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GENE R. WELKE, APPELLEE, V. CITY OF AINSWORTH, NEBRASKA, APPELLANT.

138 N. W. 2d 808

Filed December 17, 1965. No. 36062.

1. **Workmen's Compensation.** If an employee suffers an injury, which appears to be slight, but which is progressive in its course, and which several physicians were unable to correctly diagnose, his failure to file claim, or bring suit within the time limited by law, will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.
2. ———. A workmen's compensation award cannot be based on possibility or speculation, and, if an inference favorable to the claimant can only be reached on the basis thereof, then he cannot recover.
3. ———. "Probably" is usually defined as reasonably; credibly; presumably; in all probability; so far as the evidence shows; and, very likely.
4. ———. If a claimant has adduced competent evidence having probative value which preponderantly convinces the trier or triers of the fact that claimant had an accident and incurred a disability arising out of and in the course of his employment, notwithstanding the trier or triers of fact may recognize a possibility or even a probability that this was not true, an award of compensation thereon is proper and on appeal therefrom must be sustained.
5. ———. To recover in a workmen's compensation case a claimant must offer proof which preponderates in his favor on each of the indispensable elements of his claim.
6. ———. Where the testimony gives rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture, a workmen's compensation award cannot be sustained.
7. ———. Where, however, the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, then the claimant sustains his burden of proof on the element involved.

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

Gross, Welch, Vinardi, Kauffman & Schatz, for appellant.

Eisenstatt, Lay, Higgins & Miller, for appellee.

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

SPENCER, J.

This is a proceeding under the Nebraska Workmen's Compensation Act, filed March 17, 1964, to recover for injuries sustained on October 10, 1962. The appellee, who will hereinafter be referred to as claimant, was the chief of police of appellant city of Ainsworth, Nebraska, which will hereinafter be referred to as defendant.

The action was first tried before one of the judges of the Nebraska Workmen's Compensation Court, who entered an order dismissing the petition. Claimant elected to waive rehearing. However, defendant sought and was granted a rehearing before the workmen's compensation court sitting en banc. The full court reversed the decision of the one-man court and awarded compensation. Defendant appealed to the district court, which affirmed the award. Defendant has perfected an appeal to this court.

The claimant, who was 41 years of age and in good health at the time of the scuffle described hereafter, had been employed by the defendant about 6 years as chief of police. About 12:30 a. m. on October 10, 1962, while making a check of the residential area, claimant attempted to arrest one Lambley for disturbing the peace and intoxication. The claimant describes the encounter which took place as follows: "Q Did you do this, take him into custody, so to speak? A Yes, I placed my arm around him and went towards my patrol car with him. Q What manner did you place your arm around him? A I approached him on his left side and placed my right arm around his waist. Q What happened then? A He took a couple steps toward the patrol car and he was going quite peaceful like and at this time he reached around my neck with his left arm and squeezed me very strongly with his left arm around the neck and grasped his left

wrist with his right hand and, of course, at tremendous leverage. Q What were you doing then, were you trying to get away from him? A Yes, I struggled to try to get loose. Q All right. A But he had a terrific pressure on my neck and he is a very strong man and I could not break loose from him. Q What happened then; how long did this go on or what followed? A It is hard to determine for some moments, some seconds, at least, we struggled around and eventually fell to the ground, both of us. Q And was he holding you at that time? A Yes. Q And did you get free or what was the fact in this regard. A We fell to the ground and thrashed around; he was actually choking me and I couldn't get my breath and I managed to get leverage on my elbow and loosened his grip enough so I could breathe and I told him that he was being very foolish that my hands were free and I could, if necessary, shoot him if I had to get loose and he released me then. Q Did you take him to the station? A We both got up and I told him to come along peacefully and he called me some obsene (sic) names and made a run for me and at that time I had retrieved my flashlight from the ground or still had it in my hand, I don't remember, but I hit him with the flashlight I had in my hand. Q Did that subdue him? A Yes, he immediately went down and I put handcuffs on him."

Claimant testified his neck was very tender, sore, and stiff for a day or two, and then began to get better. Sometime later he had some pain in his left shoulder. On October 22, 1962, he was hospitalized for pneumonia and was dismissed on October 30, 1962. Two days prior to dismissal he complained to his family doctor about a pain in the left shoulder. On November 29, 1962, he again consulted his doctor about the pain in the shoulder. The doctor assumed it to be arthritic in nature and recommended heat, rest, and ultrasonic treatment. The pain was intermittent. It would persist for 3 or 4 days and then would go away for several days. Plaintiff con-

sulted the doctor again on March 28, 1963. Thereafter the pain kept recurring and became more extensive, extending down into the arm, elbow, and hand area, and two of his fingers developed a numbness.

In the latter part of May 1963, Doctor Floyd Shiffermiller, an associate of claimant's family doctor, took some X-rays of the neck area, hospitalized claimant, and placed him in traction for 6 days. The X-rays revealed a decreased joint space between the fifth and sixth cervical vertebrae, with degenerative changes of disk and the spurring of the fifth and sixth vertebral bodies. When Doctor Shiffermiller's treatment was ineffectual, he referred claimant to Doctor Dwight W. Burney, a specialist in orthopedic surgery in Omaha, who examined him June 12, 1963. Doctor Burney thought claimant had a seventh cervical nerve root compression on the left, probably due to a herniated sixth cervical disk. Doctor Burney recommended that claimant consult a neurosurgeon in Omaha, Doctor Kenneth M. Browne.

Doctor Browne recommended that claimant enter the hospital for further studies. On July 17, 1963, Doctor Browne did a myelogram which tended to confirm the diagnosis of a herniated disk. Because of the severe pain and prolonged disability, Doctor Browne recommended surgery, and on July 18, 1963, performed a cervical laminectomy operation and removed the herniated disk. The operative report of the doctor notes that when the nerve was retracted, "'* * * two rather large pieces of loose fibrocartilage were found and removed.'" It was the doctor's testimony: "A Normally, the fibrocartilage or center part of the disk is securely attached to other ligaments in the center of the disk. In this case, they had slipped underneath the disk and outside of the disk. Q In other words, they were broken off from their usual position; is that correct? A Yes." Doctor Browne also testified that the claimant had a 10 to 15 percent permanent partial disability as the result of the herniation of the disk.

The defendant produced no witnesses and both parties rested at the close of claimant's case. The workmen's compensation court allowed a recovery for 13 1/7 weeks for temporary total disability and for 286 6/7 weeks for a 12½ percent permanent partial disability to the body as a whole.

Defendant lists 11 assignments of error, but restricts its argument to two of them: (1) Was the claimant's claim barred by the 1-year statute of limitations provided by section 48-137, R. S. Supp., 1963; and (2) did the claimant meet the burden of proving that he sustained a compensable injury in the course and scope of his employment?

Admittedly, the scuffle involved was more than 1 year before the filing of the petition herein. The question in this case is, was the injury sustained on October 10, 1962, of a latent and progressive nature sufficient to extend the filing date to 1 year from the time that claimant obtained knowledge that a compensable disability resulted from the occurrence on October 10, 1962?

The evidence is conclusive that claimant's first symptoms were a sore and tender neck which developed to a gradual pain in the shoulder, arm, elbow, and hand. This eventually produced the intense pain which resulted in the surgical procedure. It was the early impression of the family doctor that the pains were of an arthritic nature. His associate, as late as May 1963, felt that the complaints were probably due to the reduced space between the fifth and sixth cervical vertebrae and the spurring of the vertebral bodies, and X-ray studies tended to confirm this diagnosis. It was not until the examination in June 1963, that the correct diagnosis was made and the traumatic connection became a possibility. The logical conclusion is that the herniation of the disk in this instance was a latent and obscure medical condition which did not become apparent until the diagnostic skill of a specialist was secured. Under the circumstances, the claimant cannot be held to have known

the probable compensable character of the injury sustained October 10, 1962, until June 1963.

This clearly is a situation within the rule of Astuto v. Ray Gould Co., 123 Neb. 138, 242 N. W. 375, in which we stated: "If an employee suffers an injury, which appears to be slight, but which is progressive in its course, and which several physicians were unable to correctly diagnose, his failure to file claim, or bring suit within the time limited by law, will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident." See, also, Keenan v. Consumers Public Power Dist., 152 Neb. 54, 40 N. W. 2d 261.

The second objection raises the question as to whether the medical testimony is sufficient to establish causation. The only medical witnesses produced were those of the claimant. Defendant relies entirely on its cross-examination of the claimant's medical witnesses and its interpretation of claimant's medical testimony to support its contention that the claimant has not sustained his burden of proof on causation.

Doctor Browne, in response to a hypothetical question, testified: "Well, it is my opinion that an injury described by the patient could have caused the condition that has been described in the testimony." Doctor Browne was not permitted to answer a question as to whether the pieces of fibrocartilage which were removed could be broken off without a traumatic episode, and no offer of proof was made. Doctor Browne did testify that the finding of the loose fibrocartilage was an abnormal one.

Doctor Burney testified as follows: "Do you have an opinion, based on reasonable medical certainty, whether a compressed cervical nerve was actually related to the events which surrounded the arrest and grasping in the incident that was described on October 10, 1962? * * * I would feel that the scuffle described could initiate the

train of events that resulted in the compression of the nerve. Q * * * And that is based on reasonable medical certainty, Doctor? * * * Yes."

The medical report of Doctor Floyd Shiffermiller was received in evidence by agreement but over an objection by defendant as to its materiality. Doctor Shiffermiller stated, relative to claimant's disability: "In my opinion his injury and resultant disability was probably due to a scuffle he had in October of 1962, * * *."

The rule is well established in this jurisdiction that a workmen's compensation award cannot be based on possibility or speculation and if an inference favorable to the claimant can only be reached on the basis thereof, then he cannot recover. Klentz v. Transamerican Freightlines, Inc., 173 Neb. 53, 112 N. W. 2d 405. If a decision herein depended solely upon the testimony of Doctor Browne and Doctor Burney, it would have to be for the defendant within the ambit of this rule. The testimony of these two doctors, however, must be considered in conjunction with the opinion of Doctor Shiffermiller, who gave it as his opinion that the disability was probably due to the scuffle.

"Probably" is defined by Webster's New International Dictionary (2d Ed., Unabridged), p. 1971, as follows: "Reasonably; credibly; presumably. In all probability; very likely; * * *." The definition of "Probably" found in Black's Law Dictionary (4th Ed.), p. 1365, is: "In all probability; so far as the evidence shows; presumably; likely."

The language used by Doctor Shiffermiller is as definite as a doctor can be without giving a positive opinion that the scuffle caused the injury. He is familiar with the probabilities and selects the cause which within his range of experience he has reason to believe is the cause of the disability. In the area of certain disabilities it is impossible for a reputable doctor to testify with absolute certainty that one cause and one cause alone is the reason for the disability. Medical diagnosis is not that

exact a science. Even though in most instances a certain result may follow, to be accurate the medical expert hedges by the use of the words "probably due."

To require a greater degree of proof in a workmen's compensation case than we would require in a tort action is, to say the least, thwarting the basic purpose of the workmen's compensation statute. We believe the words "probably due" as used by Doctor Shiffermiller, read in context, indicate his best judgment to be that the injury sustained in the scuffle was the cause of the disability. In reaching this conclusion, we are not unmindful of the fact that on many occasions we have said that an award of compensation in a workmen's compensation case may not be based on possibility, *probability*, or speculative evidence. See Seymour v. Journal-Star Printing Co., 174 Neb. 150, 116 N. W. 2d 297. We have reviewed these cases, and this language is usually used where the proof of the accident is in question, but also on many occasions when there is no question as to the accident but one as to causation, which is the situation present herein. We have determined that the decisions would have been the same in every case if we had said the award "may not be based on possibilities or speculative evidence." As we said in one of those cases, Schwabauer v. State, 147 Neb. 620, 24 N. W. 2d 431: "If a claimant has adduced competent evidence having probative value which preponderantly convinces the trier or triers of the fact that claimant had an accident and incurred a disability arising out of and in the course of his employment, notwithstanding the trier or triers of the fact may recognize a possibility or even a probability that this was not true, an award of compensation thereon is proper and on appeal therefrom must be sustained."

So far as we have been able to determine on the element of causation without exhaustive research, the word "probabilities" came to be coupled with possibilities in our compensation law in Bartlett v. Eaton, 123 Neb. 599, 243 N. W. 772. It came into our law from Standard Oil

Co. v. Industrial Commission, 339 Ill. 252, 171 N. E. 165. The holding in that case, however, was clarified by the Illinois court in Carson-Payson Co. v. Industrial Commission, 340 Ill. 632, 173 N. E. 184, 2 years before the opinion in Bartlett v. Eaton, *supra,* was filed. We quote from that case as follows: "But although the onus of proving that the injury arose both 'out of' and 'in the course of' the employment rests upon the applicant, these essentials may be inferred when the facts proved justify the inference. If the facts proved give rise to conflicting inferences of equal degrees of probability, so that the choice between them is mere matter of conjecture, then the applicant fails to prove his case; but where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities at their respective value, and where the more probable conclusion is that for which the applicant contends, the arbitrator is justified in drawing an inference in claimant's favor."

In Bartlett v. Eaton, *supra,* the doctor testified that at most there was only a slight possibility of any causal connection between the injury and the alleged accident, so that the use of the word "probabilities" in that case on the element of causation is at best dicta. So far as we have been able to determine, our application over the years has not been much different from that applied by the Illinois court in Carson-Payson Co. v. Industrial Commission, *supra.*

To recover in a workmen's compensation case a claimant must offer proof which preponderates in his favor on each of the indispensable elements of his claim. Seger v. Keating Implement Co., 157 Neb. 560, 60 N. W. 2d 598. Where the testimony gives rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained. Where, however, the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends,

then the claimant sustains his burden of proof on the element involved.

Considering this record de novo in this court as we are required to do, Klentz v. Transamerican Freightlines, Inc., 173 Neb. 53, 112 N. W. 2d 405, we reach the same conclusion as the district court and the workmen's compensation court sitting en banc.

The judgment of the district court is correct and it is affirmed. Plaintiff's attorneys are allowed a fee of $500 for their services in this court. § 48-125, R. R. S. 1943.

AFFIRMED.

CARTER, J., dissenting.

I do not agree with that part of the majority opinion which holds that the evidence was sufficient to sustain a recovery of benefits under the Workmen's Compensation Act. It has been the rule in this jurisdiction that the Workmen's Compensation Act will be liberally construed to accomplish its beneficent purposes but the evidence must show by a preponderance that the accident caused the injury.

The evidence supports a finding that claimant sustained an accident arising out of and in the course of his employment on October 10, 1962. It will likewise sustain a finding that claimant first discovered that he had a herniated disk in June 1963, some 8 months after the accident. While the conclusion is very questionable, I shall assume that his claimed compensable injury was latent from October 10, 1962, to June 12, 1963, the date of discovery.

This court has held many times that the evidence must show that the accident caused the claimed injury. Hula v. Soennichsen, 178 Neb. 484, 134 N. W. 2d 47; Spangler v. Terry Carpenter, Inc., 177 Neb. 740, 131 N. W. 2d 159; Graber v. Scheer, 173 Neb. 552, 114 N. W. 2d 13.

The evidence in this case is as follows: On October 10, 1962, claimant was the chief of police of the city of Ainsworth. During the night on that date while making an

arrest of an intoxicated person the latter grasped the claimant around the neck from which claimant had difficulty in extricating himself. The next morning he had some pain and stiffness in the neck which continued for 7 or 8 days. From October 22, 1962, to October 30, 1962, claimant was confined to a hospital with an attack of pneumonia. Two days before his release he felt some pain in the left shoulder at the arm socket. This pain continued intermittently with increasing intensity. The attending physician referred claimant to Dr. Dwight W. Burney, an orthopedic surgeon, who examined him on June 12, 1963. Dr. Burney diagnosed claimant's ailment as a seventh cervical nerve root compression on the left, probably due to a herniated sixth cervical disk. Claimant was referred to Dr. Kenneth M. Browne, a neurosurgeon, who corrected the trouble by an operation. The operation confirmed Dr. Burney's diagnosis.

Dr. Browne testified that the scuffle on October 10, 1962, "could have caused the condition." Dr. Burney testified "that the scuffle described could initiate the train of events that resulted in the compression of the nerve." He further testified that one could have a herniated disk without any severe injury. On cross-examination he was asked and answered the following questions: "Q And it has been not uncommon to have patients suffer with herniated cervical disks who have no history at all of outside trauma? A That is correct. Q It could be caused by that, of course, as you stated in your testimony. A That is correct, yes. Q And it could be caused by other reasons? A Yes." I submit that the effect of this evidence is that the herniated disk could have been caused by the scuffle or it could have resulted from other causes. The evidence is subject to no other reasonable interpretation other than that the cause was not determinable and accounts for the evidence of the physicians that the scuffle could have initiated the train of events resulting in the herniated disk

and their unwillingness to say that the scuffle did cause it, even as a matter of opinion.

There is no evidence in this record, opinion or otherwise, that the herniated disk resulted from the accident that occurred 8 months previously. There is simply nothing to support a medical conclusion that the scuffle caused the herniated disk and, the initiating causes of herniated disks being so multitudinous, an opinion where there had been an 8-month's lapse of time with only intermittent symptoms of pain would be pure speculation at the most.

There is a letter in the record received over objection as to materiality signed by the attending physician in which he states: "In my opinion his injury and resultant disability was probably due to a scuffle he had in October of 1962, and probably will have no future disability." The attending physician did not testify in the case. The statement was not sworn to and cross-examination was not possible. The statement is purely an extrajudicial one. The use of the word "probably," in connection with the scuffle as a cause, is clearly used as synonymous with "possibly." His statement is a pure conclusion not based on any factual situation that supports the word "probably" as evidence of a medical opinion that the scuffle did cause the injury. The medical testimony, considered as a whole, preponderates in favor of the conclusion that there was no way to determine whether or not the accident precipitated the injury. Certainly a general use of the word "probably," not based on medical testimony or circumstances supporting its use, will not support an award of compensation as this court has many times said.

It has been the rule in this jurisdiction since the enactment of our Workmen's Compensation Act that causal connection between the acident and the injury must be established by evidence, and that compensation awards cannot be based on possibilities, probabilities, or speculative evidence. Omaha & C. B. St. Ry. Co. v. Johnson,

109 Neb. 526, 191 N. W. 691; Bartlett v. Eaton, 123 Neb. 599, 243 N. W. 772; Huffman v. Great Western Sugar Co., 125 Neb. 302, 250 N. W. 70; Saxton v. Sinclair Refining Co., 125 Neb. 468, 250 N. W. 655; Milton v. City of Gordon, 129 Neb. 888, 263 N. W. 208; Price v. Burlington Refrigerator Express Co., 131 Neb. 657, 269 N. W. 425; Dennehy v. Lincoln Steel Works, 136 Neb. 269, 285 N. W. 590; Towner v. Western Contracting Corp., 164 Neb. 235, 82 N. W. 2d 253; Snowardt v. City of Kimball, 174 Neb. 294, 117 N. W. 2d 543; Hula v. Soennichsen, *supra.*

In Omaha & C. B. St. Ry. Co. v. Johnson, *supra,* we said: "The plaintiff must not merely ask the court to guess that the original injury was the cause of death, nor merely that it is probable it was, but she must either prove it by evidence or by legitimate inference to be drawn from the facts which are actually made to appear."

In Bartlett v. Eaton, *supra,* the court quoted the following with approval from Standard Oil Co. v. Industrial Commission, 339 Ill. 252, 171 N. E. 165: "Liability under the compensation act cannot rest upon the imagination, speculation or conjecture or upon a choice between two views equally compatible with the evidence, but must be based upon facts established by a preponderance of the evidence. * * * Awards for compensation cannot be based upon possibilities or probabilities but must be based upon sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment." This court has consistently adhered to this holding.

In Saxton v. Sinclair Refining Co., *supra,* this court said: "Deplorable as it is that a boy of so much early promise has become the victim of schizophrenia, the rule must go further. The burden of proof is upon him, and in order to compel compensation from his employer he must prove by a preponderance of the evidence that there was a direct causal connection between his disorder

and his automobile injury. Nor can such proof be made upon possibilities or even probabilities."

In Milton v. City of Gordon, *supra,* this court stated: "The evidence of the medical experts of both parties concedes that there are many other ways that the pre-existing condition could have been lighted up besides the one contended for by appellant. After a consideration of the whole evidence, we come to the conclusion that a decree for appellant, if one could be granted, would have to be based on speculation and probability. The evidence shows that appellant's contention that the deceased was injured by striking the steering wheel of his car is based upon the possibility that it could have happened at that time and place or the probability that it did occur as alleged. This court has held many times that awards of compensation cannot be based on possibility, probability, speculation or conjecture."

This court in denying a claim for compensation in Price v. Burlington Refrigerator Express Co., *supra,* said this: "While expert testimony was produced to the effect that trauma could produce the condition with which Price was afflicted, there is no evidence that such was the fact."

The majority relies on refinements of definition of the word "probable." It is a word of common meaning and has been applied over the years in accordance with common usage. Its meaning in our previous cases has been made clear by its application to the Workmen's Compensation Act. It is most often used as a synonym for possibility and is subject to no other meaning except when supported by evidence from which a conclusion can be drawn that it was intended as medical evidence of cause and effect. There is neither medical evidence nor circumstances that warrants any such usage here. I submit that the majority opinion extends its meaning far beyond any previous holding of this court and has the effect of vesting this court with authority to supply causal connection between an accident and an injury

when the evidence fails to establish it. In this case the evidence shows that the accident could have caused the injury and that it could have been initiated by many other causes of equal degree of probability. Under such a situation the initiating cause is conjectural and speculative, and is insufficient to sustain an award of compensation. The effect of the opinion is to place the burden upon the employer to eliminate all possibilities, probabilities, and speculation in order to establish a defense, when the statute requires a claimant to establish by a preponderance of the evidence every essential fact necessary to sustain an award.

Cases from a foreign jurisdiction are relied upon to support the affirmance. Workmen's compensation statutes and their interpretations vary in all the states and are for that reason of little authoritative force. The issues in this case have been decided many times by this court, making it unnecessary to cite cases other than our own. As the cases cited show, our interpretation on the use of possibility, probability, and speculation as evidence is of long standing and has met with apparent legislative approval. This court has recently held that a change of meaning under such circumstances is for the Legislature and not the courts. Bowers v. Maire, *ante* p. 239, 137 N. W. 2d 796. It appears to me that there should be some consistency in determining what is legislative and what is judicial, and that unpredictability in this field should be removed.

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

STATE OF NEBRASKA, APPELLEE, V. VERNIS HARRY MILLER, APPELLANT.

138 N. W. 2d 807

Filed December 17, 1965. No. 36136.

Appeal from the district court for Douglas County:

JOHN E. MURPHY, Judge. On motion of appellant for appointment of counsel. Motion denied. Brief day extended.

Vernis Harry Miller pro se.

Clarence A. H. Meyer, Attorney General, for appellee.

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

PER CURIAM.

This matter comes on for determination on the motion of the appellant filed in this court for the appointment of counsel. The record discloses no request was made for such appointment in the district court to which such motions should be addressed as provided by Laws 1965, chapter 151, section 2, subsection (2), page 494. It is ordered:

First, that the motion in its present form be and the same is hereby denied.

Second, that the appellant is given 60 days from this date to make proper application and a like period in which to present his brief on appeal.

MOTION DENIED.
BRIEF DAY EXTENDED.

STATE OF NEBRASKA, APPELLEE, V. DAVID KING, APPELLANT.
138 N. W. 2d 805

Filed December 17, 1965. No. 36138.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. On motion of appellant for appointment of counsel. Submission of case vacated. Motion sustained. Brief day extended.

David King pro se.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

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

ORDER

This cause having been submitted to the court, and it appearing to the court that the defendant's motion for appointment of counsel for the purpose of this appeal was not granted by the district court; that the defendant appeared as his own counsel; that both the defendant and counsel for the State have raised the issue of representation by counsel in oral arguments; and that the case of Douglas v. California, 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811, is applicable.

NOW, THEREFORE, on the court's own motion, it is ordered:

1. The submission herein is hereby vacated.

2. The district court is directed forthwith to appoint counsel for the appellant herein under the provisions of L. B. 839, 1965 Legislative Session, Laws 1965, chapter 151, page 493.

3. Time for filing appellant's brief is extended to January 31, 1966.

WHITE, C. J., CARTER and BROWER, JJ., dissenting.

On the 17th day of December 1965, this court entered an order on its own motion vacating the submission of the case, directing the district court to appoint counsel, and extending defendant's brief day to January 31, 1966. We dissent to the issuance of this order.

The defendant was convicted in the district court for Douglas County, Nebraska, for the crime of armed robbery and sentenced to serve a sentence of 4 years from and after the 13th day of April 1965. The defendant has appealed.

The defendant was represented by legal counsel at his trial in the district court. When his notice of appeal was filed defendant moved the court for an order appointing legal counsel to handle his case on appeal. The motion was accompanied by a poverty affidavit. The

trial court did not appoint legal counsel to represent defendant on appeal, no ruling being shown on the motion.

Defendant then moved the district court to furnish without expense the transcript, bill of exceptions, and other court documents. The motion was sustained and the clerk of the district court and the court reporter were directed to furnish the transcript and bill of exceptions, respectively, which was done.

On July 2, 1965, defendant filed a motion for leave to file hand-printed briefs in this court. The motion was sustained and defendant filed such briefs. On October 20, 1965, defendant moved this court for an order directing the custodial authorities to permit his appearance before the court for the purpose of arguing his case pro se. The motion was sustained and the order made.

The case was set for trial on November 2, 1965. Defendant appeared and presented his case in a rather able manner. The case was finally submitted. It will be noted that the court sustained all motions made by the defendant. He filed no motion for the appointment of counsel in this court, nor did he file an affidavit of poverty. He mentioned in his oral argument that he needed the services of an attorney, the first time that question was ever called to the attention of this court.

We point out that this court was without authority to appoint counsel and there was no statute authorizing the payment of attorneys' fees in such cases. It is contended by the majority that the appointment of an attorney for the accused is authorized by Laws 1965, chapter 151, page 493. This statute was enacted in 1965 without an emergency clause. It did not become effective until November 18, 1965. We assert that the act was prospective and without retroactive effect. At the time the majority gives effect to the act, the crime not only had been committed, but the case had been tried, the defendant sentenced, the appeal heard, and the case submitted to this court. It requires no citation of authority to show

the nonapplicability of the statute to the case before us.

The majority asserts that irrespective of these facts, the appointment of counsel is required by Douglas v. California, 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811. We submit that the foregoing case does not support the contention for which it is cited. In that case it was said: "The record shows that petitioners requested, and were *denied,* the assistance of counsel on appeal, even though it plainly appeared they were indigents. * * * Here the issue is whether or not an indigent shall be *denied* the assistance of counsel on appeal." (Emphasis supplied.) Here the defendant has been denied nothing. The majority assumes that it is the court's duty to step into the case on its own motion and grant relief that was neither requested by defendant nor denied by the court. We submit that there is no case which imposes such a duty on this court.

The only assignment of error in this case is that the trial court was in error in not crediting the time served under a previous void sentence on the sentence imposed. The question has been determined contrary to the contentions of the defendant. McCleary v. Hudspeth, 124 F. 2d 445; Robinson v. United States, 144 F. 2d 392, affirmed on appeal, 324 U. S. 282, 65 S. Ct. 666, 89 L. Ed. 944; Palumbo v. State of New Jersey, 334 F. 2d 524. The foregoing constitutes the only assignment of error. It is wholly without merit as a matter of law. The action of the court is, therefore, a vain and useless act which can in no way benefit the defendant.

We submit that the order of the majority is contrary to applicable law, is not required by any compelling authority, constitutes an unnecessary imposition on the time of the court, and can only have the effect of building up the hopes of the defendant when none in fact exists. In addition thereto, if there be merit in defendant's contention, adequate remedies are afforded. The right of habeas corpus is open to him as well as the recently passed post conviction law, Laws 1965, chapter

145, page 486. With these remedies available to the defendant, there is no compelling reason to depart from established procedures which have been consistently applied over the years. It is not the province of courts to depart from established law, whether substantive or procedural, for when it does so, it acts through caprice and creates injustice as to those who have been denied similar considerations.

We submit that the court should proceed to dispose of the appeal on the issues properly before the court.

C. HAROLD OSTLER, APPELLEE AND CROSS-APPELLANT, V. CITY OF OMAHA ET AL., APPELLANTS AND CROSS-APPELLEES.

138 N. W. 2d 826

Filed December 24, 1965. No. 35994.

1. **Appeal and Error.** The jurisdiction of the district court to consider and set aside a final order of an inferior tribunal does not attach until there is presented to it with the petition in error a duly authenticated transcript of the proceedings containing the final order of which complaint is made.
2. ———. A party is not barred from asserting for the first time on appeal that an inferior tribunal was without jurisdiction of the subject matter of the action.
3. **Municipal Corporations: Administrative Law.** The provision of the Omaha municipal code providing that violations of the provisions of section 7.04.810 shall be punished by reprimand, suspension, demotion, or dismissal is so clearly phrased in the alternative that it is not open to any other construction.
4. ———: ———. The rules and regulations of the Omaha department of public safety, police division, are not applicable to the chief of police of the city of Omaha in their present form.
5. ———: ———. The personnel board of the city of Omaha is required to reduce its findings and decision thereon to writing and to transmit the same to the department head and the employee concerned.
6. ———: ———. The findings required by the home rule charter of the city of Omaha and the Omaha municipal code are a concise statement of the conclusions upon each contested allegation.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Affirmed.

Herbert M. Fitle, Walter J. Matejka, and Marchetti & Samson, for appellants.

Viren, Emmert & Epstein, for appellee.

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

SPENCER, J.

This is an appeal from an order of the district court for Douglas County sustaining a petition in error and reversing an order of the personnel board of the city of Omaha and remanding the cause for reconsideration.

C. Harold Ostler, hereinafter referred to as plaintiff, prior to March 10, 1964, was chief of police of the city of Omaha. On that date Chris Gugas, public safety director of the city of Omaha, hereinafter referred to as director, sent the plaintiff an interoffice communication suspending him for a period of 15 days and demoting him thereafter to the rank of captain. The order became effective at 4:30 p. m., March 10, 1964. Plaintiff prosecuted an appeal to the personnel board of the city of Omaha, hereinafter referred to as board. The board by a divided vote affirmed the action of the director, and the plaintiff filed a petition in error in the district court.

The district court sustained the petition in error and specifically determined that the order of the board was arbitrary and capricious in that the departmental rules did not apply to the chief of police, and that the board failed to make written findings as required by the home rule charter and the code. It also determined that the punishment was contrary to law, but made no determination of the sufficiency of the evidence before the board. The district court reversed the order and remanded the cause to the board for reconsideration, with directions to make written findings and in its discretion to receive additional evidence.

Subsequent to the overruling of the motions for a new trial, Harry A. Meister, describing himself as a resident and a taxpayer of the city of Omaha, pursuant to authority given to taxpayers in the home rule charter, entered his appearance, and prosecutes this appeal in behalf of the city. Attached to his filing is a certified copy of a resolution unanimously adopted by the city council, denying the city legal department authority to prosecute an appeal to this court. For convenience we will hereinafter refer to the appellant city as defendant. Defendant sets out five assignments of error, which will be described as they are discussed.

The first assignment of error urges a lack of jurisdiction of the subject matter in the district court on the ground that "* * * no duly authenticated transcript of the proceedings, contained the final order and the decision sought to be set aside, vacated and reversed was filed with the Petition in Error * * *" as required by sections 25-1905 and 25-1906, R. R. S. 1943. There is no question but that our law requires an authenticated transcript to confer jurisdiction. See Anania v. City of Omaha, 170 Neb. 160, 102 N. W. 2d 49, in which we held: "The jurisdiction of the district court to consider and set aside a final order of an inferior tribunal does not attach until there is presented to it with the petition in error a duly authenticated transcript of the proceedings containing the final order of which complaint is made."

This assignment of error is asserted for the first time in this court. However, it is well settled that if a judicial tribunal has no jurisdiction of the subject matter of an action, jurisdiction cannot be obtained either by acquiescence or consent of the parties. See Plunkett v. Parsons, 143 Neb. 535, 10 N. W. 2d 469, in which we held: "A party is not barred from asserting for the first time on appeal that an inferior tribunal was without jurisdiction of the subject-matter of the action."

The transcript filed with the clerk of the district court

is composed of volumes I and II. Volume I contains the testimony before the board, consisting of 216 typewritten pages. Attached to the cover of the testimony are certificates signed by the chairman of the board; the vice chairman of the board; the secretary of the board; the personnel technician of the city of Omaha, who is the custodian of the records for the board; and an affidavit by counsel for plaintiff. There is also attached to volume I exhibits A, B, and C, which are respectively the order of the director, the appeal to the board, and the finding and order of the board affirming the director's action. Volume II is a folder containing exhibits 1 through 33. The certificates of the chairman, the vice chairman, and the secretary of the board are in identical form except for the name and description of the position of the party executing the certificate. The certificate of the secretary is as follows:

"I, JOSEPH CASCIO, hereby certify that I am the duly elected Secretary of the Personnel Board of the City of Omaha, State of Nebraska; that on the 9th day of April, 1964, the Personnel Board of the City of Omaha heard the appeal of C. HAROLD OSTLER from his suspension and demotion, as Chief of Police, Police Division, City of Omaha; and I hereby certify that a transcript of the proceedings duly made by Elmer Shamberg & Associates, Court Reporter, Lincoln, Nebraska, together with Exhibits 1 through 33 inclusive, attached hereto, and by reference incorporated herein, said transcript being described as Volume I, and said Exhibits 1 through 33 inclusive being described as Volume II, constitute all of the proceedings in and the material, relevant evidence adduced at the hearing before the Personnel Board of the City of Omaha, on April 9, 1964.

"I do further certify that attached hereto and by reference incorporated herein are EXHIBIT 'A', Order of Suspension and Demotion dated March 10, 1964; EXHIBIT 'B', Appeal by C. Harold Ostler dated March 16, 1964; EXHIBIT 'C', Findings and Order. I do further

certify that Volume I, Volume II, EXHIBIT 'A', EXHIBIT 'B' and EXHIBIT 'C' constitute a complete transcript of proceedings together with final order in the matter of the suspension, demotion and appeal of C. Harold Ostler; and that such complete transcript has been duly prepared, served, settled and allowed by the undersigned."

The certificate of the personnel technician, so far as material herein, is as follows: "I do certify that attached hereto and by reference incorporated herein are EXHIBIT 'A', Order of Suspension and Demotion dated March 10, 1964; EXHIBIT 'B', Appeal by C. Harold Ostler dated March 16, 1964; EXHIBIT 'C', Findings and Order, which exhibits are matters of record in the Personnel Department of which I am custodian. I do further certify that EXHIBIT 'A', EXHIBIT 'B' and EXHIBIT 'C' constitute the pleadings together with final order in the matter of the suspension, demotion and appeal of C. Harold Ostler; and that same has been duly prepared, served, settled and allowed by the undersigned."

The affidavit of plaintiff's attorney, so far as material herein, is as follows: "That on May 4, 1964, I requested Robert O. Moore, in his capacity as Acting Personnel Director, to certify the transcript of proceedings, together with Exhibits 1 through 33 inclusive of the Appeal of C. Harold Ostler before the Personnel Board of the City of Omaha on April 9, 1964; that the said Robert O. Moore stated that he was unable to certify said transcript of proceedings."

Defendant in its brief stated: "It would appear that no attempt was made in the proceedings herein to secure and obtain certified or authenticated copy of the proceedings irrespective of the fact that there are five purported affidavits, attached to the unidentified transcript, * * *." We do not accept defendant's two major premises, so consequently we cannot agree with its conclusions. Three of the "purported affidavits" to

which defendant refers are in fact certificates of the three principal officers of the board authenticating the transcript of the proceeding. The plaintiff, out of an abundance of caution, had the chairman, the vice chairman, and the secretary of the board authenticate the record filed with the petition in error. When the custodian of the board's records refused to do so, plaintiff's attorney filed an affidavit to that effect and had him certify that exhibits A, B, and C constituted the proceedings, together with the final order. The certificate of the presiding officer would have been a sufficient authentication.

The other premise is defendant's allusion to the "unidentified transcript." The transcript shows the matter involved, the dates, and the details of the entire proceeding. The certificates attached identify, incorporate, and allude to the transcript, as well as certify to its completeness, preparation, service, settlement, and allowance.

The transcript of the proceeding bears the filing stamp of the clerk of the district court showing it to have been filed on the same date as the petition in error. The petition in error specifically refers to and incorporates the transcript of the proceeding therein. We determine that the transcript of the proceeding, filed with the petition in error, was a sufficient compliance with section 25-1905, R. R. S. 1943, to give the district court jurisdiction of the subject matter, and there is no merit to defendant's first assignment of error.

Defendant's second assignment of error is as follows: "The Court erred in reversing and remanding the cause to the Omaha Personnel Board for consideration by that Board, on the grounds that it did not have the authority to suspend and demote Chief Ostler." This assignment refers to the finding of the trial court that the disciplinary action provided in section 7.04.810 of the Omaha municipal code is restricted to only one of the penalties provided, and that the director exceeded his

jurisdiction by applying two penalties, and the board exceeded its jurisdiction in affirming the action of the director.

The pertinent part of section 7.04.810 is as follows: "Violation of the provisions of this section shall be punishable by reprimand, suspension, demotion, *or* dismissal." (Emphasis supplied.) The pertinent section of the Omaha home rule charter, defining the power of the board, is section 6.04(3), which reads as follows: "Hear appeals in case any officer or employe in the classified service is suspended *or* removed, *or* reduced in classification or pay by the Mayor or a department or division head, * * *." (Emphasis supplied.)

The question raised is one of first impression in this jurisdiction, although it has arisen in several other jurisdictions. Those cases in most instances are not of too much help because of the varying application of the provisions involved. We determine, however, that the case of State ex rel. Heffernan v. Board, 247 Wis. 77, 18 N. W. 2d 461, is analogous on the facts to the instant case and delineates what we consider to be the proper rule. In that case the pertinent provision of a statute was as follows: "'* * * If the board shall determine that the charges are sustained, the accused, by order of the board, may be suspended, reduced in rank, or removed, as the good of the service may require.'" The penalty applied by the board was demotion and suspension. The court there said: "It appears to us that the words of the statute are so plainly and clearly put in the alternative that this court may not, without usurping the function of the legislature, interpolate or depart from the language of the statute under the pretext of construction."

