruling on demurrer, not prejudicial to defendant and affords no valid basis for asserting error. Simmons v. Mutual Benefit Health & Acc. Assn. ---------- 26
3. Provisions of cited statute dealing with certificate or proof of service of notice of appeal from municipal court to district court not mandatory and jurisdictional, but directory only; defective proof of service may be corrected or amended with permission. Havelock Meats, Inc. v. Roberts ---------- 73
4. Allegations which are proper in motion to dissolve attachment or garnishment may be included in special appearance without making general appearance. Conner v. Southern ---------- 164
5. Motion to dismiss appeal to Supreme Court, where there has been no final order in district court, is not general appearance in action pending in district court. Conner v. Southern ---------- 164
6. A litigant who invokes provisions of statute may not challenge its validity; he may not seek benefit of

it and at same time question its constitutionality. Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney 168
7. Rule requiring the defense that plaintiff not real party in interest be specially pleaded not applicable where case one in which facts showing interest must be established as essential of cause of action, or where circumstances of case such that objection raised goes to existence of cause of action. Durand Associates, Inc. v. Guardian Inv. Co. ---------- 349
8. All defects that may be excepted to by motion to quash information will be taken to be waived by defendant pleading general issue. State v. Workman 467
9. Payment is affirmative defense; party alleging it has burden of proof. Haney v. L. R. Foy Constr. Co. 528
10. Where verdict not excessive but exceeds amount of prayer, prayer may be amended to conform to proof. Haney v. L. R. Foy Constr. Co. ---------- 528
11. Denial of right to file amended pleading not tending to promote interests of justice not abuse of discretion. Ogallala Fertilizer Co. v. Salsbery ---- 537
12. Litigant who invokes provisions of statute may not challenge its validity; may not seek benefit of it and at same time question its constitutionality. City of Grand Island v. American Federation of S. C. & M. Employees ---------- 711
13. Facts constituting laches should normally be pleaded, but court of equity may in some circumstances on own motion deny relief on this ground. Rutt v. Frank ---------- 842
14. In action in equity for reinstatement of mortgage where relief denied because of laches, court may nonetheless render judgment on note, where such alternative relief included in prayer. Rutt v. Frank 842

Post Conviction.

1. When following plea of guilty in criminal action and institution of post conviction action, court finds from record of in-court examination of defendant that plea was voluntary, was free from coercion, was fairly advised by counsel, and that counsel was effective, subsequent contention that plea coerced and counsel ineffective will not be entertained. State v. Sargent ---------- 155
2. Evidentiary hearing in post conviction proceeding not required where files and records in case show prisoner entitled to no relief. State v. Gero ---------- 379
3. Although record shows formal court appointment

of counsel and arraignment of defendant occurred on same day, does not establish defendant deprived of effective assistance of counsel. State v. Norgard 535
4. Fact that interviews with defendant conducted by different attorneys on public defender's staff prior to arraignment does not establish ineffective assistance of counsel. State v. Norgard ---------- 535
5. Claim of error on ground of ineffective assistance of counsel must be supported by record showing counsel's assistance so grossly inept as to jeopardize rights of defendant and shock court by its inadequacy. State v. Oziah ---------- 541
6. Effectiveness of counsel not to be judged by hindsight. State v. Phillips ---------- 547
7. For post conviction relief on ground of ineffective counsel, must appear that counsel's assistance so grossly inept as to shock conscience of court. State v. Phillips ---------- 547
8. Ineffectiveness of counsel not inferable from single fact of shortness of time between appointment of counsel and commencement of trial, must be some showing of prejudice; amount of time which elapses between appointment of counsel and commencement of trial not per se sufficient to carry that burden. State v. Phillips ---------- 547
9. Late appointment of counsel not erroneous as matter of law; appellant has burden of proving late appointment erroneous as matter of fact. State v. Phillips 547
10. In post conviction proceeding, burden of proof on movant to establish basis for relief; where such burden not met, denial of relief required. State v. Phillips ---------- 547
11. Motion for post conviction relief not substitute for appeal. State v. Carpenter ---------- 605
12. When offenses charged are of same or similar character or are based on same act or transaction or on two or more acts or transactions connected together or constituting parts of common scheme or plan, they may be joined. State v. Rodgers ---------- 633
13. If appears that joinder would prejudice defendant, court may order election for separate trials of counts. State v. Rodgers ---------- 633
14. Question of election between counts and advisability of joint or separate trials one directed to sound discretion of trial court. State v. Rodgers ---------- 633
15. Without substantial basis, claim of prejudice from substitution of appointed counsel for defendant in

criminal prosecution no ground for post conviction relief. State v. Anderson ---------- 769
16. Decision by counsel to call or not to call witness forms part of trial tactics; ordinarily mistaken decision in that respect not sufficient for post conviction relief. State v. Anderson ---------- 769
17. 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. Lincoln ---------- 783
18. Where facts and issues which are grounds of motion for post conviction relief known to defendant and his counsel, and were raised, heard, and determined at time of trial resulting in conviction but not raised in direct appeal, those issues not ordinarily considered in post conviction review. State v. Lincoln ---------- 783
19. Committed offender eligible for release on parole upon completion of minimum term less reduction, or upon completion of minimum sentence provided by law less reductions if approved by sentencing judge or his successor. State v. McMillian ---------- 784
20. In post conviction proceeding, petitioner has burden of establishing basis for relief. State v. Rapp ---- 785
21. Defendant in post conviction proceeding may not raise questions which could have been raised on direct appeal and which do not involve questions making judgment of conviction void or voidable under state or federal Constitutions. State v. Huffman 809
22. Post conviction remedies intended to provide relief in those cases where miscarriage of justice may have occurred; not intended as procedure to secure review for defendant dissatisfied with his sentence. State v. Huffman ---------- 809
23. Imposing two sentences for one offense constitutes violation of due process of law and is ground for relief under post conviction proceeding statute. State v. Huffman ---------- 809
24. Court appointed counsel should be given wide latitude in adoption of trial or argument strategy. State v. Ondrak ---------- 838
25. One of primary duties of attorney to represent client zealously within bounds of law. State v. Ondrak ---------- 838

Principal and Agent.

1. Innocent principal can, by contract with another,

relieve himself of liability for deceit because of unauthorized fraud by servant or other agent upon other party. Dembowski v. Central Constr. Co. -- 624
2. One seeking to recover from principal, for unauthorized act of agent, must establish that principal obtained knowledge of such act before it had changed its position. Dembowski v. Central Constr. Co. -- 624

Probation and Parole.
1. When any court suspends sentence and places defendant on probation it shall determine conditions and period of probation, and conditions of probation shall be such as court shall in its discretion prescribe. State v. Duitsman ---------- 39
2. Order by district court purporting to vacate sentence legally pronounced in criminal action for purpose of placing defendant on probation is nullity. State v. Carpenter ---------- 605

Process.
1. Where record fails to show defendant has transacted any business in this state, service of summons outside state under cited statute invalid. Conner v. Southern ---------- 164
2. Personal service outside state, as substitute for service by publication, invalid unless affidavit required by cited statute. Conner v. Southern ------ 164
3. Personal service outside state, as substitute for service by publication, made by some person other than sheriff or some person appointed by sheriff invalid. Conner v. Southern ---------- 164

Proof.
1. Burden of proof upon claimant in workmen's compensation case to establish by preponderance of evidence that his disability caused by accident arising out of and in course of his employment. Satterfield v. Nagel ---------- 332
2. Where claimant fails to show with reasonable certainty that disability of which he complains arose out of and in course of his employment, proceeding will be dismissed. Satterfield v. Nagel ---------- 332

Property.
1. Property owned and used exclusively for religious or charitable purposes and not owned or used for financial gain or profit exempt from taxation.

Christian Retirement Homes, Inc. v. Board of Equalization ---------- 11
2. Primary or dominant use, not incidental use, controlling in determining whether property exempt from taxation. Christian Retirement Homes, Inc. v. Board of Equalization ---------- 11
3. Property owned and used primarily for purpose of furnishing low-rent housing not entitled for exemption from taxation as property owned and used exclusively for charitable purposes. Christian Retirement Homes, Inc. v. Board of Equalization ---- 11
4. Right to full and free use and enjoyment of one's property in manner and for such purpose as owner may choose, so long as not for maintenance of nuisance or injurious to others, is privilege protected by law, and one which property owner may not be deprived without due process of law; owner's right to use his property is subject, however, to reasonable regulation, restriction, and control by state in legitimate exercise of its police powers. Stahla v. Board of Zoning Adjustment ---------- 219
5. Test of legitimacy is existence of real and substantial relationship between exercise of those powers in particular manner, and peace, public health, public morality, public safety, or general welfare of city. Stahla v. Board of Zoning Adjustment ---------- 219
6. What is for public good as it relates to zoning ordinances affecting use of property is, primarily, matter lying within discretion and determination of municipal body to which power and function is committed, and, unless an abuse of discretion has been clearly shown, it is not province of courts to interfere. Stahla v. Board of Zoning Adjustment 219
7. Intent statute is rule of construction; does not have effect of enlarging, limiting, or modifying any rule of substantive law that existed at time of its passage or that has thereafter been created. Cast v. National Bank of Commerce T. & S. Assn. 385
8. Upon enactment of Uniform Property Act, its provisions supersede conflicting provisions of law of property existing prior to effective date of act. Cast v. National Bank of Commerce T. & S. Assn. 385
9. Property owned and used exclusively for educational, religious, charitable, or cemetery purposes exempt from taxation when such property not owned or used for financial gain or profit to either owner or user. Berean Fundamental Church Council, Inc.