It appears to us that the language involved herein, "reprimand, suspension, demotion, or dismissal," is so clearly phrased in the alternative that it is not fairly open to any other construction. The director had a choice of one penalty; he chose two. The trial court

was therefore correct in holding that the director exceeded his authority by applying two of the penalties, and that the board exceeded its jurisdiction in affirming that decision.

We next consider the fourth assignment of error, which is directed to the fact that the district court held the rules and regulations of the department of public safety, police division, were not applicable to the chief of police who was one of the parties promulgating them.

The preface to the book containing the rules and regulations is signed by the plaintiff herein as the issuing officer. Chapter I, page 1, provides that the penalties require the recommendation of the chief of police and the approval of the director. It further provides that notification must be given in writing to the offending employee by the chief of police. It is apparent from the context that the rules were intended to apply to all those under the chief of police and not to the chief of police who was responsible for their enforcement. The chief of police is responsible to those over him under the provisions of the code. The portion of the order applying the rules and regulations of the department of public safety, police division, to the plaintiff is contrary to law and cannot be sustained. There is no merit to defendant's fourth assignment of error.

Defendant's third assignment of error complains of the holding of the trial court that the board failed to make written findings of fact in compliance with Article VI, section 6.04, of the home rule charter of the city of Omaha, and section 7.04.865(c), of the Omaha municipal code. There is no merit to defendant's assignment. Both the above enumerated provisions require the board to reduce its findings and decision thereon to writing and to transmit the same to the department head and the employee concerned. To make a general finding, as was done here, by merely referring to the number of the section of the code which it is alleged plaintiff violated, is clearly contrary to the intent of the code. The man-

date to reduce the findings to writing is a matter of substance. We construe its intention to be to inform the accused of the exact nature of the finding against him. A specific finding is particularly important where, as here, at least a portion of the alleged misconduct is based upon hearsay and alleged remarks appearing in the public press on different occasions. As the district court so well phrased it: "The critical events in suit span more than three months, and the evidence, years."

The findings required by the charter and code should consist of a concise statement of the conclusions upon each of the contested allegations. See Yellow Cab Co. v. Nebraska State Railway Commission, 176 Neb. 711, 127 N. W. 2d 211, which covers an analogous situation where the statute requires specific findings. The importance of this rule is emphasized in this case, where the findings on alleged code violations are combined with alleged violations of the rules and regulations of the department of public safety, police division, and there is no way to separate one from the other. It is one thing to make a finding in the language of the statute, which we have held permissible in interpreting decisions of state adminstrative agencies. See Young v. Morgan Drive Away, Inc., 171 Neb. 784, 107 N. W. 2d 752. It is quite a different matter, however, to merely refer to the number of the section of the code which might be violated, without particularizing the nature of the violation when the code requires written findings.

In view of the conclusions we have reached on the four preceding assignments of error, it is not necessary to discuss defendant's last assignment of error, which complains of the holding of the trial court that on the state of the record no finding should be made by the court on the sufficiency of the evidence.

Plaintiff, by way of cross-appeal, urges this court to retain jurisdiction, to reverse the order of the board, and to direct the entry of an order for the reinstatement of the plaintiff. This is an error proceeding from an

administrative tribunal. For the reasons outlined, the state of the record is such that we are not in a position to determine the sufficiency of the evidence. We find the district court properly reversed the order and remanded the cause to the board for further proceedings consistent with its opinion.

For the reasons given, the judgment of the district court is affirmed.

AFFIRMED.

IN RE APPRAISAL OF SCHOOL LAND LEASE NO. 77255.
SAM JACOBITZ ET AL., APPELLANTS, V. WILMA BUSSINGER, APPELLEE.

138 N. W. 2d 839

Filed December 24, 1965. No. 36006.

1. **Appeal and Error: Bonds.** Ordinarily an appellant is not a competent surety for himself, but a bond signed by a principal, who also signs as the only surety, while it may be insufficient or defective or invalid as a bond, is not void for the purpose of determining whether jurisdiction on appeal is acquired.
2. **Public Lands: Appeal and Error.** While the statute is mandatory in requiring an appeal bond in appeals from appraisals of improvements on school lands, and the bond must be filed within the time prescribed by statute, the filing date stamped on it, or the time the official records the formal filing, is merely prima facie evidence of the time it was received.
3. **Appeal and Error: Bonds.** Where the record shows that an appeal bond was delivered to the proper official within the time provided by law, a delay by the official, for his own reasons, in actually performing, entering, or recording the official filing should not prevent the district court from acquiring jurisdiction on appeal.
4. **Pleading: Appeal and Error.** By statute, the court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party and an appeal bond or undertaking is within the purview of the statute.
5. **Appeal and Error.** Where the district court has acquired jurisdiction on appeal, it is required to permit amendments of a

defective or insufficient bond or order the filing of a new bond in the furtherance of justice.

6. ———. The discretion granted a court in permitting or denying amendments is a legal discretion which is subject to review to determine if its exercise resulted in prejudice to a litigant.

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

Nelson, Harding & Acklie and Charles J. Kimball, for appellants.

Arthur A. Weber, for appellee.

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

MCCOWN, J.

This is an appeal from a judgment of the district court dismissing an appeal from an appraisement of improvements on certain school lands in the County of Rock, Nebraska.

The appraisal was filed with the county court on January 16, 1964. Notice of appeal was filed on February 14, 1964, and on the same date the appellants attempted to file a bond on appeal, and also deposited a check in the amount of the appraisement. The county judge did not approve the bond at the time it was tendered. He advised the appellants that he was not sure of the requirements as to the bond, but that he would contact the Attorney General of Nebraska in order to clarify the bond requirements, apparently as to required equities and whether a corporate surety was required. The county judge advised the appellants on February 14 that the check would act as a sufficient bond on appeal until he received the clarification. The bond was signed on February 14, but it is not clear whether the signatures as sureties were on it at that time. On February 18, 1964, some of the appellants signed the bond on appeal additionally, and the date on the bond

itself is February 18. On February 19, 1964, the county judge received a reply from the Attorney General which he interpreted as permitting him to approve the bond, and on that date the county judge filed the bond on appeal. The bond was stamped as filed February 19. It contained the signatures of all three appellants as principals, the signatures of two of the appellants as sureties, and there were no other sureties.

The appellee filed a motion to dismiss the appeal because it had not been made according to law. At the hearing on that motion, the appellants requested permission to file an amended and sufficient bond if the court should find the appeal bond filed was insufficient. The district court sustained the motion to dismiss the appeal, and this appeal followed.

Section 72-240.06, R. S. Supp., 1963, provides in part: "(2) Either the former lessee or the new lessee may, if he is dissatisfied with the appraisement, within thirty days after the filing thereof, appeal therefrom to the district court of the county in which the land is situated, by filing a notice of appeal with the county judge. Thereafter all proceedings on appeal shall be had and conducted in the manner prescribed in sections 76-716 to 76-720."

Section 76-716, R. R. S. 1943, provides: "The party appealing shall also, at the time of filing of notice of appeal, enter into an undertaking, with at least one good and sufficient surety, to be approved by the county judge conditioned (1) that the appellant will prosecute such appeal to effect without unnecessary delays, and (2) that if judgment be rendered against appellant on the appeal, the appellant will satisfy whatever judgment may be rendered against him."

An undertaking on appeal is the equivalent of an appeal bond. It is the appellee's position that the appeal bond is jurisdictional, and was required to be filed within the time provided by statute, signed by at least one good and sufficient surety. The argument is that an ap-

pellant is not a competent surety for himself; that a bond having no valid surety, and bearing a filing date out of time, is not only insufficient and defective, but void; and, therefore, it is not subject to amendment or correction.

Ordinarily an appellant is not a competent surety for himself, but a bond signed by a principal, who also signs as the only surety, while it may be insufficient or defective or invalid as a bond, is not void for the purpose of determining whether jurisdiction on appeal is acquired.

In Rube v. Cedar County, 35 Neb. 896, 53 N. W. 1009, the appeal bond was apparently not signed by the appellant, but was signed only by the sureties. This court said: "This undertaking, although informal, is not void. The proceedings, while irregular, were sufficient to give the district court jurisdiction. The plaintiff in error appears to have acted in good faith and should have been given an opportunity to file a new and sufficient bond."

While the statute is mandatory in requiring an appeal bond in appeals from appraisals of improvements on school lands, and the bond must be filed within the time prescribed by statute, the filing date stamped on it, or the time the official records the formal filing, is merely prima facie evidence of the time it was received. As early as the case of Tootle, Farleigh & Co. v. White, 4 Neb. 401, it was held that: "If a mistake has been made in the date, to the prejudice of either party, it is the duty of the court to correct it, * * *." In that case, a transcript was left with a deputy clerk who was unable to state the date on which it was received. The transcript was endorsed: "Filed, January 28, 1875," but the plaintiff's attorney, by affidavit, stated he had left the transcript with the clerk on or about the 15th day of January. The court said: "The date of filing indorsed on a transcript, by the clerk, is merely prima facie evidence of the time at which it was received by him."

In the supplemental transcript here, the county judge certified that on February 14, 1964, the appellants at-

tempted to file the bond on appeal. It is clear that a form of appeal bond was delivered to the county judge on February 14, although the judge did not then approve it, or "file" it, or stamp a filing endorsement on it until February 19. Where the record shows that an appeal bond was delivered to the proper official within the time provided by law, a delay by the official, for his own reasons, in actually performing, entering, or recording the official filing should not prevent the district court from acquiring jurisdiction on appeal.

Section 25-853, R. R. S. 1943, provides in part: "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; * * *."

Ballantyne Co. v. City of Omaha, 173 Neb. 229, 113 N. W. 2d 486, specifically held that the right to amend an appeal bond was within the purview of this statute, and that if such a bond be found to be defective, it may be amended in the appellate court or a new bond may be filed.

In State v. Kidder, 169 Neb. 181, 98 N. W. 2d 800, this court said: "We conclude that a defective appeal bond which has been approved by the court rendering the judgment confers jurisdiction on the appellate court to have the defect corrected, and the appellate court is required to permit amendments of the bond or order the filing of a new bond in the furtherance of justice. Where a failure to so do results in prejudice to the complaining party it constitutes prejudicial error. The discretion granted a court in permitting or denying amendments is a legal discretion which is subject to review to determine if its exercise resulted in prejudice to a litigant."

In the case at bar, the appellants delivered a form of appeal bond in time. It is uncontradicted that the county judge specifically advised them that the check delivered to him at the same time would act as a suffi-

cient bond on appeal until he received clarification. This might well be treated as conditional approval, and a delay in satisfying himself as to approval should not be treated as also delaying or changing the time the appeal bond was delivered to him. The evidence is clear that the appellants were acting in good faith.

Under the circumstances here, it was the duty of the court to permit amendment of the bond, or order the filing of a new bond in the furtherance of justice, and the failure to do so was prejudicial to the appellants.

The judgment of the district court is therefore reversed and the cause remanded with directions to overrule the motion to dismiss the appeal, and to grant the appellants the right to amend the bond on appeal, or to file a new bond on appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1966

JESSIE O'NEIL, ADMINISTRATRIX OF THE ESTATE OF ROBERT O'NEIL, DECEASED, APPELLEE, V. LAVON HAARBERG ET AL., APPELLANTS.

139 N. W. 2d 217

Filed January 4, 1966. No. 36012.

Public Lands. Section 72-240.06, R. S. Supp., 1963, provides the procedure for the appraisement of improvements on school land when a lease has been terminated by expiration or forfeiture. The procedure prescribed therein is an exclusive remedy that is binding upon all lessees of school lands.

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

Daniel E. Owens, for appellants.

Curtis & Curtis, for appellee.

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

BROWER, J.

Robert O'Neil in his lifetime was the lessee in a lease of a section of school lands in Hayes County, Nebraska, given by the Board of Educational Lands and Funds. The lease expired December 31, 1963. Robert O'Neil died February 27, 1963, and the appellee Jessie O'Neil was appointed and is acting as administratrix of his estate. The lease of this land was offered for sale by the Board of Educational Lands and Funds on October 24,

1963, at which sale Lavon Haarberg and Sharon Haarberg, the appellants, were the highest bonus bidders and were awarded and received a new 12-year lease which went into effect on January 1, 1964.

The lessees in their respective leases failed to agree on the amount to be paid for the crops growing on the section and three appraisers were appointed pursuant to section 72-240.06, R. S. Supp., 1963. From the award of the appraisers the Haarbergs appealed to the district court for Hayes County. On the appeal Jessie O'Neil, administratrix, was designated as plaintiff and Haarbergs as defendants. They will be referred to herein as they were designated in the trial court, and when defendant is mentioned in the singular, it will refer to Lavon Haarberg.

A trial to a jury in district court resulted in a verdict and judgment in favor of the plaintiff in the sum of $6,742. From an order overruling their motion for a new trial the defendants have appealed.

The defendants assign as error to the trial court that the verdict and judgment are contrary to the law and the evidence. They also contend certain instructions given were erroneous and that the trial court erroneously failed to instruct the jury upon the theory of the defendants.

It was stipulated there was planted by the plaintiff and growing on the premises on January 1, 1964, 354 acres of wheat and 74 acres of rye. This stipulation further showed the acres allotted to the premises by the governmental authorities as a wheat base was 157.2 acres and that the defendants bid and paid a bonus of $8,500 for the new lease under which $1,890.30 was the applicable annual rental. The undisputed evidence shows that the defendants took in cattle of others for pasturage on the growing small grain crop and received $998.63 therefor. The premises were unfenced and had thereon no well or source of water. Within time to effect compliance with the government's crop regula-

tions defendant destroyed 200 acres of the wheat and all of the rye for which he received wheat certificate payments and the payments from the government agency in the amount of $1,961. On June 21, 1964, the remaining crop was totally destroyed by hail.

The evidence with respect to the value of the wheat and rye on January 1, 1964, is in conflict. Testimony of the plaintiff was that she hired her husband's cousin to summer fallow the land. She paid $357 for each of three operations in preparing the land. About half of the ground so planted was rodweeded before drilling at $1 an acre. Drilling cost another $1 for each acre. The seed wheat cost $814, and the rye $111. The average production of wheat in Hayes County was 27 bushels per acre, and of rye 10 bushels. The market on wheat at harvesttime was $1.27 a bushel and on rye $0.92. Harvesting costs would have been $4 an acre. It was a normal season, the soil where planted was good, and she felt on January 1 a normal crop was to be expected. The plaintiff testified the wheat was worth $34.92 per acre and the rye $9 per acre on January 1, 1964. She knew the expiration date of her lease.

Several other farmers were called as witnesses by the plaintiff, some of whom had appraised the growing crops. They valued the wheat between $25 and $22.13 per acre. They considered the rye to be of little or no value except for pasturage and to keep the soil from blowing. The rye was planted on the more sandy portions of the land. These witnesses said portions of both the wheat and rye acreages contained wild oats, which is sometimes referred to as downy brome. The acres affected, the extent of the infestation, and the resulting damage varied considerably with the testimony of the several witnesses but they did not consider it widespread or serious. Some said they made allowance for this in their estimate of value. Most of them stated the wheat had a good stand and made a good cover, and that the rye was not so good. There was testimony that there were 3 or 4

inches of rain in the latter part of October and other normal rainfall in the fall of 1963, and that the condition of the crops as to moisture was good.

The defendant testified that the crops on the whole place had wild oats in them and if left would choke out the crops and damage the land for cultivation in future years as they ripen their seeds in May. He had pastured 150 head of cattle for 10 days beginning April 15, 1964, after which until May 20, 1964, there were either 200 or 250 head. He received 13 cents a day per head. Defendant was forced to install 4 miles of temporary fencing in order to pasture the cattle and hauled water for them twice daily and three times when it was warm. The wheat was not worth more than $10 an acre on January 1, 1964, and the rye of no value.

Several farmers were called as witnesses by the defendants. They all testified at considerable length concerning the infestation of the crops by wild oats. Their testimony varied in that respect also but they generally agreed more damage would naturally follow to the crops because thereof than the plaintiff's witnesses. One said the crops were practically worthless except for grazing, for which purpose he valued them at $1,750. Another stated the growing wheat was worth not to exceed $10 or $11 an acre and declined to value the rye. Similar testimony was given by other witnesses. One estimated the wheat was worth $10 or $12 an acre. Two gave no opinion as to the value of the crops on January 1, 1964, one of whom stated he would decline to buy such crops at that time as it would only be a gamble.

The provisions with respect to the obligation of a lessee of state school lands with respect to the purchase of the improvements thereon at the expiration of the prior leasehold estate were hitherto set forth in section 72-240.06, R. R. S. 1943. This section was amended by Laws 1963, chapter 417, section 1, page 1340. The new statute was effective October 19, 1963, only 5 days before the sale at which defendants bid in the leasehold inter-

est at public sale. As far as it affects the present action there was no significant change made by the amendment. We will quote certain portions pertinent to this action from section 72-240.06, R. S. Supp., 1963, as follows: "All authorized improvements on school land leases shall become the property of new lessees in all instances, and payment shall be made to the old lessees as herein provided. * * * Improvements to be included in such appraisement shall be all buildings, fencing, wells, windmills, pumps, tanks, irrigation improvements, assessments paid to any irrigation district, dams, drainage ditches, conservation terraces, trees, plowing for future crops, and alfalfa or *other crops growing thereon.* * * * The new lessee shall pay all costs of the appraisement.

"(2) Either the former lessee or the new lessee may, if he is dissatisfied with the appraisement, within thirty days after the filing thereof, appeal therefrom to the district court of the county in which the land is situated, by filing a notice of appeal with the county judge. Thereafter all proceedings on appeal shall be had and conducted in the manner prescribed in sections 76-716 to 76-720." (Italics supplied.)

This court in the case of Kidder v. Wright, 177 Neb. 222, 128 N. W. 2d 683, construed this section as it was before the amendment mentioned. In its syllabus this court held: "Section 72-240.06, R. R. S. 1943, provides the procedure for the appraisement of improvements on school land when a lease has been terminated by expiration or forfeiture. The procedure prescribed therein is an exclusive remedy that is binding upon all lessees of school lands." In the body of the opinion, the court held: "The statute enters into and becomes a part of the contract between the state and each lessee."

The defendants have two theories respecting their contention that the verdict and judgment are contrary to the law and the evidence. They first urge a lessee who plants crops, knowing the term of his lease will expire before they ripen and can be harvested, loses all his interest

therein when the new lessee takes possession of the premises under his term. They cite several cases involving the usual lease between private parties, including Peterson v. Vak, 160 Neb. 450, 70 N. W. 2d 436, 51 A. L. R. 2d 1221. It is so obvious that those cases involve an entirely different situation other than the one before us which is governed wholly by the cited statute that discussion of them is unnecessary. Defendants' contention cannot be sustained.

The defendants next cite Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200, an eminent domain proceeding, calling particular attention to a portion of that opinion which states: "In the light of the foregoing, it is logical to conclude, as we do, that an owner or tenant in possession of a farm who at the proper time, in due course of good husbandry and in good faith, plants a crop on the land after the petition for condemnation is filed but before condemner has deposited the award with the county judge or before condemner has by some binding election accepted the award, and such crop is growing but unmatured at the time of such deposit or election, may as of that time ordinarily recover damages for injury to or destruction of his share of the value of such crop in its then condition. 18 Am. Jur., Eminent Domain, § 256, p. 896. However, condemnee must establish the foregoing conditions by a preponderance of competent evidence which also meets the requirements as to measure of damages and sufficiency and clarity of proof to take it out of the realm of speculation for the purpose of submission to a jury within the meaning of relevant rules announced in Gledhill v. State, 123 Neb. 726, 243 N. W. 909; * * *."

Defendants argue that because that portion of section 72-240.06, R. S. Supp., 1963, states that "all proceedings on appeal shall be had and conducted in the manner prescribed in sections 76-716 to 76-720," which governs appeals in eminent domain proceedings, that the rules in such proceedings apply with respect to the proof re-

quired in the case before us. They claim the burden of proof is on plaintiff to show that the crops planted by her were planted in good faith and in due course of good husbandry. We think the reference to the sections on appeals from an award in condemnation means only that the proceedings on appeal shall be conducted in the manner prescribed in sections 76-716 to 76-720, R. R. S. 1943, and does not affect the rules of proof and of recovery. Such recovery and the payment of the award itself is governed in the present circumstance by section 72-240.06, R. S. Supp., 1963. The two proceedings are entirely different. In condemnation proceedings the recovery is for damages, and in the case before us it is based on the contract of the parties in which the statute becomes a part of those contractual rights and obligations. In the present case the crops were planted in season before the auction of the new leasehold interest. The plaintiff did not know whether she or another would acquire the new lease. Her testimony indicates the crops were planted in good faith. The state apparently in the interest of good husbandry has provided that farming operations continue uninterrupted by the change of leasehold interests. The assignment of error has no merit.

The defendants' complaint of the trial court's failure to submit their theory of the case relates to its failure to submit to the jury the issue of the plaintiff's good faith in planting the crops as well as their theory that if plaintiff planted them knowing the lease would end before harvest there could be no recovery. These aspects of the case have already been answered contrary to defendants' contention.

The defendants assign error to the trial court's giving certain specific instructions, No. 3 and No. 4. They relate to the evidence to be considered by the jury in assessing the value of the unmatured and growing crops on January 1, 1964. The instructions are long and this opinion would be unnecessarily lengthened to quote

them. When taken together the instructions seem in substance to follow quite closely the instruction set out in Hopper v. Elkhorn Valley Drainage Dist., 108 Neb. 550, 188 N. W. 239, which was as follows: " 'In determining the value of the crop of any year at the time of its injury or destruction, you should take into consideration the kind of crops planted, the nature of the land, the kind of season, whether wet, dry, or normal, what crops such land according to the season would ordinarily yield, the state of the crops' growth when injured or destroyed, the average yield of similar land in the neighborhood, the crop of which was cultivated in the same way and not injured, the market value of the crop injured and the market value of the reasonably probable crop without injury at the time of maturity, the expense that would have been incurred after the injury of fitting for market the portion of the crop the wrongful act prevented from maturing, the time of the injury, the circumstances which conditioned the probability or improbability of the maturing of the crops in the absence of injury, and all other facts and circumstances shown by the evidence tending to establish such value.' " We think the general rule there stated with respect to injury or destruction is applicable to the present case where it is sought to determine the value of such crops on the date of the commencement of the new lease.

The defendants contend the trial court by these instructions permitted the jury to speculate upon the possible production of wheat and rye but withdrew from its consideration the right to consider that 200 acres of such wheat constituted acres in excess of the allotted acres and the value of such acres would be considerably less than the value of the remainder of the crop. We think the trial court properly instructed the jury on this aspect of the case in the second paragraph of instruction No. 4, as follows: "The defendant contends that it was necessary for him to destroy 200 acres in order for him to

comply with the government regulations under the support program and to obtain government payments. You are instructed that said contention is no defense in this case and you have no right to consider such contention in arriving at your verdict, *except in so far as the same might have affected the right of the owner to sell the wheat upon maturity and the reasonably probable market price.*" (Italics supplied.) We think the instruction proper under the evidence in the case. If the defendants desired a more specific instruction they should have tendered one which they did not do. We have examined all of the instructions complained of by the defendants and find no error in them.

We conclude that under the conflicting evidence hitherto summarized the jury by giving credence to the testimony of the witnesses for plaintiff might properly have found the value of the crops in question to be in the amount of their verdict.

We find no error in the submission of the cause to the jury. Its verdict and the judgment of the court entered thereon were sustained by the evidence and the law and are affirmed.

AFFIRMED.

IN RE PETITION OF HARM DE JONGE.
HARM DE JONGE, APPELLEE, V. SCHOOL DISTRICT OF THE VILLAGE OF BLOOMINGTON, NO. R-1 OF FRANKLIN COUNTY, NEBRASKA, ET AL., APPELLANTS.
139 N. W. 2d 296

Filed January 4, 1966. No. 36019.

1. **Schools and School Districts.** The state is supreme in the creation and control of school districts and may if it thinks proper modify or withdraw any of the powers, or destroy such school districts without the consent of the residents thereof or even over their protest.
2. ———. This includes the power to permit the transfer of property from a nonaccredited high school district to an accredited

one without regard to whether said property is contiguous to the accredited high school district.

3. **Schools and School Districts: Statutes.** The fixing of boundaries of school districts is exclusively a legislative function, but it may properly be delegated provided the Legislature prescribes the manner and the standards under which the power may be exercised.

4. ———: ———. In section 79-403 (2), R. S. Supp., 1963, the Legislature has prescribed the manner and standards necessary to permit the transfer of land from a nonaccredited high school district to an accredited one.

5. ———: ———. The fact that a board or a court inquires into and determines whether or not the evidence produced shows a sufficient compliance with the procedure and statutory requirements to justify the transfer of land from a nonaccredited high school district to an accredited one does not constitute a delegation of legislative discretion.

6. **Schools and School Districts: Constitutional Law.** Section 79-403 (2), R. S. Supp., 1963, is not invalid in that it confers legislative powers upon a local board in violation of the provisions of the Constitution of Nebraska.

Appeal from the district court for Franklin County: NORRIS CHADDERDON, Judge. Affirmed.

Meier & Goossen, for appellants.

Martin & Stirtz and Sprague & Sprague, for appellee.

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

SPENCER, J.

This is an appeal from the granting of an application to transfer land from the school district of the village of Bloomington, No. R-1 in Franklin County, hereinafter referred to as R-1, to the school district of the village of Hildreth, No. R-37 in Franklin County, hereinafter referred to as R-37, pursuant to the provisions of section 79-403 (2), R. S. Supp., 1963.

Section 79-403 (2), R. S. Supp., 1963, which will hereinafter be referred to as subsection (2), provides as follows: "Any freeholder or freeholders, person in possession or constructive possession as vendee pursuant to

a contract of sale of the fee, holder of a school land lease under section 72-232, or entrant upon government land who has not yet received a patent therefor may file a petition with a board consisting of the county superintendent, county clerk, and county treasurer, asking to have any land described therein set off from the district in which it is situated and attached to some other district. The petition shall state the reasons for the proposed change and show: (a) That the land therein described is either owned by the petitioner or petitioners or that he or they hold a school land lease under section 72-232, are in possession or constructive possession as vendee under a contract of sale of the fee simple interest, or have made an entry on government land but have not yet received a patent therefor; (b) that the territory proposed to be attached has children of high school age residing thereon with their parents or guardians; (c) that the land described therein is located in a nonaccredited high school district, and is to be attached to an accredited high school district; and (d) that such petition is approved by a majority of the members of the school board or board of education of the district to which such land shall be attached. All procedures as provided in subsection (1) of this section shall apply to this subsection except that the board shall in this instance change the boundaries where it is found that all provisions as herein set forth have been met."

A petition was filed by Harm De Jonge, hereinafter referred to as De Jonge, alleging ownership of the land which is located in R-1, a nonaccredited district, requesting permission to attach said land to R-37, an accredited district; alleging the residence thereon of children of high school age; alleging the reason for the request is that the children will receive a better education in R-37 because of better teachers, better facilities, and a better curriculum; and further alleging that a majority of the board members of R-37 had approved the transfer and signed the petition.

The objectors filed a lengthy answer which may be briefly summarized by stating that the transfer would be detrimental to the best educational interests of the objectors and all of the children of school age who reside in R-1 as well as on the land in question, and that subsection (2) is unconstitutional.

The case was tried on a stipulation of facts, which was offered and received in evidence. The stipulation in essence provided as follows: That exhibit 1 attached thereto is a copy of the original petition filed by the petitioner with the county superintendent, the county clerk, and the county treasurer of Franklin County, Nebraska, who after a hearing thereon granted the change requested by said petition; that exhibit 2 is a copy of the notice of the hearing on the petition which was published as shown by the proof of publication in said exhibit, and that copies of said notice were also posted on the doors of the schoolhouses involved; that R-1 is an approved high school district but is not an accredited high school district, but is attempting to qualify for such rating; that R-37 is an accredited high school district and that a majority of the board of education of said school district have approved the transfer of the land described in the petition to that school district; that De Jonge is the owner of the land described in the petition, that a child of high school age resides on said land with his parents, and that said child is at the present time attending high school in R-37; that exhibits 3 and 3-a are maps showing the location of the real estate described in the petition within the boundaries of R-1; and that the objectors are resident freeholders of R-1.

The district court came to the same conclusion as the local tribunal, and attached the land to R-37. The objecting freeholders on behalf of R-1 as appellants have perfected an appeal to this court. They will hereafter be referred to as appellants.

Appellants allege five assignments of error which for purposes of discussion herein may be narrowed to the

only two argued in the brief: (1) The court erred in finding that the evidence was sufficient to support the judgment; and (2) the court erred in holding that subsection (2) is constitutional.

Appellants argue that under the statute the only matter the board and the district court on appeal inquire into is whether petitioner has made the allegations required by subsection (2); that no evidence was offered to support material and controverted allegations of the petition; and that there is no finding that the allegations of the petition are true. We do not so interpret the statute or the record. The statute specifically provides that: "* * * the board shall * * * change the boundaries *where it is found* that all provisions as herein set forth have been met." (Emphasis supplied.) The word "found" requires a review of evidence and certainly cannot be interpreted to read "alleged" as would be necessary under appellants' interpretation.

The petition filed herein states the reasons for the requested change, and subdivisions (a), (b), (c), and (d) of subsection (2), which are covered in the allegations of the petition, are affirmatively established by the stipulation of facts. The petition, which is positively verified, is attached to, identified, and filed with the stipulation and became a part of the record without objection or qualification. Objectors offered no evidence, and except for their own status none of the allegations of their answer are covered in the stipulation of facts. Most of their allegations, however, are discussed herein.

As to a finding by the trial court, the journal entry is as follows: "Now on this 23rd day of July, 1964, by agreement of the parties, Stipulation of June 4th, 1964, filed June 8th, 1964, was offered in evidence, admitted and ordered filed. Parties being present in Court by their attorneys, the Court finds generally for the applicant, Harm DeJong (sic), and orders that the Northeast Quarter (NE¼) of Section Thirty two (32), Township Three (3) North, Range Fifteen (15), Franklin

County, Nebraska, be set off from School District No. R-1 of Franklin County, Nebraska, and be attached to School District No. R-37 of Franklin County, Nebraska, and that costs herein be attached to the objectors.

"It is therefore ordered, adjudged and decreed that the Court finds generally for the applicant Harm DeJong (sic), and that the Northeast Quarter (NE¼) of Section Thirty two (32), Township Three (3) North, Range Fifteen (15), Franklin County, Nebraska, be set off from School District R-1 of Franklin County, Nebraska, and be attached to School District No. R-37 of Franklin County, Nebraska, and that the objectors pay the costs herein." There is no merit to the appellants' contention on the sufficiency of the evidence.

Appellants complain that there is no evidence that the change of boundaries is in the public interest, or that it is in the interest of the public health, convenience, and welfare. Appellants overlook the fact that the Legislature itself made these determinations in weighing the advantages of an accredited high school over one not accredited, and these determinations are not a part of the required proof.

We need not speculate on the legislative intent of subsection (2). We are not unmindful of the fact that in this time of educational emphasis, meeting college entrance requirements is becoming increasingly important. The high school graduate from a school which for many of several reasons cannot gain accreditation in most instances will be at a disadvantage when competing for college entrance with graduates of accredited high schools. The Legislature may well have decided that the public welfare demanded a method by which those high school students resident in nonaccredited high school districts could attend high schools which had met the higher standards required for accreditation.

Appellants also argue that there is no evidence that R-37 maintained facilities nearer and more convenient to petitioner's residence. Actually, the facilities in R-1

are much closer to the land in question than those of R-37. In this respect, we also note that the land in question is not contiguous to any portion of R-37, but will be entirely surrounded by land attached to R-1. These facts may be relevant in subsection (1) of section 79-403, R. S. Supp., 1963, but are not incorporated into subsection (2), which is concerned solely with the attachment of land in nonaccredited high school districts to accredited high school districts.

If, as appellants suggest, subsection (2) will destroy nonaccredited high school districts, that is a matter for legislative discretion. We have often said that the fixing of boundaries of school districts is exclusively a legislative function. See McDonald v. Rentfrow, 176 Neb. 796, 127 N. W. 2d 480.

Article VII, section 6, Constitution of Nebraska, provides: "The legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years."

The state is supreme in the creation and control of school districts and may as it thinks proper, modify or withdraw any of their powers, or destroy such school districts without the consent of the residents thereof, or even over their protests. See Schutte v. Schmitt, 162 Neb. 162, 75 N. W. 2d 656. This includes the power to permit the transfer of property from a nonaccredited high school district to an accredited one, without regard to whether said property is contiguous to the accredited high school district.

Appellants further argue that this is not a case involving a change of boundary recommended by a public body, but is rather a change of boundary proposed by a private petitioner and constitutes a delegation of legislative power to an individual. They quote language from Elliott v. Wille, on rehearing, 112 Neb. 86, 200 N. W. 347, to suggest that even in cases where the Legislature has properly authorized private individuals to fix boundaries, there must be some provision for deter-

mining whether the action is for the public health, convenience, or welfare. That case involved the formation of a public power district, is not analogous to the situation herein, and has no application in any way.

The fixing of boundaries of school districts is exclusively a legislative function, but it may properly be delegated provided the Legislature prescribes the manner and the standards under which the power may be exercised. McDonald v. Rentfrow, 176 Neb. 796, 127 N. W. 2d 480. We determine that in subsection (2) the Legislature has prescribed the manner and the standards. A petition must be filed with a designated board giving reasons for the request and four specific standards or requirements must be met to entitle a freeholder to the right to request a transfer of the land. These requirements are keyed to the educational welfare of the children resident on the land. It is true that a landowner must take affirmative action if his land is in a nonaccredited high school district and he wishes the children resident thereon to have the benefit of an accredited high school. This in no sense can be considered a delegation of legislative power. After he files his petition, the designated board must find compliance with the jurisdictional requirements of the act before it is required or permitted to grant the transfer. Contrary to appellants' contentions, the duties of this board are purely administrative in determining whether certain facts exist which the Legislature has decided entitles a petitioner to have his land transferred. The board in no sense exercises legislative discretion. It is the law which works the desired change, not the board. The board merely facilitates the execution of the legislative process.

Appellants also argue that subsection (2) purports to delegate the legislative function of changing the boundaries of school districts to the district court. What has been said heretofore is a sufficient answer to this contention. The court does not fix boundaries. It merely

inquires into and determines whether or not the evidence produced shows a sufficient compliance with the procedure and statutory requirements to justify the transfer.

Appellants argue subsection (2): "* * * is unconstitutional because it uses an arbitrary and vague criterion, distinction of classification of high school districts, when it states the land located in a 'non-accredited high school district' shall arbitrarily be transferred to an 'accredited high school district.' "

Section 79-328, R. S. Supp., 1963, and section 79-1247.02, R. R. S. 1943, relate to the accreditation of high schools. Appellants argue these statutes authorize the State Board of Education and the State Department of Education to provide rules and procedures for the accreditation of high schools, but contend that neither of them nor any statute in pari materia with them establishes any standards or limitations for such certification as are required to meet the provisions of Article II, section 1, and Article III, section 1, Constitution of Nebraska. There is no merit to appellants' contention. Appellants ignore the fact that this specific issue has been previously determined adversely to their contentions in School Dist. No. 8 v. State Board of Education, 176 Neb. 722, 127 N. W. 2d 458. We there held subdivision (5) (c) of section 79-328, R. S. Supp., 1961, which permits the State Board of Education through the Commissioner of Education, to: " '* * * establish rules and regulations based upon the program of studies, guidance services, the number and preparation of teachers in relation to the curriculum and enrollment, instructional materials and equipment, science facilities and equipment, library facilities and materials, health and safety factors in buildings and grounds, and procedures for classifying, approving, and accrediting schools, for approving the opening of new schools, for the continued legal operation of all schools, * * *' " is not invalid in that it confers legislative powers upon the State Department of

Education in violation of Article II, section 1, of the Constitution of Nebraska.

In Meyerkorth v. State, 173 Neb. 889, 115 N. W. 2d 585, we held that section 79-1247.02, R. R. S. 1943, did not go beyond protecting the interests of the state in education, and determined that said statute and others in pari materia therewith were not unconstitutional.

As heretofore stated, the Legislature has the authority to provide for the transfer of land from nonaccredited to accredited high school districts, and subsection (2) which accomplishes that purpose adequately prescribes the manner and standards under which that power is to be exercised. We determine subsection (2) to be constitutional as applied to the facts herein.

For the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.

GRACE A. WATTS, APPELLEE, V. GEORGE ZADINA, APPELLEE, IMPLEADED WITH MUTUAL OF OMAHA INSURANCE COMPANY, A NEBRASKA CORPORATION, APPELLANT.

139 N. W. 2d 290

Filed January 4, 1966. No. 36023.

1. **Master and Servant: Negligence.** The burden of proof is upon the plaintiff in an action against an employer for the negligence of his employee to establish by a preponderance of the evidence that the employee was acting in the scope of his employment at the time the act of negligence was committed.
2. **Master and Servant: Automobiles.** Proof that an employee was performing service for his employer at the time employee's automobile collided with the automobile of another because of employee's negligence may be proved by circumstantial evidence.
3. **Master and Servant: Trial.** Such evidence, to be sufficient to sustain a verdict or require submission of the case to a jury, must be of such character and the circumstances so related to each other that an inference fairly and reasonably arises that the fact sought to be established is true.
4. ———: ———. Whether or not an act was done by an em-

ployee in the execution of his employer's business, within the scope of his employment, is a question of fact. Each case must be determined in the light of the surrounding facts and circumstances, the character of the employment, and the nature of the wrongful act.

5. ———: ———. Where the facts and circumstances are such that a reasonable inference may be drawn that an employee was performing services incidental to his employment when an accident occurred, the question is for the trier of the facts.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Affirmed.

Haney, Walsh & Wall, for appellant.

Frost, Meyers & Farnham and John B. Abbott, for appellee Watts.

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

CARTER, J.

Plaintiff, Grace A. Watts, brought this action for damages for injuries sustained in an automobile collision between an automobile driven by her and one operated by the defendant, George Zadina. The Mutual of Omaha Insurance Company was made a party defendant, plaintiff's petition alleging that Zadina was an employee of Mutual and engaged in the business of the employer at the time of the collision. The jury returned a verdict for $8,000 against each of the defendants. Mutual has appealed. Zadina did not appeal and the judgment has become final as to him.

The primary and controlling issue on the appeal is whether or not the evidence is sufficient to sustain a judgment that Zadina was acting within the scope of his employment with Mutual at the time of the accident. Motions for a directed verdict and judgment notwithstanding the verdict were made by Mutual at proper stages of the trial.

The collision occurred at the intersection of Vinton Street and Hanscom Boulevard in Omaha, Nebraska, on

January 2, 1962. Plaintiff was traveling west on Vinton Street and Zadina was traveling south on Hanscom Boulevard immediately prior to the collision. Questions of negligence and contributory negligence were determined by the jury, and no error is assigned as to the correctness of the manner in which these issues were submitted. Mutual complains by proper assignment of error that a verdict should have been directed in its favor because of insufficient evidence to submit to the jury the question as to whether or not Zadina was engaged in the business of Mutual at the time of the accident.

The evidence shows that Zadina was employed by Mutual from December 1961, until November 1962. His position was that of an inspector and investigator of new applicants for insurance and questionable claims. He was paid a flat salary and furnished his own automobile for which he was paid on a mileage basis. He was assigned no days or hours of work, and he handled the work assigned to him as he chose. He reported the results of his investigations as they were completed. Mutual had no information as to when he was working for the company or engaged in his personal pursuits. Immediately following the accident Zadina called Mutual and it sent one Jack Clark, an employee of Mutual, to the scene of the accident. At the time of trial the whereabouts of Zadina was unknown. Clark was a resident of Sacramento, California, and did not testify. It was on this evidence that the trial court submitted the issue as to whether Zadina was in the course of his employment at the time of the accident. It is Mutual's contention that the evidence is insufficient to sustain a reasonable and logical inference that Zadina was in the scope of his employment when the accident occurred.

The record presents a close question of fact. Zadina was an employee of Mutual. Days and hours were not assigned for the performance of his work, nor does it appear that he worked in a limited area. Mutual knew that he used his automobile in the performance of his

work because it paid him mileage for using his car. At the time of the accident Zadina was driving south, a direction away from both his home and Mutual's place of business. Mutual had a rule that employees were to report any and all accidents to it in writing. Zadina made no such report, but Clark did report the accident orally to a superior officer. Zadina was paid a flat salary and it is argued that it is presumed that he worked usual working hours. He was a full-time employee. From this it is argued that since the accident occurred on a Tuesday at 10:45 a.m., it may be inferred that he was performing service for Mutual. The evidence shows that immediately following the accident Zadina reported it by telephone to Mutual and that Mutual sent Clark to the scene of the accident. It is argued that this indicates the accident was in the course of the employment. The telephone call was not, of course, in compliance with Mutual's requirement that all automobile accidents by its employees be reported in writing.

The accident occurred on January 2, 1962, and according to the evidence Zadina remained in the employ of Mutual until November 1962. The petition in this action was filed on October 25, 1962, at a time when Zadina was in the employ of Mutual, the record showing that Zadina remained in Mutual's employ until the day after election in that year, to wit, November 6, 1962. The employment of Zadina is admitted and Mutual offered no evidence that he was not in its service at the time of the accident. From this it is argued that Mutual had the means of obtaining the evidence of Zadina and that its failure in this respect constitutes a circumstance favorable to the plaintiff. In support thereof plaintiff cites Morris v. Equitable Life Assurance Society, 109 Neb. 348, 191 N. W. 190, wherein it is said: "It is a rule well established that uncontradicted evidence should ordinarily be taken as true, and that where the evidence tends to establish a fact which it is within the power and to the interest of the opposing party to dis-

prove if false, his failure to attempt to disprove it strengthens the probative force of the evidence tending to prove it." See, also, Edwards v. Gisi, 45 F. Supp. 17. In relating the foregoing rule to the case at bar we hold that in a circumstantial evidence case uncontradicted evidence should ordinarily be taken as true, and failure to attempt to disprove what could have been disproved, if false, though not substantive proof, strengthens the probative force of such evidence. The weight and credibility of the evidence remains, however, with the trier of the facts.

The burden of proof is upon the plaintiff to establish that Zadina was engaged in the service of Mutual at the time of the accident. Klentz v. Transamerican Freightlines, Inc., 173 Neb. 53, 112 N. W. 2d 405. Proof that an employee was in the service of his employer at the time of an accident may be established by circumstantial evidence. Goodwin v. Omaha Printing Co., 131 Neb. 212, 267 N. W. 419. The burden of establishing a cause of action by circumstantial evidence requires that such evidence, to be sufficient to sustain a verdict or require submission to a jury, must be of such character and the circumstances must be so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved. Howell v. Robinson Iron & Metal Co., 173 Neb. 445, 113 N. W. 2d 584; Petracek v. Haas O. K. Rubber Welders, Inc., 176 Neb. 438, 126 N. W. 2d 466. Whether the act was done in the execution of the employer's business, within the scope of his employment, is a question of fact. Each case must be determined in the light of the surrounding facts and circumstances, the character of the employment, and the nature of the wrongful act. Whether or not the act was or was not such as to be within the scope of the employment is, ordinarily, one of fact for the determination of the jury. LaFleur v. Poesch, 126 Neb. 263, 252 N. W. 902; Niemeyer v. Forburger, 172 Neb. 876, 112 N. W. 2d 276.

The unavailability of Zadina to testify does not, of course, remove the only source of proof as to whether or not he was engaged in his employer's business at the time of the accident. That he was so engaged may be shown by the facts and circumstances existing before and at the time of the accident. Mutual admits that Zadina was a full-time employee, being paid on a flat salary basis. The accident occurred on a work day within usual working hours. At the time of the accident he was not at a place from which he was restricted by his employment agreement. When the accident occurred he called his employer, who sent another employee, Clark, to the scene of the accident. The employee sent to the scene of the accident was Mutual's selection and not that of Zadina. There is nothing to indicate that the telephone call was made and Clark sent to the scene of the accident other than because of the employer-employee relationship. Mutual has not produced, nor offered, any evidence indicating that Zadina was engaged in his personal pursuits at the time of the accident. Under these circumstances we think a jury could reasonably and fairly infer that Zadina was in the course of his employment at the time of the accident. This being true, the trial court did not err in submitting the case to the jury. Since this determination disposes of all assignments of error adverse to Mutual's contentions, the judgment of the district court is affirmed.

AFFIRMED.

GUY MITCHELL ET AL., APPELLANTS, V. VERA WILCOX ET AL., APPELLEES.

139 N. W. 2d 293

Filed January 4, 1966. No. 36029.

1. **Estates: Gifts.** A transfer of property by a donee of a power of sale annexed to a life estate must be made in good faith

for an adequate consideration; and if the donee exceeds his authority, the court will revise his judgment.

2. **Contracts.** Words of condition in a promise may indicate a request for a consideration if the happening of the condition will be a benefit to the promisor.

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

Aten & Noble, for appellants.

Anderson, Storms & Anderson, for appellees.

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

SMITH, J.

The principal issue in this declaratory judgment action is the adequacy of the consideration for a real estate conveyance under a power of sale annexed to a devise of a life estate. The district court upheld the transaction, and plaintiffs have appealed.

The subject matter of the conveyance is an apartment house located in Alma, Nebraska. The owner, Margaret M. Wilcox, died on May 11, 1962, leaving a will in which the power of sale was coupled with a devise of the life estate to her husband, Henry Edwin Wilcox. She devised the remainder interest in unsold land to her two brothers and a sister, who are plaintiffs. The testamentary language is as follows:

"I * * * devise to Henry Edwin Wilcox a life estate in all of the remainder of my real estate * * *, and I hereby vest in * * * (him) full power and authority to sell and dispose of said real estate, or to mortgage the same, and to execute, acknowledge and deliver deeds, contracts, mortgages, notes, and other instruments required to carry this power into effect without the authority of any court whatsoever. Upon the termination of said life estate, all such real estate not sold by * * * Henry * * * shall descend to * * * (plaintiffs)."

In another paragraph Margaret devised to her husband

as trustee an undivided one-half interest in 800 acres of land located in Colorado. After payment of mortgage installments, taxes, and expenses the trustee was to distribute the income to himself individually for life. Five years after the death of Henry the successor trustee was to sell the property and distribute the proceeds.

On May 18, 1962, Henry executed a warranty deed conveying the fee in the apartment house for $1 and other valuable consideration. The grantee was defendant Vera Wilcox, the widow of a son of Henry and Margaret. Henry delivered the deed to his attorney with instructions to hold it for future escrow.

On May 26, 1962, Henry and Vera signed an instrument which recited that for more than 2 years she had faithfully and constantly attended him and Margaret without adequate compensation; that his health was frail; that he needed the services of Vera as nurse and housekeeper; and that he had delivered the warranty deed to be held in escrow.

In the operative part of the instrument the parties agreed that in compensation for the past services rendered by Vera the escrow agent was to deliver the deed to her upon the happening of certain conditions which included the following: Vera should continue to care for him and to keep house, and all household expenses and a monthly "stipend" of $100 were to be his obligation. He reserved the right during his lifetime to occupy the premises and to receive the rents and profits.

The parties also agreed that in addition to, and as a part of, the consideration Henry was selling her all his personal property, furniture and fixtures, and household goods used in the apartments in the house, the sale being subject to his life estate.

Vera's services had commenced in January 1960 with her removal from California to the apartment house at the request of Henry. On March 10, 1960, they entered into a written contract of employment. It recited that Margaret needed an attendant because of her advanced

age and infirmities. Vera agreed to live with them and to render services including laundry, housekeeping, cooking for occupants, and care of Margaret. Henry agreed to provide board and room and to pay Vera $100 per month plus an annual bonus of $100 conditioned on faithful performance. The contract was terminable by either party on prior written notice of 2 weeks. Vera fully performed this agreement as well as the conditions of the escrow.

The health history of Henry prior to the escrow is indefinite. He recuperated from illness many times. He signed the escrow agreement at home subsequent to a hospitalization, but he was getting along all right. Only age suggested that he was soon to die, but death occurred May 30, 1962. Neither the nature of his illness nor the cause of his death is shown.

A transfer of property by a donee of a power of sale annexed to a life estate must be made in good faith for an adequate consideration; and if the donee exceeds his authority, the court will revise his judgment. Attebery v. Prentice, 158 Neb. 795, 65 N. W. 2d 138; Abbott v. Wagner, 108 Neb. 359, 188 N. W. 113.

To label the transaction in question a gift, plaintiffs seize upon the provision in the escrow agreement that the conveyance was additional compensation for past services. The provision for future services is said to have been a condition in a gratuitous promise.

There was no gift. The 1960 contract had terminated at the death of Margaret, and the 1962 contract was not a gratuitous modification. To call the provision for future services a condition of a gift is to disregard intention and place form ahead of substance. The benefit to Henry is undeniable, and the benefit was bargained for.

" 'It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining

which construction of the promise is more reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration * * *.'" Allegheny College v. National C. Co. Bank, 246 N. Y. 369, 159 N. E. 173, 57 A. L. R. 980. See, also, 1 Williston on Contracts (3d ed.), § 112, p. 445.

The argument on adequacy of the consideration is directed to evidence of Henry's motives and to a comparison of the terms of the 1960 and 1962 contracts. The value of the land and personal property was not proved, but in the posture of the argument this failure should be added to other intangibles affecting the contract. The parties have made nothing out of the omission, and monetary worth apparently is not significant if plaintiffs' contentions are not well taken.

Oral statements made by Henry subsequent to the death of Margaret indicate a mixture of motives. He asked plaintiffs to sign a release on the ground that Margaret had made a mistake in her will. They refused and no form was prepared. Another oral statement may be related indirectly. Henry told Vera that she was to have the house because she had been good to him. The implications of the declarations are diluted by other evidence. Henry himself had little personal property, and at that time personal property was not on hand for payment of debts and administration expenses in the estate of his wife.

We look at the consideration as of the time of the contract. See Dalton v. Florence Home for the Aged, 154 Neb. 735, 49 N. W. 2d 595. Henry's motives were consistent with a valid agreement. No doubt affectionate care was an important element of the contract, and properly so. See, Copass v. Wilborn, 139 Neb. 124, 296 N. W. 565; Griffin v. Kitchen, 225 Mass 331, 114 N. E. 431. In our opinion Henry did not push gratitude and affection to the point of an inadequate consideration. Our conclusion is not weakened by a comparison of the

two contracts. One consideration cannot be measured fairly by the other. If the services rendered under the contracts had the same value, we meet the recital in the later one concerning inadequate compensation. If the services had different values, the comparison fails on this record.

Plaintiffs also say that Henry's income from the Colorado land was sufficient for his support and consequently that the sale of the apartment house was unnecessary. We do not know the amount of his income or his prospective income, but we do know that he had little personal property. Margaret gave him some latitude of judgment, and his decision to sell respected her testamentary intention.

The judgment was correct and it is affirmed.

AFFIRMED.

MARIE M. FOWLER, APPELLEE, V. BENSON F. BACHUS, APPELLANT.

139 N. W. 2d 213

Filed January 4, 1966. No. 36036.

1. **Witnesses: Evidence.** Under circumstances where the opinion of an expert medical witness becomes, in effect, a "fact" in the case, such an opinion may be included as a basis for a hypothetical question propounded to another expert, where it is not upon the precise question upon which the opinion is expressed.
2. ———: ———. If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient.
3. **Evidence: Appeal and Error.** Review is limited where a general objection has been overruled. It reaches only an obvious flaw; otherwise specification is required.
4. ———: ———. In dealing with the admission of questions calling for expert medical opinion, much must be left to the discretion of the trial court; and its rulings will ordinarily not be revised unless they are plainly prejudicial to the rights of the excepting party.

5. **Negligence: Trial.** Where a verdict is directed against the defendant on the issue of negligence, the plaintiff is not relieved from the burden of proving that the injuries were proximately caused by the negligence of the defendant, and the amount and nature of the damages.

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

Stoehr, Rickerson & Caporale, for appellant.

Abrahams, Kaslow, Story & Cassman and Robert C. Oberbillig, for appellee.

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

MCCOWN, J.

At the trial of an action for personal injuries received by the plaintiff in an automobile accident, the court directed liability on the issue of negligence against the defendant, and the jury returned a verdict for the plaintiff for $1,000. The plaintiff's motion for a new trial was sustained, and the defendant has appealed from the order granting a new trial.

The injuries plaintiff complained of were to the cervical and lumbar areas of the back. These same two areas were involved in injuries received by the plaintiff in a previous automobile accident which occurred in January 1961. As a result of the first accident, a cervical disk was removed and the cervical vertebrae were fused. A resection of the disk in the interspace between the fourth and fifth lumbar vertebrae was also done, and the herniated disk was excised. This was not followed by fusion. The cervical surgery was performed in January 1962, and the lumbar surgery in February 1962.

In the second accident, which occurred on January 25, 1963, the plaintiff first complained about her neck or cervical area, and later about pain in her leg, which related to the back area. The neck area cleared up in a

short time, but on June 11, 1963, surgery was again performed at the identical interspace between the same two lumbar vertebrae as in the prior operation following the first accident. Further herniation of the disk was found and fragments of disk removed.

The plaintiff relies upon two grounds as justifying the trial court's action in granting the motion for a new trial. One involved the overruling of an objection to a question involving medical testimony. The other is that the amount of damages allowed by the jury was inadequate.

One of plaintiff's physicians testified that as a result of the January 1961 accident, and the operations which followed, it was his opinion that the plaintiff had somewhere between 30 percent to 35 percent permanent partial disability of the body as a whole. He also testified that the result obtained from the back operation done in February 1962, was a satisfactory result. Another of plaintiff's physicians testified that in March 1962, he wrote a letter opinion with reference to the results of the accident of January 1961, and stated: "The patient has a permanent partial disability of between thirty and forty per cent to the body as a whole."

Dr. Gross, an orthopedic surgeon who had examined the plaintiff on behalf of the defendant following the second accident, was asked the following question: "Well, Doctor, in connection with the testimony here, there has been testimony by the two treating doctors of the Plaintiff, Dr. Margules, who did all of the operations, the cervical, the first disk operation and the second disk operation, and by Dr. Ladwig, who also treated her on both of them, in reference to the percentage of disability of the body as a whole after the accident of January, 1961 but prior to the accident of January, 1963 that we are concerned with. Based upon your examination in this case and based upon the further fact that Dr. Margules placed her disability after the first accident and before the second accident at thirty to thirty-five per

cent of the body as a whole and Dr. Ladwig testified that her disability after the first accident and before the second accident or accident of January, 1963, that her disability, her permanent partial disability was thirty to forty per cent of the body as a whole, do you have an opinion as to whether or not there was a good result obtained in the first operation on her back in February, 1962?"

The objection to this question was: "Your Honor, I object to this, I don't think the Doctor has any foundation, there has been no foundation laid as to giving such an opinion; he hadn't examined her at that time. He certainly did not follow her after the treatment at that point and I don't believe he would be in a position to give such opinion." The objection was overruled; the witness answered: "Yes." He was then asked: "And what is that opinion, Doctor?" The answer was: "Well, if a person has that type of a disability they obviously have had a very poor result."

The plaintiff contends that this testimony violates the frequently quoted rule that the opinion of an expert witness which is predicated, in whole or in part, upon the opinions of other witnesses, whether lay or expert, is inadmissible. See, 20 Am. Jur., Evidence, § 791, p. 665; 2 Jones on Evidence (5th Ed.), § 421, p. 796. It was upon this ground that the trial court granted the motion for new trial.

While the general rule has been stated time and again, its application and interpretation have troubled American courts almost from the beginning. It is quite clear that a medical expert may base his opinion upon "facts" testified to by another expert, but it is ordinarily said that he may not generally base his opinion upon the "opinion" of another expert. VII Wigmore on Evidence (3d Ed.), § 1919, p. 14, states: "* * * there is no virtue in any test based on the mere verbal or logical distinction between 'opinion' and 'fact.' * * * the law takes no more special account of a logical difference between

'opinion'-testimony and 'fact'-testimony than between testimony by a short witness and testimony by a tall witness."

Again, II Wigmore on Evidence (3d Ed.), § 682, p. 810, states: "It is sometimes said that 'an opinion of an expert cannot be based upon opinions expressed by other experts'; but this is unsound. Keeping in mind that the ordinary distinction between 'fact' and 'opinion' has here no value, it will be seen that the basis for a hypothetical opinion may be either data observed or data inferred, and that inferred data presented by expert testimony may equally well become a part of the basis for a hypothetical question; * * *. There is no mysterious logical fatality in basing 'one expert opinion upon another'; it is done every day in business and in applied science." The pocket part supplement to this section at page 277 adds: "For that matter, 'in everyday trials factual opinions or conclusions of both lay and expert witnesses are utilized in hypothetical questions.' "

The cases cited in support of the rule, including the Nebraska cases cited by the plaintiff, almost invariably involve the assumption of a fact not testified to, or not determinable from the evidence, or a witness expressing an opinion not his own; all of which might be characterized as being generally within the hearsay rule. In some instances, the rule has been applied where the expert is asked to base his opinion upon the opinion of another expert covering the precise question upon which the opinion is expressed. This case fits none of these categories.

In this case, the testimony of plaintiff's doctors as to the percentage of disability of the body as a whole after the first accident and before the second, was the "opinion" or "inference" of those doctors as to an ultimate "fact." There was no conflicting evidence upon the issue, and the question presented as inferred data, the "fact" which the evidence tended to prove. In the circumstances here present, where the opinion of an ex-

pert medical witness becomes, in effect, a "fact" in the case, such an opinion may be included as a basis for a hypothetical question propounded to another expert, where it is not upon the precise question upon which the opinion is expressed.

As stated in 2 Jones on Evidence (5th Ed.), § 418, p. 790: "In any event, there is substantial support for the rule that, if the hypothetical question properly presents the fact which the evidence tends to prove, and does not call upon the witness to reconcile conflicting evidence or to pass upon the merits of the case, a wide range may be given by the court, and a liberal discretion allowed as to its form."

As this court stated in Chambers v. Chicago, B. & Q. R.R. Co., 138 Neb. 490, 293 N. W. 338: "If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient."

In any event, the objection that a question bases the opinion of one expert upon that of another necessarily must be to the form of the question itself, and also must be determinable from an inspection of it. The only objection made at the trial was a general one going to foundation. This court stated in Campbell v. City of North Platte, 178 Neb. 244, 132 N. W. 2d 876: "Review is limited where a general objection has been overruled. It reaches only an obvious flaw; otherwise specification is required. The purpose is to ease the burden on the trial court and to permit correction by the questioner."

It is obvious that upon specific and proper objection, the question here could have been rephrased to make the testimony clearly admissible. No objection was made by the plaintiff at the trial that the question called for an opinion based upon an opinion. It was not apparent from the question itself and a mere inspection of it would not establish that it called for an opinion upon an opin-

ion. The issue of the result of the first operation on the lumbar area of the plaintiff's back, as well as the issue of the plaintiff's condition after the first accident, was raised by the plaintiff, and the defendant was entitled to test the issue by the testimony of a qualified expert witness. The trial was over, verdict in, and judgment entered before any contention was made that the question here involved an opinion based on an opinion.

While the requirement of form might have been insisted upon if raised, the bill of exceptions indicates no substantial prejudice to the plaintiff. There was other testimony of Dr. Gross in the record that normally a good result in a lumbar disk operation has a disability of 10 percent, occasionally 15 percent, and also that the plaintiff's specific disability from the total cervical injury was 5 percent. He also testified, without objection, that the normal 10 percent or 15 percent disability resulting from a good lumbar disk operation was, in part, the basis for his statement that the plaintiff could not have had a good result in February 1962, if her doctors were believed on the percentage of disability that she had after the first accident.

In dealing with the admission of questions calling for expert medical opinion, much must be left to the discretion of the trial court; and its rulings will ordinarily not be revised unless they are plainly prejudicial to the rights of the excepting party. See King v. Belmore, 248 Mass. 108, 142 N. E. 911.

The plaintiff also contends that the amount of the damages allowed was clearly inadequate under the evidence. The trial court quite properly determined that the jury could have found that the damages, or part of them, were not the direct and proximate result of the second accident only, but resulted in whole or in part from the original accident and subsequent operations.

Where a verdict is directed against the defendant on the issue of negligence, the plaintiff is not relieved from

the burden of proving that the injuries were proximately caused by the negligence of the defendant, and the amount and nature of the damages. Cooper v. Hastert, 175 Neb. 836, 124 N. W. 2d 387.

The weight of the evidence and the credibility of witnesses are for determination by the jury. Under the circumstances in this case, the plaintiff has failed to establish prejudicial error in the record which will justify the granting of a new trial.

For the reasons stated, the action of the court in granting the motion for new trial was in error, and the order granting a new trial is vacated and the cause remanded with directions to reinstate the verdict of the jury and the judgment thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANT, V. MISSOURI VALLEY CONSTRUCTION COMPANY, APPELLEE.

139 N. W. 2d 222

Filed January 4, 1966. No. 36037.

Contracts. The terms of a written contract may be changed by a subsequent parol agreement of the parties at any time before breach.

Appeal from the district court for Buffalo County: NORRIS CHADDERDON, Judge. Affirmed.

H. L. Blackledge, for appellant.

Tye, Worlock, Knapp & Tye, for appellee.

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

BOSLAUGH, J.

This is an action by the United States Fidelity & Guaranty Company as plaintiff against Missouri Valley Con-

struction Company to recover the amounts paid by the plaintiff to the executor of the estate of Nicholas J. W. Shada under the Workmen's Compensation Act. The plaintiff is the insurance carrier for Carl Whitney. Shada died as the result of injuries sustained in an accident on October 21, 1958, while employed by Whitney. Whitney's liability to the executor of Shada's estate was established in a previous action in which both Whitney and the defendant were parties. See Shada v. Whitney, 172 Neb. 220, 109 N. W. 2d 167.

The petition in this action alleged that the defendant and Whitney had entered into a contract by which Whitney agreed to furnish gravel trucks and drivers to the defendant; that the contract provided that the defendant " 'will hire and furnish the drivers of said trucks and will pay the wages of such drivers, including any employer's contributions required by law' "; and that the plaintiff as subrogee of Whitney was entitled to reimbursement from the defendant for the amounts paid for the death of Shada under the Workmen's Compensation Act.

The answer alleged that the contract referred to in the petition was never executed but was disregarded by agreement of the parties; that the defendant did not hire Shada; and that the judgment in the previous action was res judicata.

In the district court a jury was waived and the action tried to the court. The district court found generally for the defendant and dismissed the action. The plaintiff's motion for new trial was overruled and it has appealed.

The question presented by the appeal is whether the evidence is sufficient to support the decision and judgment of the district court.

The plaintiff's theory of the case is that the truck rental agreement is controlling. The plaintiff contends that the provision in the truck rental agreement that the defendant would hire the drivers and pay their

wages, including any employer's contribution required by law, made the defendant liable to Whitney for any compensation paid by Whitney to a driver as a result of an accident while hauling gravel on the defendant's job. The plaintiff contends that it is entitled to judgment as a matter of law.

There is very little conflict in the evidence. The record shows that Whitney had agreed to furnish gravel trucks with drivers to the defendant. A truck rental agreement was signed on Saturday, October 18, 1958, by Clifford Murrish, a foreman representing Whitney, and Wayne Nelson, a foreman representing the defendant. The work was then in progress and Whitney's trucks had been on the defendant's job for several days.

The truck rental agreement provided that Whitney would furnish trucks; that the defendant would pay "R. C. Rates"; that the defendant would have exclusive control and supervision over the trucks and drivers at all times; that the defendant would hire and furnish the drivers of the trucks and pay the wages of the drivers, including any employer's contributions required by law; and that the defendant would provide its own public liability and property damage coverage but was under no obligation to provide any insurance coverage for Whitney. Under "Other provisions" the contract stated: "Addendum #1."

Although the truck rental agreement provided that Whitney would furnish the trucks and the defendant would hire the drivers, the defendant intended to use Whitney's drivers to operate the trucks. In order to carry Whitney's drivers on the defendant's payroll it would have been necessary for the defendant to obtain information concerning the age of each driver, his dependents, social security number, and home address. This information was never furnished to the defendant by Whitney.

Although the truck rental agreement provided that the defendant would hire the drivers, the defendant had

agreed to pay "R. C. Rates." An R. C. rate is a railway commission rate for hauling material on a yard-mile basis. In order to operate under the truck rental agreement at R. C. rates it would have been necessary for the defendant to deduct the wages paid to the drivers from the amount due Whitney as computed under the R. C. rate. The "Addendum #1" referred to in the truck rental agreement was an authorization to the defendant to deduct "all wages, including employer's contributions required by law" paid to the drivers from the rental computed at the fully operated R. C. rate. The addendum No. 1 was never signed or furnished to the defendant.

Murrish and Nelson discussed the matter of how the drivers would be paid. Nelson advised Murrish that the defendant would pay drivers only for actual hauling. It was Whitney's custom to pay his drivers for all of the time that they worked including time spent in repairing and servicing the trucks and moving on and off the job. Murrish and Nelson agreed that the drivers would remain on Whitney's payroll and thus avoid the necessity of dividing the drivers' time, keeping duplicate time records, and making two payrolls. This agreement was followed. The defendant kept no record of the drivers' time and did not pay any of Whitney's drivers. Whitney paid his drivers as usual. The defendant paid Whitney on the basis of R. C. rates without any deduction for wages paid to drivers.

The evidence also shows that Whitney retained control over the trucks and drivers while they were hauling gravel for the defendant. Whitney retained the right to hire and fire the drivers, lay them off, or assign them to another job. On one occasion the trucks were used by Whitney to haul equipment to Palisade, Nebraska, on another job. The only supervision of the operation of the trucks by the defendant related to the time when hauling was to begin and stop, where the gravel was to be hauled, and general supervision of safety on the job.

The plaintiff's theory is that the drivers were really employees of the defendant; that Whitney paid their wages as a convenience to the defendant; and that the contract between Whitney and the defendant was an agreement on the part of the defendant to assume all of the liabilities of an employer to the drivers. The evidence does not support this theory.

The truck rental agreement in its original form remained executory, was never completed, and was never performed by either party. The agreement that was performed by the parties was a modification of it. Under the agreement as modified, the defendant did not hire the drivers, pay them, or maintain exclusive control and direction over them. The drivers remained in the employ of Whitney and were never hired by the defendant or paid by the defendant. This court reached a similar conclusion in the previous action. Shada v. Whitney, *supra.*

The terms of a written contract may be changed by a subsequent parol agreement of the parties at any time before breach. Bowman v. Wright, 65 Neb. 661, 91 N. W. 580; Wolf v. Tastee Freez Corp., 172 Neb. 430, 109 N. W. 2d 733. The evidence in this case shows the modification of a written contract by a subsequent oral agreement.

The record fully supports the decision and judgment of the district court which is affirmed.

AFFIRMED.

ARO INVESTMENT COMPANY, A CORPORATION, APPELLEE, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, IMPLEADED WITH JAMES J. DWORAK, MAYOR OF THE CITY OF OMAHA, NEBRASKA, ET AL., APPELLEES.

139 N. W. 2d 349

Filed January 14, 1966. No. 35956.

1. **Injunction.** A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle

him to relief, for injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.

2. **Municipal Corporations.** It is not necessary that a municipality accept and open a street for public use until public necessity requires it.
3. ———. Even though a dedication of a street is accepted by the city, until the city manifests some intent to use it or it has been used as a street there is no public use and no rights will accrue in said street as against the city.
4. ———. It is not essential that there should be any prescribed formal declaration but there must be use or some other act indicating its status as a street by those authorized in such matters to represent the public to complete the dedication.
5. ———. Vacated Thirty-sixth Street was never opened, improved, maintained, or used in any manner as a street. Consequently the plaintiff and its predecessors in interest could not acquire any interest therein which would force the city to use said street or permit the plaintiff to contest its vacation.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Reversed and dismissed.

Herbert M. Fitle, Bernard E. Vinardi, Frederick A. Brown, Edward M. Stein, Sebastian J. Todero, Walter J. Matejka, and Frederick S. Geihs, for appellant.

Jack W. Marer and Seymour L. Smith, for appellee Aro Inv. Co.

Michael J. Dugan and Kelley, Grant & Costello, for appellee Seliga.

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

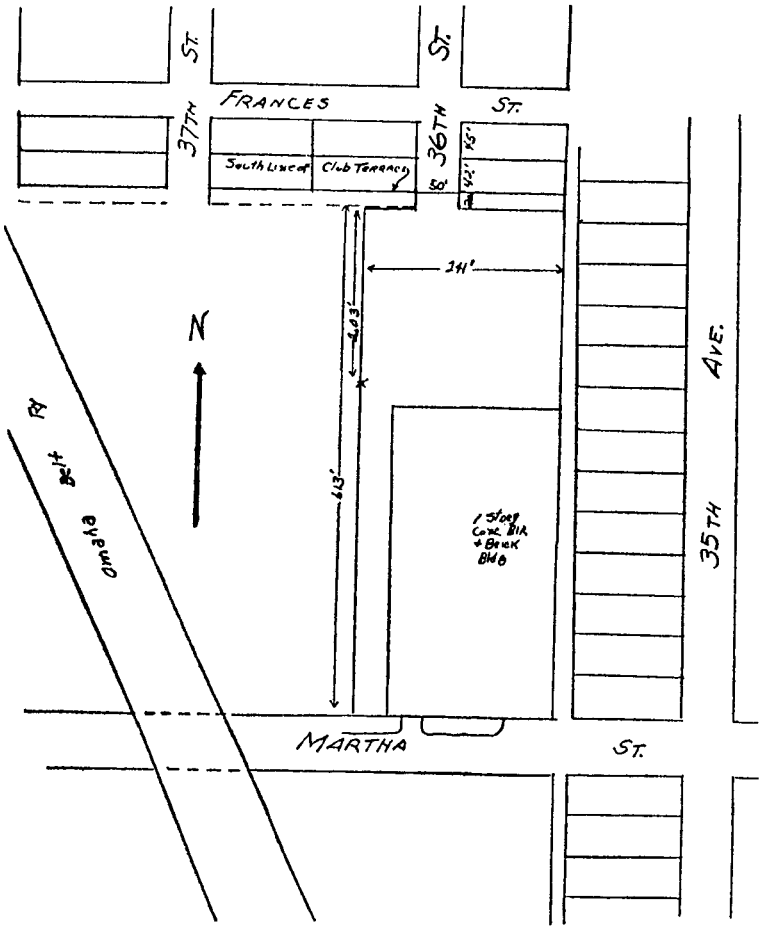
SPENCER, J.

This is an action brought by the Aro Investment Company, a corporation, hereinafter referred to as plaintiff, against the city of Omaha, the mayor and the members of the city council, and the property owners abutting on the sides of what will hereinafter be designated as vacated Thirty-sixth Street. The action is to restrain the enforcement of ordinance No. 22375 of the city of

Omaha vacating and closing Thirty-sixth Street from Frances Street to a point 87 feet south of Frances Street in the city of Omaha, hereinafter designated as vacated Thirty-sixth Street, and for a declaration of the rights of the parties under the city charter and under the Constitutions of the United States and the State of Nebraska. The district court found generally for the plaintiff, subject to specific findings of fact and conclusions of law which it is not necessary to set out herein. The defendant city of Omaha has appealed and for convenience will hereinafter be designated as defendant.

Club Terrace Addition to the city of Omaha was dedicated and accepted by the city many years ago. All streets in the addition were opened, improved, and used except vacated Thirty-sixth Street, which has never been opened or used as a street. On the plat it is an 87-foot extension of Thirty-sixth Street south of Frances Street, and dead ends on the south edge of Club Terrace Addition. Plaintiff's property, which is now zoned as industrial property, except for the "nub" described later, lies 20 feet south of and parallel to the south line of Club Terrace Addition on the south. Its ownership antedates the vacation ordinance but not the plat of Club Terrace Addition. Plaintiff's property includes a "nub" the width of Thirty-sixth Street, which directly adjoins the dead end of the street on the south and connects with plaintiff's property 20 feet south of the south line of Club Terrace Addition. Plaintiff alleges this "nub" was purchased for the purpose of providing access to and from plaintiff's property lying immediately south of it, which comprises a rectangle 613 feet north and south by 241 feet east and west, to Thirty-sixth Street. This "nub" is not and never has been a part of Club Terrace Addition. There is a 20 to 25 foot difference in grade between the residences to the side of vacated Thirty-sixth Street and the industrial tract owned by the plaintiff. It was the testimony of the city planning director that any grade for a street would have to be extremely steep. Plain-

tiff's property is bordered on the south by Martha Street and on the east by an alley with access to both Martha Street and Frances Street. The plaintiff has improved the southern portion of its property and the judgment of the trial court applies only to the north 203 feet. The following plat will clarify the location and the relative positions of the property involved.



Three individuals who owned all of the property on both sides of vacated Thirty-sixth Street initiated the

vacation proceedings by petition. They were made parties herein, but did not appeal from the judgment of the trial court. The vacation was approved by the planning board, who recommended it to the city council over the objections and protest of the plaintiff. The objections and the protest were sent to the city council with the recommendation. The city council held a hearing at which plaintiff was represented by counsel and produced witnesses in opposition to the proposed ordinance. After the adoption of the ordinance, plaintiff filed this collateral attack upon it.

The district court determined that the plaintiff was an abutting owner of vacated Thirty-sixth Street; that in the enactment of the ordinance, it was deprived of due process of law and just compensation; that it was possessed of certain valuable rights in said street, including the right of reasonable ingress and egress in a free and unobstructed manner across Thirty-sixth Street vacated, which an equity court will protect without a showing of pecuniary loss; and that said rights accrued although the street was never opened, and although plaintiff's land abutted on the end of the street rather than the sides thereof. The district court enjoined interference with plaintiff's rights by the individual defendants. The defendant perfected an appeal to this court.

Many issues have been raised in this appeal, involving constitutional law, real property law, and municipal corporation law. Because we determine that the plaintiff has never acquired any rights in the vacated street, we do not deem it necessary to consider the issues raised. In passing, we also observe that if plaintiff had an interest in the vacated street, it also had an adequate remedy at law. A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle him to relief, for injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure

of justice. See Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622.

In the instant case, plaintiff had never used the vacated street in any way. The street had never been opened and could not be used as a street in its present condition. Further, to open it would entail considerable work and expense and if opened it would require a grade steeper than that now being approved by the city planning department. It goes without saying that the plaintiff could never have forced the city to open it.

Plaintiff alleges that it purchased the "nub" for the express purpose of providing access from its industrial property to Thirty-sixth Street. It knew at all times that the street was merely a nominal street on the plat of an adjoining addition. Certainly it could not acquire any greater rights than its predecessors in title possessed. Its predecessors in title had no interest in the street or in any property abutting on the street in Club Terrace Addition. Plaintiff had available and was using the same means of ingress and egress which had always been used by it and its predecessors in title.

While the plat of Club Terrace Addition had been of record for many years and the dedication had been accepted by the city and all other streets therein had been opened for public use, no work was ever performed by the public authorities in opening, improving, or maintaining the strip in question as a street, nor was it in any way used as a public way for vehicular or other traffic. It was at the most only a nominal street. See, Hart v. Village of Ainsworth, 89 Neb. 418, 131 N. W. 816; Johnson v. Buhman, 98 Neb. 236, 152 N. W. 403; Village of Hay Springs v. Hay Springs Commercial Co., 131 Neb. 170, 267 N. W. 398.

While the cases cited above involve a different statutory provision applying to cities of the second class and villages, the principles announced therein are applicable herein. It is not necessary that a municipality accept and open a street for public use until public necessity

requires it. Village of Maxwell v. Booth, 161 Neb. 300, 73 N. W. 2d 177. We determine that even though a dedication of a street is accepted by the city, until the city manifests some intent to use it or it has been used as a street there is no public use and no rights will accrue in said street as against the city. In this respect, it is not essential that there should be any prescribed formal declaration, but there must be use or some other act indicating its status as a street by those authorized in such matters to represent the public to complete the dedication.

In the instant case, vacated Thirty-sixth Street was never opened, improved, maintained, or used in any manner as a street. There was no public use. Consequently, the plaintiff and its predecessors in interest could not acquire any interest therein which would force the city to use said street or permit plaintiff to contest its vacation. One hundred percent of the owners of abutting taxable frontage on the vacated street petitioned for its vacation. The city proceeded in strict accord with section 14-3,107, R. R. S. 1943, which permits vacation upon the petition of the owners of 75 percent of the taxable frontage abutting upon a street, and provides for the reversion of that part vacated to the abutting owners on the respective sides thereof. Section 14-3,107, R. R. S. 1943, provides a method by which property owners in metropolitan cities may initiate a petition for the vacation of nominal streets. To secure a vacation, however, requires the express approval of the city. The plaintiff has no interest in the vacated street and consequently is in no position to question the proceedings herein.

For the reasons given, we reverse the judgment of the trial court and remand the cause with directions to dismiss.

REVERSED AND DISMISSED.

FREMONT FARMERS UNION COOPERATIVE ASSOCIATION, A NEBRASKA CORPORATION, APPELLEE, V. CITY OF FREMONT, NEBRASKA, APPELLANT, IMPLEADED WITH THE DEPARTMENT OF UTILITIES OF THE CITY OF FREMONT, NEBRASKA, APPELLEE.