v. Board of Equalization ---------- 431
10. Statutes exempting property from taxation should be strictly construed. Berean Fundamental Church Council, Inc. v. Board of Equalization ---------- 431
11. One contending his property exempt from taxation must clearly show he is within exemption provided by statute. Berean Fundamental Church Council, Inc. v. Board of Equalization ---------- 431
12. Burden of proof upon one claiming property exempt from taxation to establish its predominate use for one of purposes set out in cited statute. Berean Fundamental Church Council, Inc. v. Board of Equalization ---------- 431
13. Exclusive use of property determines exempt character; use of property as distinguished from use of income from property determines whether exempt from taxation. Berean Fundamental Church Council, Inc. v. Board of Equalization ---------- 431
14. One of primary incidents of ownership of property in fee simple is right to convey or encumber it. Burney v. Pick ---------- 828
15. Conveyance of real estate of such importance to state that one will not be permitted to become whimsical and unreasonable after creating estate recognized by law, such as estate in fee simple, by attaching conditions repugnant to estate created. Burney v. Pick ---------- 828
16. Testator or grantor may not create vested fee simple estate and at same time effectively forbid its alienation. Burney v. Pick ---------- 828
17. Under common law no duty devolved upon abutting owner to keep sidewalks adjacent to his property in safe condition. Mackey v. Midwest Supply Co. ---------- 834
18. Law of this state imposes upon various municipal corporations thereof duty to keep their streets and sidewalks in reasonably safe condition for travel by public. Mackey v. Midwest Supply Co. ---------- 834
19. Where provisions of ordinance impose upon property owners performance of part of duty of municipality to public and for benefit of municipality as organized government, and not for benefit of individuals comprising public, breach of such ordinance remediable only at instance of municipal government; no right of action accrues to individual citizen especially injured thereby. Mackey v. Midwest Supply Co. ---------- 834

Public Officers and Employees.

Where duty placed upon public officer to perform acts necessary to perfect appeal, failure to perform cannot be charged to litigant nor operate to defeat appeal. Harte v. Gallagher ---------- 141

Public Utilities.

1. Municipal corporation in fixing rates to be charged by public utility acts in legislative rather than judicial capacity. Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney ---------- 168
2. Public utility entitled to rates for its service that may normally be expected to yield fair return upon reasonable value of property that is being used for public convenience. Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney ---------- 168
3. Utility rates fixed by city are presumed to be correct and reasonable, and burden on party attacking them to show they are arbitrary, unreasonable, and confiscatory. Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney ---------- 168

Public Service Commissions.

1. Purpose of Motor Carrier Act regulation for public interest; purpose not to stifle legitimate competition but to foster it. Hunt Transportation, Inc. v. Yellow Cab, Inc. ---------- 518
2. Reference in cited statute to enlargement of competition over that then existing means substantial or material increase in competition. Hunt Transportation, Inc. v. Yellow Cab, Inc. ---------- 518
3. Effect of transfer of certificate upon local competitive situation peculiarly for determination of State Railway Commission. Hunt Transportation, Inc. v. Yellow Cab, Inc. ---------- 518

Public Works Contracts.

1. Lease-purchase agreement relating to financing of waste disposal plant and authorized by law not franchise that violates cited statute. Consentino v. City of Omaha ---------- 407
2. Requirements for competitive bidding strictly construed against public authorities. Consentino v. City of Omaha ---------- 407
3. Where process or article patented, public authorities may specify its use without complying with competitive bidding requirements in these circum-

stances: The process or article in their judgment possesses such exceptional superiority it would be public injury for authorities not to use it. Cosentino v. City of Omaha ---------- 407

Quieting Title.

1. Claim of adverse possession must be proved by actual, open, exclusive, and continuous possession under claim of ownership for statutory period of 10 years. Hammerly v. County of Dodge ---------- 608
2. Fact that one claiming title by adverse posesssion never intended to claim more land than called for in his deed not controlling factor. Hammerly v. County of Dodge ---------- 608
3. Adverse possession sufficient if land used continuously for purpose to which adapted because of its nature and character. Hammerly v. County of Dodge ---------- 608
4. Acts of dominion over land of title owner, to be effective against him, must be so open, exclusive, and continuous as to put ordinarily prudent person on notice that his lands in adverse possession of another. Hammerly v. County of Dodge ---------- 608

Rape.

1. Corroboration of prosecutrix in rape case sufficient if there are material facts and circumstances which tend to support her testimony and from which, together with her testimony as to principal fact, inference of guilt may be drawn. State v. Wagner 37
2. In prosecution under cited statute, touching, fondling, rubbing, or feeling of body, members or private parts of minor under age of 16 years, with intent of arousing, appealing to, and gratifying lusts, passions, and sexual desires of either minor or accused, constitutes offense charged, even though such touching, fondling, rubbing, or feeling was through clothing of minor. State v. Reich ---------- 289
3. Where prosecutrix 15 or over, her previous chastity essential element of offense of statutory rape. State v. Vicars ---------- 311
4. While general criminal intent involved in crime of statutory rape, no intent requisite other than that evidenced by doing of act constituting offense. State v. Vicars ---------- 311
5. Question of previous chastity of prosecutrix one for jury to determine under proper instructions.

State v. Vicars ---------- 311
6. Mistake or lack of information as to victim's chastity no defense to crime of statutory rape. State v. Vicars ---------- 311
7. Chaste female within meaning of cited statute is one who has never had unlawful sexual intercourse with a male prior to intercourse with which prisoner stands indicted. State v. Vicars ---------- 311

Replevin.
1. Mechanic who has made repairs to automobile, at request of one who has possession under bailment lease, does not have lien on automobile for his services against real owner, and latter is entitled to repossess himself of his property in action in replevin. Gibreal Auto Sales, Inc. v. Missouri Valley Machinery Co. ---------- 763
2. Facts that transpire after institution of replevin action immaterial in consideration and determination of merits of case. Gibreal Auto Sales, Inc. v. Missouri Valley Machinery Co. ---------- 763

Res Judicata.
1. Rules of res judicata stated. Simmons v. Mutual Benefit Health & Acc. Assn. ---------- 26
2. Judgment will not operate as res judicata unless it appears on face of record, or is shown by extrinsic evidence, that precise question raised and determined in former suit between parties or their privies. Simmons v. Mutual Benefit Health & Acc. Assn. ---------- 26
3. Adjudication as to construction or validity of instrument is res judicata when it comes in issue and is determined in another action between same parties, although immediate subject matter of two actions is different. Simmons v. Mutual Benefit Health & Acc. Assn. ---------- 26
4. Doctrine of res judicata applicable to defenses, setoffs, and counterclaims; an issue so adjudicated as defense in prior action between parties may not be interposed in subsequent action as cause of action or defense. Simmons v. Mutual Benefit Health & Acc. Assn. ---------- 26
5. Rule of res judicata grounded, first, on public policy and necessity to terminate litigation and, second, hardship on person by being vexed more than once for same cause. Norlanco, Inc. v. County of Madison 100

6. Conclusiveness of prior judgment precluding subsequent litigation of same cause of action between same parties much broader in application than determination of questions actually involved in prior action; conclusiveness of judgment in such case extends not only to matters actually determined but also to other matters which properly could have been raised and determined and those which were necessarily adjudicated or necessarily implied in final judgment, whether formally raised or not. Norlanco, Inc. v. County of Madison ---------- 100

Residence.

Jurisdiction of a state to regulate custody of infants found within its territory not dependent upon domicile of child, but arises out of power that every sovereignty possesses as parens partriae to every child within its borders to determine its status and custody that will best meet its needs and wants; residence within state suffices even though domicile may be in another jurisdiction. Copple v. Copple ------ 696

Restraints on Alienation.

1. Conveyance of real estate of such importance to state that one will not be permitted to become whimsical and unreasonable after creating estate recognized by law, such as estate in fee simple, by attaching conditions repugnant to estate created. Burney v. Pick ---------- 828
2. Testator or grantor may not create vested fee simple estate and at same time effectively forbid its alienation. Burney v. Pick ---------- 828

Revenue and Taxation.

1. Property owned and used exclusively for religious or charitable purposes and not owned or used for financial gain or profit exempt from taxation. Christian Retirement Homes, Inc. v. Board of Equalization ---------- 11
2. Primary or dominant use, not incidental use, controlling in determining whether property exempt from taxation. Christian Retirement Homes, Inc. v. Board of Equalization ---------- 11
3. Property owned and used primarily for purpose of furnishing low-rent housing not entitled for exemption from taxation as property owned and used exclusively for charitable purposes. Christian Re-

tirement Homes, Inc. v. Board of Equalization -- 11
4. Property owned and used exclusively for educational, religious, charitable, or cemetery purposes exempt from taxation when such property not owned or used for financial gain or profit to either owner or user. Berean Fundamental Church Council, Inc. v. Board of Equalization ---------- 431
5. Statutes exempting property from taxation should be strictly construed. Berean Fundamental Church Council, Inc. v. Board of Equalization ---------- 431
6. One contending his property exempt from taxation must clearly show he is within exemption provided by statute. Berean Fundamental Church Council, Inc. v. Board of Equalization ---------- 431
7. Burden of proof upon one claiming property exempt from taxation to establish its predominate use for one of purposes set out in cited statute. Berean Fundamental Church Council, Inc. v. Board of Equalization ---------- 431
8. Exclusive use of property determines exempt character; use of property as distinguished from use of income from property determines whether exempt from taxation. Berean Fundamental Church Council, Inc. v. Board of Equalization ---------- 431