139 N. W. 2d 369

Filed January 14, 1966. No. 36031.

1. **Evidence: Trial.** Where an expert gives an opinion upon facts established by the record in a matter recognized as a proper subject for expert opinion, unless impeached to such an extent as to have no probative value, it is ordinarily sufficient to sustain a verdict.
2. ———: ———. Under ordinary circumstances, expert opinion evidence is to be considered and weighed by the triers of the facts like any other testimony.
3. ———: ———. Where expert opinion evidence is in conflict, it becomes a question for the jury.

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

Sidner, Gunderson, Svoboda & Schilke and Max A. Powell, for appellant.

Richards, Yost & Schafersman, for appellee Fremont Farmers Union Coop. Assn.

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

SPENCER, J.

This is a negligence action. Trial was had on plaintiff's allegations of negligence and defendants' denial thereof, and their allegations of contributory negligence. The jury returned a verdict for the plaintiff and defendant city has perfected an appeal to this court.

The plaintiff, Fremont Farmers Union Cooperative Association, contracted for the construction of a feed mill during the forepart of 1963. On February 27, 1963, while the basement was being excavated, the contractor's caterpillar struck and ruptured a 6-inch water main

owned and maintained by the defendants, City of Fremont and Department of Utilities, who will hereinafter be referred to as defendant. The rupture occurred between 4 and 4:30 p.m. The defendant was contacted immediately and had a repair crew on the job shortly thereafter. It was necessary to shut off the water in the mains in some of the adjoining streets in the area. The water was then pumped out of the excavation by the fire department. Defendant repaired the break by removing a portion of the pipe and inserted a length of pipe and what is known as a solid sleeve connection at one end and a split sleeve connection at the other end. Defendant completed the repair between 10 and 10:30 p.m. The night was very cold and it was snowing. Representatives of the contractor, at the direction of the defendant, covered the exposed pipe and repair with corncobs to protect it from the weather. When the foundation was put in the cobs were removed and the area around the pipe was filled with packed sand, which the evidence indicated to be the usual practice. Construction was completed and the feed mill started operation June 1, 1963. On the morning of September 14, 1963, the plaintiff discovered its basement flooded. The amount of the damage sustained is not in dispute in this lawsuit. The defendant was called and the area of the previous repair was excavated. It was then determined that the trouble was in the previous repair and that the water was gushing out of the split sleeve. This split sleeve was located outside but within 3 inches of the plaintiff's basement foundation.

When the split sleeve was examined, it was discovered that of the four nuts and bolts on the north side of the sleeve three nuts were missing and the fourth bolt was broken. The defendant again repaired the water main but on this occasion used a solid rather than a split sleeve. Defendant's explanation for the change is that no split sleeve was immediately available.

Plaintiff's allegations of negligence may be stated

briefly as follows: (a) The split sleeve was an inadequate type of repair; (b) it was not adequately bolted; and (c) defendant failed to inspect and test the repairs after they were made.

The defendant denied all allegations of negligence; and alleged that the repair was made in a customary and accepted manner consonant with other water services and maintenance practices; that said repair was done in a workmanlike manner; and that it was inspected and tested after installation and found to be serviceable. Defendant further alleged that the plaintiff was contributorily negligent in constructing a feed mill in the area of the water main without reasonable regard to the possible impact damage to the water main known by the plaintiff to be in the immediate vicinity.

Defendant assigns 25 errors, many of which are repetitious and for convenience herein will be grouped. The first 13 assignments are related to its motion for a directed verdict and its motion for judgment notwithstanding the verdict, all of which is premised on the assumption that the verdict is not supported by the evidence. We do not deem it necessary to a decision herein to review in detail the four volumes of evidence or defendant's summarization thereof, which covered 44 pages of its brief. We think it sufficient to state that we have carefully read the record and defendant's review of the record, and we are of the opinion that the evidence was sufficient to require the submission of the case to the jury.

Defendant's chief complaint is its claim that the plaintiff's case is premised entirely on circumstantial evidence which is insufficient to show causation with reasonable certainty. Defendant ignores the fact that there is some direct testimony, as well as the testimony of plaintiff's expert, which testimony the jury must have accepted in preference to that of defendant's general manager and defendant's expert.

The focal point in this case is the installation of the

split sleeve. The undisputed testimony is that the bolts on the split sleeve were installed so that the nuts were underneath the installation. There was evidence from which the jury could find this to be an improper installation. Defendant's general manager, when questioned as to the proper installation of a split sleeve, testified as follows: "Q- * * * On Exhibits '1' and '2' the nut is on top of the flange, is that right? Answer, * * * 'Yes'. * * * Is that the correct installation or do you sometimes install them with the nuts underneath? * * * 'No. The nut on top is the proper installation. There is a plug on top to let the air off'."

The undisputed evidence is that on September 14, 1963, when defendant's employee uncovered the valve and reached under the north flange of the split sleeve, he turned around and said: " 'My God, there is no nuts on these bolts'." He then fished around in an attempt to find the nuts and found what appeared to be a piece of a broken nut. He also discovered that the remaining bolt had ruptured.

The February 27, 1963, repair was made in cold weather and during a snowstorm, and took from approximately 4:30 until 10:30 p.m. The two workmen who made the repair testified that each of them tightened half of the bolts. One of them testified that he later tested all of them and before he left he was satisfied there were no leaks. Some of defendant's witnesses testified they subsequently checked for leaks. Even if the jurors believed this testimony they could have found the checking was done without removing the cobs from the top of the excavation 6 feet away. Plaintiff's witnesses testified that they were on the job during working hours except for a 30-minute lunch period, and did not see any of the defendant's employees subsequently checking the repair, and that the cobs did not appear to be disturbed until they removed them.

It was the testimony of plaintiff's expert that a split sleeve, if properly installed, is a good temporary re-

pair, but in his judgment is not to be recommended as a permanent repair where there is a complete severance of the line, as was present here. This testimony is disputed by defendant's expert, who contends just as positively otherwise. Plaintiff's expert also testified that if the split sleeve had been properly installed he could not conceive of a break occurring so soon. It was his opinion that the sleeve was not properly clamped up in this instance. He drew a conclusion that because only one of the bolts broke when the break occurred, that the three others had not been properly tensed and must have loosened sometime after installation. It was his further opinion that the sleeve could have leaked some over a considerable period of time, until the remaining bolt ruptured and the break occurred. He deduced this from what he determined to be erosion marks on the sleeve. It was his positive testimony that it was not logical to believe that truck traffic could cause the break if the split sleeve had been properly installed. He also testified that if the bolts were properly tightened on both sides, he could not conceive that one of them would have fractured apart.

Defendant's expert testified the repair was a proper one and that if the nuts were not in place after the repair was made, a leak would have been evident. It was his opinion that the loss of the nuts and the rupture of the bolt were due to the vibration caused by the constant pounding of heavy trucks which passed over a gravel road within 3 feet of the waterline, which was buried 6 feet below the surface. It was his opinion this would be accelerated by the sand because there is no cushioning effect in sand when it is confined. He further testified that cast iron crystallizes when subjected to repeated stress, and that this would account for the break. It was his opinion that the plaintiff should have installed a substantial concrete apron to absorb the pounding of the trucks. In this respect it might be argued that at the time the repair was made the de-

fendant knew the nature of the construction and the use to which the waterline would be put. The repair was made entirely by the defendant and it was reimbursed for the cost thereof by the contractor.

Defendant argues that plaintiff's expert was inconsistent in many of his answers and some of his premises were unfounded as shown by defendant's evidence. Assuming defendant's premise, the answer would be that where an expert gives an opinion upon facts established by the record in a matter recognized as a proper subject for expert opinion, unless impeached to such an extent as to have no probative value, it is ordinarily sufficient to sustain a verdict. See Long v. Railway Mail Assn., 145 Neb. 623, 17 N. W. 2d 675. Under ordinary circumstances, expert opinion evidence is to be considered and weighed by the triers of the facts like any other testimony. Where expert opinion evidence is in conflict, it becomes a question for the jury. See Stolting v. Everett, 155 Neb. 292, 51 N. W. 2d 603.

Defendant's 14th assignment of error was directed to the refusal of the trial court to permit the jury to view an experiment or movies of an experiment using an identical type split sleeve with certain exceptions which were to be noted. Plaintiff objected to defendant's offer setting out specific instances in which the experiment would be dissimilar to the actual situation. There was no attempt to prove these dissimilarities did not exist, and the objection was properly sustained.

Defendant's assignments of error Nos. 15 to 24 are directed to instructions tendered and refused by the trial court, and to some of the instructions given by the court. To have given some of the instructions tendered by the defendant and refused would have been prejudicial error under the issues in this case. For instance, assignment of error No. 19 covers an instruction tendered by the defendant, providing in substance that to hold the defendant liable the city must have actual or constructive notice of the defect which caused the damage, and must

have a reasonable time after notice to make the necessary repairs. The only observation we make is that this was not an action for a structural defect in the water main. It was an action for damages caused by a repair which the plaintiff alleged to be improper in the first instance, and inadequately installed in the second. The instructions tendered by the defendant which were proper have been adequately covered in the instructions given by the trial court. Viewing the instructions of the court as a whole, we find that they adequately cover the issues involved, and adequately presented the defendant's theory of defense.

We find no merit in any of the defendant's assignments sufficient to constitute reversible error herein. We affirm the judgment of the trial court.

AFFIRMED.

ELMER REIBER, APPELLANT, V. WENONA HARRIS, COUNTY SUPERINTENDENT FOR ADAMS COUNTY, NEBRASKA, ET AL., APPELLEES.

ELMER REIBER, APPELLANT, V. WENONA HARRIS, COUNTY SUPERINTENDENT FOR ADAMS COUNTY, NEBRASKA, ET AL., APPELLEES.

139 N. W. 2d 353

Filed January 14, 1966. Nos. 36038, 36039.

Schools and School Districts: Appeal and Error. In an appeal to the district court from the order of a freeholder's board, it is mandatory and jurisdictional that a notice of appeal be served upon the county clerk and a bond be executed and approved by the county clerk within 20 days after the action of the board has been entered upon the records of the board by the county clerk of the county in which the real estate is located. § 79-403, R. S. Supp., 1963; § 23-135, R. R. S. 1943.

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

Wagoner & Grimminger, for appellant.

Dunmire & Blessing, for appellees.

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

BOSLAUGH, J.

In two proceedings under section 79-403, R. S. Supp., 1963, a freeholder's board ordered that land be detached from school district No. 8 of Adams County, Nebraska, and be attached to school district No. 74 of Webster County, Nebraska. Elmer Reiber, a taxpayer of school district No. 8 of Adams County, Nebraska, appealed from both orders to the district court for Adams County, Nebraska.

Luther Goding, Jr., and Frances Louise Goding, the petitioners in case No. 36038, were designated as defendants in the district court in that case. John D. Fishel and Margaret A. Fishel, the petitioners in case No. 36039, were designated as defendants in the district court in that case. The members of the freeholder's board were defendants in each case.

In the district court both appeals were dismissed upon motions filed by the defendant petitioners. The plaintiff Reiber filed motions for new trial which were overruled and he has appealed to this court from the orders of the district court dismissing the appeals. Upon the stipulation of the parties, the appeals were consolidated for briefing and argument in this court. Since the cases involve identical questions, we dispose of both appeals in this opinion.

In each case the hearing before the freeholder's board was held on June 9, 1964. The order detaching the land from school district No. 8 and attaching it to school district No. 74 in each case was dated June 12, 1964. On June 24, 1964, in each case, the plaintiff filed in the district court for Adams County, Nebraska, a petition on appeal, a notice of appeal, a "cash bond," and a transcript of the proceedings before the freeholder's board. Each notice of appeal contained a certificate by the plaintiff's

attorney that a copy of the notice of appeal had been mailed to each of the petitioners in the case, and a certificate of the county superintendent of Adams County, Nebraska, stating that she had received a copy of the notice of appeal.

The cash bond filed in the district court in each case read as follows: "Comes now Elmer Reiber, Plaintiff in the above entitled action, and herewith deposits with the Court, a Cash Bond in the amount of $26.00 conditioned that plaintiff will pay all of the costs adjudged against him as a result of this Appeal.

"ELMER REIBER, Plaintiff,
WAGONER & GRIMMINGER
Attorneys for Plaintiff
By /s/ Sam Grimminger

"CERTIFICATE

"I, Bernard H. Taylor, Clerk of District Court for the County of Adams, State of Nebraska, do hereby certify that on the 24th day of June, 1964, there was deposited in my office a Cash Bond in the amount of $26.00 by Elmer Reiber, which Bond was applied by me for the payment of all costs in the prosecution of this Appeal.

"/s/ Bernard H. Taylor
CLERK OF THE DISTRICT COURT"

A certificate of the clerk of the district court appearing in the record in each case shows that the $26 deposited with the clerk of the district court in each case was in addition to $26 in costs paid by the plaintiff on June 24, 1964, in each case.

On July 28, 1964, the petitioners filed a written motion in each case to dismiss the appeal for the reason that the plaintiff had failed to perfect his appeal as required by statute. The motions specifically alleged a failure to file and execute a proper bond approved by the county clerk as required by section 23-135, R. R. S. 1943.

On September 14, 1964, the plaintiff filed motions to

amend the bond in each case by "obtaining the endorsement of the County Clerk's approval thereon" and by "adding the words 'conditioned for the faithful prosecution of this appeal.' "

The district court found in each case that the bond had not been filed with or approved by the county clerk as required by law. The plaintiff's motions to amend were overruled, the petitioners' motions to dismiss were sustained, and the appeals dismissed.

Section 79-403, R. S. Supp., 1963, provides that an appeal may be taken from the action of a freeholder's board to the district court of the county in which the real estate is located within 20 days after the entry of such action on the records of the board by the county clerk of the county in which the real estate is located in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county.

Section 23-135, R. R. S. 1943, provides that an appeal from the disallowance of a claim against a county may be taken "by causing a written notice to be served on the county clerk, within twenty days after making such decision and executing a bond to such county, with sufficient security, to be approved by the county clerk, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant." Section 23-136, R. R. S. 1943, provides that a taxpayer may appeal from the allowance of a claim by serving a like notice within 10 days and giving a bond similar to that provided for in section 23-135, R. R. S. 1943.

The Legislature has prescribed the method by which an appeal from an order of a freeholder's board shall be perfected. Within 20 days after the action of the board has been entered upon the records of the board by the county clerk of the county in which the real estate is located, a notice of appeal must be served upon the county clerk and a bond must be executed and approved by the

county clerk. These requirements are mandatory and jurisdictional. Sommerville v. Board of Commissioners of Douglas County, 116 Neb. 282, 216 N. W. 815, affirmed on rehearing, 117 Neb. 507, 221 N. W. 433; Drier v. Knowles Vans, Inc., 144 Neb. 619, 14 N. W. 2d 222. If the bond is not submitted to the county clerk for approval within the time required by statute, the appeal should be dismissed. County of Cedar v. McKinney Loan & Investment Co., 1 Neb. (Unoff.) 411, 95 N. W. 605.

The Cedar County case involved an appeal from the disallowance of a claim against the county. The defendant had moved to dismiss the appeal in the district court on the ground that the appeal bond had not been approved within the time required by law. In holding that the appeal should have been dismissed, this court stated: "In this case, so far as is disclosed by the record, the appeal bond was not approved by the clerk until some eight months after the decision appealed from was made, and until two months after the ruling on said motion. In our opinion, the appeal was not perfected within the time required by law, and the court erred in overruling defendant's motion to dismiss."

The record in each case here fails to show that a bond was executed and submitted to the county clerk for approval within the time prescribed by statute. Motions to amend the cash bonds were filed on September 14, 1964, more than 90 days after the date of the orders approving the petitions, and more than 80 days after transcripts of the proceedings before the freeholder's board had been filed in the district court. The time for appeal had then expired and the motions to amend were properly overruled.

The bonds which were filed in these cases did not comply with the statute in several respects. A bond which has been filed and approved within the time required by statute is subject to amendment if defective or invalid. See Jacobitz v. Bussinger, *ante* p. 524, 138 N. W. 839. In these cases the record does not show

that bonds were submitted to the county clerk for approval within the statutory time.

The judgment of the district court in each case is affirmed.

AFFIRMED.

WILLIAM O. SUNDET, APPELLANT, V. OLIN MATHIESON CHEMICAL CORPORATION, APPELLEE.

139 N. W. 2d 368

Filed January 14, 1966. No. 36041.

Sales. In a products liability case against a manufacturer the plaintiff must show that the offending condition existed when the product left defendant's control.

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

Haney, Walsh & Wall, for appellant.

Cassem, Tierney, Adams & Henatsch and Charles F. Gotch, for appellee.

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

SMITH, J.

While plaintiff was firing his rifle which contained in its chamber a cartridge allegedly manufactured by defendant, an explosion of the rifle injured him. This action for breach of warranty was dismissed by the district court on motion of defendant at the close of plaintiff's evidence-in-chief. We affirm the judgment on the ground of insufficient evidence that any defective condition of the cartridge existed at the time the cartridge case left defendant's control.

Shortly before the accident plaintiff purchased from a retailer twenty .264-caliber cartridges in an unsealed box. Both the box and the rims of the cartridge cases

indicated manufacture by defendant. The explosion occurred on April 21, 1961, while the first cartridge was being used.

Plaintiff may have purchased cartridges with cases which someone else had reloaded. There were grayish discolorations on several cases and plier or vise marks on two bullets. Plaintiff, who repaired firearms and sold equipment for reloading cartridge cases, testified that in the reloading process the neck of a case is crimped against a bullet. Defendant manufactured a product for the box on September 8, 1960, but it knew neither the date of shipment nor the place of delivery. The retailer did not testify. The condition of the product at the time it left defendant's control or the treatment which the product received up to the time of purchase by plaintiff is unknown.

If there was a defect in the cartridge, the defect must be found from these facts and a stipulation excluding the parts and assembly of plaintiff's rifle from the legal cause of injury; but it is unnecessary for us to consider the sufficiency of the evidence on this point.

In a products liability case against a manufacturer the plaintiff must show that the offending condition existed when the product left defendant's control. See, Tegler v. Farmers Union Gas & Oil Co., 124 Neb. 336, 246 N. W. 721; 2 Harper and James, Torts, §§ 28.22, 28.33, pp. 1584, 1605.

We find no basis for a reasonable inference that defendant manufactured these cartridges. The unsealed box contained earmarks of reloaded cases, and without additional evidence a trier of the facts cannot infer reasonably that defendant was in the business of reloading spent cases. Even if we assume that plaintiff purchased cartridges with unused cases, a reasonable conclusion cannot be drawn that any defect at the time of the retail sale represented a preexistent condition of defendant's making. The evidence is insufficient to carry the issue

of warranty to a jury, and the district court correctly dismissed the action.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE MCCREARY, APPELLANT.

139 N. W. 2d 362

Filed January 14, 1966. No. 36043.

1. **Criminal Law: Evidence.** The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such a conclusive nature as to exclude every reasonable hypothesis except that of guilt.
2. ———: ———. In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce written confessions, statements, and other evidence for the inspection of defendant's counsel before the trial. Error may be predicated only for an abuse of such discretion.
3. **Searches and Seizures.** Where an affidavit for a search warrant details the underlying circumstances upon which is based a belief that probable cause exists, reasons for crediting the source of the information is given, and a magistrate has found probable cause, technical refinements should not be indulged and doubtful or marginal cases should be resolved according to the preference accorded to warrants.
4. ———. A search of an apartment by law enforcement officers without a search warrant but with the consent of the occupant who paid the rent and controlled the premises is not unlawful as an unreasonable search.
5. ———. A reasonable seizure under a search warrant can only be made of instrumentalities connected with the crime charged.

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

Kerrigan, Line & Martin, for appellant.

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

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

CARTER, J.

Defendant was convicted of breaking and entering a public telephone pay station in Fremont, Nebraska. Defendant was also charged with being an habitual criminal and was sentenced to 15 years confinement under the provisions of the habitual criminal statute. Defendant has appealed.

On the afternoon of December 10, 1964, defendant was in an apartment occupied by Sharon Stanek in the company of Sharon and Georgia Jones. It appears that one Cliff Freeman became the subject of conversation, Freeman being a cousin of Sharon and the boy friend of Georgia. Freeman was in jail in Omaha and money was needed to get him released. Defendant volunteered to get some money for them. He asked Sharon and Georgia to accompany him for this purpose. The three of them entered defendant's automobile and drove directly to the Schmit Frontier Station. Defendant asked Georgia to engage the attendant in conversation and Sharon to stand by the telephone booth in the station. Sharon stepped into the booth with the defendant. She saw him working on the lower part of the telephone with something she described as being silver in appearance. The attendant and Sharon testified that they heard no dialing tones from the telephone caused by the dropping of coins into the pay telephone. Sharon testified that she heard a clatter of coins before she left the booth. Georgia said that she heard the clattering of coins before defendant came from the booth and heard coins jingling in defendant's pocket after he left the booth. The three left the station and returned to the apartment, where all three of them counted the money amounting to $20 or $25.

The attendant, Fred F. Ramakers, testified that the three came into the station about 9:10 p.m., on De-

cember 10, 1964. He said Georgia engaged him in conversation and that defendant and Sharon entered the telephone booth which they occupied for 10 or 12 minutes. He heard no dial tones which he usually heard when the telephone was being used. He heard the sound of coins rattling out of a box. When the three left the station he notified the telephone company. Two employees of the company came to the station within 30 minutes. They opened the telephone and found the coin box missing and $4 in change on the floor of the telephone housing. The coins removed were covered with a sticky substance. The last time the company removed money from the coin box was on November 2, 1964, when it contained $16.10. The coin box was missing at that time and a new one was installed. The coin box was missing on December 10, 1964, and has not been accounted for. Sharon and Georgia saw no coin box and a search of the areas traveled by defendant after he left the station failed to produce it.

Law enforcement officers searched the apartment and found $22.05 in quarters, dimes, and nickels in a dresser drawer. The coins also had a sticky substance on them. In a subsequent search two lock picks were found under a rug in the apartment, the fact of their existence in the room having been given by Georgia. The lock and the picks were sent to the laboratory of the Federal Bureau of Investigation. The laboratory technician who made the examination testified that there were marks on all six tumblers on the lock, which could not have been made by the key to the lock. He testified that the picks in evidence could have been used to open the lock, but there was no evidence from which he could conclude that the marks were made by these specific picks.

The State produced evidence furnished by customers that considerable money in excess of $4 had been put into the pay telephone after November 2, 1964, and before December 10, 1964.

The defendant complains of the action of the trial court

in overruling his motion for an order to produce for defendant's inspection all items of physical evidence which the State proposed to introduce at the trial. The trial court has a broad judicial discretion in ordering the production of evidence in the possession of the State. 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 may be helpful to him. Valid reason must exist for sustaining such a motion. In certain types of cases, such as forgery and embezzlement, reason for the production of written instruments may require the sustaining of such a motion. But the State is not generally required to produce its evidence solely to permit a defendant to build his case in a manner to avoid its implication. In Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323, the rule is stated as follows: "The 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. In the administration of these rules the trial court has a broad judicial discretion and it is only when such discretion is abused that error can be based thereon." Under the record in this case the trial court did not abuse its discretion in denying the motion.

The defendant made two separate motions to suppress evidence in the possession of the State, both of which were overruled by the trial court after the taking of evidence thereon. Defendant assigns these rulings as error.

As to the first motion, it appears that D. W. Parker, deputy sheriff of Dodge County, filed an affidavit and obtained a search warrant from a justice of the peace to search the apartment occupied by Sharon, and by the defendant as her guest. Defendant contends that the

affidavit was insufficient to sustain the issuance of the warrant. The affidavit recites the break-in of the telephone booth, the presence of defendant, Sharon, and Georgia at the booth at the time of the alleged break-in, that they were seen leaving the apartment together shortly thereafter, and that an immediate search was necessary before the items lost in the break-in could be removed. The affidavit states that the items mentioned in the affidavit were based on information furnished by a "reliable informant." The defendant relies on Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723; and Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726. These cases hold in effect that a warrant must be issued on the judgment of the magistrate and not on the mere suspicion, belief, or conclusion of the affiant seeking the search warrant.

In the instant case the affidavit stated that affiant believed the apartment occupied by Sharon concealed or kept "Tools and picks and equipment for burglarizing telephone booths and a coin receptacle from the telephone booth in the Mark Schmidt Frontier Filling Station." The affidavit states that defendant, Sharon, and Georgia were in the filling station about the time the money was taken, and that a "reliable informant" informed the affiant that he heard money making noise in a box while defendant and Sharon were in the telephone booth and Georgia was talking to him. The affidavit recites that officer Fred Whitt saw the three leaving the apartment and that the break-in occurred about 9:15 p.m. on December 10, 1964. The affidavit states that the search should be made immediately in the nighttime before the items could be moved.

The justice of the peace clearly had enough evidence on which to base his judgment that the search warrant should issue. At the hearing on the motion the "reliable informant" was disclosed as Fred F. Ramakers, the attendant at the Schmit Frontier Station. The case is controlled by United States v. Ventresca, 380 U. S. 102,

85 S. Ct. 741, 13 L. Ed. 2d 684, wherein it is said: "Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." The identity of the informant need not be disclosed. Aguilar v. Texas, *supra*. We conclude that the affidavit was sufficient to sustain the issuance of a search warrant.

Defendant contends that the evidence pertaining to the money consisting of quarters, dimes, and nickels in the amount of $22.05 should have been suppressed for the reason that it was not listed in the warrant as an item of search. Defendant cites Woo Lai Chun v. United States, 274 F. 2d 708, 79 A. L. R. 2d 999. In that case the court said: "The letters seized were not described in the search warrant. They then were improperly seized unless they were instrumentalities of the crime itself. (citing authority). In Takahashi v. United States, 9 Cir., 1944, 143 F. 2d 118, at page 123, we laid down the general proposition 'that a reasonable seizure can only be made of instrumentalities of the crime itself and not of private papers which are mere evidence or indicia of the commission of a crime.'" Defendant asserts that the money was not an instrumentality of the crime within the foregoing rule. The money was identifiable not only as small change in an unusual amount, but also as being sticky, as was the money found in the telephone housing. It was strong circumstantial evidence that it came

from the pay telephone. It was, as the jury subsequently found, an element of the crime charged, to wit, to forcibly break into a public telephone pay station with intent to steal property of value contained in said telephone pay station. We think the money, in its denominations, amount, and condition, was a proper item for search under the search warrant, under and by authority of which the search was made.

Defendant moved to suppress evidence obtained in a search made on December 11, 1964. The deputy sheriff and another law enforcement officer contacted Russell Bradbury and informed him they were about to search apartment 3 in the Claassen Apartments. Bradbury is the father of Sharon Stanek. He told the officers that the apartment was his, that he paid the rent, that the door was open, that they did not need a search warrant, and for them to go ahead and search it. They proceeded to do so, Bradbury coming to the apartment when he finished his lunch shortly thereafter. Two picks suitable for picking locks were subsequently found under the rug in the apartment, under Bradbury's consent to search the apartment. Defendant asserts that the trial court erred in not suppressing this evidence for the reason that the search was unlawful.

The basis for the claim of error is that defendant had occupied the apartment for 2 or 3 weeks as the guest of Sharon. It is asserted that the consent of Bradbury was ineffectual to lawfully permit a search of the premises as to the defendant. Defendant relies on Stoner v. California, 376 U. S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856. The case is not applicable to the case at bar. There it was held that defendant's hotel room was in effect his home and that a search without a warrant, even with the permission of the hotel management, was not lawful.

The case before us is controlled by the holdings in Cutting v. United States, 169 F. 2d 951; Calhoun v. United States, 172 F. 2d 457; Woodard v. United States, 254 F. 2d 312; Fredricksen v. United States, 266 F.

2d 463; and Rees v. Peyton, 341 F. 2d 859. The tenor of these cases is that one who has no control over an apartment, neither owning nor renting it, may not complain of a permission to search it by the owner or renter. The prohibitions of the state and federal Constitutions are against unreasonable searches and seizures. A search with the express consent of the owner or lessee, in possession, is deemed to be a reasonable search.

Defendant contends that the trial court erred in not sustaining his objection to an alleged hypothetical question on the ground that it assumed facts not established by the evidence. The laboratory technician in the Federal Bureau of Investigation laboratory who examined the lock on the pay telephone and the picks found in the apartment was asked the following question: "I will ask you again then from your knowledge as an expert in the field of nomenclature and assembly of locks and tool mark identification can you state whether or not a person with knowledge of locks, with the knowledge of 'picks' and their use and experience in their use could use these 'picks' marked Exhibit's '4' and '5' to pick this lock Exhibit '6' or a similar lock so as to open the door, remove what may be inside and close and lock the door again?" His answer was: "That instrument such as this, that is Exhibit '4' and Exhibit '5', could be used to pick a lock of this type or similar type lock."

The lock from the telephone was in evidence. The picks found under a rug in an apartment recently occupied by the defendant were also in evidence. The picks had been received as a circumstance surrounding the transaction. Unless the picks so found could be used to open the lock, they would have much less weight as circumstantial evidence. That the witness was an expert in the field is not questioned. The witness did not testify that the picks were used in opening the lock or that he gained any evidence from which he could infer that they were. The extent of his evidence was that the picks were such that they could be used to pick the lock

by one who understood how to use them. We see no error in this. No reference was made to the defendant. Every opinion of an expert in his particular field need not be based upon a hypothetical question even though some facts must be assumed to afford the basis of opinion. The answer to the question in the instant case merely shows that the picks were instruments which could be used in picking the lock in evidence. There was no error in permitting this evidence.

Defendant further contends that the proof was insufficient to sustain a conviction on circumstantial evidence. The applicable rule is: "The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt." State v. Sedlacek, 178 Neb. 322, 133 N. W. 2d 380. The jury was correctly instructed on this point. The evidence heretofore recited is ample to sustain the verdict of the jury.

Defendant contends there was error in the instructions given and in the refusal to give instructions tendered by the defendant. The instructions given fairly and correctly submitted the case to the jury. The instructions tendered were either covered by instructions given by the court or properly refused.

We find no error in the record prejudicial to the rights of the defendant. The judgment of the district court is affirmed.

AFFIRMED.

KIWANIS CLUB FOUNDATION, INC., OF LINCOLN, NEBRASKA, A CORPORATION, ET AL., APPELLANTS, V. LEVI YOST ET AL., APPELLEES.

139 N. W. 2d 359

Filed January 14, 1966. No. 36044.

1. Waters. Where a dam has been built for the private convenience and advantage of the owner, he is not required to maintain and operate it for the benefit of an upper riparian proprietor who obtains advantages from its existence; and the construction and maintenance of such a dam does not create any reciprocal rights in upstream riparian proprietors based on prescription, dedication, or estoppel.
2. ———. The owner of a dam and the prescriptive right to overflow the land of upper riparian owners may abandon his rights, and may also return the river to its natural state by removing or destroying the dam.

Appeal from the district court for Seward County: H. EMERSON KOKJER, Judge. Affirmed.

Pierson & Pierson, for appellants.

Ivan A. Blevens, Marti, O'Gara, Dalton & Bruckner, and Robert M. O'Gara, for appellees.

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

MCCOWN, J.

This is an action for an injunction restraining the defendants from damaging and destroying a dam and to require them to replace and repair a portion of the dam already destroyed. The district court sustained a demurrer and a later motion to dismiss, and the plaintiffs have appealed.

The plaintiffs alleged that in 1924, a dam was constructed by the Nebraska Gas and Electric Company on the Blue River approximately 1 mile downstream from the property of plaintiff Kiwanis Club Foundation, Inc., which dam replaced a former dam constructed in 1887; that plaintiffs and their predecessors acquired their property and have improved it at great expense, and operated

it as a camp and recreation area for Camp Fire Girls, Inc., for over 40 years in reliance upon the existence of the dam and the water level maintained thereby; that the plaintiffs, by ownership, possession, occupation, and user of their lands, and by prescription, have acquired rights in the existence of the dam and the flow of water and water level maintained by it; that the defendants, who are successors in interest to the builders of the dam, are barred by acquiescence and are estopped from damaging or interfering with such claimed rights; that the dam was used by power companies or districts until 1960 when it was abandoned for power purposes; and that defendants propose to destroy the dam and have damaged and destroyed a portion of it. The plaintiffs pray that the defendants be enjoined from damaging or destroying the dam and that they be required to replace and repair the portion of the dam already damaged and destroyed.

The plaintiffs, with admirable purpose, have carried out on their property a worthwhile project. In doing so, they have had the advantage for over 40 years of the favorable water level situation created by the defendants' dam. They now claim that this use has ripened into a right sufficient to require the defendants to maintain the dam, or at least sufficient to prevent the defendants from destroying it.

The amended petition alleged that the purposes and actions of the defendants are irrational and capricious. These are conclusions, and the court does not pass upon any issues involving malicious or malevolent use of property for the purpose of damaging another.

The issue here has received consideration on many occasions, although the premises and reasoning are greatly divergent. See Annotation, 88 A. L. R. 130. Aside from cases resting on contract, mutual consent, or grant, the theories upon which courts have sustained the right of upper riparian owners to continuation of conditions established by dams below them on the

stream have varied widely. Some courts take the position that the originally artificial condition has become the natural permanent condition which cannot be affirmatively diverted or altered to the damage of other riparian owners. Others proceed on the theory that the upper owner acquires a reciprocal prescriptive right to enjoy the benefit of the improvement. Still others proceed upon the theory of estoppel, or upon the theory that the establishment of the artificial condition constitutes a dedication.

Cases representing the view denying the claims of upstream owners are likewise diverse. The largest group hold that "property rules" are predominant and that the upper owners cannot obtain any prescriptive rights because adverse user is an essential element in the acquisition of prescriptive rights, and is not present in such cases. Others base the decisions on the ground that the owner of the dam was not estopped from changing or destroying the improvement, and may abandon it at any time; and in still others, the distinction is made as to whether the artificial condition is temporary or permanent.

The leading case relied on by the plaintiffs is that of Kray v. Muggli, 84 Minn. 90, 86 N. W. 882, 87 Am. S. R. 332, 54 L. R. A. 473, which held: "Where the flow of a stream of water has been diverted from its natural channel, or obstructed by a permanent dam, and such diversion or obstruction has continued for the time necessary to establish a prescriptive right to perpetually maintain the same, the riparian owners along such stream of water, who have improved their property with reference to the change and in reliance on the continuance thereof, acquire a reciprocal right to have the artificial conditions remain undisturbed; and the person who placed the obstruction in the stream, or caused the diversion of the waters, and all those claiming under or through him, are estopped upon principles of equity from restoring the waters to their natural channel or

state to the injury of such riparian owners."

While there is no Nebraska case directly in point, the case of Mitchell Drainage Dist. v. Farmers Irr. Dist., 127 Neb. 484, 256 N. W. 15, expressly rejected the reasoning of Kray v. Muggli, *supra,* and similar cases representing that view. This court, in the Mitchell case, relied on the fact that a dam was not a "permanent" obstruction or diversion, and that there was a clearly distinguishable difference between a prescriptive right obtained for a temporary or specific purpose and one that, from the beginning was, or later became, of a permanent character.

What is referred to as the majority rule is expressed in 93 C. J. S., Waters, § 147, p. 865, and 56 Am. Jur., Waters, § 159, p. 626. See, also, Taft v. Bridgeton Worsted Co., 237 Mass. 385, 130 N. E. 48, 13 A. L. R. 928; Drainage Board v. Village of Homer, 351 Mich. 73, 87 N. W. 2d 72; Hood v. Slefkin, 88 R. I. 178, 143 A. 2d 683.

Construction and maintenance of a dam over a long period of years may well tend to lead persons owning property above the dam to believe that a permanent and valuable right has been acquired, or is naturally present. The very fact that a manmade dam is obviously present, however, is sufficient to charge them with notice that the water level above the dam is artificial as distinguished from natural, and that its level may be lowered or returned to the natural state at any time.

A departure from the "rules of property" in cases such as this of necessity compels a judicial attempt to weigh and balance conflicting, interlocking, and equally appealing equities. There may be many other riparian owners, not parties here, both upstream and downstream, whose interests and equities are not even before the court. The record also does not disclose how much the water level above the dam would be affected, nor to what extent the waters of the river are backed up by the dam, nor the nature and extent of the land covered by the overflow. Under such circumstances, the rules affecting the title to real estate should prevail.

We hold that where a dam has been built for the private convenience and advantage of the owner, he is not required to maintain and operate it for the benefit of an upper riparian proprietor who obtains advantages from its existence; and that the construction and maintenance of such a dam does not create any reciprocal rights in upstream riparian proprietors based on prescription, dedication, or estoppel.

The owner of a dam and the prescriptive right to overflow the land of upper riparian owners may abandon his rights, and may also return the river to its natural state by removing or destroying the dam.

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

AFFIRMED.

IN RE APPLICATION OF LAWRENCE PRIBIL.
LAWRENCE PRIBIL, APPELLANT, V. ALICE L. FRENCH, COUNTY SUPERINTENDENT OF HOLT COUNTY, NEBRASKA, ET AL., APPELLEES, EUGENE R. BAKER. INTERVENER-APPELLEE.

139 N. W. 2d 356

Filed January 14, 1966. No. 36051.

1. **Trial.** The right to intervene under section 25-328, R. R. S. 1943, may be exercised at any time before trial, and an intervener is not required to set forth any reasons why he did not intervene at an earlier time.
2. **Statutes.** The fundamental purpose of statutory construction is to ascertain the intent of the Legislature from the language of the act itself.
3. **Schools and School Districts.** Section 79-1108, R. S. Supp., 1963, which prohibits the transfer of property from an accredited school district to a nonaccredited school district is applicable to proceedings under section 79-403, R. S. Supp., 1963, for the transfer of property between school districts upon petition.

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

Edward E. Hannon, for appellant.

William W. Griffin, for appellees.

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

BOSLAUGH, J.

This is an appeal from an order of a freeholder's board denying the petition of Lawrence Pribil to transfer land from school district No. 137 of Holt County, Nebraska, to school district No. 165 of that county.

In the district court the members of the freeholder's board filed a demurrer and an answer in which they were designated as defendants. On July 13, 1964, upon the motion of the petitioner, the demurrer and answer were stricken from the file upon the ground that the defendants did not have sufficient interest to be parties to the litigation.

On July 20, 1964, Eugene R. Baker, a resident elector and taxpayer in school district No. 137 of Holt County, Nebraska, filed a motion to intervene in the proceeding. On the same day the petitioner filed a motion objecting to the motion of the intervener, alleging that all persons interested in the proceeding were in default, and requesting that the petitioner be granted the relief prayed for in his petition. On August 3, 1964, the district court overruled the motion of the petitioner, sustained the motion of the intervener, and granted the intervener 10 days in which to plead.