Right to Counsel.
1. Defendant may effectively waive right to counsel at custodial interrogation, provided he does so voluntarily, knowingly, and intelligently. State v. Deardurff ---------- 92
2. Revocation of motorist's license to operate motor vehicle for refusal to take test of body fluids for alcoholic content as required by implied consent law on ground that he had been denied services of legal counsel is not deprivation of constitutional rights. Rusho v. Johns ---------- 131
3. Refusal of request of arrested person until he could contact attorney before consenting to alcoholic test under implied consent law affords no reasonable ground for refusing to submit to test. Metschke v. Department of Motor Vehicles ---------- 197
4. Autopsy not critical stage of prosecution; no right to representation by counsel at autopsy. State v. Wilbur ---------- 306
5. Licensed driver's request for counsel when requested to submit to chemical analysis to determine intoxication cannot be considered basis for holding that

driver did not in fact refuse to submit to test. Doran v. Johns ---------- 321
6. Law clear that accused person entitled to counsel at every critical stage of criminal proceeding. State v. Journey ---------- 416
7. Although record shows formal court appointment of counsel and arraignment of defendant occurred on same day, does not establish defendant deprived of effective assistance of counsel. State v. Norgard -- 535
8. Fact that interviews with defendant conducted by different attorneys on public defender's staff prior to arraignment does not establish ineffective assistance of counsel. State v. Norgard ---------- 535
9. Claim of error on ground of ineffective assistance of counsel must be supported by record showing counsel's assistance so grossly inept as to jeopardize rights of defendant and shock court by its inadequacy. State v. Oziah ---------- 541
10. Effectiveness of counsel not to be judged by hindsight. State v. Phillips ---------- 547
11. For post conviction relief on ground of ineffective counsel, must appear that counsel's assistance so grossly inept as to shock conscience of court. State v. Phillips ---------- 547
12. Ineffectiveness of counsel not inferable from single fact of shortness of time between appointment of counsel and commencement of trial, must be some showing of prejudice; amount of time which elapses between appointment of counsel and commencement of trial not per se sufficient to carry that burden. State v. Phillips ---------- 547
13. Late appointment of counsel not erroneous as matter of law; appellant has burden of proving late appointment erroneous as matter of fact. State v. Phillips ---------- 547
14. Rule stated when leave should be given to withdraw plea of guilty. State v. Journey ---------- 556

Sales.

1. Security interest continues in collateral notwithstanding sale, exchange, or other disposition thereof by debtor, unless action authorized by secured party in security agreement or otherwise; also continues in any indentifiable proceeds including collections received by debtor. Garden City Production Credit Assn. v. Lannan ---------- 668
2. Provision in security agreement granting security in-

terest in proceeds of collateral, as well as in collateral itself, does not amount to written consent to dispose of collateral but only provision that should sale, exchange, or other disposition occur, proceeds also would be covered by security agreement. Garden City Production Credit Assn. v. Lannan ---------- 668

3. Failure to rebuke or object alone by lender to sale of collateral does not amount to written consent to dispose of collateral free of lender's security interest. Garden City Production Credit Assn. v. Lannan ---------- 668

4. Coupling of provision prohibiting disposition of collateral without written consent, together with reservation of security interest in proceeds of sale, are provisions primarily designed for further protection of security holder and not provisions to expand rights of purchaser. Garden City Production Credit Assn. v. Lannan ---------- 668

5. Every contract for leasing for longer period than one year, or for sale of any lands, void unless contract or some note or memorandum thereof in writing and signed by party by whom lease or sale to be made. Kubicek v. Kubicek ---------- 802

6. Cited statute clearly contemplates that contract, note, or memorandum thereof in writing shall contain within itself all essential elements which go to make up contract, and when essential elements of contract are lacking, contract must fail, because essential elements cannot be supplied by parol testimony. Kubicek v. Kubicek ---------- 802

Schools and School Districts.

1. Cited statute required giving of notice by publication and also by posting notice in certain places, and where proof of such notices does not appear in bill of exceptions, action of board in granting request for change of school district boundaries will be held void for want of jurisdiction. Endorf v. School Dist. No. 303 ---------- 167

2. At common law, when school district divided, or part of its territory detached and included in another district, old district retained all its funds and property. School Dist. No. 74 v. School Dist. of Grand Island ---------- 728

3. School district in Nebraska has no territorial integrity but subject to reserve power of state exercised through administrative authority of state to

make changes according to educational needs and principles. School Dist. No. 74 v. School Dist. of Grand Island ---------- 728
4. State may change or repeal all powers of school district, take its property without compensation, expand or restrict its territorial area, unite whole or part thereof with another subdivision or agency of state, or destroy district with or without consent of citizens. School Dist. No. 74 v. School Dist. of Grand Island ---------- 728
5. When literal wording of statute leads to absurdity, or to illogical or unjust conclusion, intention of Legislature, as gathered from whole act, prevails. School Dist. No. 74 v. School Dist. of Grand Island ------ 728
6. Statute which provides for raising revenue for nonresident high school tuition which places substantially unequal tax burden on either district which receives nonresident students or on district which sends them would be discriminatory. Mann v. Wayne County Board of Equalization ---------- 752
7. In setting nonresident high school tuition rates, true test is that in compliance with statutory directions there shall be reasonable and approximate estimate and determination made in light of known and reasonably ascertainable facts and also in light of known and fairly anticipated conditions. Mann v. Wayne County Board of Equalization ---------- 752
8. Burden of proof upon taxpayer to show that school levy excessive. Mann v. Wayne County Board of Equalization ---------- 752
9. Cited statute allows each individual high school district receiving nonresident students to determine, as accurately as possible, per pupil cost of high school education in its district, and to certify tuition rate for nonresident high school students based upon average per pupil cost of high school education for district, not less than average per pupil cost for preceding school year. Mann v. Wayne County Board of Equalization ---------- 752

Searches and Seizures.

1. Package shipped by air mail parcel post subject to inspection by postal authorities; inspection of such package in presence of postal authorities and while package is in their custody not illegal search. State v. Collins ---------- 50
2. Objects in plain view subject to seizure by officer

who has right to be in position to have that view. State v. Collins ---------- 50

3. When materials in automobile which are indicative of criminal offense in plain sight of officer looking into automobile from outside, search justified and legal. State v. Rys ---------- 341
4. Generally held that when motorist stopped or arrested for violation of traffic or motor vehicle laws, exploratory search of vehicle for purpose of obtaining evidence of other offenses unwarranted. State v. Rys ---------- 341
5. Search of automobile made in connection with violation for which it is stopped, ordinarily held lawful search although results in discovery of evidence of some other offense. State v. Rys ---------- 341
6. Ordinarily, when liquor, narcotics, or contraband materials found on defendant's premises or in automobile owned and operated by him, evidence of unlawful possession deemed sufficient to sustain conviction in absence of any other reasonable explanation for its presence. State v. Rys ---------- 341
7. Affidavit for search warrant may be based on hearsay information and need not reflect direct observations of affiant so long as magistrate informed of some of underlying circumstances supporting affiant's conclusions. State v. Huggins ---------- 704
8. Affidavits for search warrants must be tested in common sense, realistic fashion. State v. Huggins 704
9. Correct test is whether warrant, if sought, could have been obtained by law enforcement agency application which disclosed its corporate information, not whether any one particular officer could have obtained it on what information he individually possessed. State v. Huggins ---------- 704

Securities.

Contracts made in violation of Securities Exchange Act of 1934, or of any rule or regulation thereunder, not void but merely voidable at option of innocent party. J. Cliff Rahel & Co., Inc. v. Roper ---------- 34

Security Interest.

1. Security interest continues in collateral notwithstanding sale, exchange, or other disposition thereof by debtor, unless action authorized by secured party in security agreement or otherwise; also continues in any identifiable proceeds including collections re-

ceived by debtor. Garden City Production Credit Assn. v. Lannan ---------- 668
2. Provision in security agreement granting security interest in proceeds of collateral, as well as in collateral itself, does not amount to written consent to dispose of collateral but only provision that should sale, exchange, or other disposition occur, proceeds also would be covered by security agreement. Garden City Production Credit Assn. v. Lannan ---------- 668
3. Failure to rebuke or object alone by lender to sale of collateral does not amount to written consent to dispose of collateral free of lender's security interest. Garden City Production Credit Assn. v. Lannan 668
4. Coupling of provision prohibiting disposition of collateral without written consent, together with reservation of security interest in proceeds of sale, are provisions primarily designed for further protection of security holder and not provisions to expand rights of purchaser. Garden City Production Credit Assn. v. Lannan ---------- 668
5. Unless lease or consignment intended as security, reservation of title thereunder not security interest. Gibreal Auto Sales, Inc. v. Missouri Valley Machinery Co. ---------- 763

Self-Defense.

1. Cited statute unconstitutional and void in that it delegates to person asserting self-defense determination of amount and extent of force to be used in defending his person as legal justification for crime. State v. Goodseal ---------- 359
2. Killing in self-defense grounded upon necessity; exists only in extremity where no other practical means exists to avoid death or great bodily harm apparent to person resorting to it. State v. Goodseal ------ 359
3. In order to excuse or justify killing in self-defense, accused must not only have entertained belief that his life was in danger or that he was in danger of suffering great bodily harm, but belief must have been reasonable and in good faith. State v. Goodseal 359
4. Whether or not accused killed in fear of death or great bodily harm, or whether or not killing was motivated by anger, punishment, or vengeance is issue of fact to be determined by jury. State v. Goodseal ---------- 359
5. Bad character of accused and fact she was acknowl-

edged prostitute does not deprive her of right of self-defense, but such facts are circumstances to be considered in determining necessity for and extent and reasonableness of force used in connection with other evidence in case. State v. Goodseal -- 359

Sentences.