The intervener then filed an answer in which he alleged that school district No. 137 was a fully accredited district; that school district No. 165 was a nonaccredited district; and that section 79-1108, R. S. Supp., 1963, prohibited the transfer of property from an accredited school district to a nonaccredited school district.

The district court found generally for the intervener and dismissed the proceeding. The petitioner's motion for new trial was overruled and he has appealed.

The petitioner contends that the intervener should not have been allowed to intervene in the proceeding, that the intervention was out of time, and that the petitioner should have been granted a default judgment.

Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against both, may become a party to the action, either before or after issue has been joined, before the trial commences. § 25-328, R. R. S. 1943. The right to intervene may be exercised at any time before trial and an intervener is not required to set forth any reasons why he did not intervene at an earlier time. State v. Farmers State Bank, 103 Neb. 194, 170 N. W. 901.

This proceeding involved a matter of public interest affecting all taxpayers in school district No. 137 of Holt County, Nebraska. Prior to July 13, 1964, the action was being defended by other parties. When the pleadings filed by these parties were stricken, intervention became necessary to prevent a default. The intervener proposed to defend the action in behalf of all the taxpayers in school district No. 137 of Holt County, Nebraska, who were similarly situated and similarly interested. At the time intervention was sought, no trial had occurred and it was within the discretion of the trial court to grant the intervener additional time to plead.

The other issue that requires consideration is whether section 79-1108, R. S. Supp., 1963, applies to a proceeding to detach land from school district No. 137 and attach it to school district No. 165. For this purpose we assume but do not decide that the petitioner was entitled to the relief requested unless section 79-1108, R. S. Supp., 1963, prohibits the transfer of the property.

Section 79-1108, R. S. Supp., 1963, provides: "No transfer of property from an accredited school district to a nonaccredited school district of any class shall be permitted."

The record shows without dispute that school dis-

trict No. 137 is a fully accredited Class II school district and that school district No. 165 is a nonaccredited Class I school district. If section 79-1108, R. S. Supp., 1963, applies to proceedings under section 79-403, R. S. Supp., 1963, for the transfer of property between such school districts, then the petition filed in this case must be denied.

Section 79-1108, R. S. Supp., 1963, was enacted in 1961 as section 2 of L. B. 681. Laws 1961, c. 404, § 2, p. 1221. L. B. 681, as originally introduced, contained only one section. That section now appears as section 79-1107, R. S. Supp., 1963, and provides for the withdrawal of Class I school districts from rural high school districts in which the high school has been disapproved. On general file, L. B. 681 was amended to include an additional section which now appears as section 79-1108, R. S. Supp., 1963. Nebraska Legislative Journal, 72nd Session, 1961, pp. 1309, 1311.

Although section 2 of L. B. 681, Laws 1961, appears in Chapter 79, article 11, Revised Statutes Supplement, 1963, which contains provisions applicable to Class VI school districts only, it is a statute of general application and its operation is not limited to Class VI school districts. This is apparent from the language of the bill, including its title.

The petitioner contends that section 79-403, R. S. Supp., 1963, and section 79-1108, R. S. Supp., 1963, are in conflict with each other; that section 79-1108, R. S. Supp., 1963, is a general statute; that section 79-403, R. S. Supp., 1963, is a special statute and is controlling in this case; and that section 79-1108, R. S. Supp., 1963, is not applicable.

The fundamental principle of statutory construction is to ascertain the intent of the Legislature from the language of the act itself. Todd v. County of Box Butte, 169 Neb. 311, 99 N. W. 2d 245. We think the legislative intent is apparent from the language of the statutes involved in this case.

Section 79-403, R. S. Supp., 1963, provides for the transfer of land between school districts upon the petition of a freeholder. A transfer can be made only when it is just and proper and for the best interest of the petitioner to do so. The best interest of the petitioner means the best educative interest. McDonald v. Rentfrow, 176 Neb. 796, 127 N. W. 2d 480.

The purpose of accreditation is to maintain adequate school programs and to encourage and assist schools in providing better instructional opportunities for their pupils. § 79-1247.02, R. R. S. 1943. Subsection (2) of section 79-403, R. S. Supp., 1963, provides for the transfer of property from a nonaccredited high school district to an accredited high school district. In De Jonge v. School District of the Village of Bloomington, *ante* p. 539, 139 N. W. 2d 296, we noted that this was a legislative determination that it was in the public interest to transfer property from nonaccredited high school districts to accredited high school districts.

The purpose of section 79-1108, R. S. Supp., 1963, was to extend this policy generally by prohibiting the transfer of property from accredited school districts to nonaccredited school districts. The statutes involved are not in conflict but must be construed together. Thus, section 79-1108, R. S. Supp., 1963, is applicable in this proceeding. It is controlling and requires that the petition be denied.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ORAL LONG, JR., APPELLANT.

139 N. W. 2d 813

Filed January 21, 1966. No. 36010.

1. **Criminal Law: Evidence.** In a criminal trial a confession of guilt alleged to have been made by the defendant is not compe-

tent in evidence, unless first shown to have been voluntarily made.

2. ———: ———. The court must first determine on evidence taken out of the presence of the jury, if there is objection to taking it in the presence of the jury, whether or not it has been sufficiently shown that the confession was voluntarily made. The question to be determined by the court is that of whether or not the affirmative evidence shows that the confession was voluntarily made and that this evidence excludes any other hypothesis.
3. ———: ———. The admission of the confession in evidence constitutes the court's independent determination that the confession is voluntary.
4. ———: ———. The question of whether or not in the first instance the State has laid proper and sufficient foundation for the admission of a confession is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid, then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact for the jury.
5. **Constitutional Law: Criminal Law.** The use of any confession obtained in violation of the due process clause requires reversal of the conviction even though unchallenged evidence adequate to convict remains.
6. **Criminal Law: Evidence.** A confession prompted by remorse and a gnawing consciousness of guilt is not because thereof inadmissible.
7. **Constitutional Law: Criminal Law.** A secret interrogation of a defendant charged with a felony, when the accused has asked for and been denied the presence of his counsel, is a violation of his constitutional rights.
8. **Criminal Law: Evidence.** Where the accused was informed of his right to counsel and warned of his right to remain silent, and thereafter confesses to participation in a crime, there is no rule excluding the use of such a confession because of lack of counsel.
9. **Criminal Law.** The generally accepted test of responsibility for crime is the capacity to understand the nature of the act alleged to be criminal, and the ability to distinguish between right and wrong with respect to such act.

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

Shrout, Hanley, Nestle & Corrigan, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

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

BROWER, J.

An information was filed in the district court for Dodge County, the first count of which charged the defendant, Oral Long, Jr., on June 13, 1964, with feloniously, forcibly, and by violence, taking from the person of Donna Miller money and personal property of value with intent to rob and steal. By a second count he was charged with making felonious assault on Donna Miller on the same day with intent to purposely, intentionally, and maliciously, but without deliberation and premeditation, kill her.

Defendant was found guilty by a jury of both crimes charged and was sentenced by the trial court to be imprisoned in the Nebraska Penal and Correctional Complex for a term of 10 years on each count, the sentences to run concurrently. This appeal is from an order of the trial court overruling the defendant's motion for a new trial.

In April or May 1964 the defendant became dissatisfied with his employment with the Campbell Soup Company. He saw an advertisement for a salesman by the Encyclopedia Britannica, and after an interview he was hired as such and shortly thereafter gave up his work for the Campbell Soup Company. The new employment consisted of making calls on prospective customers at their home in attempting to make sales of the encyclopedias on which he received a commission. This was his only compensation. At first he was accompanied by another salesman. The two of them called at the home of Donna Miller but were unable to make a sale. For 3 weeks thereafter his attempts to sell encyclopedias resulted in no sales and no compensation. Thereupon he terminated this employment but deceived his wife into believing he was still working.

Needing money he drove his car to the home of Mrs.

Miller on Saturday, June 13, 1964, arriving at approximately 8:20 p.m. He rang the doorbell and when Mrs. Miller appeared he inquired the location of Jensen Street of which he was aware at the time. Mrs. Miller recognized the defendant and proceeded to assist him in gaining the information, attempting to do so without leaving her door unlocked. She gave him her phone book and phoned the police department and ascertained the street's location. On giving the defendant the information she attempted to retrieve the phone book. In so doing she opened the door and before being able to lock it again the defendant charged her and succeeded in gaining entrance to the house. A struggle ensued in which defendant knocked Mrs. Miller down, beat her head against the wall, choked her, and slashed her throat with a pocket knife. For a time Mrs. Miller pretended to be unconscious. Defendant started to walk to the telephone. He saw Mrs. Miller's purse on a chair. From it he took her billfold containing $9.81 and put it in his pocket. When defendant went toward the phone, Mrs. Miller saw her chance to escape and ran out of the house to the neighbors for protection. Hearing the door slam, the defendant rushed out too, got in his car, and drove off.

There is no effort made to refute the facts hitherto outlined concerning the assault. The defendant himself testified to certain of the related incidents but states he has no memory concerning some of them. He concedes that is the way it must have happened.

The errors which defendant attributes to the trial court are in its finding that as a matter of law that there was sufficient evidence for the jury to conclude that defendant's confession, exhibit 15, was his free and voluntary statement; in failing to sustain defendant's objections to its admission because the defendant was deprived of his right to counsel; and in failing to give instruction No. 1 tendered by the defendant.

The evidence preceding the admission of the confes-

sion in controversy, heard by the court and jury without objection, shows that the defendant came to the Fremont police station at about 9:40 p.m., on June 13, 1964, accompanied by his wife. He appeared very pale and nervous and he looked "scared." He told patrolman Batten who was there at the time: " 'I am the party you think tried to kill that woman.' " At that time he asked: " 'She won't die, will she?' " He was then advised he was under arrest and officer Batten took him to the "traffic room" and conversed with him while waiting for lieutenant Hurt. Lieutenant Hurt and the county attorney arrived shortly thereafter. An officer testified the county attorney then advised defendant that he did not have to say anything and what he did say could be used against him. When asked if he understood this, he answered yes. The county attorney also then told him he was entitled to legal counsel. The county attorney then interrogated him at about 10:10 p.m., for approximately 8 minutes. Lieutenant Hurt and officer Franssen thereafter questioned him in the presence of the county attorney until 11:30 p.m. He was then allowed to rest. At 1:10 a.m., on the following morning, he was questioned by lieutenant Hurt for half or three-quarters of an hour. Police chief Millard was there only for the first 10 minutes. Then he was given a cup of coffee and allowed to rest. At 3 a.m., officer Franssen visited with the defendant but discussed only his children and his job. From 4:25 to 5 a.m., he was questioned again by lieutenant Hurt. At 6 o'clock defendant was given some milk and orange juice. He was questioned by the county attorney in the presence of officer Franssen at 7 a.m., "for an hour or so."

The admissions of the defendant contained in these early interrogations were testified to by the respective officers without objections in the first instance and were further brought out by defendant's counsel on cross-examination. As early as around 10:30 in the evening of June 13, 1964, he admitted going to the Miller residence

because he wanted to talk with someone. He then stated he remembered standing over Mrs. Miller, looking at her face, and seeing the blood which made him sick. He rushed out and drove to his father's home where he went to the bathroom to vomit. It was not until the interrogation beginning at 4:25 a.m., that he stated he went to Mrs. Miller's home to get money. During the several questionings the substance of the whole story hitherto related came out in these admissions. From what he said, the officers were enabled to find his knife in the street along the course he admitted driving and Mrs. Miller's billfold still containing the money in the trash barrel behind his father's home.

The defendant objects to the admission of the confession, exhibit 15, in evidence, claiming it was not shown it was voluntary. In this connection it is urged the defendant was at least emotionally disturbed which must be considered in connection with his claim that it was in fact coerced under the circumstances.

Previous to its admission, a psychologist had testified for the State that on the basis of several tests she had determined the defendant was of average intelligence and although moderately depressed had control of his emotional reactions more than an extremely impulsive individual did. She stated, however, he was emotionally immature, unstable under stress, resentful, and hostile. It was her opinion that "an irresistible impulse" is probably outside the realm of psychology.

Another physician and surgeon whose specialty was that of a psychologist, neurologist, and a consultant in psychiatry, also called by the State, said that on the basis of his examination and tests, including an electroencephalogram examination, the defendant knew right from wrong with reference to his acts on June 13, 1964. He found the defendant did have a psychiatric disorder. He classified his psychiatric reaction as "a character disorder, emotional unstable in a type." Also, the doctor testified the defendant had some depression.

The questioned confession was taken from the defendant at the office of the secretary of the county attorney at the courthouse in Fremont at approximately 8 p.m., on Sunday, June 14, 1964. The county attorney, officer Franssen, the court reporter, Derrold McCardle, and his friend, Gene Bay, who had accompanied him, were present. It was taken in shorthand and thereafter transcribed and is unsigned.

Officer Franssen testified that he had examined the confession and gone over the contents, and that to the best of his knowledge it was true in every detail and was exactly what was said by both the county attorney and the defendant. He said neither threats nor promises were made to the defendant. The reporter also testified that no threats or promises were made and that he correctly transcribed the conversation that took place.

At this point the jury was excused and the following occurred in its absence. The defendant testified he lacked 2 months of completing his last year in high school. The county attorney had told him he did not have to talk if he did not want to, but although he had thought and thought about whether the attorney had advised him if he could have counsel, he just did not remember if he did. Later he says he never asked for an attorney but was not told he could have one. Defendant says he got the idea the county attorney would do better for him than a lawyer. He thought it was cut and dried that he was "a goner." He states the county attorney went over and over his questioning until he finally got him to say what he wanted him to say. Describing his interrogation, he stated: "It seems like when they got done talking with me I went back to the County Jail or the City Jail. And I would shake just like this. I would get in there by myself and have to walk for a little bit to calm myself down and how long I walked, I don't know. I didn't have a watch. When I walked at least until I quit shaking. And then I would sit down and it seemed like at about the time I sat down somebody would come

back in and they would get me up and talk to me for awhile and then I would start shaking again when he left and then I would walk again and then someone else would come in."

His descriptions of the interrogations by the officers and county attorney in his quoted statement apparently refer to what happened during and previously to the questioning which took place at 7 o'clock Sunday morning which lasted an hour or two. From his testimony it would appear that he was not bothered later in this respect until 8 o'clock in the evening of Sunday, June 14, 1964. From what he says, however, his agitation continued whether interrupted by the officers or not. "Q- Let me ask you this final question. During the night of the 13th and 14th, you had no sleep? A- No. Q- But this statement was taken on the evening of the 14th? A- Yes. Q- Did you have any sleep during the day of the 14th? A- I really can't say I did and I can't say I didn't. I will try to go over the day of the 14th as I remember it after I had breakfast. Q- Alright. A- I remember I had that orange juice and I don't remember anybody talking to me after that. A couple of police officers took me out and got my stuff together and they brought me over to the County Jail here. The sheriff or the deputy, I don't remember which, took my things and logged me in and put me in a cell. I remember I paced the cell quite a bit and couldn't sleep. I got to the point where I couldn't stand up any more and I did try to lie down. I remember I tossed and I turned and I don't remember if I had noon dinner or not. I don't remember. I do recall having 1 meal after I had orange juice for breakfast. And I don't recall getting what you would call sleep. If I did sleep it was a sleep where all I could do was—I don't know how to say it."

The defendant's counsel read to him many portions of the questions and answers set forth in the confession in question. In some instances he said he did not remember giving the answers. In other instances when

asked by his counsel if he intended to so answer, he said he did not. At times he stated he might have so answered but if he did it was because the county attorney had through questioning indicated the way in which he should respond to the question and that he had no independent recollection of whether the answer was true or not.

In the defendant's testimony he stated that when he first came in he could not remember very much of anything. In fact he did not still. It was just like a bad dream. "And then every time I would say, well I am not sure or I don't know if this is true he (the county attorney) would say, 'You are a God damned liar'." In answer to the next questions he said that he distinctly remembers he called him such a liar once and maybe more.

Before the giving of the testimony of the defendant before the court alone, the defendant's counsel had made a motion to exclude the confession because it was an involuntary statement which shows upon its face that the defendant was not advised of his constitutional rights and is not in keeping with the law on confessions and constitutional rights. The trial court overruled the motion.

The defendant urges that subsequent testimony should have been considered by the trial court on the question of the exclusion of the confession. The record does not indicate it was not so considered at trial and so far as pertinent it will be considered by this court.

Later on cross-examination defendant said the county attorney called him a liar, using such oaths all night long. When asked if it was 50 or 100 times, he said it could have been 200. Subsequently he states that he remembers the county attorney calling him that once. He was then asked: "Q- Do you recall any other time I said this? A- No, sir. Like I said after that I just didn't pay too much attention to you. It was just that you thought I was a liar and whether or not you swore at

me all night long, I don't know. I had the feeling you did, but I don't know."

Defendant's father testified that on going to the police station with his son the defendant himself asked him not to go in with him. Thereafter on standing outside the station not far from a window he heard the county attorney say to his son, whom he could then see, " 'Don't lie about this, you little son of a bitch.' "

Both defendant's father and wife related incidents in defendant's life where he had acted strangely, impulsively, and without apparent good reason when agitated or crossed by others.

Dr. Chester H. Farrell, a qualified physician practicing in the field of neuropsychiatry, testifying for the defendant, said he had spent about an hour in examination of the defendant. This consisted of asking him questions and letting him talk while he sat back and tried to evaluate defendant's story. His conclusion was that the defendant was disturbed mentally. He felt the defendant was prone to develop episodes of mental disassociation and was unable to function for brief periods. The doctor stated on "Internal stress he acts out impulsively and without any ability to control his behavior for brief periods of time." He stated it was his opinion the alleged acts occurred in such a period. Although he stated he thought the defendant was mentally sane, he said: "I speak of this as an hysterical type of reaction. I think he has an hysterical personality and in his hysterical episodes he strikes out blindly and without any restraint and I think he is sick." The doctor stated defendant could not remember the date of the incident's occurrence. He remembered throwing away the purse but not going through it. The doctor seemed to base his opinion on the things the defendant could not remember. The doctor testified he had no opportunity to perform certain psychological tests to make certain the defendant was not faking. On redirect examination the doctor testified there was some possibility the defendant is schizophren-

ic although in cross-examination he had given it as his opinion that he was not.

The defendant cites the recent case of State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66, wherein this court, after reviewing its own decisions and those of the courts of the United States, in its syllabi laid down the following rules in regard to the admissibility of confessions: "In a criminal trial a confession of guilt alleged to have been made by the defendant is not competent in evidence, unless first shown to have been voluntarily made.

"The court must first determine on evidence taken out of the presence of the jury, if there is objection to taking it in the presence of the jury, whether or not it has been sufficiently shown that the confession was voluntarily made. The question to be determined by the court is that of whether or not the affirmative evidence shows that the confession was voluntarily made and that this evidence excludes any other hypothesis. * * *

"The admission of the confession in evidence constitutes the court's independent determination that the confession is voluntary. * * *

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

"The use of any confession obtained in violation of the due process clause requires reversal of the conviction even though unchallenged evidence adequate to convict remains."

With these rules in mind we shall now evaluate the evidence before the trial court on which its ruling admitting the confession was based. To begin, there was a complete absence of any physical violence to the defendant. Also, it is not shown or contended that any

threats or promises were made to procure the confession. The contention seems to be that he was so badgered and worn out by questioning that he yielded up the answers desired by the county attorney without any recollection of his own. It is true that he was interrogated repeatedly by the officers during the night and morning following his arrest. It, however, appears the questioning was by no means continuous. He was allowed periods to rest although he asserts he was unable to do so. Moreover, the defendant was not annoyed during the day of Sunday, June 14, 1964, from early morning until on or about the time of giving the confession at 8 o'clock that evening. He claims that again he was restless and agitated and walked the floor. Although he remembers one meal after the morning, he does not know when he received it. It seems clear his agitation and inability to rest continued unabated after the cessation of the preceding night's questioning. It seems therefore to have arisen from the workings of his own conscience and not the treatment received at the hands of the officers or the county attorney. It is not surprising indeed that with the knowledge of what he had committed he was nervous, agitated, and unable to rest. A confession prompted by remorse and a gnawing consciousness of guilt is not because thereof inadmissible. Morcumb v. State, 125 Neb. 42, 248 N. W. 807.

According to the testimony of two witnesses, the confession was correctly transcribed by the reporter. This is not refuted. Accordingly an examination of the confession itself is proper. It shows the nature of the interrogation and throws some light on its voluntariness and the ability of the defendant to remember what occurred. In its important aspects the questions generally do not call for yes and no answers. The defendant's responses appear to be full and relate the incidents in some detail. There is little indication that the answers were given because of the suggestions of the interrogator. They appear to be free and voluntary. It is true some

details are not remembered but the salient facts are related quite clearly. At its beginning defendant was told he did not have to tell anything and whatever he said would be used against him. At its conclusion defendant testified he was neither threatened nor promised anything, but just told it would be better to tell the truth and not lie, and that he had told the truth. Moreover, the history of the assault related by defendant to his own psychiatrist, which was placed in evidence without objection, appears in most respects to correspond with the confession.

Defendant and his father testified that the county attorney used abusive language toward the defendant and this was not specifically refuted although no one else so testified. Defendant urges therefore this is reason for excluding the confession. It is generally held that abusive language alone in procuring a statement from the accused will not vitiate a confession. See Buschy v. People, 73 Colo. 472, 216 P. 519.

We conclude that the evidence affirmatively shows the confession was voluntarily made and excludes any other hypothesis. The trial court therefore did not err in admitting it in evidence subject to the consideration of the jury with respect to its being voluntary.

We will now consider the contention of the defendant that the confession could not be received in evidence because the defendant was deprived of his right to counsel. The record is quite clear that he never asked for counsel. The defendant himself so testified. The officer states affirmatively the county attorney told him he was entitled to an attorney. On defendant being first asked on direct examination if he was advised by the county attorney that he was entitled to counsel, he replied: "After this questioning was started out, I thought and I thought and I thought and I kept thinking of a T.V. program and I know it is supposed to be done and I tried to rack my mind. I even tried to remember last night if he did and I didn't. I don't recall. *If he said it I don't*

remember it." (Italics supplied.) Although thereafter he says he was not so informed it was only after other statements which show quite clearly he really had no remembrance concerning the matter. We do not think such testimony is sufficient to refute that of the officer.

In the case of State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66, this court held: "A secret interrogation of a defendant charged with a felony, when the accused has asked for and been denied the presence of his counsel, is a violation of his constitutional rights."

The defendant cites the case of Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977. He freely admits the facts there related are entirely different than those in the case before us because in that case the defendant already had counsel and each of them were attempting and demanding to see the other. Nevertheless defendant calls attention to the following general language from the opinion in that case: "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

Defendant refers to cases from other jurisdictions from which he claims the rules stated in Escobedo v. Illinois, *supra,* have been extended to apply to the case before us. They include State v. Neely, 239 Or. 487, 398 P. 2d 482, but an examination of the opinion therein shows the court in that case concluded either that the defendant had asked about his right to counsel and was told that he could have one only after the completion of his interrogation, or had asked about counsel and was told he was entitled to it after the confession was made. Also, it appears the defendant in the cited case was never informed of his constitutional right to remain silent. The case has no application to the one before us. Defendant relies further on the case of People v. Dorado, 42 Cal. Rptr. 169, 398 P. 2d 361. In that case the defendant was not in-

formed of his right to remain silent, neither was he informed of his right to counsel. The judgment of the trial court was reversed because of the failure of the officer to inform the defendant of both of these rights. The California court did, with respect to the right to counsel, appear to extend the rule of Escobedo v. Illinois, *supra,* by holding an accused did not waive his right to counsel during the accusatory state in the absence of evidence that he knew of such right. Because of the difference in the facts we are not called upon to evaluate the merits of the rulings set forth in the cited case. We hold the evidence in the case before us shows the defendant was informed of his right to counsel. Where the accused was informed of his right to counsel and warned of his right to remain silent, and thereafter confesses to participation in a crime, there is no rule excluding the use of such a confession because of lack of counsel.

The last error assigned to the trial court is in failing to give defendant's tendered instruction No. 1. The defendant by that which was tendered sought to instruct the jury to return a verdict of not guilty by reason of insanity in the event it found the defendant had acted from irresistible impulse. In Bothwell v. State, 71 Neb. 747, 99 N. W. 669, this court stated: "The generally accepted test of responsibility for crime, is the capacity to understand the nature of the act alleged to be criminal, and the ability to distinguish between right and wrong with respect to such act. Schwartz v. State, 65 Neb. 196." The court in that opinion further stated: " 'The doctrine of moral insanity or uncontrollable impulse, upon which counsel seem mainly to rely, is not recognized in the jurisprudence of this state.' " Counsel for the defendant frankly concedes the rule quoted in Bothwell v. State, *supra,* is that which has obtained in this state and that it was set forth in the trial court's instructions. He urges, however, the rule should be changed. We are inclined to agree with the statement in the Both-

well case: " 'Capacity to comprehend the nature and moral quality of an act determines criminal responsibility. There is no other safe or practical test.' " The defendant's request to change the rule cannot be sustained.

Having carefully considered the case before us, we find no errors in the rulings of the trial court. Consequently its judgment must be and is affirmed.

AFFIRMED.

NOEL T. SCHOENROCK, APPELLANT, V. SCHOOL DISTRICT OF NEBRASKA CITY ET AL., APPELLEES.

139 N. W. 2d 547

Filed January 21, 1966. No. 36135.

1. **Workmen's Compensation.** In an action under the Workmen's Compensation Act the burden is on the claimant to establish by a preponderance of the evidence an accident arising out of and in the course of his employment and the disability resulting therefrom.
2. ———. Objective symptoms of an injury are those which may be observed by others as distinguished from those which are apparent only to the injured person. An objective symptom may be any symptom which indicates a deleterious change in the bodily condition of the injured person.
3. ———. The requirement that objective symptoms of an injury be produced "at the time" of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown.
4. ———. The Workmen's Compensation Act does not require that the objective symptoms of an injury produced at the time of the accident be observed by others or that their existence be proved by independent testimony.
5. ———. If conflicting evidence on rehearing in the Nebraska Workmen's Compensation Court is specially resolved according to the demeanor of witnesses, the resulting findings will be considered correct on de novo review in this court.
6. ———. Where the evidence shows that certain medical and hospital expenses have been incurred by an injured employee, a prima facie case is made out, and in the absence of any show-

ing that the expenses incurred were unreasonable, the proof will be held sufficient.

Appeal from the district court for Otoe County: VICTOR H. SCHMIDT, Judge. Reversed and remanded with directions.

Healey & Healey, for appellant.

Tyler & Frerichs, for appellees.

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

BOSLAUGH, J.

This is a proceeding under the Workmen's Compensation Act brought by Noel T. Schoenrock as plaintiff against the School District of Nebraska City, Nebraska, and Western Casualty & Surety Company, its insurance carrier. The plaintiff was employed by the school district during the fall semester in 1963 as a tenth grade English teacher. The plaintiff claims that he injured his back in September 1963 as the result of a fall on steps leading from the bookroom at the high school.

After the hearing before a single judge of the compensation court, the action was dismissed on the ground that the plaintiff had failed to prove that his injury and disability were the result of an accident arising out of and in the course of his employment. Upon rehearing before the full compensation court, the plaintiff recovered an award for temporary total disability; permanent partial disability; and medical, hospital, and drug expense.

The district court found upon appeal that the evidence failed to show that the accident, if it occurred, produced at the time objective symptoms of an injury, and dismissed the action. The plaintiff's motion for new trial was overruled and he has appealed.

The principal issue presented in this case is whether the evidence is sufficient to show that the plaintiff's disability is the result of an accident arising out of and in

the course of his employment. In an action under the Workmen's Compensation Act the burden is on the claimant to establish by a preponderance of the evidence an accident arising out of and in the course of his employment and the disability resulting therefrom. Smith v. Stevens, 173 Neb. 723, 114 N. W. 2d 724.

The plaintiff testified that he was assigned to teach in room No. 35, a classroom on the second floor of the high school building. Commencing in the second or third week of school he planned to have several of his classes study a play. On or about September 10, 1963, he went to the bookroom to get copies of the play so that he could hand them out to the students.

The bookroom is a small storage room on the third floor of the high school building which opens off room No. 41, the typing room. The floor of the bookroom is about 2 feet higher than the floor of the typing room. There are three steps between the typing room and the bookroom.

The plaintiff testified that he had carried one box of books from the bookroom to his classroom. On the second trip he was carrying between 12 and 18 of the small, clothbound books under his left arm when he slipped and fell on the steps leading from the bookroom to the typing room.

The plaintiff testified that he fell backward and caught himself with his right arm on the floor level of the bookroom. There was a jolt and a twist to plaintiff's spine when he struck the floor. He felt pain and believed that he had strained a muscle in the lower part of his back.

The plaintiff returned to his classroom and then went to the teachers' room on the first floor to correct some papers. He had difficulty sitting down and getting his chair up to the desk. At noon he had trouble sitting down in the lunchroom and getting his chair up to the table. At first the plaintiff thought that the injury was minor and would correct itself. The injury became pro-

gressively worse and the plaintiff made an appointment to see a physician.

The plaintiff was examined by Dr. Burbridge on September 30, 1963. Dr. Burbridge found extensive muscle spasm in the plaintiff's lower back and right hip. He prescribed Medcosonolator treatments and an analgesic. On October 2, 1963, the plaintiff was referred for X-ray examination. On October 3, 1963, Dr. Burbridge taped the plaintiff's back.

On October 19, 1963, the plaintiff was referred to Dr. Getscher, an orthopedic surgeon at Lincoln, Nebraska. Dr. Getscher found a muscle weakness in the right leg and tenderness in the lower back and right buttock. The straight leg-raising test was strongly positive on the right side and there was considerable loss of sensation over the outer aspect of the left foot and ankle. X-ray examination disclosed a narrowing of the disk space at L-5. Conservative treatment did not prove successful. On February 17, 1964, a myelogram was performed which revealed a ruptured intervertebral disk at L-4 on the right side. A hemolaminectomy was performed the following day. A ruptured intervertebral disk was found and removed on the L-4 on the right side. The plaintiff's recovery was satisfactory and uneventful. The plaintiff's permanent disability was estimated to be approximately 5 percent.

The plaintiff's evidence, if believed, is sufficient to establish an accident arising out of and in the course of his employment. The statute defines an accident as "an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." § 48-151, R. R. S. 1943.

Objective symptoms of an injury are those which may be observed by others as distinguished from those which are apparent only to the injured person. An objective symptom may be any symptom which indicates a deleterious change in the bodily condition of the injured per-

son. Manning v. Pomerene, 101 Neb. 127, 162 N. W. 492. An abnormal posture or an inability to walk in a normal manner may be an objective symptom. Bekelski v. Neal Co., 141 Neb. 657, 4 N. W. 2d 741.

The evidence in this case is that the plaintiff commenced having difficulty immediately after the accident. When he went to the teachers' room to correct papers and again at noon in the lunchroom the plaintiff had difficulty in sitting down and getting his chair up to the table. The injury seemed to progress and he developed a numbness in his right foot. His right hip joint felt as though it was catching and would not move. At the time the plaintiff went to see the doctor his right leg was numb and the ankle joint and knee joint would not bend. The plaintiff could climb stairs only one step at a time and had to walk very slowly. These are all symptoms which could have been observed by others and constitute objective symptoms.

The requirement that objective symptoms of an injury be produced "at the time" of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown. Albert v. Krey Packing Co. (Mo. App.), 195 S. W. 2d 890; Schroeder v. Western Union Telegraph Co. (Mo. App.), 129 S. W. 2d 917. There is no evidence in this case of any intervening cause of the plaintiff's disability.

There is no statutory requirement that the symptoms be observed by others or that the existence of the symptoms be proved by independent testimony. Although the plaintiff was not examined by a physician until September 30, 1963, Dr. Burbridge found that there was considerable muscle spasm at that time. The evidence permits an inference that muscle spasm was present following the accident and would have been observed if an examination had been made at that time. There is also evidence to the effect that some of the students noticed the difficulty which the plaintiff was having.

The serious question in this case is the credibility of the plaintiff's testimony. There were no witnesses to the accident and the entire proof relating to the circumstances of the accident consists of the plaintiff's testimony. The defendants were able to introduce some conflict in the evidence by proof that some of the plaintiff's testimony was in error. However, the defendants' evidence, for the most part, did not dispute the testimony of the plaintiff directly or relate to the circumstances of the accident. Much of the defendants' evidence related to collateral matters, was negative in character, or related to what the usual or customary procedure might be instead of what happened in the particular instance.

The medical evidence tends to corroborate the plaintiff's testimony. The plaintiff was examined on August 27, 1963. This examination, although routine in nature, indicated that the plaintiff's musculo-skeletal system was normal and that the plaintiff had no limitations or significant defects.

Dr. Getscher testified that it was his opinion that the accident on or about September 10, 1963, produced the ruptured intervertebral disk in the plaintiffs' back; that the history given by the plaintiff was consistent with the injury and his findings; and that the condition had not existed for a long period of time.

There are circumstances in the record which tend to explain the discrepancies and irregularities in the plaintiff's testimony. The injury in this case did not produce immediate disability. The injury was progressive in nature and the disability developed over a period of several weeks. Under such circumstances it is not unusual for a claimant to be unable to remember correctly all of the circumstances surrounding the accident which produced the injury and eventual disability.

There is also evidence to the effect that the plaintiff has some emotional instability. Dr. Getscher testified that the plaintiff was quick of action; was very quick to answer questions and make up his mind; that he had a

superficial attitude toward everything that occurred in his life including his own physical condition; and that he exhibited a light, unrestrained, and highly emotional status.

Although the appeal is determined de novo upon the record by this court, consideration must be given to the fact that the compensation court saw and heard the witnesses who testified in person and found for the plaintiff. If conflicting evidence on rehearing in the Nebraska Workmen's Compensation Court is specially resolved according to the demeanor of witnesses, the resulting findings will be considered correct on de novo review in this court. Meadows v. Skinner Manuf. Co., 178 Neb. 856, 136 N. W. 2d 184. See, also, Klentz v. Transamerican Freightlines, Inc., 173 Neb. 53, 112 N. W. 2d 405.

From our consideration of the record we conclude that the evidence is sufficient to support a finding that the plaintiff's injury and disability are the result of an accident arising out of and in the course of his employment.

At the trial, statements for medical and hospital services furnished to the plaintiff were received in evidence over the defendants' objection that there was no evidence as to the fair and reasonable value of the services included in the statements. The record shows that at the time the exhibits were received, the presiding judge of the compensation court stated that the court would check the charges closely and determine whether they were reasonable and complied with the medical fee schedule that had been approved by the compensation court. This procedure was in accordance with Rule IV of the Rules of Procedure of the Nebraska Workmen's Compensation Court.

The statute provides in part that: "The employer shall be liable for reasonable medical and hospital services and medicines as and when needed, subject to the approval of the compensation court, not, however, to exceed the regular charge made for such service in similar

cases; * * *." § 48-120, R. R. S. 1943. Where the evidence shows that certain medical and hospital expenses have been incurred by an injured employee, a prima facie case is made out, and in the absence of any showing that the expenses incurred were unreasonable, the proof will be held sufficient. Gourley v. City of Grand Island, 168 Neb. 538, 96 N. W. 2d 309. The statements for medical and hospital expenses were properly received in evidence.

The defendants attempted to introduce excerpts from records of the student health center of the University of Nebraska which purported to relate to medical attention that the plaintiff had received in May 1962 and May 1963. There was no foundation for the admission of the records and the plaintiff's objection was properly sustained. Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59.

For the reasons stated, the judgment of the district court is reversed and the cause remanded with directions to enter judgment for the plaintiff affirming the award of the compensation court.

REVERSED AND REMANDED WITH DIRECTIONS.

SPENCER, J., participating on briefs.

TERRY CARPENTER, PLAINTIFF, V. STATE OF NEBRASKA ET AL., DEFENDANTS.

139 N. W. 2d 541

Filed January 25, 1966. No. 36208.

1. **Constitutional Law.** Constitutional provisions are not subject to rules of strict construction.
2. ———. Where a constitutional amendment is duly and regularly adopted by the electorate with notice on the ballot as to two specific provisions of the amendment, the fact that one of the provisions is unconstitutional does not invalidate both, where the remaining provision is capable of enforcement alone, and is not dependent upon nor interwoven with the other, and can be operative with the void portions eliminated.
3. ———. Each and every clause in a constitution has been

inserted for some useful purpose, and the fact that the provision was an amendment rather than an original part of the constitution in no sense changes that principle.

4. ———. Article III, section 5, of the Constitution of Nebraska, as amended in 1962, is a valid and subsisting part of the Constitution of the State of Nebraska, and in full force and effect, except the last sentence thereof, which sentence has been declared to be violative of the United States Constitution.

5. ———. The provisions of Article III, section 5, of the Constitution of Nebraska, require any apportionment or reapportionment of legislative districts to be based solely on population.

6. **Constitutional Law: Municipal Corporations.** L.B. 925, 75th Session of the Legislature of Nebraska (Laws 1965, c. 22, p. 171), does not constitute a delegation of power to the City of Beatrice to alter legislative boundaries, or deprive the city of its power of annexation.

7. **Constitutional Law: Elections.** L.B. 925, 75th Session of the Legislature of Nebraska, does not create any unconstitutional hindrance or impediment to the right of a qualified voter to exercise the elective franchise, and does not violate Article I, section 22, of the Constitution of Nebraska.

8. **Statutes.** Boundaries of precincts, townships, and cities mentioned in section 2 of L.B. 925, 75th Session of the Legislature of Nebraska, unless specifically defined otherwise, refer to and mean boundaries as established by Nebraska law as of April 1, 1960.

Original action. Judgment for defendants.

Barney, Carter & Buchholz, for plaintiff.

Clarence A. H. Meyer, Attorney General, and Cecil A. Johnson, for defendants.

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

MCCOWN, J.

This is an original action to test the validity of L.B. 925, 75th Session of the Legislature of Nebraska (Laws 1965, c. 22, p. 171), a legislative reapportionment act; and, as a necessary preliminary, to determine whether the 1962 amendment of Article III, section 5, Constitution of Nebraska, was entirely void, including its provi-

sions with respect to following county lines in legislative redistricting.

A brief background may be appropriate. At the 1961 session of the Nebraska Legislature, L.B. 217 (Laws 1961, c. 246, p. 731) was passed providing for the submission to the electors of an amendment to Article III, section 5, of the Constitution of Nebraska. The amendment was adopted at the 1962 election.