1. On appeal from lower court to district court in criminal case, district court affords defendant complete new trial and, in case verdict of guilty found, trial court may impose sentence within limits of statutory penalty without regard to sentence imposed in lower court. State v. Stanosheck ---------- 17
2. Supreme Court will not interfere with sentence imposed by lower court unless it appears to be result of abuse of discretion. State v. Duitsman 39
3. Motion in arrest of judgment must be made and disposed of after verdict and before court pronounces final judgment and sentence; where motion made after judgment and sentence, it is void in absence of order vacating judgment and sentence. State v. Moore ---------- 71
4. Mere fact that accused upon plea of guilty receives sentence greater than sentence anticipated is insufficient to render plea involuntary or assistance of counsel ineffective. State v. Busse ---------- 99
5. Where no evidence to show what information considered by judge in passing sentence, and record on its face reflects nothing to indicate sentence excessive, sentence imposed within statutory limits will not be disturbed. State v. Gaston ---------- 140
6. Supreme Court may reduce sentence when in its opinion sentence excessive. State v. Dixon -------- 143
7. Defendant may request that presentence report be made part of record and included in bill of exceptions. State v. Walker ---------- 156
8. Where sentence has been imposed by district court within statutory limits it will not be disturbed in absence of abuse of discretion. State v. Gamron 249
   State v. McDonnell ---------- 316
   State v. Trout ---------- 477
9. Voluntary drunkenness of one accused of crime does not mitigate offense, although it may have bearing on his turpitude and quality of his crime, and be considered on question of punishment. State v. Gamron ---------- 249
10. Where criminal statute amended by mitigating pun-

ishment, after commission of prohibited act but before final judgment, punishment is that provided by amendatory act unless Legislature has specifically provided otherwise. State v. Randolph 297

11. In absence of statute, district court after commitment of prisoner possesses no authority to set aside sentence and place prisoner on probation. Housand v. Sigler 414

12. Insanity as bar to imposition of sentence presents factual issue for determination of court. State v. Anderson 435

13. Function of district court to impose sentences upon persons convicted of crime in accordance with applicable statute; in absence of abuse of discretion, such sentences will not ordinarily be disturbed on appeal. State v. Walker 439

14. Order by district court purporting to vacate sentence legally pronounced in criminal action for purpose of placing defendant on probation is nullity. State v. Carpenter 605

15. To release person from sentence of imprisonment by habeas corpus, must appear that sentence absolutely void. Rhodes v. Sigler 628

16. Habeas corpus will not lie to discharge person from sentence of penal servitude where court imposing sentence had jurisdiction of offense and of person of defendant, and sentence within power of court to impose. Rhodes v. Sigler 628

17. Post conviction remedies intended to provide relief in those cases where miscarriage of justice may have occurred; not intended as procedure to secure review for defendant dissatisfied with his sentence. State v. Huffman 809

18. Forging and fraudulently uttering and publishing same instrument if done by same person constitute only one crime and if two acts charged in separate counts and conviction results on both counts, only one sentence may be imposed. State v. Huffman 809

19. Imposing two sentences for one offense constitutes violation of due process of law and is ground for relief under post conviction proceeding statute. State v. Huffman 809

20. One trial upon two counts growing out of single transaction for which only one sentence may be imposed does not violate constitutional provisions against double jeopardy. In such cases where two concurrent equal sentences imposed, one will be re-

garded as surplusage and be vacated. State v. Huffman ---------- 809

Sheriffs, Police, and Constables.

1. Under provisions of cited statute, police officer of city of second class has same powers and duties as sheriff or constable and has duty to apprehend and arrest felons and disturbers of peace and to keep and preserve peace within whole area of his respective county. Henning v. City of Hebron -- 381
2. Under provisions of cited statute, sheriff has power to summon to his assistance, in arrest of felons, police officers of cities of second class. Henning v. City of Hebron ---------- 381
3. Police officer exercising powers and performing duties required by law acting within scope of his employment. Henning v. City of Hebron ---------- 381

Specific Performance.

Specific performance of contract will not be decreed unless minds of parties to contract have met. Shelhamer v. O'Neill ---------- 854

State.

Property of state and its governmental subdivisions exempt from taxation under cited section of Constitution. Sioux City & New Orleans Barge Lines, Inc. v. Board of Equalization ---------- 690

Statute of Limitations.

1. In proper case, estoppel may be applied to prevent fraudulent or inequitable resort to statute of limitations; defendant may, by representations, promises, or conduct, be estopped where other elements of estoppel present. Luther v. Sohl ---------- 119
2. Where plaintiff has ample time to institute action after inducement for delay has ceased, he cannot excuse failure to act within statutory time on ground of estoppel. Luther v. Sohl ---------- 119

Statutes.

1. Cited statute provides: Whenever statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute. State v. Duitsman ---------- 39

2. Police power is attribute of state sovereignty; within limitations of state and federal Constitutions, state may, in its exercise, enact laws for promotion of public safety, health, morals, and generally for public welfare. Central Markets West, Inc. v. State ---------- 79
3. Statutes which are reasonably designed to protect health, morals, and general welfare do not violate Constitution where statute operates uniformly on all within reasonable class. Central Markets West, Inc. v. State ---------- 79
4. Not province of Supreme Court to annul legislative act unless act clearly contravenes Constitution and no other resort remains. Central Markets West, Inc. v. State ---------- 79
5. Duty of Legislature to use its judgment in exercising police powers of state; presumption is that any such law enacted by it is constitutional; only when courts determine enacted law invades personal and property rights protected by Constitution that it will not be sustained. Central Markets West, Inc. v. State ---------- 79
6. Legislature may make reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but classification must rest upon real differences in situations and circumstances surrounding members of class, relative to subject of legislation, which render appropriate its enactment; to be valid, law must operate uniformly and alike upon every member of class so designated. Central Markets West, Inc. v. State ---------- 79
7. Cited statute not violative of Constitution of Nebraska, but on contrary is reasonable and valid exercise of police power. Central Markets West, Inc. v. State ---------- 79
8. Courts will not hold statutes unconstitutional unless necessary to proper disposition of case. Norlanco, Inc. v. County of Madison ---------- 100
9. Statute presumed to be constitutional and judgment entered on unconstitutional statute not void, but voidable only. Norlanco, Inc. v. County of Madison 100
10. Original maturity of indebtedness, referred to in cited statute, is date on which final payment is due without acceleration. Central Savings Bank v. First Cadco Corp. ---------- 112
11. Cited statute required giving of notice by publication and also by posting notice in certain places, and

where proof of such notices does not appear in bill of exceptions, action of board in granting request for change of school district boundaries will be held void for want of jurisdiction. Endorf v. School Dist. No. 303 ---------- 167

12. A litigant who invokes provisions of statute may not challenge its validity; he may not seek benefit of it and at same time question its constitutionality. Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney ---------- 168

13. A state agency may be subject to suit by statutory implication. School Dist. of Omaha v. State Board of Education ---------- 179

14. Cited statute, in providing that no injunction shall be granted by judge after motion therefor has been overruled on merits of application by court, simply establishes rule of practice. School Dist. of Omaha v. State Board of Education ---------- 179

15. Uninsured motorist law enacted for benefit of innocent victim of financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose. Protective Fire & Cas. Co. v. Woten -- 212

16. Policy provisions which conflict with requirements of uninsured motorist statute will not be effective to reduce insured's recovery below amount necessary to fully indemnify him for his loss within limits of all applicable policies. Protective Fire & Cas. Co. v. Woten ---------- 212

17. In interpreting statutes, function of courts to construe language so as to give effect to intent of Congress. United States of America v. Edmunds ---- 271

18. Basic rule in interpretation of statutes is to ascertain legislative intent from whole act and to give effect to it if it is lawful one. United States of America v. Edmunds ---------- 271

19. A statute should be given reasonable construction in order to accomplish its purpose. United States of America v. Edmunds ---------- 271

20. While penal statutes must be construed strictly, it is not proper to give them strained or unnatural construction. State v. Reich ---------- 289

21. Penal statutes should be construed so as to give effect to plain meaning of words employed, and where of doubtful meaning, or application, court should adopt sense that best harmonizes with context and apparent policy and objects of Legislature. State v. Reich ---------- 289

22. In prosecution under cited statute, touching, fondling, rubbing, or feeling of body, members or private parts of minor under age of 16 years, with intent of arousing, appealing to, and gratifying lusts, passions, and sexual desires of either minor or accused, constitutes offense charged, even though such touching, fondling, rubbing, or feeling was through clothing of minor. State v. Reich ---------- 289
23. Where criminal statute amended by mitigating punishment, after commission of prohibited act but before final judgment, punishment is that provided by amendatory act unless Legislature has specifically provided otherwise. State v. Randolph ---------- 297
24. Not violative of due process for Legislature in framing its criminal laws to cast upon public duty of care or extreme caution. State v. Vicars -------- 311
25. Definition of crimes and penalties for their violation are statutory in this state; statute which has effect of delegating to private person punishment to be assessed for crime subject to constitutional objection. State v. Goodseal ---------- 359
26. Where unconstitutional statute is relied on to sustain position of one or more of parties, Supreme Court will, in proper case, notice plain error in premise on which case was tried and declare unconstitutionality of act even though that issue was not raised by parties. State v. Goodseal ---------- 359
27. Intent statute is rule of construction; does not have effect of enlarging, limiting, or modifying any rule of substantive law that existed at time of its passage or that has thereafter been created. Cast v. National Bank of Commerce T. & S. Assn. -------- 385
28. Upon enactment of Uniform Property Act, its provisions supersede conflicting provisions of law of property existing prior to effective date of act. Cast v. National Bank of Commerce T. & S. Assn. 385
29. Unless construction would be inconsistent with manifest intent of Legislature, heads supplied in compilation of sections enacted after passage of cited statute do not constitute any part of law. Cosentino v. City of Omaha ---------- 407
30. Legislation operates prospectively only unless clearly indicates retrospective operation. Housand v. Sigler 414
31. One contending his property exempt from taxation must clearly show he is within exemption provided by statute. Berean Fundamental Church Council, Inc. v. Board of Equalization ---------- 431