Article III, section 5, of the Nebraska Constitution, as approved by the voters at the 1962 election provides: "At the regular session of the Legislature held in the year nineteen hundred and thirty-five the Legislature shall by law determine the number of members to be elected and divide the state into legislative districts. In the creation of such districts, any county that contains population sufficient to entitle it to two or more members of the Legislature shall be divided into separate and distinct legislative districts, as nearly equal in population as may be and composed of contiguous and compact territory. After the creation of such districts, beginning in nineteen hundred and thirty-six and every two years thereafter, one member of the Legislature shall be elected from each such district. The basis of apportionment shall be the population excluding aliens, as shown by next preceding federal census. The Legislature may redistrict the state from time to time, not more often than once in ten years. In any such redistricting, county lines shall be followed whenever practicable, but other established lines may be followed at the discretion of the Legislature. In such redistricting, primary emphasis shall be placed on population and not less than twenty per cent nor more than thirty per cent weight shall be given to area."

Insofar as is relevant here, the 1962 amendment added the following provisions to the former Article III, section 5, of the Nebraska Constitution: "In any such redistricting, county lines shall be followed whenever practicable, but other established lines may be followed

at the discretion of the Legislature. In such redistricting, primary emphasis shall be placed on population and not less than twenty per cent nor more than thirty per cent weight shall be given to area." This portion constitutes the last two sentences of the section.

In 1964, the United States District Court for the District of Nebraska specifically held that: "* * * the portion of the 1962 amendment of Article III, section 5 of the Constitution of the State of Nebraska providing that not less than 20% nor more than 30% weight shall be given to area in the creation of Unicameral legislative districts * * *," violated the requirements of the equal protection clause of the Fourteenth Amendment to the United States Constitution. League of Nebraska Municipalities v. Marsh, 232 F. Supp. 411.

Meanwhile, following the adoption of the 1962 constitutional amendment, the Nebraska Legislature passed two bills in the 1963 legislative session in an attempt to redistrict, and after the above decision, passed another redistricting bill early in the 1965 session. All of these abortive legislative bills were declared unconstitutional under the equal protection clause of the United States Constitution. Thereafter, L.B. 925 of the 1965 legislative session with which we are now concerned was passed. Under its provisions, in some districts a county which does not have population sufficient to entitle it to two or more members is divided. It should be pointed out here that the United States District Court in its ruling on the earlier 1965 redistricting bill stated its conclusion: "* * * that *if county lines are to be followed* a legislature of 49 or 50 districts is an impossibility as a constitutionally valid legislative reapportionment plan." League of Nebraska Municipalities v. Marsh, 242 F. Supp. 357. In the case now before this court, no question is raised under the equal protection clause of the Fourteenth Amendment to the United States Constitution, nor is any issue raised as to whether county lines were followed whenever practicable. The

major and basic issue here then is whether *only* county lines must be followed in the establishment of legislative districts in any county that does not contain population sufficient to entitle it to two or more members of the Legislature.

The plaintiff contends that because the provision dealing with area in the last sentence of the 1962 amendment has been declared unconstitutional, the entire amendment is void; and that under the former provisions of Article III, section 5, Constitution of Nebraska, county lines must be followed except as to any county entitled to two or more members of the Legislature. It is the plaintiff's position that, in the main, the general principles governing the construction of statutes apply also to construction of constitutions; and it is argued that the rules governing legislative enactments and their interpretation and validity should, therefore, be applied to construction and determination of the validity of a constitutional provision adopted by the people. While this general rule is well accepted, it is subject to a rather important exception that constitutional provisions should receive a broader and more liberal construction than statutes, since the power dealt with in the case of constitutional provisions is original and unlimited, and in the case of legislative enactments is limited. Consequently, constitutions are not subject to rules of strict construction. See 16 Am. Jur. 2d, Constitutional Law, § 62, p. 236.

Even in the absence of any such rule, it has long been held in this state, even as to legislative acts, that: "If a portion of a legislative act is unconstitutional and it can be separated from other portions of the act and the latter enforced independent of the former, and it further appears that the unconstitutional part did not constitute such an inducement to the passage of the other parts of the law that they would not have been passed without it, the former may be rejected and the latter

upheld." Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729.

The same rule stated in slightly different fashion appears in the case of Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475: "When a legislative enactment in which such a declaration appears contains valid and void provisions, the valid provisions will be upheld if it is a complete law in itself, capable of enforcement and is not dependent upon that which is invalid; or, stated another way, when the invalid portions of the act are so interwoven with the rest that the act may not be operative with the void portions eliminated or where it is obvious from an inspection of the act that the invalid portion formed the inducement for the passage of the act, the whole act fails."

The plaintiff here relies upon the last portion of the above quotation, arguing that the area provision of the 1962 amendment was designed as an inducement to residents of nonurban areas to support the amendment and that the area provision was the substance and the inducement to the adoption of the 1962 amendment. The plaintiff's position is that the amendment was presented as a package and adopted as a package, and that any inducement which tainted the unconstitutional portion tainted it all. The plaintiff also is forced into the position of contending that whatever was the inducement to passage of the bill in the Legislature remained the inducement when the issue was voted on by the people. Such a position makes inducement take precedence over the determination of whether the remaining portions of a constitutional amendment are capable of enforcement separately, or are dependent upon the invalid portion, or are so interwoven that the amendment may not be operative with the unconstitutional and void provisions eliminated. We note also that there is actually no evidence as to inducement even in the Legislature with respect to the sentence dealing with county lines. It came in as a standing committee amendment. The Committee on

Enrollment and Review changed the title of the bill to reflect the specific sentence dealing with county lines, and the record of legislative debate submitted in evidence reveals nothing whatever about this sentence nor the inducement for it.

We deem it important to note the specific language placed on the ballot upon the proposition for adoption of the proposed 1962 amendment: "Constitutional amendment to provide that in redistricting of the state for legislative purposes established lines other than county lines may be followed and that primary emphasis shall be given to population with prescribed weight being given to area."

The plaintiff asks that we assume from an inspection of the amendment itself that its only purpose was to permit area to be given some weight in redistricting rather than population alone; and that since that purpose was unconstitutional, any other provisions of the amendment applying to redistricting, to which the entire amendment was addressed, must likewise be held to be void. We cannot agree.

It will be noted that in the proposal on the ballot, the provisions with respect to county lines were first and the area provisions second. It is quite clear that the sentence: "In any such redistricting, county lines shall be followed whenever practicable, but other established lines may be followed at the discretion of the Legislature," may be separated from the sentence dealing with population and area. The sentence dealing with county lines can obviously be enforced independently. The sentence is complete in itself, and it is not in any way dependent upon the invalid and unconstitutional part of the amendment nor interwoven with it, and would be operative with the void portions eliminated. Only the fact that both sentences deal with redistricting and that they were presented to the people at the same time as part of the same amendment, and as a part of the same section of the Constitution, hold them together. Where

the language and meaning of a constitutional amendment are clear, a determination of what inducements motivated voters in the adoption of the amendment ought to be outside the scope of any judicial examination. Where a constitutional amendment is duly and regularly adopted by the electorate with notice on the ballot as to two specific provisions of the amendment, the fact that one of the provisions is unconstitutional does not invalidate both, where the remaining provision is capable of enforcement alone, and is not dependent upon nor interwoven with the other, and can be operative with the void portions eliminated. Under such circumstances, a court should not inquire nor attempt to determine what inducement caused the electorate to do what it did. It has been established that each and every clause in a constitution has been inserted for some useful purpose. Mekota v. State Board of Equalization & Assessment, 146 Neb. 370, 19 N. W. 2d 633. The fact that the provision was an amendment rather than an original part of the Constitution in no sense changes that principle.

We therefore hold that Article III, section 5, of the Constitution of Nebraska, as amended in 1962, is a valid and subsisting part of the Constitution of the State of Nebraska, and in full force and effect, except the last sentence thereof, which sentence has been declared to be violative of the United States Constitution. We also hold that the provisions of Article III, section 5, of the Constitution of Nebraska, require any apportionment or reapportionment of legislative districts to be based solely on population.

We turn now to a consideration of the validity of L.B. 925 other than for reasons dependent upon the 1962 constitutional amendment. The plaintiff challenges the constitutionality of L.B. 925 upon the ground that it involves a delegation of apportionment powers. District 30 includes certain precincts in Gage County "and the City of Beatrice." Cities mentioned in other portions of the bill either lie totally within a precinct in the

same legislative district, or the bill makes reference to boundaries which are fixed by street or other boundary lines, or refers to corporate limits fixed as of a certain date. In the absence of such specific reference, the words "the City of Beatrice" would ordinarily be construed to mean the city as it existed when L.B. 925 was adopted. See Buller v. City of Omaha, 164 Neb. 435, 82 N. W. 2d 578. It is contended that the Legislature obviously did not intend the date of adoption of L.B. 925 as to Beatrice; and consequently, it constituted a delegation of power to the city to alter legislative boundaries, or deprived the city of its powers of annexation. As hereafter referred to, section 4 of the act discloses the intent of the Legislature. We construe "the City of Beatrice" to mean its corporate limits established as of April 1, 1960.

The plaintiff also contends that because of the fact that the terms of legislators are staggered, some persons residing within odd-numbered districts will be unable to vote for a legislative representative until the 1968 general election. The plaintiff contends that this deprives voters of their right to vote for their representative for a period of 2 years, and violates Article I, section 22, of the Constitution of Nebraska. With the staggered terms of Nebraska legislators provided for under Article III, section 7, of the Constitution of Nebraska, it would be a practical impossibility to redistrict without this effect. The regulations regarding the exercise of the elective franchise provided for under the Constitution of Nebraska, and as affected by L.B. 925, are reasonable, uniform, and impartial, and should not be treated as subverting or impeding the exercise of the elective franchise. L.B. 925 does not create any unconstitutional hindrance or impediment to the right of a qualified voter to exercise the elective franchise and does not violate Article I, section 22, of the Constitution of Nebraska.

Finally, the plaintiff asserts that L.B. 925 is vague

and indefinite in that section 4 states: "The precincts, townships, and cities mentioned in section 2 of this act shall be the precincts, townships, and cities set out in the 1960 Census of Population by the United States Department of Commerce, Bureau of the Census, as outlined in Volume I, Characteristics of the Population, Part A, Number of Inhabitants, pages 29-3 to 29-18."

The plaintiff's argument is that the precincts, townships, and cities used in defining districts are to be, not as established by law in the State of Nebraska, but as outlined in the census document, and that the census document does not affirmatively show that it reflects boundaries set by Nebraska law. The census document contains map outlines and populations of counties, minor civil divisions, election precincts, and townships which accurately reflect the boundaries of the respective precincts, townships, and cities as of April 1, 1960. While the census document and maps do not affirmatively and conclusively disclose it, there can be little reasonable question but that they refer to and show boundaries as established by Nebraska law as of April 1, 1960, and we so hold. L.B. 925 is not so vague and indefinite as to be meaningless and void.

For the reasons stated, we determine that L.B. 925, 75th Session of the Nebraska Legislature, is a valid, enforceable, and constitutional enactment. The plaintiff's petition is dismissed and costs herein are assessed to the plaintiff.

JUDGMENT FOR DEFENDANTS.

SHIRLEY RUTH READ, APPELLANT AND CROSS-APPELLEE, V. EDWARD OSCAR READ, APPELLEE AND CROSS-APPELLANT.
139 N. W. 2d 829

Filed January 28, 1966. No. 36045.

1. **Divorce.** Divorce cases are tried de novo on appeal in this court.

2. ———. A general rule by which to measure the exact amount or degree of corroboration required in a divorce case cannot be formulated, and each case must be determined on its own facts and circumstances.
3. ———. In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired and the contributions each has made thereto, and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just.

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

Edward E. Hannon, for appellant.

William W. Griffin, for appellee.

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

SPENCER, J.

This is a divorce action commenced May 26, 1964, by appellant, Shirley Ruth Read, against appellee and cross-appellant, Edward Oscar Read, who will hereinafter be referred to as appellee. The trial court granted appellant a divorce and awarded her $1,500 cash and a 1959 Chevrolet as permanent alimony, and a $300 allowance for attorney's fees. Appellant perfected an appeal and appellee a cross-appeal to this court.

Appellant assigns as error the insufficiency of the alimony, and appellee assigns the insufficiency of the evidence to justify a divorce. Appellant's evidence, in addition to interrogatories submitted to appellee covering

his property and the testimony of a valuation witness, consisted of her own testimony and that of her mother and father. Appellee did not take the witness stand or produce any witnesses of his own, but rested at the conclusion of appellant's case.

Appellant's chief complaints consisted of her husband's excessive drinking, staying away overnight without explanation of any nature, talking about appellant in public, calling her names, harassing and humiliating her, and asking her to pack her clothes and get out.

Divorce cases are tried de novo on appeal in this court. Overton v. Overton, 178 Neb. 267, 133 N. W. 2d 7. While the corroboration herein is very weak, we determine that it is sufficient to justify the action of the trial court in granting a divorce. A general rule by which to measure the exact amount or degree of corroboration required in a divorce action cannot be formulated, and each case must be determined on its own facts and circumstances. See Schwarting v. Schwarting, 158 Neb. 99, 62 N. W. 2d 315.

Appellant's testimony indicates a course of continual harassment and humiliation, much of which from its nature could not be corroborated. There is, however, sufficient corroboration to determine that a divorce is in order herein. Appellee on one occasion was heard to tell his own mother, when he was away until the early hours of the morning and his wife was frantically trying to locate him, that he was in no hurry, he had nothing to go home for. Appellee admitted to appellant's mother that he stayed out all night and said he did not know why he did it. Appellee was observed in an intoxicated condition on occasions, and on one of them, when appellant's father told him if he would quit his drinking he and his wife could get along, he said he knew it. Shortly before the divorce appellee told appellant's mother that he and her daughter were not going to live together much longer, which is some corroboration of appellant's testimony that appellee told her to pack her things and

leave. That same night, about 1:45 a. m., appellant's mother and brother were called to the home of the parties and there discussed their marital difficulties until 8 a. m. On the question of a possibility of a reconciliation, appellee said he wanted to know what his wife was going to do, as he would not change. Appellee removed his wife's signature from their joint bank account, and checks written by her shortly before the separation were returned. The only corroboration of physical abuse was the testimony of appellant's father that he observed appellee strike her and bounce her up against the automobile.

The parties were married just a little over 2 years. At the time of the marriage, appellant had approximately $500 in cash or in a checking account; 19 head of cattle; and household furniture and furnishings. She moved her furniture and furnishings to appellee's home, and used the money she had on hand in the marriage. She moved her cattle onto the ranch, but in May of 1963, at appellee's insistence, she moved them off. However, all money received from the sale of her own calves went into her own bank account. This amounted to $1,012.66. Appellant contributed at least $1,150 of her own cash funds, and also household goods and furniture, on which she put a valuation in excess of $1,700, to the marriage. This furniture and the household goods remained with appellee under the terms of the court's divorce decree.

Appellee had three children from a previous marriage, who were 13, 15, and 16 years of age at the time of the divorce. He owned a ranch valued at $68,000, which at the time of the divorce was subject to a mortgage of $33,242.58. At the time of the marriage he also owned 69 cows, 2 bulls, 76 heifers and steers, and 60 calves. At the time of the divorce this had increased to 95 cows, 3 bulls, 35 yearlings, 76 calves, 10 sows, and 1 boar. He also owned three tractors, other farm machinery, two cars, and a truck. At the time of the divorce, in addition to the mortgage on the ranch, he owed obligations of

approximately $7,600, of which $4,000 was to his father.

In Vollbrecht v. Vollbrecht, 178 Neb. 31, 131 N. W. 2d 651, we said: "In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired and the contributions each has made thereto, and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just."

At the time of the divorce the appellant was 34, the appellee 39. The marriage lasted only 2 years and 1 month. There is no evidence that appellant's health is impaired; there has been little change in appellee's property; and appellee does have three minor children dependent upon him for their support and education. The marriage has been more or less a stormy one. An action for divorce was filed in 1963, and the parties were separated but were reconciled on appellee's promise to spend more time at home and to be more moderate in his drinking.

Under the facts of this case, the allowances herein are not too far out of line. We do believe, however, that the appellant should receive basically her contributions to the marriage, which we determine to be slightly in excess of the trial court's figures, and an increase in the cash allowance of $1,000 would be more equitable to the appellant.

For the reasons given, we affirm the judgment of the trial court granting a divorce to the appellant and setting off the 1959 Chevrolet automobile, but we modify the award of alimony by allowing appellant $2,500. We further allow the appellant an additional $300 for services of her attorney in this court and the costs of the action.

AFFIRMED AS MODIFIED.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. JOSEPH M. BRUECKS, SR., ET AL., APPELLEES AND CROSS-APPELLEES, IMPLEADED WITH ALL-STATE INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE, ST. PAUL FIRE & MARINE INSURANCE COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT.

139 N. W. 2d 821

Filed January 28, 1966. No. 36057.

1. **Insurance.** The words "arising out of" are very broad, general, and comprehensive terms, and are ordinarily understood to mean originating from, growing out of, or flowing from.
2. ———. The term "accident arising out of the use" in the insurance policies herein contemplates an accident immediately identifiable with the ownership, maintenance, or use of the vehicle.
3. **Automobiles: Insurance.** The accidental discharge of a loaded gun in an automobile being used to transport a minor home after a hunting trip is not an accident within the contemplation of the term "arising out of the use" of an automobile, under the facts in this case.
4. **Estoppel.** Equitable estoppels cannot in the nature of things be subjected to fixed and settled rules of universal application like legal estoppels, nor be hampered by the narrow confines of a technical formula.
5. ———. Equitable estoppel rests largely on the facts and circumstances of the particular case.
6. **Insurance: Estoppel.** Assumption of complete control of a matter involving a possible claim for a period of 17 months, with the consequent need of cooperation under the terms of the policy,

constitutes a sufficient showing of prejudice as a basis for urging estoppel.

7. **Insurance: Pleading.** An insurer's duty to defend an action against the insured is measured in the first instance by the allegations of the pleadings in the action against the insured.

8. ———: ———. If such pleadings state facts bringing the injury within the coverage of the policy, insurer must defend irrespective of the insured's ultimate liability to the plaintiff.

Appeal from the district court for Douglas County: RUDOLPH TESAR, Judge. Affirmed in part, and in part reversed and remanded with directions.

Stoehr, Rickerson & Caporale, for appellant.

Haney, Walsh & Wall, for appellee National Union Fire Ins. Co.

Sodoro & Meares, for appellee St. Paul Fire & Marine Ins. Co.

Kennedy, Holland, DeLacy & Svoboda, for appellees Campbell.

Floersch & Floersch, for appellees Bruecks.

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

SPENCER, J.

This is an action for a declaratory judgment to have determined the coverages afforded to MacDowell Campbell and Scott Campbell by insurance policies issued by National Union Fire Insurance Company of Pittsburgh, Pennsylvania, hereinafter referred to as National; St. Paul Fire & Marine Insurance Company, hereinafter referred to as St. Paul; and Allstate Insurance Company, hereinafter referred to as Allstate. The action is brought by National against Joseph M. Bruecks, Sr., Joseph M. Bruecks, Jr., MacDowell Campbell, Scott Campbell, Allstate, St. Paul, and Nancy L. Campbell.

MacDowell and Scott Campbell are defendants in another lawsuit arising out of the shooting of Joseph M.

Bruecks, Jr., by a gun in the hands of Scott Campbell. That action will hereinafter be referred to as the tort action. At the time of the shooting, National insured the Campbells under a comprehensive personal liability policy. Allstate insured Joseph M. Bruecks, Sr., and his family, including persons using the automobile with his consent, under an automobile liability policy covering the car which Bruecks, Jr., was driving at the time of the shooting. St. Paul had in force an automobile liability policy on an automobile owned by the Campbells which extended coverage for the use of nonowned automobiles.

In the petition in the tort action it is alleged that on or about the 26th day of December 1961, Scott Campbell was hunting with certain other minors in west Omaha; that about 5:30 p. m. on said date, Bruecks, Jr., a minor, drove an automobile owned by his father and covered by the Allstate policy, to pick up said minors and return them to their homes in Omaha; that Scott Campbell sat in the right rear seat of said car and on the way back to Omaha, while said car was in motion, negligently and carelessly attempted to unload his rifle; and that in the process thereof said gun discharged, causing a bullet to penetrate the front seat of the automobile, striking Bruecks, Jr., the driver of said car, and causing serious injuries.

There are many allegations of negligence alleged in the petition against the Campbells as well as against Sears Roebuck & Company, a corporation, which sold the gun to the Campbells. However, there is no allegation of any nature suggesting a causal relationship of the incident pleaded to the use of the automobile. Bruecks, Jr., had not been hunting with the boys but had been sent out by his stepmother to pick up the boys and return them to their homes.

Immediately after the accident, notice was given by MacDowell Campbell to National, and he was told he had $50,000 coverage under his comprehensive personal

liability policy. The matter was referred by National to the law firm of Haney & Walsh, who will hereinafter be referred to as National's attorneys, for investigation. While there is a dispute as to the facts, for the purposes of this case we determine the following to be the facts: National's attorneys conducted an investigation by contacting persons having knowledge of the facts, including the Campbells. This initial investigation extended over a period of several weeks, and continued periodically until June 8, 1963. The entire investigation was under the control of National's attorneys. No notice of the accident was given to Allstate or to St. Paul prior to August 13, 1962.

In August of 1962, National's attorneys contacted the Campbells, suggesting the possibility of coverage being afforded under the Allstate policy written on the automobile in which the shooting incident occurred. They thereafter sent the Campbells a letter written by them for Scott Campbell's signature, to be returned to them for forwarding to Allstate. This was done.

The Campbells were led to believe that National was affording coverage and left the matter entirely in the hands of National's attorneys. The tort action was filed on May 17, 1963. The papers and summons served on the Campbells were immediately forwarded to National's attorneys. On June 8, 1963, some 3 weeks subsequent to the filing of the action against the Campbells, National's attorneys sent a notice to MacDowell Campbell that National did not intend to afford coverage under its policy. This was the first indication given the Campbells that National was denying coverage. A few days prior thereto, National's attorneys had indicated to the Campbells that the matter was progressing satisfactorily, and that the prospects of a settlement looked good. The Campbells then consulted other counsel. On June 17, 1963, National's attorneys filed a special appearance in the tort action on behalf of the Campbells. On July 17, 1963, a reservation of rights agreement was executed

between the Campbells and National, and National's attorneys have continued to represent the Campbells in the tort action.

The judgment of the trial court may be summarized as follows: (1) National is required to defend MacDowell Campbell in the tort action and to participate in any judgment against him; (2) National is estopped to deny coverage to MacDowell and Scott Campbell, and shall be primarily liable to participate in any judgment against them; (3) Scott Campbell was using the Brueck's automobile within the meaning of the terms of the Allstate policy, and Allstate has a primary duty to participate with National in the defense of the tort action as well as in any judgment entered; (4) National's and Allstate's participation shall be in proportion to the applicable limits of their respective policies; and (5) Scott Campbell was using the Bruecks' automobile within the meaning and terms of the St. Paul policy, and St. Paul shall be liable as an excess carrier in the event a judgment is rendered in excess of the combined coverage of National and Allstate. Allstate perfected an appeal to this court, and St. Paul and National have perfected cross-appeals.

The Allstate policy issued to Bruecks, Sr., afforded liability coverage to any person actually using the automobile with his permission for "* * * bodily injury sustained by any person * * * arising out of the ownership, maintenance or use, including loading and unloading, of the owned automobile or a non-owned automobile." The St. Paul policy issued to MacDowell Campbell afforded coverage to him and members of his family, including Scott, for "* * * bodily injury * * * arising out of the ownership, maintenance or use of the owned automobile" and also "with respect to non-owned automobile * * * provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission,

* * *." The insurance policy issued by National to MacDowell Campbell afforded comprehensive coverage for him and for Scott Campbell as follows: "To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury," and provided an exclusion from the above coverage of "the ownership, maintenance, operation, use, loading or unloading of (1) automobiles while away from the premises * * *."

It would seem that the obligation to defend a suit for an insured should be determined on the basis of whether the petition filed against him attempts to allege a liability within the terms of the policy. In the tort action, which is the basis for this declaratory judgment action, there is no allegation set out in the petition which would indicate that the action was brought as one arising out of the use of a motor vehicle. Ignoring, for purposes of discussion herein, the allegation of negligence as against Sears Roebuck & Company and until later as against MacDowell Campbell, the allegations of negligence against Scott Campbell may be summarized as failing to unload the gun previous to entering the automobile and in attempting to unload the gun in a moving automobile. These allegations in no way predicate recovery on the use of the automobile as such. The gun did not discharge as a result of being in the vehicle or for any reason even remotely connected with the vehicle. It seems clearly apparent that the tort action is not premised upon any connection with the automobile in which the shooting occurred, except as describing the situs of the act.

It is the position of both National and the Campbells that Scott Campbell was using the Bruecks' automobile with the permission of Bruecks, Sr., within the intent and meaning of the Allstate and St. Paul policies, and it is National's contention that by virtue thereof Scott Campbell is excluded from coverage under the National policy.

For purposes of discussion herein, we determine that

Scott Campbell was using the Bruecks' automobile within the meaning of the term "use" in the Allstate and St. Paul policies. See Metcalf v. Hartford Acc. & Ind. Co., 176 Neb. 468, 126 N. W. 2d 471, in which we said: " '* * * an automobile is being used by an individual who is traveling in it regardless of whether it is being operated by him or by another.' "

It seems patent, however, that some causal relation must exist between the injury and the use of the vehicle to come within the ambit of "arising out of the use of a vehicle." Many courts have found a causal relation to exist if the use was connected with the accident or the creation of a condition that caused the accident. The proximate cause of the injury here was the discharge of the gun. Was the discharge of the gun during the use of the automobile a sufficient connection with its use to be within the coverage provided by the "arising out of the use" clause of the Allstate and St. Paul policies? To put it another way, we must determine whether the fact that Scott Campbell was riding in the automobile at the time of the accident, making the automobile the situs of the accident, constitutes the accident one "arising out of the use of" the automobile, or, if not, whether it constitutes the creation of a condition that caused the accident within the terms of the policy. In this connection, it may be pertinent to observe that the injury could never have happened if Scott Campbell had not had a loaded gun in his possession in the automobile. The accident could just as readily have happened in the Bruecks' living room if Scott Campbell had carried the gun into the Bruecks' home. National and the Campbells argue that because the boys had been on a hunting expedition, it must necessarily be implied that Scott Campbell had permission to transport the gun in the automobile. This is obvious. The question, however, is whether he had permission to transport a loaded gun, when the ordinary experiences of mankind dictate that guns are to be unloaded when not intended for immediate use.

Is the construction contended for by National and the Campbells within the scope of any risk reasonably to be contemplated by the policy? Courts have the obligation to determine from the written contract the true intent of the parties. Here the terms of the contract are plain and unambiguous. The policy is intended to cover any injury caused by an accident arising out of the use of an automobile and a reasonably liberal construction should be in order if we are to effectuate the purpose of the contract. Here no one argues that the use of the car can in any way be considered the proximate cause of the injury. However, National and the Campbells do contend that there is a causal connection between the use of the automobile and the accident, and that this is sufficient to make the accident one arising out of the use of the automobile.

The words "arising out of the use" are very broad, general, and comprehensive terms, and are ordinarily understood to mean originating from, growing out of, or flowing from. See Schmidt v. Utilities Ins. Co., 353 Mo. 213, 182 S. W. 2d 181, 154 A. L. R. 1088. It was there held that injuries sustained in falling over blocks left on the sidewalk by the driver of insured's trucks after being used as ramps to facilitate the backing of the trucks up over the curb to a coalhole in the sidewalk was an accident arising out of the use of insured's vehicle. There the use of the blocks was necessary to facilitate the use of the truck. National relies upon Manufacturers Casualty Ins. Co. v. Goodville Mut. Casualty Co., 403 Pa. 603, 170 A. 2d 571, in which the court said "arising out of" means causally connected with, not proximately caused by, and that a "but for" causation, that is, a cause and result relationship, is enough to satisfy this provision of the policy. In that case, the court stated that a horse trailer was in use within the ownership, maintenance, or use clause of the insurance policy on the trailer while being pulled by a pickup truck insured by a different company, where facts disclosed that

at the time of the accident the trailer was being used to transport a horse.

National also cites Suburban Service Bus Co. v. National Mutual Casualty Co., 237 Mo. App. 1128, 183 S. W. 2d 376, in which the court held that an injury to a girl passenger arose out of the use of a bus within the meaning of the terms of a policy issued on the bus where the girl's injury was caused by fluid from a fire extinguisher which the driver of the bus discharged at the passengers to scare them into refraining from using water guns on him. A reading of that case convinces us that it is not in any way analogous to the case herein, for the reason that what the driver did was to prevent disorderly conduct which was interfering with the safe operation of the bus and was clearly incident to the use of the bus in transporting passengers.

The case of Fidelity & Casualty Company of New York v. Lott, 273 F. 2d 500, cited by National, is also clearly distinguishable on the facts from the instant one. There, the insured, spying three deer slightly below the road, brought the vehicle to a stop and leaning his gun over and against the vehicle fired at one of the deer. For some unexplained reason (as suggested by the court probably because the muzzle of the gun did not clear the curved top of the vehicle), the bullet tore down through the top of the car, was deflected downward, and killed one of the hunters who was sitting on the right front seat of the vehicle.

Allstate cites McDonald v. Great American Insurance Co., 224 F. Supp. 369, a Rhode Island case, in support of its position. That was a declaratory judgment action to determine whether the insurers under a comprehensive home owners personal liability policy and an automobile liability policy were required to conduct the defense of actions brought against the insured by persons claiming injury as a result of the insured's having thrown a cherry bomb from an automobile. The automobile liability policy involved was construed under Massachusetts law.

The court there held that in order to constitute an injury arising out of the ownership, maintenance, or use of a motor vehicle under Massachusetts law, the cause of injury to the victim must be something physically attached to or immediately connected in some manner with the motor vehicle or its operation, and held that coverage was not afforded by the policy.

The contracting parties plainly contemplated an accident immediately identifiable with the ownership, maintenance, or use of the vehicle. It does not appear to us, however, that the occurrence here will fit the plain, ordinary meaning of those categories within any reasonable interpretation of them. We agree that the terms themselves encompass many uses of an automobile other than the driving or directing the driving of it. We believe, however, to hold the injury herein to be one arising out of the use of the automobile, within the terms of the policy, is to do violence to the intent of the contracting parties, and to enlarge the contract by judicial construction.

The Campbells cite the case of Dorsey v. Fidelity Union Casualty Co. (Tex. Civ. App.), 52 S. W. 2d 775, as authority for their position. There, preparatory to entering an automobile to return from a hunting trip, one of the party unloaded his gun and in the process injured the driver who, after unloading his own gun, had entered the vehicle. The court held that the removing of the shells from the gun was so closely connected with the loading thereof into the car as to constitute a part thereof, and determined the injury was sustained as a result of operating or riding in the automobile. That case is clearly distinguishable from the instant one. Elementary safety precautions require the unloading of guns before they are transported from one place to another, and such act may constitute a part of the loading and unloading process.

Allstate Insurance Co. v. Valdez, 190 F. Supp. 893, a Michigan case cited by National, covers an analogous

situation and involved an interpretation of a loading and unloading provision of the use clause. In that case, a gun was discharged while it was being unloaded preparatory to placing it in the trunk of the car. Insured, who was 25 feet behind the car, slipped in the process of unloading the gun and it discharged, projecting a shell through the open trunk into the back seat, killing one of insured's companions. We find no fault with the holding that this was within the ambit of the loading and unloading provision of the policy, but do not see fit to apply it to an attempt to unload a gun in a moving automobile. On the facts herein, we hold that the accident is not one arising out of the use of an automobile within the terms of the policies involved.

The remaining question herein is the holding of the trial court that National is estopped to deny coverage to MacDowell and Scott Campbell. MacDowell Campbell advised his National agent of the accident immediately thereafter, and was told by the agent that he "* * * had $50,000 liability that would cover that sort of thing under my Home Owner's policy." Soon thereafter the Campbells were contacted by National's attorneys, who conducted the investigation. Various assurances were given by National's representatives to the Campbells. They were told early in the investigation that the matter was in the hands of the insurance company and they should not worry about it. When suit was filed May 17, 1963, National's attorneys accepted the summons and the petition. Subsequent thereto and before the letter of disclaimer of liability dated June 8, 1963, one of National's attorneys told Mrs. Campbell that "* * * things were looking up, things looked good, and we did not have anything to worry about," and in answer to a question as to whether that meant they were going to settle, National's attorneys said " 'It looks good.' "

The first knowledge that the Campbells had that Na-

tional was disclaiming liability was the letter of June 8, 1963. For a period of 17 months National had assumed complete and exclusive control of the case, with the complete cooperation of the Campbells. So complete was National's control of the situation that it is undisputed that its attorneys brought the matter of Allstate's possible coverage to the attention of the Campbells and prepared and forwarded the notice to Allstate. National knew the terms of its policy, and from its investigation must be assumed to have had full and complete knowledge of the facts. If it is now National's position that the accident is excluded from coverage by the terms of its policy, it knew that fact at all times during the 17 months it presumed to represent the Campbells. National argues that it made no false representations herein which could constitute a basis for estoppel. We determine that National's conduct was sufficient to constitute a representation, and is a most persuasive argument for the operation of the doctrine of equitable estoppel. We find, therefore, that by its conduct National construed the policy to provide coverage in this instance.

In May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448, we said: " 'Equitable estoppels operate as effectually as technical estoppels. They cannot in the nature of things be subjected to fixed and settled rules of universal application, like legal estoppels, nor hampered by the narrow confines of a technical formula. So, while the attempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case, and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances. * * * The following, however, may be ventured as the sum of all cases: That a person 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. Such an estoppel is founded on morality and justice, and especially concerns conscience and equity.' 10 R. C. L., sec. 19, p. 689. See, also, 31 C. J. S., sec. 59, p. 236." See, also, Roll v. Martin, 164 Neb. 133, 82 N. W. 2d 34.

National urges that there is no evidence in the record that the Campbells took any action or failed to take any action to their detriment because of reliance upon any acts of National. We determine that the assumption of complete control of the matter for a period of 17 months, with the consequent need of cooperation with National under the terms of the policy, in itself constitutes a sufficient showing of prejudice.

Ignoring for the moment the question of estoppel, it would appear that National is required by the terms of its policy to defend MacDowell Campbell in any event. There is nothing in any of the allegations in the tort action pertaining to the alleged negligence of MacDowell Campbell which in any way can be said to relate to or be connected with the use of the automobile which was the situs of the accident. Any negligence of MacDowell Campbell, if any, arose prior to the use of the automobile. An insurer's duty to defend an action against the insured is measured in the first instance by the allegations of the pleadings in the action against the insured, and if such pleadings state facts bringing the injury within the coverage of the policy, insurer must defend irrespective of the insured's ultimate liability to the plaintiff. See 7A Appleman, Insurance Law and Practice, § 4683, p. 436, and cases cited in footnote 26.

For the reasons outlined above, we reverse the judgment of the trial court so far as it pertains to Allstate and St. Paul, and direct the dismissal of the action as to each of them. In all other respects the judgment is affirmed.

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

IN RE PETITION FOR FORMATION OF THE VILLAGE OF VALENTINE MOTEL.

ROGER M. LITTLE, FOR HIMSELF AND ON BEHALF OF ALL OTHER PETITIONERS, APPELLANTS, V. BOARD OF COUNTY COMMISSIONERS OF CHERRY COUNTY, NEBRASKA, ET AL., APPELLEES.

140 N. W. 2d 1

Filed January 28, 1966. No. 36067.

1. **Counties: Municipal Corporations.** The duty imposed on the county board by section 17-201, R. R. S. 1943, is mandatory and the action of the board is ministerial in nature.
2. ———: ———. Where a proper petition is presented under section 17-201, R. R. S. 1943, complying with the jurisdictional provisions, the county board has no discretion and a failure on its part to act would justify the interference of the courts by mandamus.
3. **Officers.** If the law directs an officer to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer.
4. ———. An act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act.
5. **Mandamus.** An action to procure the issuance of a writ of mandamus is not begun until a motion and affidavit, or a petition verified positively, is filed in the district court.

Appeal from the district court for Cherry County: ALBERT W. CRITES, Judge. Affirmed.

John C. Coupland, Lane, Baird, Pedersen & Haggart, and Theodore M. Tedesco, for appellants.

Richard L. Spittler, for appellees.

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

SPENCER, J.

Appellants have perfected an appeal from an order of the district court for Cherry County sustaining ap-

pellees' motion to dismiss and dismissing appellants' petition in error for review of an order of the board of county commissioners denying a petition for incorporation of the unincorporated village described as Village of Valentine Motel.

Appellants attempted to incorporate the area as a village under the provisions of section 17-201, R. R. S. 1943. A 1961 amendment to said section, which became effective after the filing of appellants' petition, does not affect this case. Section 17-201, R. R. S. 1943, provides, insofar as material to the formation of the village, as follows: "Whenever a majority of the taxable inhabitants of any town or village, not incorporated under any laws of this state, shall present a petition to the county board of the county in which said petitioners reside, praying that they may be incorporated as a village, designating the name they wish to assume, and the metes and bounds of the proposed village, and such county board or majority of the members thereof shall be satified that a majority of the taxable inhabitants of the proposed village have signed such petition, and that inhabitants to the number of one hundred or more are actual residents of the territory described in the petition, the board shall declare the proposed village incorporated, and enter the order of incorporation upon its records, and designate the metes and bounds thereof. Thereafter the said village shall be governed by the provisions of law applicable to the government of villages. The county board shall, at the time of the incorporation of said village, appoint five persons, having the qualifications provided in section 17-203, as trustees, * * *."

Appellants filed their petition with the board of county commissioners of Cherry County, hereinafter referred to as board, on December 30, 1961. On January 9, 1962, the board held a public hearing on the petition, and after the hearing denied the request without giving reasons for its denial. Appellants filed their petition in error in the district court to review the action of the board. It

was this petition to which appellees' motion to dismiss was sustained.

The only issue raised by the motion to dismiss is whether the determination made by the board was judicial or ministerial in nature. The district court determined the action to be purely a ministerial function. If it is judicial in nature, there is no question it is reviewable in the district court on a petition in error. § 25-1901, R. R. S. 1943. On the other hand, if such action is merely ministerial, then, as will be hereinafter indicated, a petition in error is not a proper remedy.