32. Burden of proof upon one claiming property exempt from taxation to establish its predominant use for one of purposes set out in cited statute. Berean Fundamental Church Council, Inc. v. Board of Equalization ---------- 431
33. Where statute susceptible of two constructions, one which renders it constitutional and other unconstitutional, duty of Supreme Court to adopt construction which without doing violence to fair meaning of statute will render it valid. State v. Workman -- 467
34. Nebraska Legislature may lawfully adopt by reference existing law or regulation of another jurisdiction, including United States. State v. Workman -- 467
35. Supreme Court of Nebraska interprets cited statute to include those portions of Federal Food, Drug, and Cosmetic Act which were in existence on June 6, 1967. State v. Workman ---------- 467
36. Statutory amendment relating to matter of procedure applicable to pending cases which have not been tried. Happy Hour, Inc. v. Nebraska Liquor Control Commission ---------- 533
37. Statutes exempting property from taxation should be strictly construed; one contending his property exempt must clearly show he is within exemption provided by statute. OEA Senior Citizens, Inc. v. County of Dodge ---------- 593
38. In personam jurisdiction may be acquired over nonresident defendant in divorce action by extraterritorial personal service of process made in accordance with statute of this state if there exist sufficient contacts between defendant and this state relevant to cause of action to satisfy traditional notions of fair play and substantial justice. Stucky v. Stucky ---------- 636
39. Under circumstances involved, barge line operating and leasing portion of port area of City of Omaha not "owner" of improvements on port area within meaning of cited statute. Sioux City & New Orleans Barge Lines, Inc. v. Board of Equalization -------- 690
40. Statutes of Colorado provide that orders regarding custody of children may be changed after entry of divorce decree as circumstances may warrant. Copple v. Copple ---------- 696
41. Under Iowa guest statute, elements of recklessness are: (1) No care, coupled with disregard for consequences; (2) must be evidence of defendant's knowledge, actual or chargeable, of danger and

proceeding without any heed of, or concern for, consequences; and (3) consequences of actions of driver are such that occurrence of injury is probability rather than possibility. Peterson v. Dean ---- 716

42. Under Iowa guest statute, showing of persistent course of conduct is matter of evidence ordinarily shown to establish recklessness; not in itself essential element; in most instances, merely helpful yardstick or guide by which to determine recklessness as opposed to negligence. Peterson v. Dean -- 716

43. Under Iowa guest statute, conduct arising from momentary thoughtlessness, inadvertence, or from error of judgment, does not indicate reckless disregard of rights of others and does not constitute recklessness within meaning of law. Peterson v. Dean ---- 716

44. Under Iowa guest statute, whether motorist reckless is question of law for court if reasonable minds, having before them all evidence on question, could reach but one conclusion; and is question of fact for jury if, under proved or admitted facts, different minds might reasonably reach different conclusions. Peterson v. Dean ---- 716

45. When literal wording of statute leads to absurdity, or to illogical or unjust conclusion, intention of Legislature, as gathered from whole act, prevails. School Dist. No. 74 v. School Dist. of Grand Island 728

46. Real intent of Legislature, when ascertained, always prevails over literal sense of language used in statute. School Dist. No. 74 v. School Dist. of Grand Island ---- 728

47. In construing statute, court must look to object to be accomplished, evils and mischief sought to be remedied, or purpose to be subserved, and place on it reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. School Dist. No. 74 v. School Dist. of Grand Island ---- 728

48. Holding that act of Legislature is constitutional or unconstitutional determines its validity only on questions considered and determined by Supreme Court; silence by Supreme Court does not have effect of validating section of act not brought in issue and determined therein. Blue Flame Gas Assn. v. McCook P. P. Dist. ---- 735

49. Provisions of subsections (5) and (6) of section 59-1202, R. R. S. 1943, so indefinite and uncertain

as to be arbitrary and unreasonable and are therefore unconstitutional and invalid. Blue Flame Gas Assn. v. McCook P. P. Dist. ---------- 735

50. In absence of severability clause, provisions of subsections (5) and (6) of section 59-1202, R. R. S. 1943, are such integral and vital part of Unfair Sales Act that unconstitutionality of those subsections necessarily makes entire act unconstitutional. Blue Flame Gas Assn. v. McCook P. P. Dist. ------ 735

51. In construing act of Legislature, all reasonable doubt must be resolved in favor of constitutionality; burdens imposed by statute are presumed reasonable; burden of proving statute contains unlawful or unreasonable terms rests upon those assailing it. Mann v. Wayne County Board of Equalization ------ 752

52. Statute which provides for raising revenue for nonresident high school tuition which places substantially unequal tax burden on either district which receives nonresident students or on district which sends them would be discriminatory. Mann v. Wayne County Board of Equalization ---------- 752

53. Cited statute does not violate constitutional requirements of tax uniformity nor constitute commutation of taxes. Mann v. Wayne County Board of Equalization ---------- 752

54. Where Legislature has provided reasonable limitations and standards for carrying out delegated duties, no unconstitutional delegation of legislative authority. Mann v. Wayne County Board of Equalization ---------- 752

55. Constitutionality of retroactive statute under contract and due process clauses of United States and Nebraska Constitutions generally depends upon reasonableness; relevant factors are nature and strength of public interest, extent of modification of asserted preenactment right, and nature of right altered by statute. Hiddleston v. Nebraska Jewish Education Soc. ---------- 786

56. Cited section of reverter act, either on its face or in its application to plaintiffs, did not violate due process or contract clause of United States or Nebraska Constitution or eminent domain provision of latter Constitution. Hiddleston v. Nebraska Jewish Education Soc. ---------- 786

57. In extradition proceeding, requisition may refer to, annex, and authenticate accompanying papers; sufficient if together they meet statutory requirements.

Austin v. Brumbaugh ---------- 815
58. Federal Constitution and statutes control extradition in fugitive from justice cases; state statutes merely ancillary thereto and may permit Governor to surrender prisoner on terms less exacting than those imposed by Congress. Austin v. Brumbaugh ---------- 815
59. Provisions of cited statute relating to mortgages executed by guardians prohibit incompetent's estate from incurring new debt and does not prohibit inclusion of interest already due in executing renewal mortgage. Burney v. Pick ---------- 828
60. Cited statute requires endorsement of names of witnesses on information; failure in contested case to endorse those known at time information filed error, but not necessarily prejudicial error. State v. Adels ---------- 849

Taxation.

1. Statutes exempting property from taxation should be strictly construed. Berean Fundamental Church Council, Inc. v. Board of Equalization ---------- 431
2. Property owned and used exclusively for charitable purposes exempt from taxation if such property not owned or used for financial gain or profit to either owner or user. OEA Senior Citizens, Inc. v. County of Douglas ---------- 593
3. Statutes exempting property from taxation should be strictly construed; one contending his property exempt must clearly show he is within exemption provided by statute. OEA Senior Citizens, Inc. v. County of Dodge ---------- 593
4. Burden of proof upon one claiming property exempt from taxation to establish its predominant use for one of purposes set out in cited statute. OEA Senior Citizens, Inc. v. County of Douglas ------ 593
5. In determining tax exempt status, neither incidental use of property nor character of owner which controls; rather is primary or dominant use of property which controls. OEA Senior Citizens, Inc. v. County of Douglas ---------- 593
6. No reason why institution, merely because it caters to needs of aged and infirm, should be exempt from taxation if someone other than institution furnishing cost of care and maintenance provided by institution. OEA Senior Citizens, Inc. v. County of Douglas ---------- 593
7. Property of state and its governmental subdivisions

exempt from taxation under cited section of Constitution. Sioux City & New Orleans Barge Lines, Inc. v. Board of Equalization ---------- 690

8. Under circumstances involved, barge line operating and leasing portion of port area of City of Omaha not "owner" of improvements on port area within meaning of cited statute. Sioux City & New Orleans Barge Lines, Inc. v. Board of Equalization -------- 690

9. Improvements on real estate constituting Missouri River port area under control and supervision of Dock Board of City of Omaha, and owned by city, exempt from taxation. Sioux City & New Orleans Barge Lines, Inc. v. Board of Equalization ---------- 690

10. Action of county board of equalization with respect to actual value of property will be affirmed on appeal to district court unless (1) action of board unreasonable or arbitrary or (2) property of appellant assessed too low. Loskill v. Board of Equalization ---------- 707

11. County board of equalization in valuation proceeding ought to look through form to substance to prevent unconscionable avoidance of taxation of property. Loskill v. Board of Equalization ---------- 707

12. Statute which provides for raising revenue for nonresident high school tuition which places substantially unequal tax burden on either district which receives nonresident students or on district which sends them would be discriminatory. Mann v. Wayne County Board of Equalization ---------- 752

13. Cited statute does not violate constitutional requirements of tax uniformity nor constitute commutation of taxes. Mann v. Wayne County Board of Equalization ---------- 752

14. In setting nonresident high school tuition rates, true test is that in compliance with statutory directions there shall be reasonable and approximate estimate and determination made in light of known and reasonably ascertainable facts and also in light of known and fairly anticipated conditions. Mann v. Wayne County Board of Equalization ---------- 752

15. Burden of proof upon taxpayer to show that school levy excessive. Mann v. Wayne County Board of Equalization ---------- 752

16. Cited statute allows each individual high school district receiving nonresident students to determine, as accurately as possible, per pupil cost of high school education in its district, and to certify

tuition rate for nonresident high school students based upon average per pupil cost of high school education for district, not less than average per pupil cost for preceding school year. Mann v. Wayne County Board of Equalization ---------- 752

17. Burden of proof upon taxpayer to establish his contention that value of his property arbitrarily or unlawfully fixed by county board of equalization in amount greater than its actual value, or that its value not fairly and proportionately equalized with all other property resulting in discriminatory, unjust, and unfair assessment. Lexington Building Co., Inc. v. Board of Equalization ---------- 821

18. Where evidence shows that assessed value of real property determined by formula in substantial compliance with cited statute, which has been uniformly and impartially applied, such assessed value will not ordinarily be disturbed on appeal on evidence indicating mere difference of opinion as to such valuation. Lexington Building Co., Inc. v. Board of Equalization 821

19. To secure reduction in assessed value of real property, must be demonstrated by evidence that assessment grossly excessively or that its value not fairly and proportionately equalized, and is result of arbitrary or unlawful action; evidence must be such as to indicate exercise of arbitrary action or failure of plain legal duty, and not mere error in judgment. Lexington Building Co., Inc. v. Board of Equalization 821

Time.