Appellants argue that section 17-201, R. R. S. 1943, requires the board to hear and weigh evidence and determine whether the statutory requirements are met. They argue this requires the board to make the following determinations: (1) The territory is unincorporated and is a true village and not merely a rural area; (2) inhabitants to the number of 100 or more are actual residents of the village; and (3) a majority of the taxable inhabitants have signed the petition to form the village. If the board finds these three statutory requirements exist, then the board declares the proposed village incorporated, enters the order of incorporation upon its records, designates the metes and bounds of the village, and appoints five persons as trustees. These actions, appellants urge, are quasi-judicial as that term has been applied by our decisions.

The difficulty with appellants' position is that we have two Nebraska cases which state in effect that the duty imposed on the county board by section 17-201, R. R. S. 1943, is mandatory, and the action of the board is ministerial in nature. The pertinent part of the statute, for our purposes substantially in its present form, was discussed in a 1907 case, Commonwealth Real Estate Co. v. City of South Omaha, 78 Neb. 368, 110 N. W. 1007. In that case, referring to the authority granted to the board, this court said: "The authority thus delegated to county boards is ministerial, * * *."

In Kriz v. Klingensmith, 176 Neb. 205, 125 N. W. 2d 674, we quoted as follows from Commonwealth Real Estate Co. v. City of South Omaha, *supra*: " 'The authority thus delegated to county boards is ministerial, and may be exercised only in strict accord with the letter of the statute, and where the proper petition is presented, complying with the jurisdictional provisions, the county board has no discretion, and a failure on their part to act would justify the interference of the courts by mandamus to compel the performance of this statutory duty. * * *.' " Mandamus is not available if there is an adequate remedy at law. § 25-2157, R. R. S. 1943.

Appellants seek to distinguish these cases. They suggest that the holding in the Commonwealth case, which involved an action in the nature of quo warranto to disconnect certain agricultural lands included in the city limits, is dicta. They then point out that the Kriz case did not involve the issue herein but involved rather the constitutionality of the statute itself. We believe the determinations there made, dicta or otherwise, accurately categorize the authority granted.

Answering specifically appellants' argument that the determination made by the county board required construction of the law and consideration of the evidence, which takes it out of the ministerial category, we call attention to the fact that an act may be held to be ministerial even though the person performing it may have to satisfy himself that a certain state of facts exist under which it is his duty to perform the act.

As is well said in 34 Am. Jur., Mandamus, § 72, p. 862: "Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law and must, therefore, in a certain sense, construe it in order to form a judgment from its language as to what duties he is directed by statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law

directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer."

In State ex rel. Herman v. City of Grand Island, 145 Neb. 150, 15 N. W. 2d 341, to determine the propriety of a mandamus action, it was necessary to decide whether the action of the city council was discretionary or administrative. We there said: "It has been authoritatively said that, 'A duty or act is ministerial in the sense here intended when there is no room for the exercise of discretion, official or otherwise, the performance being required by direct and positive command of the law. It is such an act as an official or agent is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed. Where the duty in a particular situation is so plainly prescribed as to be free from doubt, it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there is provision or implication to the contrary.' 34 Am. Jur., sec. 80, p. 859. 'Where the duty is such as necessarily requires the examination of evidence and the decision of questions of law and fact, such a duty is not ministerial; but an act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act.' 38 C. J., sec. 73, p. 598."

Contrary to appellants' contentions, the duties of the board under section 17-201, R. R. S. 1943, are purely administrative in determining whether certain facts exist which the Legislature has decided entitle the petitioners to have their area incorporated as a village. The board must find compliance with the jurisdictional require-

ments of the act before it is permitted or required to act.

As we said in State ex rel. McIlvain v. City of Falls City, 177 Neb. 677, 131 N. W. 2d 93: "'* * * an act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act.'" The board in no sense exercises discretion. If the necessary facts exist, it must perform the duties outlined in the statute. It is the law which makes the desired change. The board merely facilitates the legislative process in determining that the facts exist which require it to enter the order of incorporation on its records and to carry out the discretion of the law.

Appellants urge that if we determine that a petition in error is not the proper remedy, that the pleadings are broad enough to permit mandamus or other appropriate relief. There are several reasons why appellants' contention is without merit. Suffice it to say that even if the petition in error, which is verified on information and belief, is broad enough to be interpreted as a petition in mandamus, there is no application by motion supported by affidavit to justify the action pursuant to section 25-2160, R. R. S. 1943. See State ex rel. Krieger v. Board of Supervisors, 171 Neb. 117, 105 N. W. 2d 721.

As we said in State ex rel. Chicago & N. W. Ry. Co. v. Harrington, 78 Neb. 395, 110 N. W. 1016: "An action to procure the issuance of a writ of mandamus is not begun until a motion and affidavit, or a petition verified positively, is filed in the district court, * * *."

For the reasons given, the judgment of dismissal entered by the district court was proper and is affirmed.

AFFIRMED.

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

139 N. W. 2d 832

Filed January 28, 1966. No. 36074.

1. **Homicide.** Under section 28-402, R. R. S. 1943, a purpose to kill and malice are essential elements of murder in the second degree and, under a charge therefor, both must be proved beyond a reasonable doubt.
2. ———. Malice is never implied or presumed as a matter of law where the circumstances of the killing are testified to on the trial by eyewitnesses.
3. ———. Where the evidence does not prove a higher degree of homicide than manslaughter, it may be prejudicial error to submit to the jury the issue of murder in the second degree.
4. **Criminal Law.** This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.
5. ———. Where the evidence and circumstances of the crime are such that different conclusions may properly be drawn therefrom as to the degree, the trial court is without error in submitting the different degrees to the jury for its determination.

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

Willard F. McGriff and Alfred J. Kortum, for appellant.

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

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

BROWER, J.

The defendant John Hizel, Jr., at a trial to a jury in the district court for Scotts Bluff County, was found guilty of the crime of murder in the second degree perpetrated on the person of Elbert Eugene Hendren. He was sentenced to the Nebraska Penal and Correctional Complex for life. The defendant was not charged with

murder in the first degree. He has by an appeal brought the case to this court.

The fatal occurrence took place on Sunday, October 11, 1964. The defendant John Hizel, Jr., his wife, and stepson, Glen Dalrymple, aged 16 years, lived together in their home in Mitchell, Nebraska. Harold Dalrymple, another stepson, a single man, lived a few blocks from them. The defendant was about to go to the veterans hospital at Cheyenne for an examination. At the suggestion of Harold, the stepsons and the defendant decided to have a farewell party, or celebration, for the latter. Before an early Sunday dinner they went in defendant's 1953 Plymouth sedan to Bob's Superette at Scottsbluff and got a six-pack of beer. This they drank, each consuming two cans, on their way back to Mitchell where they had dinner with the wife and mother. After dinner between 1 and 1:30 o'clock they went to Terrytown and bought a case of Colt 45 malt liquor, referred to as ale. They then proceeded to drive and drink during the afternoon. They appear to have all become intoxicated in varying degrees. None of them remembered all of the roads they took, or the towns or places they went through, and Harold remembered very little of the trip.

Shortly before the fatal events hereafter related they had for a considerable distance been driving eastward on a narrow private road which runs on top of the dike along the Gering-Ft. Laramie irrigation ditch. Between 3:30 and 4 o'clock they were passing on this road through the farm premises where the deceased victim of the lethal shot lived. The road in that vicinity is on the north bank of the canal. Eighteen cans of Colt 45 had then been consumed. About 2/10 of a mile west of the intersection of this private road with a north and south county road passing through the same farm, the front wheel of their sedan became caught in a cattle guard they were attempting to cross, apparently because of a missing rail or plank in its floor. In extricating the

wheel an argument ensued between the two brothers. Glen said it arose as to which of them should get down and retrieve an automobile jack, used in the operation, which had fallen into the pit of the cattle guard. Its recovery did not, however, stop the argument which grew quite heated and eventually led to blows. In the end the brothers descended the dike, repaired to an adjoining meadow to the north, and engaged in "fisticuffs." The blows were intersperced with considerable shouting and swearing. The defendant got out of the sedan and attempted to separate them but failing in so doing returned to the car and took the driver's seat previously occupied by Glen. The brothers never returned to the sedan but first Glen and eventually Harold walked diagonally northeasterly across the meadow to the county road.

The deceased, Elbert Eugene Hendren, was generally referred to in the testimony as "Gene" Hendren and will be so designated herein. He lived with his wife, Wanda Hendren, on the farm through which the canal and dike road passes and where the cattle guard is located. The north and south county road extends by means of a bridge over the canal. The canal and county road cross approximately but not exactly at right angles. Immediately to the south of the canal and just to the west of the county road is the building site of the farm. It is surrounded by an extensive grove of trees. Mr. Hendren worked elsewhere and neither owned nor operated the farm. The farm which included land on both sides of the canal was owned by Ione Campbell, mother of Wanda Hendren. Mrs. Campbell lived in a separate residence at the same building site. On the morning and early afternoon of October 11, 1964, several truckloads of cattle belonging to others arrived at the home site. Mr. Hendren assisted in unloading, sorting, and corralling them. The work with respect to the last load was completed at approximately 4 o'clock that afternoon. Shortly thereafter they heard the loud talk emanating from the fight

between the Dalrymple brothers but from the farmstead could not see what was happening. The weather was dry and there were many stacks of hay upon the meadow. Mr. and Mrs. Hendren thought they should find out what was going on. For that purpose they walked out to the bridge, which was somewhat elevated, to view the meadow. They saw the defendant's car parked on the dike road and three persons in a group out on the meadow not far from the cattle guard.

Up to this point there is little dispute as to the facts. The evidence with respect to what occurred at and near the bridge is conflicting and will be outlined separately with respect to the testimony offered by the State and the defendant.

The evidence offered by the State is embodied in the testimony of Wanda Hendren and Ione Campbell who, aside from the defendant himself, are the only persons claiming to be eyewitnesses to what occurred near the bridge. Mrs. Hendren said that Gene Hendren on seeing the men on the meadow told her to go and get the pickup. Thereupon she ran or briskly walked home and got it. Mrs. Campbell who was quite deaf had seen the Hendrens walk to the bridge and knew something was going on and asked to go too. She returned with Mrs. Hendren in the pickup which was parked near the bridge on the east side of the public road. When they returned the defendant's car was parked on the ditch company road 25 or 30 feet west of the county road, close to an electric light pole. Gene Hendren was standing in front of defendant's car and the two men were just off to the side of it talking. Meantime, Glen Dalrymple, walking diagonally northeasterly across the meadow, had reached and was walking northward on the public highway some distance away but could be seen from the bridge. Mr. Hendren asked his wife to go and get the boy with the pickup. She drove northward on the road and asked him to go back with her but he refused. Glen testified he told her he wasn't going back,

he would just get into another argument. Mrs. Hendren then drove back to the bridge.

While Wanda Hendren was away with the pickup, Ione Campbell testified that she stood on the corner of the bridge. When she started to go to Gene Hendren, he motioned her to stay back. She could tell Gene and defendant were talking but because of deafness was unable to hear any of the conversation. Defendant had a gun which he was waving in front of Gene's face and Gene was taking his hands and forcing the defendant back. In this manner the two men backed up to the car door and Gene opened it and defendant got in. She never saw the gun again until after the shot. Gene made a motion which Mrs. Campbell interpreted as meaning, " 'Go on, everything is clear.' " The defendant did not start the motor but in just a little while opened the door and again stepped out by Gene. Standing there Mrs. Campbell observed Harold Dalrymple going northeasterly on the hay meadow. He took a few steps, staggered, and fell several times. About this time Wanda Hendren came back and walked over where the two men were. Mrs. Campbell said to Wanda, " 'There is a man up there that is wounded, I think,' or something." The three were standing along the defendant's car and gradually backing up toward its rear. The two men backed to the west end of the automobile when Mrs. Campbell heard a shot. She saw the defendant fall back and Gene fell at the same time. Gene got up, threw the gun in the canal, and fell again. The defendant got in his car and left.

Wanda Hendren testified that when she got back to the bridge she got out of the pickup and walked over beside her husband. The defendant was standing against his car. Defendant was telling Gene what his name was and for whom he had worked. She could tell he was incapacitated so she suggested they go home and let the defendant go his way. Gene told his wife the defendant had a gun. He asked Wanda to get it. She

walked over behind defendant and reached in his back pocket and found a billfold which she left there. She never got the gun. She asked for it and the defendant looked at her but said nothing. Gene put his arms across the defendant's arms and there was a sudden move, a scramble "such as you see on television to disarm a person." The defendant held his left hand and arm behind him. She only saw the gun an instant before it was fired. The gun was pressed deeply into her husband's stomach and then fired. Gene fell on the defendant who went down because of her husband's weight. The defendant dropped the gun as he fell. Gene got up with the gun, threw it in the irrigation ditch, and then collapsed. The defendant got in his car and drove away. The two women aided by a neighbor loaded the deceased in Mrs. Campbell's station wagon and took him to the West Nebraska General Hospital, arriving there at 5:35 o'clock p.m.

The defendant, on the other hand, testified that after trying to break up the boys' fight he sat in the car a few minutes and then drove east on the ditch bank road. He saw the Hendrens walk across the bridge. Both Mr. and Mrs. Hendren got in front of his car and stopped him. There was little room in which to pass them. The deceased ordered him not to move the car. He was beginning to get sick from the malt liquor. He took the alcoholic cure in 1958. Defendant asked Gene Hendren to let him go and showed him his identification wallet and named some of his friends. His gun was in the glove compartment of the car. He belonged to the National Riflemen's Association and used it in practice. He put it in his left pocket after being stopped. Getting out he stood on the driver's side of his car. The Hendrens continued to stand in front of his car. Defendant, weighing only 130 pounds, was afraid of being beaten up by Gene Hendren, a larger man, having suffered from beatings in the past. Mr. Hendren smelled of liquor and defendant believed he was drunk. Hendren asked

for defendant's gun and he told him he couldn't have it. The gun was put back in his pocket. He asked Mr. Hendren to let him go and started to back up. Hendren tripped him and hit him on the chest. Defendant fell on his back and Hendren jumped on top of him. Lying on his back, he was partially under the fender. Defendant's left ear was very tender and had been operated on. Hendren was sitting on defendant's stomach and struck his ear. Defendant was afraid he would strike again. He says he asked Hendren in a nice way to let him up. Hendren leaned over and let some air out of his tire. Defendant rolled over and pulled the gun out and fired. He did not know where he hit Hendren or what happened to his gun afterwards. He then got in his car and drove north on the county road. He drove past Glen Dalrymple who was walking on the road. He told him he had shot a man and asked Glen to go home with him but Glen refused, saying he was going back to see about Harold. Defendant testified he saw no woman standing on the bridge. There was only one woman there. He would have seen another if she had been there and there was no pickup there either. On cross-examination the defendant admitted he had been previously convicted of a felony.

Certain testimony concerning what happened thereafter having some bearing on the actions of the defendant and the decedent at the bridge will be mentioned.

The deceased died without being conscious except for a brief moment at the bridge. He only stated, " 'That man shot me.' " An autopsy was performed on Gene Hendren on October 11, 1964, by Dr. Francis J. Hatch who testified. Death, he said, was caused by internal bleeding from the common iliac artery caused by a gunshot wound at close range penetrating below and to the right of the navel. There was an odor of alcohol while performing the autopsy. A blood specimen of the deceased was taken for blood alcohol determination. The test showed the blood alcohol was 0.21 percent. The

doctor testified in his opinion it would take a minimum of 10 ounces of whiskey in a man of the size of Hendren to raise the blood alcohol to that percentage. Mrs. Hendren and Mrs. Campbell had testified the deceased had not used alcoholic liquor that day.

The defendant drove to his home at Mitchell. There he had 2 cups of coffee and told his wife he had shot a man. There he got a 410 shotgun and shells for it. Defendant says he went back to find the boys. Defendant drove into the farmyard of Ray Stufft, Jr. Stufft testified that he arrived at 6 o'clock or a little later and they talked over the farmyard gate. The defendant told Stufft he had shot a man, whose wife had pulled him off, and he did not know whether the man was dead or not. Defendant did not know where the shooting took place. He said he had a loaded shotgun in the car and he was going up west to get the boys and his gun left in the scuffle and finish the job. Stufft said defendant had been "drinking a plenty" and he gave little credence to his story until 10 or 15 minutes later when deputy sheriff Hanley drove in the yard and told defendant to get in the officer's car. Defendant admitting talking to Stufft but denied he ever said he was going back to finish the job. He went there to find out something about Stufft's proposed moving to Oregon. He told him only that he had shot a man and was going to find the boys.

Two patrolmen and deputy sheriff Yeoman drove into Stufft's farmyard while deputy sheriff Hanley and the defendant were still there. The defendant's car was searched and the 410 shotgun and shells taken from it as was the holster for the pistol which was lying empty on the front seat. The defendant went with Hanley in the latter's car to the scene of the shooting. The others went there too. Hanley said when he arrived there and was asked how it happened, the defendant grabbed for his hip pocket and showed how he pulled the gun out in a crouched position and shot the man. This was repeated

several times although the question was not again asked. It was testified to by deputy Yeoman also. While at the scene a patrolman testified that he obtained a urine specimen from the defendant at 7 p.m. A laboratory technician who tested it was a witness. He said the urine showed 0.18 percent alcohol by weight. This equates with about 0.14 percent alcohol when the test is made from the blood. The person from whom such a blood specimen was given would be under the influence of alcohol.

Dr. Thomas C. Tips, a medical doctor specializing in neuropsychiatry, was the only witness besides the defendant who testified for the defense. He had examined the defendant pursuant to court order. The doctor stated defendant's mental age as between 8 and 12 years. His intelligence is in the mentally defective range and his emotional development is "very limited—primitive." The defendant suffers from chronic brain damage from alcoholism. The doctor's opinion was that defendant could not exercise the same judgment as an ordinary man. His responses would react spontaneously as a child. However, defendant knows right from wrong. His history evidenced alcoholism for which he had received treatment at the State Mental Hospital at Hastings. He has mental lapses. Defendant can only write his name but can sometimes grasp the contents of a newspaper. The doctor felt the defendant was fearful of his life at the time of his shooting. Because of defendant's low mentality affected as it was by alcohol at the time he did not have the capacity to control his action. As a child he purposely and maliciously shot Hendren. The defendant needed hospitalization and in the doctor's opinion he was a permanent menace to the public safety. A report written by the doctor previous to the trial, introduced by the State on cross-examination, is in evidence. It states: "It is further my opinion, after completing the examination, that Mr. Hizel committed the act of shooting purposely and maliciously, that there is no evidence that deliberation and premeditation were

elements of the crime for which he is charged, and that he had sufficient mental capacity to distinguish right from wrong in respect to the act for which he is to be tried."

Defendant assigns error to the trial court in its refusing to sustain the defendant's motion to direct a verdict for the defendant made at the conclusion of the State's case and renewed at the conclusion of all the evidence, and in submitting the charge of murder in the second degree to the jury; and contends the verdict is contrary to the law and the evidence.

Although defendant assigns error to the trial court in failing to sustain the defendant's motion for a directed verdict in his favor, the defendant's brief contains no argument that an instructed verdict of acquittal as a matter of law would have been justified in the present case. Defendant does cite as propositions of law statements based upon two syllabi from the case of Bourne v. State, 116 Neb. 141, 216 N. W. 173, as follows: "Where a plea of not guilty is interposed on the part of the defendant in a criminal trial, he is clothed with the presumption of innocence which stands as evidence in his favor, and so remains until the state by its proof shows him to be guilty beyond a reasonable doubt. The burden of furnishing such proof is with the prosecution throughout the trial, and never shifts.

"In such a case, if the evidence or any material part thereof is fairly susceptible of two constructions, one in favor of the state, and the other in favor of the defendant, the doubt must be resolved in behalf of the innocence of the accused, as every intendment or inference under the evidence, considered in its entirety, must be construed in his favor." The evidence in the cited case was wholly circumstantial and there was evidence tending to show that the death resulted from an accident which, if true, proved the defendant was entirely blameless. The judgment was reversed in the cited case and this court did lay down the quoted rules of law. How-

ever, this court in that case did not find the evidence as a matter of law failed to show the commission of the crime. It found that the trial court erred in failing to give an instruction tendered by defendant that certain evidence elicited by the State in an effort to show a motive failed as a matter of law to so show motive and such evidence should be disregarded by the jury. Further, it found that the trial court should have submitted the issue of manslaughter to the jury and erred in not so doing. The case is no authority for sustaining the defendant's motion for a directed verdict in his favor in the case before us. The trial court committed no error in overruling defendant's motion for a directed verdict for the defendant.

The defendant's brief is directed principally toward his assertion that the trial court erred in submitting the crime of murder in the second degree to the jury. He alleges the evidence was as a matter of law insufficient to show the commission of that crime. It is because of this he contends the verdict is contrary to the law and the evidence. All of these assignments will be considered together.

The defendant calls attention to the statute on murder in the second degree, section 28-402, R. R. S. 1943, which reads as follows: "Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree; and upon conviction thereof shall be imprisoned in the Nebraska Penal and Correctional Complex not less than ten years, or during life." He argues that the evidence fails to show that the shooting was purposely or maliciously done. He cites the case of Runyan v. State, 116 Neb. 191, 216 N. W. 656, where this court held: "Under section 9545, Comp. St. 1922 (now section 28-402, R. R. S. 1943), a purpose to kill and malice are essential elements of murder in the second degree and, under a charge therefor, both must be proved beyond a reasonable doubt.

"Malice is never implied or presumed as a matter of law, where the circumstances of the killing are testified to on the trial by eyewitnesses.

" 'Where the evidence does not prove a higher degree of homicide than manslaughter, it may be prejudicial error to submit to the jury the issue of murder in the second degree, though the trial results in acquitting the accused of the graver offense and in finding him guilty of the lesser.' Whitehead v. State, 115 Neb. 143 (212 N. W. 35)." In that case an undercover man employed and paid by the city of North Platte was assisting other officers, including the deputy sheriff, in maintaining a roadblock in an attempt to seize a car said to be illegally transporting intoxicating liquor in violation of the prohibition laws. A car, after being stopped, started up and attempted to speed on. The defendant after giving warning to stop shot with a revolver, endeavoring to hit the tires. Another fired a rifle which shot and killed an innocent occupant of the car. The man who fired the rifle was previously convicted of manslaughter. The defendant was prosecuted as an aider and abettor of the crime of murder in the second degree and manslaughter, and convicted of the latter crime. This court held that all the testimony of the eyewitnesses showed the shooting was neither purposely nor maliciously done, and that the submission of murder in the second degree was not warranted and was erroneous and prejudicial to the defendant even though he was convicted of the lesser crime. The cited case has little application to the case before us.

In the present case the following evidence was before the jury. Before the defendant left his car he took his gun with him. He waved it in front of the deceased. The deceased kept crowding the defendant back toward his car door. Defendant at one point got in his automobile and the deceased waved him on but instead of starting his car defendant got out again with the gun in his pocket. There is evidence no blows were struck and the

deceased was merely forcing him back with Hendren's arms only in front of the defendant when a violent movement took place and the defendant shot with the gun pressed into the deceased's abdomen. The defendant testified that he pointed the gun at the deceased to scare him. He further testified: "Q Where did you shoot him? A I don't remember. Q Did you intend to shoot him? A I shot him. That's all I remember. Q Well, you took the gun out and you were going to shoot him, isn't that right? Is that right? A No, I didn't want to shoot him where it went; I was going to just catch him in the side and kind of wound him a little, but I didn't aim to. Q But you intended to shoot him? A Yes. But I begged the man to leave me go, I was sick, and he wouldn't do it. Q Were you afraid for your life? A Yes." Again he testified: "Q And before you got out of your car you reached into the glove compartment and got this gun and you figured at that time you were going to have to use it. A For my own protection—." There is other evidence that the defendant acted out what happened by grabbing for his hip pocket and showing how he pulled the gun out in a crouched position and shot the man. After the shooting he went home and got the 410 shotgun and there is evidence that he said he intended to go back to finish the job. This testimony was submitted to the jury with testimony offered by defendant by which the defendant maintains he acted in self defense. The evidence is in such complete conflict that the jury could not give complete credence to both versions of what happened. Ione Campbell testified she went to the scene in the pickup and remained while Wanda Hendren drove away to get Glen Dalrymple to return. Glen testified to speaking with her. Defendant denies Mrs. Campbell or the pickup were present. The defendant's contention alleges as error the submitting of murder in the second degree to the jury. There is no objection to

the contents of the instructions if that issue was proper to submit under the evidence.

In Buckley v. State, 131 Neb. 752, 269 N. W. 892, this court stated the rule: " 'This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.' Williams v. State, 115 Neb. 277, 212 N. W. 606."

In Woodard v. State, 159 Neb. 603, 68 N. W. 2d 166, it was held: "Where the evidence and circumstances of the crime are such that different conclusions may properly be drawn therefrom as to the degree, the trial court is without error in submitting the different degrees to the jury for its determination."

In the present case there was evidence from which the jury if it gave credence thereto could properly conclude the defendant shot the deceased purposely and maliciously. Certainly this court cannot under the conflicting evidence before it find that it is insufficient to support a finding of guilt of murder in the second degree as a matter of law. We find the submission of that issue to the jury was proper and that the verdict was neither against the law nor the evidence.

It follows that the judgment of the trial court was without error and should be and is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. DELMAR STULP, APPELLANT, v. B. F. MUSCHEITES, APPELLEE.

139 N. W. 2d 887

Filed February 4, 1966. No. 36004.

1. **Judgments: Appeal and Error.** In a summary judgment proceeding a finding that no genuine issue existed as to any material fact is presumed to have been correct in the absence of a

bill of exceptions, and the only issue on appeal is the sufficiency of the pleadings to support the judgment.

2. **Elections.** If a candidate for public office gives property of value as compensation for votes, his election will be void. § 32-1101, R. R. S. 1943.

3. **Quo Warranto.** In a quo warranto proceeding by a claimant to public office a recovery by relator must be based upon the strength of his own title and not upon weakness in the claim of his adversary.

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

Richard H. Hansen and Hyman Polsky, for appellant.

Dwight Griffiths and Robert S. Finn, for appellee.

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

SMITH, J.

This is a statutory proceeding in quo warranto to contest an election. On defendant's motion for summary judgment the district court dismissed the action, and relator has appealed.

The information alleges that at the general election held November 6, 1962, defendant, and not relator, was declared to be elected to the office of county clerk of Pawnee County, Nebraska, as a result of illegal votes and wrongful conduct by defendant. The answer and reply raise a formal issue of fact whether relator gave property of value as compensation for votes.

The motion for summary judgment was based partly on this formal issue. At the hearing both parties adduced evidence. The district court made a general finding for defendant in addition to a specific finding for him on another issue. The court also found from the pleadings, depositions, and admissions on file that there was no genuine issue as to any material fact, and it concluded that defendant was entitled to judgment as a matter of law.

There is no bill of exceptions. Therefore the finding

of no factual issue is presumed to have been correct, and we consider only the sufficiency of the pleadings to support the judgment. See Ehlers v. Pound, 176 Neb. 673, 126 N. W. 2d 893.

The judgment is supported by the allegations concerning the conduct of relator. If a candidate gives property of value as compensation for votes, his election will be void. § 32-1101, R. R. S. 1943. In a quo warranto proceeding by a claimant to public office a recovery by relator must be based upon the strength of his own title and not upon weakness in the claim of his adversary. State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N. W. 2d 625.

The judgment is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion because it ignores the real issue presented to this court. The only issue on which the trial court made a specific finding was the fact that appellant had been convicted of a felony and his civil rights had not been restored so he was ineligible to hold public office. This was the issue extensively briefed and argued in this court. It is not referred to in any way by the majority opinion.

I am authorized to say that Carter, J., joins in this dissent.

WILSON GRAIN COMPANY, INC., A CORPORATION, APPELLEE, v. DON RESSO, APPELLANT, IMPLEADED WITH STECKLEY HYBRID CORN COMPANY, A CORPORATION, APPELLEE.

140 N. W. 2d 18

Filed February 4, 1966. No. 36065.

1. **Trial: Judgments.** To justify the entry of a summary judgment, the record must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

2. **Negligence.** A party is answerable for the natural, probable, reasonable, and proximate consequences of his act.
3. **Sales: Negligence.** One who knows or has reason to know a certain food product is not fit or suitable for use in the ordinary channels of commerce and who sells it without disclosing its dangerous or noxious nature to a good faith purchaser is subject to liability to the purchaser for all damages the purchaser may sustain as the result of the introduction of the product in the ordinary channels of commerce.

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

Chauncey C. Sheldon, for appellant.

Crosby, Pansing, Guenzel & Binning and Theodore L. Kessner, for appellee Wilson Grain Co., Inc.

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

SPENCER, J.

Wilson Grain Company, a corporation, hereinafter referred to as Wilson, instituted this action for negligence and breach of warranty against Don Resso, hereinafter referred to as Resso, and Steckley Hybrid Corn Company, hereinafter referred to as Steckley. A jury was waived. Upon trial to the court, the action was dismissed as to Steckley and judgment was entered in favor of the plaintiff and against Resso in the amount of $7,179.78. Resso perfected an appeal to this court.

Wilson operates several country grain elevators, one of which is located at Murray, Nebraska. It is what is known as a one-man operation, with Richard Schanot, hereinafter referred to as Schanot, as its only employee. On August 20, 1959, Schanot purchased approximately 1,350 bushels of yellow corn from Resso at the Murray elevator. Resso had purchased this corn from Steckley at a reduced price. It was sold to Wilson as top-quality corn at the market price. It is undisputed the corn had been treated with Captan, a chemical substance used by producers of seed corn to prevent soil-borne diseases.

Steckley had used a light pink coloring on the corn to identify it as treated corn. There is a dispute as to whether Captan-treated corn is fit for livestock feed, but there is no dispute it is not fit for human consumption.

It is also undisputed that the Federal Seed Act required the labeling of seed corn treated with Captan when sold or offered for sale in interstate commerce. That act also required a statement of limitation against use of such corn for feed, food, or oil purposes, to be placed on the container holding it. At the time Resso purchased the corn he knew it was packaged in bags which were labeled to indicate the fact it had been treated with Captan, and should not be used for feed, food, or oil purposes. Steckley, at his direction, emptied the corn from the labeled sacks directly into the truck. No supervision or control was exercised by Steckley after the corn was sold to Resso. It was stipulated that Resso signed an agreement with Steckley at the time he purchased the corn that he would not mill the corn nor resell it to any party for the purpose of milling or using the same for feed, food, or oil purposes, nor would he sell the corn to any person who might place it in regular channels of commerce wherein the corn might be susceptible to such use. It is also evident that Resso hauled the corn directly from Steckley to the Wilson elevator at Murray.

During the unloading of the first truckload of the corn into the elevator pit at Murray, Schanot noticed that some of the corn had a pink cast, and when he called Resso's attention to it, he was informed that this was because it had been marked to distinguish it as 2-year-old corn. Schanot's testimony is as follows: "I said, 'Don, I don't know if I can use the corn. I may have to load this corn back up.' He said, 'Why?' I said, 'What's this pink coloring on this corn?' He said, 'That's nothing but cake dye.' I said, 'Was this Steckley's corn?' He said, 'Yes, this was Steckley's corn. That's nothing but cake dye where they determine their two-year-old corn.'

I said, 'Well, I will have to go in and call the office.' So, I said, 'Come on in with me.' He came in the office with me and I set down at the desk at the phone. He was standing beside the phone. Standing beside the desk. I talked to Mr. Noske and I told him that I was getting in this corn, this corn I talked to him about before from Resso, and it had coloring on it. First thing he asked me, if it had been treated with anything poisonous; and I turned and asked Mr. Resso. He said, 'No; this corn is not treated with anything poisonous. All that is is a cake dye to determine the corn, determine the year of the corn. That cake dye would determine the year of the corn.' So I told Mr. Noske what—he was waiting on the phone when I asked Mr. Resso about this—and Mr. Noske said then, 'If the corn hasn't—if he claims the corn isn't treated with anything poisonous, why go ahead and take it.' "

Resso was not present and did not testify at the trial, but it was stipulated that if present he would testify that he told Schanot he acquired some seed corn from Steckley which he would be willing to sell at a reasonable figure because it had been treated and could not be used for any purpose other than livestock feed. This testimony lacks credence considering the price Wilson paid Resso for the corn. Wilson's evidence indicates it was purchased as best quality corn and priced accordingly. The corn was dumped into the elevator pit, where it was carried into the elevator by conveyor buckets. It is undisputed the only corn to which a coloring agent had been added and handled by Wilson during this period was the Resso corn.

Wilson at that time held a contract or license with the Commodity Credit Corporation to handle government grain called in for delivery from the farms on which it had been stored. This contract permitted Wilson to commingle the grain, and required only that grain of equal quality be delivered to the destination designated by the Commodity Credit Corporation. On August

19, 1959, Wilson was directed by the Commodity Credit Corporation to ship 16 carloads of yellow corn to St. Joseph, Missouri.

Because railroad cars were not readily available, it was necessary that some of the corn, when delivered to Wilson, would be put into the elevator and transferred to cars when they were available. When the first two cars were received at the elevator, Wilson did not have enough Commodity Credit Corporation corn on hand to ship out, and, under its commingling agreement, filled the cars with grain in the elevator, including some of the Resso corn.

There are two methods of loading corn into cars at the Murray elevator. One is the truck weight method whereby grain is weighed on the trucks and loaded directly into the cars. This method was used for the third car. The second method is the hopper scale method whereby grain is moved through the bins in the elevator, weighed through a hopper scale located under a scale bin, and then elevated into the car. The first, second, fourth, and fifth cars were loaded by the hopper scale method. The balance of the Resso corn was loaded into the fourth and fifth cars.

The shipments were inspected and sampled at St. Joseph, Missouri, by a representative of the Food and Drug Administration, and cars Nos. 1, 2, 4, and 5, which contained corn with which the Resso corn had been commingled, were found to be contaminated and unsuitable for either human or animal consumption because of the presence of an unknown substance which was later identified as Captan. The Commodity Credit Corporation stopped all payments to Wilson, and it was directed to appear in federal court at Kansas City, Missouri, on an investigation of a charge of violation of the Federal Food, Drug, and Cosmetic Act. Before the stop order, a total of 13 cars had been shipped from Murray. Only the four cars containing Resso corn were condemned.

The condemnation of the four cars of corn caused

Wilson to lose the value of the corn; its license to handle Commodity Credit Corporation grain was suspended at all of its elevators; it was necessary to incur expense to get the matter adjusted; and Wilson suffered losses as a result thereof. The damages proved herein, however, relate only to the loss at Murray.

Resso assigns as error the overruling of his motion for summary judgment. To justify the entry of a summary judgment, the record must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Storz Brewing Co. v. Kuester, 178 Neb. 135, 132 N. W. 2d 341. We determine that Resso, the moving party, was not entitled to judgment as a matter of law at that stage and the motion was properly overruled.

A stipulation of case stated was on file at that time. Its pertinent parts may be briefly summarized as follows: Resso sold the corn to Wilson with a representation that it was marketable and fit for use for feed, food, or oil purposes; that said representation was false and Resso breached his warranty of fitness; that said corn was commingled with other corn and loaded into four railroad cars, which were condemned at St. Joseph, Missouri, because of the presence of the Resso corn; and that Wilson as a result thereof sustained damage.

It was stipulated that there was no genuine issue as to the following facts: Steckley sold the corn in question to Resso, and Resso in turn sold said corn to Wilson. The corn had been treated with Captan and some of its kernels contained a pink-colored dye to distinguish it as treated corn. "(c) The dye colored kernels contained in the corn sold by the defendant Steckley to the defendant Resso to the plaintiff contained Captan. Certain kernels of corn with an identifying pink color were discovered by government inspection in the four carloads in question; and such kernels were found to contain Captan. The marketing of any corn containing Captan,

in regular channels of interstate commerce is unlawful; which fact resulted in the condemnation of the four carloads in question." Resso at the time of the purchase executed a written agreement with Steckley that he would not mill the corn nor resell it to any other party for the purpose of milling or using the same for human consumption, nor sell the corn to any person who might place it in the regular channels of commerce wherein the corn might be susceptible to such use. Wilson's manager observed some pink-colored kernels in the corn which he purchased from Resso, and to the best of his knowledge, Wilson had never purchased nor handled any other corn containing identifying pink-colored kernels. After purchase, the Resso corn was placed in handling bins in Wilson's elevator. Within 8 days thereafter, the four cars in question were loaded at the Wilson's Murray facilities under the supervision of Schanot. In a deposition taken February 3, 1963, more than 3 years later, Schanot testified he did not know when the corn was shipped out, what corn it was included with, nor where it went.

Resso's motion is premised on Schanot's testimony in the deposition. It ignores the fact that the corn was not as represented; and that Resso had signed an agreement not to resell the corn to anyone who might place it in the regular channels of commerce. He could not help but know that selling it to the Murray elevator would do just that. It also ignores the fact that the only pink-colored corn handled at Murray during the period was the Resso corn, and that each of the cars condemned were condemned because of pink-colored corn containing Captan.

Resso assigns as error the refusal of the trial court to strike the testimony of Schanot because of alleged discrepancies between the testimony at the trial and that given in the deposition taken February 3, 1963. It is Resso's contention that if this testimony were stricken, there would be no sufficient causal relationship between

the damage asserted and the alleged breach. This is not a situation where testimony was changed to meet the exigencies of the occasion. Here the discrepancies were satisfactorily explained and are accounted for by the fact that at the trial Schanot was testifying from the Wilson records made at the time of the transaction, and at the time of his deposition taken in Lincoln more than 3 years after the transaction he was testifying from memory. We find that the action of the trial court in overruling Resso's motion was proper, but even if Schanot's testimony on the questioned points was impeached or stricken, the testimony of Wilson's president and the records themselves are sufficient to sustain the judgment.

Resso argues that in order to warrant recovery, there must be a causal relation between his act and the damages sustained. Resso asserts that the verdict herein rests upon conjecture, surmise, or speculation, and cites extensively from Baer v. Schaap, 171 Neb. 347, 106 N. W. 2d 468, to sustain his position. That case and the cases quoted from therein are not in any way analogous to this one. Resso assumes a premise that there were "two or more possible causes of the injury." This premise has no foundation in fact. The evidence herein is conclusive that because of Resso's misrepresentations, the corn was purchased by Wilson and shipped in interstate commerce in the four cars which were condemned. The cars were condemned because of the presence of pink-colored corn containing Captan. There is no dispute the Resso corn was the only pink-colored corn handled by Wilson during the period in question. The acts and representations of Resso were the sole and only cause of Wilson's loss. A party is answerable for the natural, probable, reasonable, and proximate consequences of his act. See Driekosen v. Black, Sivalls & Bryson, Inc., 158 Neb. 531, 64 N. W. 2d 88.