1. Original maturity of indebtedness, referred to in cited statute, is date on which final payment is due without acceleration. Central Savings Bank v. First Cadco Corp. ---------- 112

2. Time not generally considered as essence of contract, unless expressly provided or appears was intention of parties that should be of essence thereof. Kingery Constr. Co. v. Scherbarth Welding, Inc. ---- 653

Trial.

1. Parol evidence generally admissible when offered for purpose of explaining and showing true nature of transaction between parties. Central Constr. Co. v. Osbahr ---------- 1

2. Parol evidence always admissible to show, for purpose of invalidating written instrument, that execution was procured by fraud, or because of fraud,

does not express true intentions of parties. Central Constr. Co. v. Osbahr ---------- 1
3. Rule for considering motion to dismiss stated. Omaha Nat. Bank v. Omaha P. P. Dist. ---------- 6
4. When evidence on material question of fact in irreconcilable conflict, Supreme Court, in determining weight of evidence, will consider fact that trial court observed witnesses and manner of testifying and must have accepted one version of facts rather than other. Hutchinson v. Hutchinson ---- 24
5. Burden rests on one complaining to establish that use to be made of property must necessarily create nuisance. Horn v. Community Refuse Disposal, Inc. 43
6. Triers of fact not compelled to accept as absolute verity every statement of witness not contradicted by direct evidence; persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony. Pignotti v. Coffee Time, Inc. ---------- 57
7. Workmen's compensation cases triable de novo in Supreme Court; however, where all of plaintiff's complaints subjective, Supreme Court cannot ignore fact that compensation court in assessing extent of injuries had opportunity to observe demeanor of plaintiff. Pignotti v. Coffee Time, Inc. ---------- 57
8. Latitude of cross-examination which is within discretion of court is wide. State v. Deardurff ------ 92
9. Passage of 5 months time between arrest and trial, standing alone, does not demonstrate violation of constitutional guarantee of speedy trial. State v. Ford ---------- 109
10. If court has instructed jury generally on law of case and not withdrawn any essential issue from consideration of jury, error cannot be predicated on failure to charge on some particular phase of case unless proper instruction requested by party complaining. State v. Ford ---------- 109
11. Presumption not evidence and only relates to rule of law as to which party shall first go forward and produce evidence sustaining matter in issue; presumption will serve as and in place of evidence in favor of one party or other until prima facie evidence adduced by opposite party, but presumption should never be placed in scale to be weighed as evidence. Hannon v. J. L. Brandeis & Sons, Inc. 122
12. One shown to be acquainted with property and its fair and reasonable value in market is competent to testify as to such value. State v. Carroll -------- 148

13. Qualifications of witness to give testimony as to value of personal property is matter committed to sound discretion of trial court, and ruling thereon will only be disturbed when clearly erroneous. State v. Carroll ---------- 148
14. Rule for trial of equity case in Supreme Court stated. Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney ---------- 168
Erickson v. Tyler ---------- 743
15. Court in every stage of action must disregard any error in proceeding which does not affect substantial rights of adverse party. School Dist. of Omaha v. State Board of Education ---------- 179
16. Not error for trial court to deny motion for continuance because of absence of witness where no showing made as to evidence he will give, its materiality, diligence employed to have witness present, and unavailability of other evidence to eliminate need for such witness. Metschke v. Department of Motor Vehicles ---------- 197
17. Burden on one who attacks validity of zoning ordinance, valid on face and enacted under lawful authority, to prove facts which establish its invalidity. Stahla v. Board of Zoning Adjustment ---------- 219
18. Failure to object promptly to offer of evidence ordinarily waives objection. State v. Haynes ------ 238
19. Report prepared by expert appraiser is generally not subject to discovery by adverse party in absence of strong showing of good cause. Bowley v. Airport Authority ---------- 292
20. Trial court not required to give proffered instruction upon subordinate issue, or which unduly emphasizes part of evidence in case. Bowley v. Airport Authority ---------- 292
21. Argument which is based on evidence and inferences drawn therefrom ordinarily not misconduct. State v. Jones ---------- 303
22. Statement obtained from defendant in criminal prosecution who had received Miranda warnings not inadmissible because defendant not advised as to what charges might be brought against him. State v. Wilbur ---------- 306
23. Photographs, although of gruesome nature, admissible in evidence if are relevant and true representation of what they purport to represent. State v. Wilbur ---------- 306
24. Autopsy not critical stage of prosecution; no right

to representation by counsel at autopsy. State v. Wilbur ---------- 306
25. No general principle fixes exact time within which trial must be had to satisfy requirement of speedy trial; right to speedy trial necessarily relative. State v. McDonnell ---------- 316
26. Province of jury to determine circumstances surrounding crime charged; if, assuming as proved, facts which evidence tends to establish can be accounted for upon no rational theory which does not include guilt of accused, proof cannot, as matter of law, be said to have failed. State v. Goodseal 359
27. After jury has considered evidence in light of rule regarding circumstantial evidence and returned verdict of guilty, verdict on appeal may not, as matter of law, be set aside for insufficiency of evidence if evidence sustains some rational theory of guilt. State v. Goodseal ---------- 359
28. Not error to refuse tendered instruction where its content is covered by other instructions given by court. State v. Goodseal ---------- 359
29. Party may not properly complain of instruction given by court when such instruction more favorable to him than that to which he was entitled. State v. Goodseal ---------- 359
30. Party requesting instructions on certain theory cannot be heard to complain on appeal that trial court gave other instructions on same theory; rule that party cannot complain of giving instruction in harmony with one which he requested. Meyer v. Moell ---------- 397
31. Where meaning of instruction reasonably clear, when construed with other instructions, not prejudicially erroneous to give such instruction. Meyer v. Moell 397
32. In deciding whether or not error in particular sentence or phrase of instruction, it will be considered with instruction of which it is part and all of remainder of charge to jury. Meyer v. Moell ------ 397
33. Generally, where objection to evidence substantially identical with evidence admitted and not objected to, prejudicial error will not lie because of its admission. Meyer v. Moell ---------- 397
34. Generally, admission of collateral or cumulative evidence rests within sound discretion of trial court. Meyer v. Moell ---------- 397
35. If, after commission of offense, appears accused may have become insane, and examination had by

psychiatrist who reports she is presently sane and mentally competent, in absence of request therefor, formal hearing not required. State v. Anderson -- 435

36. In automobile accident case, not ordinarily prejudicial error for court to exclude cross-examination of witness for defendant to prove these facts: Witness made claim against defendant for damage sustained in accident and defendant paid claim. Bravo v. Lacz ---------- 449

37. Duty of court upon request of accused to instruct jury upon his theory of case, if there is evidence to support it. State v. Matejka ---------- 454

38. Jury instructions must be considered collectively; even though single instruction, considered alone, might be incomplete, if charge as whole correctly states the law, verdict and judgment will not be reversed. State v. Davis ---------- 457

39. Repetition of instructions, or portion thereof, does not require reversal unless indicates that effect thereof misleads or confuses jury or gives undue prominence to aspect of case unfavorable to party claiming error. State v. Davis ---------- 457

40. Not error to refuse requested instruction if court on own motion has given substance of such request in actual charge to jury. State v. Davis ---------- 457

41. Dismissal of petition of wife for divorce where, at trial on cross-examination into extra-marital sexual relations by her, she successfully asserted privilege against self-incrimination, correct. Schrad v. Schrad ---------- 462

42. In determining sufficiency of evidence to sustain verdict, party entitled to resolution of all conflicts of evidence in his favor and all of reasonable inferences that can reasonably be deduced from the proof. Marquardt v. Nehawka Farmers Coop. Co. -- 494

43. Duty of trial court to analyze and summarize different specific allegations of negligence in pleadings and to succinctly state and submit only allegations of negligence that are supported by competent evidence. Marquardt v. Nehawka Farmers Coop. Co. 494

44. Generally, improper practice for trial court to merely copy allegation of party's petition in his pleadings when submitting issues to jury. Marquardt v. Nehawka Farmers Coop. Co. ---------- 494

45. Instructions must be taken as whole and construed together; construction based upon isolated phrases or sentences should not be permitted. Marquardt v.

Nehawka Farmers Coop. Co. ---------- 494
46. Where evidence is objected to which is substantially identical to evidence admitted and not objected to, or otherwise admissible, prejudicial error will not lie because of its admission into evidence. Marquardt v. Nehawka Farmers Coop. Co. ---------- 494
47. Under cited statute, when part of act, declaration, conversation, or writing given in evidence by one party, whole of same subject may be inquired into by other. Marquardt v. Nehawka Farmers Coop. Co. 494
48. Duty of trial court, on own motion, to submit to jury only issues upon which are controverted questions of fact which must be determined by jury in order to properly arrive at its verdict. Anthony v. Poppert 509
49. Where facts adduced to sustain issue of negligence such that reasonable minds can draw but one conclusion therefrom, duty of court to decide question as matter of law rather than submit it to jury for determination. Anthony v. Poppert ---------- 509
50. In appeal from judgment in law action by court without jury, Supreme Court will not disturb findings of fact based on conflicting evidence unless such findings of fact are clearly wrong; credibility of witnesses and weight to be given their testimony in such cases are for trier of fact. Rothenberger v. Wilks ---------- 514
51. Verdict of jury based on conflicting evidence will not be set aside unless clearly wrong. Haney v. L. R. Foy Constr. Co. ---------- 528
52. In determining sufficiency of evidence to sustain conviction, not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence. State v. Bayless ---------- 530
53. Persuasiveness of direct evidence may be destroyed by physical facts or other circumstantial evidence, even though not contradicted by direct evidence. Merritt v. Reed ---------- 561
54. Argument by prosecuting attorney, based on evidence and inferences drawn therefrom, not misconduct by prosecution. State v. Coleman ---------- 571
55. Remarks of prosecutor in summations of evidence to jury which do not mislead and unfairly influence jury toward verdict on basis not supported by or inferred from evidence not ordinarily misconduct. State v. Coleman ---------- 571
56. Error in trial to court in criminal case or action to recover penalty under city ordinance for trial court

to view premises where alleged offenses occurred without having given defendant and counsel for both parties opportunity to be present when view made by judge. State v. Rutherford ---------- 581

57. Where evidence shows that trial judge in trial to court made unauthorized inspection of scene where offenses allegedly committed, must be shown to vitiate judgment, that it related to matter in dispute and could have influenced court in making finding of guilt. State v. Rutherford ---------- 581

58. Judgment of trial court in action at law where jury waived has effect of verdict of jury and will not be set aside unless clearly wrong. American Standard Ins. Co. v. Tournor ---------- 585

59. Anyone having interest in result of pending litigation may intervene as matter of right. Geer-Melkus Constr. Co., Inc. v. Hall County Museum Board -- 615

60. Interest required as prerequisite of intervention is direct and legal interest of such character that intervener will lose or gain by direct operation and legal effect of judgment which may be rendered in action. Geer-Melkus Constr. Co., Inc. v. Hall County Museum Board ---------- 615

61. One seeking to recover from principal, for unauthorized act of agent, must establish that principal obtained knowledge of such act before it had changed its position. Dembowski v. Central Constr. Co. ---- 624

62. Refusal of requested instruction substantially covered by charge given not error. Jones v. Consumers Coop. Propane Co. ---------- 629

63. Introduction in evidence of map, chart, or diagram illustrating scene of transaction and relative location of objects rests in sound discretion of court. Jones v. Consumers Coop. Propane Co. ---------- 629

64. Mere fact that agent not, at exact time of accident, immediately pursuing principal's business purposes does not necessarily take him out of scope of employment; such question must be determined by looking at all relevant factors concerning nature of employment as well as purpose and degree of any alleged deviation. S.M.S. Trucking Co. v. Midland Vet, Inc. ---------- 647

65. Verdict will not be set aside as inadequate unless clearly against weight and reasonableness of evidence and so disproportionate to injury proved as to indicate was result of passion, prejudice, or mistake. Kingery Constr. Co. v. Scherbarth Welding, Inc. -- 653

66. Trier of fact to determine question of interpretation of integrated agreement if question depends on credibility of extrinsic evidence or on choice among reasonable inferences from extrinsic evidence. Andersen v. Blondo Plaza, Inc. ---------- 682
67. Where testimony given by witness on direct examination, from which inference arises favorable to party producing him, anything within knowledge of witness tending to rebut inference admissible on cross-examination; opposing party ordinarily entitled to pursue that line of cross-examination. Andersen v. Blondo Plaza, Inc. ---------- 682
68. Proof that exhibit in custody of law enforcement officers or in mail in sealed envelope until received at laboratory for analysis sufficient to prove chain of possession. State v. Bullard ---------- 709
69. Under law of Iowa, upon defendant's motion for directed verdict at close of plaintiff's evidence, evidence must be considered in light most favorable to plaintiff regardless of whether it is contradicted. Peterson v. Dean ---------- 716
70. Under Iowa guest statute, whether motorist reckless is question of law for court if reasonable minds, having before them all evidence on question, could reach but one conclusion; and is question of fact for jury if, under proved or admitted facts, different minds might reasonably reach different conclusions. Peterson v. Dean ---------- 716
71. Rule for consideration of motion for directed verdict stated. Maxwell v. Pugh ---------- 722
72. Where different minds may reasonably draw different conclusions or inferences from evidence adduced concerning issues of negligence or contributory negligence and degree thereof when one compared with other, such issues must be submitted to jury. Maxwell v. Pugh ---------- 722
73. Where several inferences deducible from facts presented, which inferences opposed to each other but equally consistent with facts proved, plaintiffs do not sustain their position by reliance alone on inferences which would entitle them to recover. Haynes v. County of Custer ---------- 740
74. Circumstantial evidence insufficient to warrant recovery in civil case unless circumstances proved of such nature and so related to each other that only one conclusion can be reasonably drawn therefrom. Haynes v. County of Custer ---------- 740

75. In case where conclusion reached by jury was only one permissible under pleadings and evidence, judgment will be affirmed. Haynes v. County of Custer 740
76. Burden of proof upon taxpayer to show that school levy excessive. Mann v. Wayne County Board of Equalization ---------- 752
77. Facts that transpire after institution of replevin action immaterial in consideration and determination of merits of case. Gibreal Auto Sales, Inc. v. Missouri Valley Machinery Co. ---------- 763
78. Decision by counsel to call or not to call witness forms part of trial tactics; ordinarily mistaken decision in that respect not sufficient for post conviction relief. State v. Anderson ---------- 769
79. Instructions must be taken as whole and construed together; where instructions covered issues and fairly submitted case to jury, jury's verdict will not be disturbed unless clearly erroneous. Hayes v. Anderson Concrete Co., Inc. ---------- 771
80. Duty of trial court to submit to jury all material issues presented by pleadings and supported by evidence. Munson v. Bishop Clarkson Memorial Hospital ---------- 778
81. Where facts and issues which are grounds of motion for post conviction relief known to defendant and his counsel, and were raised, heard, and determined at time of trial resulting in conviction but not raised in direct appeal, those issues not ordinarily considered in post conviction review. State v. Lincoln ---------- 783
82. One trial upon two counts growing out of single transaction for which only one sentence may be imposed does not violate constitutional provisions against double jeopardy. In such cases where two concurrent equal sentences imposed, one will be regarded as surplusage and be vacated. State v. Huffman ---------- 809
83. Statement in requisition and authenticated, accompanying papers that person sought to be extradited was in demanding state on date of offense charged prima facie evidence of truth of allegation; burden of proof on applicant in habeas corpus proceeding in resistance of extradition to conclusively prove otherwise. Austin v. Brumbaugh ---------- 815
84. Burden of proof upon taxpayer to establish his contention that value of his property arbitrarily or unlawfully fixed by county board of equalization in

amount greater than its actual value, or that its value not fairly and proportionately equalized with all other property resulting in discriminatory, unjust, and unfair assessment. Lexington Building Co., Inc. v. Board of Equalization ---------- 821

85. To secure reduction in assessed value of real property, must be demonstrated by evidence that assessment grossly excessive or that its value not fairly and proportionately equalized, and is result of arbitrary or unlawful action; evidence must be such as to indicate exercise of arbitrary action or failure of plain legal duty, and not mere error in judgment. Lexington Building Co., Inc. v. Board of Equalization ---------- 821

86. Court appointed counsel should be given wide latitude in adoption of trial or argument strategy. State v. Ondrak ---------- 838

87. One of primary duties of attorney to represent client zealously within bounds of law. State v. Ondrak ---------- 838

88. Preliminary negotiations leading to execution of integrated agreement of uncertain meaning admissible for purpose of determining intentions of parties, conditions existing at time, and objects thereby to be accomplished, but not to vary plain terms of instrument. Shelhamer v. O'Neill ---------- 854

Waiver.

1. Ordinarily, to establish waiver of legal right must be clear, unequivocal, and decisive act of party showing such purpose, or acts amounting to estoppel on his part. Garden City Production Credit Assn. v. Lannan ---------- 668

2. Ordinarily, waiver voluntary abandonment or surrender, by capable person, of right known by him to exist, with intention such right shall be surrendered. Garden City Production Credit Assn. v. Lannan ---------- 668

3. Waiver is voluntary and intentional relinquishment of known right and may be established by acts and conduct from which intention to waiver may reasonably be inferred. Pester v. American Family Mut. Ins. Co. ---------- 793

Warranty.

Caterer furnishing food for hire impliedly warrants food wholesome and fit for human consumption and

liable for injuries proximately caused by breach of warranty. Wintroub v. Abraham Catering Service 450

Waters.

Surface water common enemy; owner of real estate in interest of good husbandry, in absence of negligence or evidence of diversion to injury of lower landowner, may accelerate its flow in natural course of drainage without liability to lower owner. Erickson v. Tyler ---------- 743

Weapons and Firearms.

1. General rule in Nebraska that those who deal with firearms required to exercise closest of attention and take most careful precautions not only in preparing for their use but in using them. Finley v. Brickman ---------- 747
2. Person charged with knowledge that loaded gun dangerous instrumentality and in dealing with it charged with highest degree of care to prevent injuries to others. Finley v. Brickman ---------- 747

Wills.

1. Elements of testamentary capacity stated. Holman v. Morrison ---------- 159
2. Mere exclusion of relatives of testator not sufficient to establish undue influence, but when appears from examination of terms of purported will itself there is inequality in distribution, unreasonableness, and unnaturalness, such factors may be taken into account in deciding effect of undue influence. Holman v. Morrison ---------- 159

Witnesses.

1. Triers of fact not compelled to accept as absolute verity every statement of witness not contradicted by direct evidence; persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony. Pignotti v. Coffee Time, Inc. ---------- 57
2. One to whom complaining witness has complained may testify to fact and nature of complaint if complaint made voluntarily and without inconsistent delay. State v. Deardurff ---------- 92
3. One shown to be acquainted with property and its fair and reasonable value in market is competent to testify as to such value. State v. Carroll ------ 148
4. Qualifications of witness to give testimony as to

value of personal property is matter committed to sound discretion of trial court, and ruling thereon will only be disturbed when clearly erroneous. State v. Carroll ---------- 148

5. Where items of personal property are bought and sold by dealers in regular course of business, evidence of dealers' wholesale price is evidence of fair and reasonable market value for purpose of distinguishing between grand and petit larceny. State v. Carroll ---------- 148

6. Not error for trial court to deny motion for continuance because of absence of witness where no showing made as to evidence he will give, its materiality, diligence employed to have witness present, and unavailablity of other evidence to eliminate need for such witness. Metschke v. Department of Motor Vehicles ---------- 197

7. Each case must be considered on its own facts; conviction based on eyewitness identification at trial following pretrial identification by photograph will to be set aside on that ground only if photographic identification procedure so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Randolph ------ 297

8. In automobile accident case, not ordinarily prejudicial error for court to exclude cross-examination of witness for defendant to prove these facts: Witness made claim again defendant for damage sustained in accident and defendant paid claim. Bravo v. Lacz ---------- 449

9. Evidence which tends to impeach witness for State in criminal prosecution ordinarily admissible to discredit credibility of witness and weight to be given his testimony. State v. Matejka ---------- 454

10. Credibility of witness may be attacked by any party, including party calling him. State v. Fronning 463

11. Rule regarding defendant's issue on right of confrontation cited. State v. Workman ---------- 467

12. In determining admissibility of a state witness' in-court identification of accused after identification by same witness at illegal police lineup, proper test whether evidence objected to has been come at by exploitation of illegality or by means sufficiently distinguishable to be purged of primary taint. State v. Oziah ---------- 541

13. Rule for application of in-court identification after prior illegal police lineup stated. State v. Oziah -- 541

14. Where in-court identification shows identification had origin independent of illegal lineup, in-court identification proper to be received in evidence. State v. Oziah ---------- 541
15. Where both parties involved in accident are deceased, disabled, or lack memory, creating offsetting presumptions of due care, resolution must rest upon proper inferences to be drawn from whatever circumstantial evidence available to trier of fact. Merritt v. Reed ---------- 561
16. Decision by counsel to call or not to call witness forms part of trial tactics; ordinarily mistaken decision in that respect not sufficient for post conviction relief. State v. Anderson ---------- 769
17. Nonexpert witness may testify from his observations as to whether or not another intoxicated; weight and sufficiency of this evidence for jury to decide. State v. Adels ---------- 849
18. Cited statute requires endorsement of names of witnesses on information; failure in contested case to endorse those known at time information filed error, but not necessarily prejudicial error. State v. Adels ---------- 849

Words and Phrases.

1. Farm tractor is motor vehicle within meaning of statutes governing operation of motor vehicles on public highways of state. Keller v. Wellensiek ---- 201
2. Use of land for agricultural purposes does not necessarily mean it is rural in character; it is nature of its location as well as its use which determines whether it is rural or urban in character. Voss v. City of Grand Island ---------- 232
3. Rural means of or pertaining to country as distinguished from city or town, whereas urban means of or belonging to a city or town. Voss v. City of Grand Island ---------- 232
4. Contract carrier is one who furnishes transportation service to meet special needs of individual shipper or shippers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 261
5. Term "consistent with the public interest," as used in cited statute, means that proposed contract carrier service does not conflict with legislative policy of state in dealing with transportation by motor vehicles. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 261

6. Chaste female within meaning of cited statute is one who has never had unlawful sexual intercourse with a male prior to intercourse with which prisoner stands indicted. State v. Vicars ---------- 311
7. Workmen's compensation insurance carrier for employer deemed to be an "employer" within meaning of cited statute. Neeman v. Otoe County ---------- 370
8. Word "exclusively" as used in Constitution one of general understanding; meaning so clear that requires no interpretation but only application. OEA Senior Citizens, Inc. v. County of Douglas ---------- 593
9. Word "airport" as used in cited statute means airport qualified and licensed for public use. Bruns v. City of Seward ---------- 658
10. Maxim volenti non fit injuria means: If one, knowing and comprehending danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed risk and is precluded from recovery for injury resulting therefrom. Munson v. Bishop Clarkson Memorial Hospital ---------- 778
11. Term authenticate, as used in extradition statutes, simply means a statement that documents what they purport to be. Austin v. Brumbaugh ---------- 815

Workmen's Compensation.

1. Burden on plaintiff in workmen's compensation case to prove right of recovery. Thelen v. J. C. Penney Co. ---------- 53
2. Workmen's compensation cases triable de novo in Supreme Court; however, where all of plaintiff's complaints subjective, Supreme Court cannot ignore fact that compensation court in assessing extent of injuries had opportunity to observe demeanor of plaintiff. Pignotti v. Coffee Time, Inc. ---------- 57
3. Where automobile liability policy issued to truck owner, also a consignor, contains "severability of interests" clause and clause that excludes application of policy to employees of insured or to injuries for which insured may be held liable under workmen's compensation law, clauses do not exclude injury claims of truck owner's employee against consignee and employees of consignee who are omnibus insureds. Liberty Mut. Ins. Co. v. Iowa Nat. Mut. Ins. Co. ---------- 115
4. In action to obtain award of benefits under workmen's compensation law, burden of proof on plaintiff to establish by preponderance of evidence that

injury or death was sustained by accident arising out of and in course of employment. Hannon v. J. L. Brandeis & Sons, Inc. ---------- 122

5. Where violent death shown under circumstances indicating death took place within time and place limits of employment without evidence as to cause of death, there is no presumption that death arose out of and in course of employment by virtue of cited statute. Hannon v. J. L. Brandeis & Sons, Inc. ---- 122

6. Appeal from grant or denial of award under workmen's compensation law triable de novo in Supreme Court and is for Supreme Court to consider evidence and draw natural and logical inferences from established facts. Hannon v. J. L. Brandeis & Sons, Inc. 122

7. Where plaintiff fails to sustain burden of proving death or injury due to accident arising out of and in course of employment within meaning of workmen's compensation law, claim fails and plaintiff cannot recover. Hannon v. J. L. Brandeis & Sons, Inc. ---- 122

8. Rule of liberal construction of Workmen's Compensation Act applies to the law but it is not applicable to evidence offered in support of claim made for benefits under the act. Parrish v. Karl Kehm & Sons Contractors ---------- 252

9. Burden of proof upon claimant to establish by preponderance of evidence to claim for benefits under Workmen's Compensation Act. Parrish v. Karl Kehm & Sons Contractors ---------- 252

10. Where evidence in workmen's compensation case is in irreconcilable conflict, Supreme Court on appeal will consider fact trial court observed demeanor of witnesses and gave credence to testimony of some rather than contrary testimony of others. Parrish v. Karl Kehm & Sons Contractors ---------- 252

11. Burden of proof upon claimant in workmen's compensation case to establish by preponderance of evidence that his disability caused by accident arising out of and in course of his employment. Satterfield v. Nagel ---------- 332

12. Where claimant fails to show with reasonable certainty that disability of which he complains arose out of and in course of his employment, proceeding will be dismissed. Satterfield v. Nagel ---------- 332

13. Rule XI of Rules of Procedure of Workmen's Compensation Court requiring notice of cancellation of compensation insurance be filed within 10 days after cancellation of policy primarily for protection

of claimants entitled to compensation. Neeman v. Otoe County ---------- 370
14. Where workmen's compensation insurance policy canceled and replaced by new policy issued and certified by another insurance company and effective on date of cancellation of old policy, failure to file notice of cancellation with Workmen's Compensation Court within time specified by Rule XI does not in and of itself invalidate cancellation. Neeman v. Otoe County ---------- 370
15. New compensation insurance carrier has no standing to complain of delay by former carrier in complying with Rule XI; new carrier should be held solely responsible for payment of workmen's compensation liability arising on or after effective date of its policy and after date of cancellation of replaced policy. Neeman v. Otoe County ---------- 370
16. Workmen's compensation insurance carrier for employer deemed to be an "employer" within meaning of cited statute. Neeman v. Otoe County ---------- 370
17. Joint employment and pro rata liability for compensation payments under cited statute exists only where there is agreement between employers as to salary, wages, hours of employment, and terms of service. Henning v. City of Hebron ---------- 381
18. Claimant who sustains loss of right hand and permanent partial loss of use of right leg entitled to compensation under cited statute for that proportion of compensation allowed for total disability as extent of loss of use of two members bears to total loss of such members. Wiekhorst v. Rural Electric Co., Inc. ---------- 445
19. Where employer appeals to district court from award of Workmen's Compensation Court and fails to obtain any reduction in amount of award, district court ordinarily should allow employee reasonable attorney's fee. Wiekhorst v. Rural Electric Co., Inc. 445
20. Attorney's fee allowed in workmen's compensation case to be taxed as costs against employer and may be allowed upon motion at subsequent term. Wiekhorst v. Rural Electric Co., Inc. ---------- 445

Zoning.

1. Right to full and free use and enjoyment of one's property in manner and for such purpose as owner may choose, so long as not for maintenance of nuisance or injurious to others, is privilege pro-

tected by law, and one which property owner may not be deprived without due process of law; owner's right to use his property is subject, however, to reasonable regulation, restriction, and control by state in legitimate exercise of its police powers. Stahla v. Board of Zoning Adjustment ---------- 219

2. Test of legitimacy is existence of real and substantial relationship between exercise of those powers in particular manner, and peace, public health, public morality, public safety, or general welfare of city. Stahla v. Board of Zoning Adjustment ---------- 219

3. What is for public good as it relates to zoning ordinances affecting use of property is, primarily, matter lying within discretion and determination of municipal body to which power and function is committed, and, unless an abuse of discretion has been clearly shown, it is not province of courts to interfere. Stahla v. Board of Zoning Adjustment ------ 219

4. Where validity of legislative classification for zoning purposes is fairly debatable, legislative judgment is controlling. Stahla v. Board of Zoning Adjustment ---------- 219

5. Burden on one who attacks validity of zoning ordinance, valid on face and enacted under lawful authority, to prove facts which establish its invalidity. Stahla v. Board of Zoning Adjustment ---------- 219