Unless we ignore the fact that immediately after signing an agreement with Steckley not to resell the corn to anyone who would put it in the regular channels of

commerce where it might be used for feed, food, or oil purposes, Resso sold and delivered the corn to an elevator, we must hold that Resso deliberately misrepresented the nature and quality of the corn in wanton disregard of the consequences of his action. His answer and the stipulation admit a knowledge of the presence of Captan in the corn. The most charitable thing that may be said of his action is that he was guilty of negligence per se. When Resso was specifically asked if the corn was treated with anything poisonous he was under an obligation to make a full disclosure. One who knows or has reason to know that a certain food product is not fit or suitable for use in the ordinary channels of commerce and who sells it without disclosing its dangerous or noxious nature to a good faith purchaser is subject to liability to the purchaser for all damages the purchaser may sustain as a result of the introduction of the product in the ordinary channels of commerce. See Colvin v. Powell & Co., Inc., 163 Neb. 112, 77 N. W. 2d 900, a case in many respects similar to the instant one.

For the reasons given, the judgment of the trial court is affirmed.

AFFIRMED.

HATTIE E. ADAMS, APPELLANT, V. CITY OF OMAHA, APPELLEE.

139 N. W. 2d 885

Filed February 4, 1966. No. 36079.

1. **Appeal and Error.** The requirement that a plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified within the time specified is mandatory and jurisdictional.
2. ———. The filing of a copy of a final judgment or order, not purporting to be a transcript of the proceedings containing it, and without evidence as to its source, does not constitute a transcript of the proceedings within the meaning of section 25-1905, R. R. S. 1943.

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

Ralph W. Adams, for appellant.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, Sebastian J. Todero, Walter J. Matejka, James E. Fellows, Allen L. Morrow, and P. A. Spenceri, for appellee.

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

MCCOWN, J.

On June 9, 1964, the city council of the City of Omaha adopted a resolution declaring a wood frame dwelling owned by the plaintiff to be a public nuisance and ordering and directing the building to be torn down within 30 days from and after the adoption of the resolution. On July 9, 1964, plaintiff filed her petition on appeal in the district court. The petition had a copy of the resolution attached to it marked "Exhibit A" and incorporated by reference. Answer day was August 10, 1964. On July 13, 1964, defendant filed a motion to dismiss for the reason that plaintiff failed to transmit and file a certified copy of the proceedings of the city council with the petition. On July 16, 1964, the plaintiff filed a transcript of condemnation proceedings. The motion to dismiss was sustained and the plaintiff has appealed.

The plaintiff contends that the provisions of section 14-813, R. R. S. 1943, apply rather than the provisions of section 25-1905, R. R. S. 1943. Under the terms of section 14-813, R. R. S. 1943, a transcript is to be filed by answer day and the filing of the transcript is not jurisdictional. Ballantyne Co. v. City of Omaha, 173 Neb. 229, 113 N. W. 2d 486.

The first sentence of section 14-813, R. R. S. 1943, is: "Whenever the right of appeal is conferred by this act, the procedure, unless otherwise provided shall be substantially as follows: * * *." "This act," referred to in

section 14-813, R. R. S. 1943, does not confer the right of appeal in a case involving a resolution declaring a building to be a public nuisance, and section 14-813, R. R. S. 1943, is not applicable to this case.

Section 25-1905, R. R. S. 1943, does apply to the appeal here. Under its provisions, a transcript of the proceedings must be filed with the petition. Section 25-1931, R. R. S. 1943, provides: "No proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one calendar month after the rendition of the judgment or making of the final order complained of; * * *." The case of Anania v. City of Omaha, 170 Neb. 160, 102 N. W. 2d 49, is controlling. The requirement that a plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified within the time specified is mandatory and jurisdictional.

The plaintiff also contends that a copy of the resolution appealed from, attached to the petition as an exhibit, may be treated as a transcript of the proceedings. The filing of a copy of a final judgment or order, not purporting to be a transcript of the proceedings containing it, and without evidence as to its source, does not constitute a transcript of the proceedings within the meaning of section 25-1905, R. R. S. 1943.

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

AFFIRMED.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., A CORPORATION, APPELLANT, V. CONSUMERS PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

140 N. W. 2d 10

Filed February 4, 1966. No. 36116.

1. **Corporations.** In a merger to which Kansas law is applicable, all debts, liabilities, and duties of the respective constituent corporations shall thenceforth attach to such corporation as has resulted from the consolidation or merger, and may be enforced against it to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it.
2. **Appeal and Error.** Ordinarily this court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties.
3. **Contracts.** A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform.
4. **Equity: Reformation of Instruments.** Equity will decree reformation of a contract for mistake only if the mistake is mutual, or for fraud or inequitable conduct.
5. **Equity: Rescission.** Where rescission for unilateral mistake of one party would result in serious prejudice to the other party aside from the loss of the bargain, and where enforcement of the contract is not unconscionable, equitable relief by way of rescission is improper.

Appeal from the district court for York County: H. EMERSON KOKJER, Judge. Affirmed.

James D. Conway, Elmer J. Jackson, and Frank D. Williams, for appellant.

Wilson, Barlow & Neff, for appellee.

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

MCCOWN, J.

This is an action to construe a contract for the purchase and sale of natural gas or, in the alternative, to rescind it on the ground of unilateral mistake. The district court

found for the defendant, judgment was entered accordingly, and the plaintiff has appealed.

The defendant, Consumers Public Power District, a public corporation of the State of Nebraska, hereinafter referred to as Consumers, entered into an agreement with North Central Gas Company, a Wyoming corporation, covering Consumers' total requirements of natural gas to be used for generation of power in Consumers' generating plant at Scottsbluff, Nebraska. The contract was executed July 28, 1961, effective January 1, 1963, for a term of 8 years. The agreement specifically provided that it should extend to and be binding upon the successors and assigns of the parties. The form of the agreement was for what is generally termed industrial interruptable gas service. The agreement provides in part: "* * * the Gas Company agrees to sell and deliver to Consumers and Consumers agrees to purchase and receive from the Gas Company, natural gas to supply the total gas requirements for boilers of the Consumers equipped with gas burning equipment, and gas engine and/or gas turbine driven electric generating units in the operation of its electric generating plant known as the Bluffs Plant at Scottsbluff, Nebraska, subject to the following terms and conditions * * *."

The limitation on the amount of gas to be supplied is as follows: "The Gas Company hereby agrees to use due diligence in supplying all gas as required hereunder by Consumers and in restoring said gas service in case of any interruption. Consumers shall install and maintain at all times at said Bluffs Plant at Scottsbluff, Nebraska, adequate standby fuel, and maintain said plant in condition to permit the use of standby fuel, and if by reason of peak load or other priority demands of its other customers, the Gas Company is unable to supply the full requirements of Consumers for said plant, the Gas Company shall only be obligated to furnish the amount of gas it has available after meeting peak load or other priority demands of its customers, and upon notice from

the Gas Company that it is unable to supply the entire fuel requirements, Consumers will use standby fuel, for its fuel requirements resulting from such deficiency in gas, during such period as such peak load or priority demand may continue. The notice of the Gas Company's inability to furnish sufficient gas to meet the full fuel requirements shall be given the plant manager or the person in charge of said Bluffs Plant, and may be oral or written, and the Consumers shall reduce its gas consumption as requested by said notice as promptly as possible."

On August 14, 1962, Kansas-Nebraska Natural Gas Company, Inc., a Kansas corporation, the plaintiff in this action, acquired control of the outstanding common stock of North Central, and effective at midnight December 31, 1962, caused North Central to be merged into Kansas-Nebraska.

Between July 28, 1961, and December 31, 1962, the volume of gas produced and available from certain gas sources of North Central was reduced, but some new or additional sources were contracted for or utilized by North Central. At least one of these was contracted for by North Central after Kansas-Nebraska had assumed control of North Central, but before the merger. After the merger, the merged company, the plaintiff here, entered into contracts for new and additional gas sources in Wyoming, and built additional transmission and compression facilities.

The general statutes of Kansas here applicable to the merger between North Central and Kansas-Nebraska provide in part: "The resultant corporation shall be subject to all the restrictions, disabilities and duties of each of the constituent corporations consolidated or merged. All rights of creditors and all liens upon the property of any of the constituent corporations shall be preserved unimpaired. All debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to such corporation as has resulted from the con-

solidation or merger, and may be enforced against it to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it." K.S.A. § 17-3706. The actual merger agreement used virtually identical language except to add the word "obligations" to debts, liabilities, and duties.

In the trial court, it was plaintiff's position that the contract was limited to the specific fields or sources of supply, and the specific existing transmission facilities which North Central owned or had under contract on July 28, 1961; and that this should be translated into a fixed, specific, and limited volume of gas committed to the contract, and that volume reduced by the requirements of firm customers. Plaintiff contended that any reduction in volume available from the specific sources of supply owned or contracted for by North Central on July 28, 1961, reduces the volume of gas available and obligated for delivery under the contract, but that any increase in volume of gas coming from other sources, and any increase in volume available by reason of additions to transmission capacity, do not increase the volume obligated or available to Consumers under the contract. The argument is that the plaintiff can refuse to deliver gas to Consumers whenever peak loads or the priority demands of its customers reach a volume equal to the then reduced volume limitations of original service and transmission, even though plaintiff has gas available from new sources of supply or transmission facilities, and is able to supply the full requirements of Consumers.

In this court, the plaintiff now contends that December 31, 1962, the date of the merger rather than July 28, 1961, is the date for determination of the liabilities under the contract.

Ordinarily this court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties. See Mills v. Aetna Ins. Co., 168 Neb. 612, 96 N. W. 2d 721. We shall do so here although, as we view the matter, it is immaterial which date may

be selected in an attempt to freeze the rights, duties, and liabilities under the agreement.

The contract says nothing about what sources of supply are involved, nor anything about transmission facilities, nor the volume deliverable at any one time from any source. The agreement limits the seller's liability to delivery of gas to Consumers only to the "amount of gas it has available" and to times when "it is unable to supply" the gas requirements of Consumers because of peak loads or other priority demands of its customers. Under the interruptable gas contract here, changes in source of supply and volume deliverable and the requirements of priority customers are all implicit in the contract. It is apparent that the parties contemplated such changes; and that the contract is clear, unambiguous, and specific. The rights, duties, and obligations under such a contract cannot be reduced or enlarged, nor fixed and determined for the entire period of the contract at the volume of gas available or deliverable on a particular day or from a particular source on that day.

The evidence is quite clear that gas companies generally provide for expansion of sources of supply and facilities from time to time to take care of the requirements of their firm customers as the plaintiff did here, and as North Central did between July 28, 1961, and December 31, 1962. Such expansion of supply and facilities obviously benefit interruptable customers also even though the interruptable customer might not be able to force such expansions. There can be little question that if North Central had voluntarily made the same improvements in transmission facilities and obtained the same new sources of supply as the plaintiff here did, Consumers would have been entitled to enforce the specific terms of the contract. To assume that North Central would have done nothing at all is in fact contrary to the evidence and, in any event, pure speculation. To treat what was actually done by the plaintiff as though it had not been done at all because the plaintiff could not have

been forced to do it by the defendant, and the former company is no longer in existence, misconstrues the effect of the merger statutes as well as the terms of the contract.

We hold that the written agreement of July 28, 1961, is not ambiguous, and is not subject to construction or modification by oral or extrinsic evidence or circumstances. The language of the agreement of July 28, 1961, does not limit the gas service from plaintiff to defendant to that volume which can be delivered from time to time from the sources of gas supply which were owned or under contract to North Central on July 28, 1961, nor on December 31, 1962, nor is it subject to trasmission capacity limitations existing on either date.

Upon merger of North Central into the plaintiff, all debts, liabilities, and duties of North Central under the contract attached to the plaintiff, and may be enforced against it to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it.

With respect to the alternative contention of the plaintiff that it is entitled to rescission in the event its construction of the contract is denied, the evidence is clear that Consumers had no knowledge whatever as to what sources of supply or transmission facilities North Central had; that Consumers entered into other contracts and commitments on the strength of this agreement; and that North Central knew of these proposed contracts and commitments of Consumers before the agreement was executed. The evidence is also that the plaintiff itself had knowledge of the agreement of July 28, 1961, and its terms, prior to the merger.

A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform. Wilson & Co., Inc. v. Fremont Cake & Meal Co., 153 Neb. 160, 43 N. W. 2d 657.

As we stated in Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448: "Equity will decree reformation of a

contract only if the mistake is mutual, or for fraud or inequitable conduct."

Here the evidence establishes that serious prejudice, in addition to the loss of the bargain, would result to the defendant in the event of rescission, and that enforcement of the contract is not unconscionable. Where rescission for unilateral mistake of one party would result in serious prejudice to the other party aside from the loss of the bargain, and where enforcement of the contract is not unconscionable, equitable relief by way of rescission is improper. See School Dist. of Scottsbluff v. Olson Construction Co., 153 Neb. 451, 45 N. W. 2d 164.

For the reasons stated, the judgment of the trial court was correct in all respects and should be and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN SWANSON, APPELLANT.

140 N. W. 2d 618

Filed February 11, 1966. No. 36040.

1. **Indictments and Informations.** The general rule is that a defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads to the general issue, provided the information contains no jurisdictional defect and is sufficient to charge an offense under the law.
2. **False Pretenses.** In a prosecution for obtaining credit by false pretenses a causal connection between the false pretenses and the obtaining of the credit is an element of the offense and must be proved beyond a reasonable doubt.
3. ———. Intent to defraud may be proved by the circumstances surrounding the transaction.
4. ———. Where there is competent evidence to support a finding of intent to defraud, the verdict of the jury will not be disturbed because there is testimony tending to indicate that there was no such fraudulent intent.
5. **Criminal Law.** This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a

matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

6. **False Pretenses.** The gravamen of the offense of obtaining money by false pretenses is in making the false pretense, and thereby obtaining a person's property or signature; it does not depend upon ultimate loss to the victim or whether in fact he sustains any pecuniary loss. The offense is complete when the money or property has been obtained by such means and cannot be purged by subsequent restoration or repayment.
7. ———. If the money and credit were procured through the means of the false pretenses and representations, it is immaterial whether the victim thereof might by diligence have recouped its loss.
8. **Trial.** A party cannot complain of an instruction that is more favorable to him than he deserves although it is technically erroneous to the issues.
9. ———. An inconsistency of instructions is not fatal unless one of the inconsistent instructions errs wrongfully against the accused.

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

Murphy, Pederson & Piccolo, for appellant.

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

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

BROWER, J.

The defendant was found guilty by a jury and sentenced to the Nebraska Penal and Correctional Complex on each of two counts of an information filed in the district court for Chase County. He appeals to this court from an order overruling his motion for a new trial.

Count one was for obtaining money and credit from the National Bank of Commerce Trust and Savings Association of Lincoln, Nebraska, hereafter designated as the Lincoln Bank, on May 21, 1964, in Chase County, by falsely pretending to be the owner in the aggregate of 629 head of cattle therein listed and described in four

groups, each situated in a specifically described locality. Relying on said false pretenses the Lincoln Bank accepted from defendant a chattel mortgage on said cattle to that bank. By reason of said false pretenses and representations of the defendant, the Farmers and Merchants Bank of Imperial, Nebraska, hereafter referred to as the Imperial Bank, as agent for the Lincoln Bank, gave defendant money and credit in the sum of $3,110.53; said pretenses and representations were false; defendant did not own any of said cattle except 80 head thereof in one such group; and said representations were made with the intent to cheat and defraud the Lincoln Bank.

Count two charged that on May 21, 1964, in Chase County, defendant knowingly and unlawfully made a false statement in writing to the Lincoln Bank respecting his financial condition for the purpose of procuring a loan of $3,110.53 with the intent that said false statement should be relied upon by the Lincoln Bank and that that bank believed the false statement to be true and acting thereon parted with money and credit in the sum of $3,110.53.

Previous to the acts in question the defendant had procured cattle loans from the Imperial Bank and the Lincoln Bank, which was the correspondent of the former. In the fall of 1963 defendant's loan from the Imperial Bank had reached its legal limit of $35,000. Any additional loans were then being carried by the Lincoln Bank, either by notes payable directly to it or by notes payable to the Imperial Bank which it endorsed to the Lincoln Bank. The loans were secured by chattel mortgages on cattle. On May 21, 1964, the principal sum of his loan to the Imperial Bank was $35,000, and of loans to the Lincoln Bank, $81,786.67. None of them were then due. A short time previous to May 21, 1964, Wilbur Baack, vice president of the Lincoln Bank, telephoned Edwin Burke, vice president of the Imperial Bank, and arranged for a meeting with the defendant on that date.

Cattle prices were down and Baack thought Swanson's loan should be reviewed and his paper extended.

Defendant was notified and on the morning of May 21, 1964, met Burke and Baack at the Imperial Bank. Defendant drove Burke and Baack to the several locations where he showed them cattle. Included with these cattle were 82 head of heifers at the Vilas Smith feed lot in pen No. 6. He also pointed out as they rode to various locations 120 head of steers in Chase County, 300 white-faced steers on Malancie grass in Lincoln County, and 127 white-faced steers on Guthrie grassland in Garden County. It is unnecessary to allude to the statements of the defendant or his actions during the trip. It was stipulated in open court that he represented to both bankers that he owned these cattle and that the representations were untrue and, with the exception of 80 head of white-faced steers located in Chase County, he did not own any of them. The cattle mentioned are those described in the first count. It was not until evening that they returned to Imperial.

At 8:30 or 9 that evening the two bankers and the defendant met again at the Imperial Bank where Baack prepared a written list of the cattle on an inspection sheet, totaling 1,275 cattle, which includes those exhibited that day, from the notes he had taken on the trip. It is dated May 21, 1964, and states that, "I have inspected this day chattel of John Swanson * * * for $122,000." It is signed by both bankers and at its end is the statement: "I certify that the above chattel as listed is the property of my chattel of above date and amount. (Signed) John Swanson." Also, the property statement was prepared which shows it was given to the Lincoln Bank, "For the purpose of obtaining loans and discounting paper with you, and otherwise procuring credit." It contains a list of 1,640 cattle, grouped by age, sex, and weight which includes cattle corresponding with like kinds listed on the inspection sheet. It also sets forth certain real estate, including farmlands valued at $129,-

950, one parcel of which was encumbered for $16,000. It states it is a true and correct statement of the financial condition of the defendant.

With respect to the property statement referred to in count two, it was also stipulated that defendant was not the owner of any cattle listed thereon which bore a similar description to the ones previously mentioned and was not the owner of the northeast quarter of Section 19, Township 13, Range 2 East, in Walton Township, Sumner County, Kansas, described in the financial statement. This land was unencumbered and valued at $72,000 in the statement.

Before drawing the papers, defendant was asked if he desired further money and he replied he could use some. He stated he needed between $2,000 and $3,000, and the loan was rounded out in the sum of $122,000. A chattel mortgage was drawn, purporting to mortgage 1,272 cattle, including those heretofore mentioned as inspected that day. The chattel mortgage was made to the Imperial Bank and the Lincoln Bank and secured two notes, one for $35,000 and the other for $87,000. Such a $35,000 note to the Imperial Bank and an $87,000 note to the Lincoln Bank were prepared. The notes, chattel mortgage, and property statement were all prepared in defendant's presence and all signed by him that night.

After the papers were signed vice president Burke made a deposit slip showing defendant had deposited to his credit at the Imperial Bank the sum of $122,000. The defendant signed and delivered to the bankers two checks on this account in the same bank. One was for $35,895 to the Imperial Bank which was for the principal and $895 interest on its former loan, and the other for $82,-994.47 to the Lincoln Bank for the principal and $1,209.80 interest on the loans to it. At this conference at the bank, vice president Baack told vice president Burke in Swanson's presence to credit the additional amount to defendant's account and "to make the various entries

to offset that for our banks." The Imperial Bank posts its books the day following a transaction. On May 22, 1964, the individual account of defendant in the Imperial Bank was credited with $122,000 and charged with the two checks given by defendant, one for $35,895 and one for $82,994.47. This left the credit difference of $3,110.53 to augument his account. The new note of $35,000 was entered on the liability ledger. The two banks adjusted their accounts between themselves by ledgers kept at each bank similarly to an account with an individual. Those adjustments were made on May 22, 1964, at the Imperial Bank and on May 25, 1964, at the Lincoln Bank as Baack did not return to Lincoln immediately.

At some undisclosed time on May 22, 1964, two officers of an Ogallala bank, the mortgagee, with one of the owners of the 82 heifers in Vilas Smith's pen No. 6, went to the Imperial Bank and informed Burke that these cattle were not the defendants but were owned by other parties. They all drove to defendant's farm and Burke confronted defendant Swanson with what he had learned as to the ownership of the 82 heifers. Defendant immediately admitted the ownership by McCullough and Jasnock and that they were not owned by him.

On the posting of the transaction to the defendant's account in the Imperial Bank, the new credit of $3,110.53 augmented his balance to the total sum of $9,689.99 on May 22, 1964. Under date of May 23, 1964, after cashing three small checks and one large one for $2,782.44 for a feed bill, there was still $6,889.91 in his account. On May 25, 1964, a deposit is shown of $1,200, and a check marked for cattle in the sum of $8,000 and another of $112.50 marked for labor were paid, leaving an overdraft of $22.59.

Baack testified that the representations had the effect in the rewriting of the loan of showing they had a sufficient margin in the cattle, "plus looking at the financial statement," to warrant additional credit. He stated he

would not have rewritten the loan if he had known the defendant did not own the 300 steers on the Malancie grass, nor would he have done so if he had known that the 82 white-faced heifers at the Vilas Smith feed lot in pen No. 6 were not so owned, nor had he known that the 120 steers were in fact only 80 head. Neither would the loan have been negotiated if he had known defendant did not own the cattle listed on the financial statement or the land listed thereon, described herein.

The defendant assigns many errors to the trial court. Those which we deem necessary to consider will be stated as discussed.

Defendant contends that the trial court erred in overruling the defendant's demurrer to each count of the information for the reason each of them fails to state facts sufficient to constitute an offense under the statute. These so-called demurrers were made orally at the conclusion of the State's evidence. The theory of the defendant appears to be that each count fails to inform the defendant with reasonable certainty of the crime of which he was charged. Each count charges that the defendant obtained "money and credit (from the Lincoln Bank) in the sum of $3,110.53." It is urged by defendant that it is impossible to tell therefrom how much money was obtained or what kind and how much credit.

Both sections 28-1207 and 28-1216, R. R. S. 1943, plainly provide that so far as receipt of the avails of the false pretense or representation by the wrongdoer is a necessary element of the particular crimes mentioned, obtaining either money or credit is sufficient. The evidence shows that what the defendant obtained was a credit in the Imperial Bank, advanced by the Lincoln Bank through the Imperial Bank. The credit was later checked out by the defendant. The giving of the mortgage and its date is set out in the first count. The date of the property statement is shown in the second. The amount obtained therefor in the sum of $3,110.53 was set forth in both. As far as the record discloses there

was but one transaction on May 21, 1964, at which time the mortgage and the false statement were given to effectuate the loan and procure the advancement.

In the case of State v. Jarrett, 177 Neb. 459, 129 N. W. 2d 259, there was a prosecution under section 28-1207, R. R. S. 1943, in which the defendants were charged with obtaining money by false pretenses in excess of $35 with intent to cheat and defraud. Proof showed that instead of receiving money, defendants received checks which they later cashed. This court held: "In the case of a charge of obtaining money by false pretenses, under section 28-1207, R. R. S. 1943, proof that the defendants received a check, which was paid, is sufficient to sustain the allegation that the defendants obtained 'money.'

"In the case of a charge of obtaining money by false pretenses, if the defendants received a check or draft which was paid, there is no variance in the charge and the proof."

In Mason v. State, 23 Okl. Cr. 111, 212 P. 1028, in a prosecution for obtaining property by false representation, the preliminary complaint charged the defendant with obtaining a certain amount of good and lawful money of the United States, and the information filed thereafter which charged the defendant with obtaining the same amount of good and lawful money by means of falsely procuring certain warrants issued by the city of Ardmore, Oklahoma, totaling said amount. The Criminal Court of Appeals of Oklahoma, in the cited case, held that: "An information is sufficient where it charges substantially the same offense charged in the preliminary complaint. * * * Words used in an indictment or information must be construed in their usual acceptation in common language, except words and phrases having a different fixed legal significance. * * * In the sense here used, 'money' means gold and silver coin, treasury notes, bank notes, and other forms of currency in common use, and every deposit which any person owning the same is entitled to withdraw in money on demand." We think

the rule of the court in the cited case is sound and it seems to be that which was the basis of the decision of this court in State v. Jarrett, *supra*. In the information before us, the expressions "money and credit" charge but a single thing which the defendant obtained. The terms are synonymous and interchangeable. In the present case it is scarcely conceivable that the defendant would not have known from the information that the money and credit he had obtained was the difference between the loan procured from the Lincoln Bank and credited to his account in the Imperial Bank, less the checks he himself drew, and that the amount was approximately the $3,110.53 so obtained.

In Smith v. State, 169 Neb. 199, 99 N. W. 2d 8, this court said: "The general rule is that a defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads to the general issue, provided the information contains no jurisdictional defect and is sufficient to charge an offense under the law." In that case it was held that certain counts of the information were fatally defective in failing to show the venue, but as to the count which set forth the venue, there were no jurisdictional defects and they were sufficient to charge the offense under the law. We hold the defects complained of in the two counts in the information before us were not jurisdictional defects. As they were not raised by demurrer until after the defendant had pleaded and the State had rested, the defendant's assignment of error cannot be sustained as to either count.

Defendant assigns as error the trial court's failure to sustain his motion made at the close of the State's evidence to dismiss each count of the information and that the verdict of the jury on each count is contrary to the law and the evidence. The contentions with respect to these errors are so interrelated that they will be considered together.

Defendant contends there was no proof that the false pretenses were made for the purpose of obtaining credit.

He cites the case of Anthony v. State, 109 Neb. 608, 192 N. W. 206, as authority for the proposition that in a prosecution for obtaining credit by false pretenses a causal connection between the false pretenses and the obtaining of the credit is an element of the offense and must be proved beyond a reasonable doubt. In the cited case the indictment set forth the false representations and that the person to whom they were made relying thereon bought certain stock which was misrepresented. Because it failed to explicitly state that the promissory note obtained by the defendant was given in reliance on such representations it was held not to state facts sufficient to show the commission of the crime. In the case before us the defendant applies the rule of the cited case as it relates to the sufficiency of the proof. Defendant contends that he made no pretense, representation, or statement for the purpose of obtaining money or credit. He says he had already obtained credit in a large amount and had not asked for additional funds. Defendant claims any representations and statements related by him were made with respect to the property which secured his existing indebtedness and not in connection with any new credit. He says it was an afterthought of the bankers at the time of extending the indebtedness which was not then due. It was the bankers who asked defendant if he needed some more operating money. He then said he could use some and they simply voluntarily and without solicitation rounded off the rewrite of the notes and mortgage to an even $122,000 which resulted in an additional credit of $3,110.53. Therefore he claims there is no proof of any intent on his part to cheat and defraud either bank, and the conviction cannot be sustained by the record. We have no quarrel with the rule of law stated by the defendant. There is, however, other evidence here besides the statement of the defendant that he needed more money and could use the approximate amount of the additional credit. The inspection record and property statement refer to a loan of $122,000 which

included the new credit. All day was spent in exhibiting his cattle to the bankers. In Haines v. State, 135 Neb. 433, 281 N. W. 860, this court said: " 'This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.' Williams v. State, 115 Neb. 277, 212 N. W. 606.

"Where there is competent evidence to support a finding of intent to defraud, the verdict of the jury will not be disturbed because there is testimony tending to indicate that there was no such fraudulent intent.

"Intent to defraud may be proved by the circumstances surrounding the transaction." We think there was evidence from which the jury could infer the false pretenses and representations were made to secure the additional credits beyond a reasonable doubt.

Defendant argues that no additional money or credit was actually obtained by him until he checked it out of his account. That was some time after the Imperial Bank, as agent for the Lincoln Bank, had knowledge of his falsification. He maintains the evidence of agency was proved, being elicited on cross-examination by the defendant's counsel. This agency, he argues, was of a continuing nature and not for a specific purpose of assisting in making the loan and transferring the credit. The Imperial Bank as such agent on learning of defendant's deceit on May 22, 1964, should have frozen the defendant's account in the Imperial Bank and enabled the Lincoln Bank to reclaim the credit it had advanced and recoup its loss. The evidence that the balance in the defendant's account in the Imperial Bank exceeded the new credit for several days is pointed out. Authorities are cited which defendant contends establishes that where a depositor has perpetrated a fraud in connection with an unmatured indebtedness, a bank is entitled to

rescind any agreement made as to the time of payment and set off a deposit against the unmatured debt.

We think it unnecessary to discuss the authorities cited or to determine whether the agency disclosed by the evidence was a continuing one or restricted for a specific purpose. Neither are we required to determine whether the Imperial Bank as an agent of the Lincoln Bank could freeze the account in the Imperial Bank for the benefit of its correspondent. In 22 Am. Jur., False Pretenses, § 32, p. 463, it is said: "The gravamen of the offense, however, is in making the false pretense, and thereby obtaining a person's property or signature; it does not depend upon ultimate loss to the victim or whether in fact he sustains any pecuniary loss. The offense is complete when the money or property has been obtained by such means and cannot be purged by subsequent restoration or repayment. Under this rule actual repayment of a loan obtained by false pretenses does not exonerate the deceiver from criminal prosecution." This rule has been applied by this court. See, West v. State, 63 Neb. 257, 88 N. W. 503; Pettijohn v. State, 148 Neb. 336, 27 N. W. 2d 380; McDonald v. State, 124 Neb. 332, 246 N. W. 716. If the money and credit were procured through the means of the false pretenses and representations, it is immaterial whether the victim thereof might by diligence have recouped its loss.

The defendant assigns error in the giving of instructions Nos. 3, 6, 7, 8, 9, 10, 14, 16, 17, and 18, numbered in severalty. The instructions are quite long and will not be set forth herein. We will only discuss those matters which reflect the defendant's contentions. His principal objection is that the instructions previously referred to by number are in conflict and for that reason confusing with the following: "INSTRUCTION NO. 13 You are further instructed that before the defendant can be found guilty of either count in this case, the State must have established, beyond a reasonable doubt, that the National Bank of Commerce Trust and Savings Association actu-

ally parted with money or credit on the reliance of the false representations to its damage.

"If you find that immediately after the alleged extension of additional credit, if you find beyond a reasonable doubt that it was extended, the Farmers and Merchants Bank had money on deposit to the credit of John Swanson, and said Farmers and Merchants Bank was agent of the National Bank of Commerce Trust and Savings Association, then the National Bank of Commerce Trust and Savings Association had the opportunity to protect itself against any alleged false representations made by the defendant and cannot be said to have sustained any damage." (Italics supplied.)

It is apparent from his brief that this italicized portion of instruction No. 13 states the law as contended by the defendant. Our previous discussion, however, quite clearly determines that the crime, if committed, was complete on the deposit to the defendant's bank account of the new credit and that the ability of the Lincoln Bank through the Imperial Bank or otherwise to save itself from loss thereafter was immaterial. It owed no such duty to the wrongdoer. The italicized portion of instruction No. 13 did not correctly state the law and should not have been given. It was more favorable to the defendant than he was entitled. This court has held that a party cannot complain of an instruction that is more favorable to him than he deserves although it is technically erroneous to the issues. See, Darr v. Donovan, 73 Neb. 424, 102 N. W. 1012; In re Estate of Keup, 145 Neb. 729, 18 N. W. 2d 63. Here the defendant clings to the erroneous instruction No. 13 but complains that the others are in conflict with it. An inconsistency of instructions is not fatal unless one of the inconsistent instructions errs wrongfully against the accused. 23A C. J. S., Criminal Law, § 1307, p. 747; Finn v. United States, 219 F. 2d 894, certiorari denied, 349 U. S. 906, 75 S. Ct. 583, 99 L. Ed. 1242; Hopper v. Commonwealth (Ky.), 371 S. W. 2d 646.

The defendant complains because in some of the instructions hitherto set out by number, the jury was instructed it must find the false statements and representations were made for the purpose of obtaining the sum of $3,110.53 *or some other amount.* Of course the exact amount which he intended to obtain might not necessarily be that which he finally received and the instruction is in that respect a correct statement of the law. In other instances, however, the jury was told that it was necessary it find the Lincoln Bank parted with credit in the sum of $3,110.53 *or some other amount.* In those instances the addition of the italicized words was not in accordance with the evidence which clearly shows $3,110.53 was the exact amount obtained. We think the other instructions quite clearly point out the exact amount of the credit claimed to have been obtained. Although the additional words were not proper, on reviewing all of the instructions and the evidence as a whole we think the error was not prejudicial to the defendant.

Defendant complains that the verdict of the jury is fatally defective because it fixes the value of the credit obtained by its findings as to the first count in the sum of $118,889.47, where the evidence clearly shows it was $3,110.53. In the case of Wax v. State, 43 Neb. 18, 61 N. W. 117, this court held: "In a prosecution for obtaining money under false pretenses it is the duty of the jury, in case of a conviction, to find the value of the money feloniously obtained; but a verdict of guilty will not be set aside because it fixes the value of the money at a few dollars more than is established by the evidence, where the uncontradicted proofs show that the sum procured from the complaining witness exceeded in value $35." The discrepancy in the amount in the cited case was small and here it is great but the same principle is involved. Here the evidence clearly shows that the credit obtained exceeded the amount required to make the offense a felony. Previous to the case before us, section 29-2026, R. R. S. 1943, had required

the jury to fix the amount obtained by the defendant in such cases. It was repealed by Laws 1963, chapter 163, page 576. Although it was reenacted by Laws 1965, chapter 146, page 488, it did not exist either at the time of trial or of the commission of the offense. We think the rule in Wax v. State, *supra,* should be followed and the verdict will not be set aside because of this error.

We are unable to sustain the errors assigned by the defendant. It follows the judgment and sentence of the trial court should be and is affirmed.

AFFIRMED.

SKAG-WAY DEPARTMENT STORES, INC., A CORPORATION, APPELLANT, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

140 N. W. 2d 28

Filed February 11, 1966. No. 36078.

1. **Constitutional Law: Municipal Corporations.** An ordinance of a city which has for its sole purpose the closing of legitimate business on Sunday and other Sabbatical days to promote religious observance does not promote the health, safety, peace, and good order of the city's inhabitants.
2. ———: ———. A legislative body may make a reasonable classification of persons for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate its enactment.
3. ———: ———. In determining whether or not a classification of persons is unconstitutional, discrimination is the essence of classification and is not objectionable unless founded upon distinctions which the court is compelled to find unreasonable.
4. ———: ———. A city ordinance providing for Sunday closing cannot prohibit that which is harmless in itself, or require that to be done which does not promote the health, safety, peace, and good order of society.
5. **Sunday: Constitutional Law.** A prohibition of activities on Sunday for the promotion of the health, safety, peace, and good order of society by requiring a periodic day of rest is sustain-

able as a proper exercise of the police power if the classification of persons to which it applies is reasonable.

6. **Constitutional Law.** In order to determine whether or not persons or transactions within the provisions of an act are on a different basis from those excluded, the purpose of the act is of great importance. The objects and purposes of a legislative act afford the basis for determining the propriety of the classification.

7. ———. Legislation which is directed to a portion of a class, and the object of the legislation applies equally to the whole as well as the part, the legislation is discriminatory and contravenes constitutional provisions requiring uniformity as to class.

8. ———. Where prior decisions of a court are based on distinctions and circumstances which no longer exist, it is the province of the courts to reexamine their holdings in the light of the changed conditions and circumstances in determining the constitutionality of legislation.

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

Cunningham & Blackburn, for appellant.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, Sebastian J. Todero, Walter J. Matejka, James E. Fellows, Allen L. Morrow, and P. A. Spenceri, for appellees.

Ray R. Simon, amicus curiae.

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

CARTER, J.

This is an action by Skag-Way Department Stores, Inc., against the City of Omaha, its mayor, and chief of police to enjoin the threatened enforcement of Chapters 19.12 and 19.24 of the municipal code of the city of Omaha. The defendants filed an answer and cross-petition asserting the validity of the questioned code provisions and praying that the court so hold. The trial

court found for the defendants and dismissed the action. The plaintiff has appealed.

Section 19.12.010 of the code provides that it shall be unlawful for any person to sell, offer to sell, give away, or dispose of, in any way, any new or used clothing, shoes, jewelry, ready to wear items, or hardware, on Sunday; and all places of business from which such goods are ordinarily sold, as the main or primary businesses of such places, shall be closed on Sunday, provided that no restriction therein contained shall extend to those who conscientiously observe the seventh day of the week as the Sabbath and pursuant to such observation shall keep their places of business closed on the seventh day of the week commonly known as Saturday. Penalty provisions are then provided.

Section 19.24.010 provides that it shall be unlawful for any person on Sunday to open to the public, or to sell, or offer to sell, give away or dispose of in any way from any store, establishment, or location where groceries, fruits, or vegetables are sold, any groceries, fruits, vegetables, or articles ordinarily sold from a grocery, fruit, or vegetable store or stand, or to open any meat market, sell, offer to sell, or give away from such meat market, any meats or other products ordinarily sold or handled in meat markets, and all such stores, establishments, and meat markets shall be closed on said day, provided nothing contained therein shall extend to those who conscientiously observe Saturday as the Sabbath and pursuant to such observation shall close and keep closed their store or meat market on Saturday. Penalties are then imposed for a violation of this section of the code.

The plaintiff is engaged in the retail department store business in Omaha. It has for sale all of the articles of merchandise set out in the cited code provisions, and many more such as food and beverages for immediate consumption, petroleum products, gardening equipment, sporting goods, drugs, optical goods, radio and television

sets, dry goods, tobacco, confections, tools, and newspapers.

The authority of a city to enact ordinances under the police power for the preservation of the peace, good order, safety, and health of its inhabitants is not here questioned. State v. Somberg, 113 Neb. 761, 204 N. W. 788. The questions here raised are whether or not it can be said that the questioned provisions of the municipal code are for the preservation of the peace, good order, safety, and health of the city's inhabitants and, second, whether or not the provisions are discriminatory as to the sale of goods of the same class. Early cases in this country sustained Sunday closing on the theory that it was within the police power to promote a day of religious worship in that it promoted the health, peace, safety, and good order of society. This theory, in part at least, has been carried into the code sections presently before us. The sections appear to be grounded on the protection of a Sabbatical day rather than for the preservation of the peace, good order, safety, and health of the inhabitants of the city. The modern cases on the subject hold that Sunday closing laws based solely on Sunday as a Sabbatical day conflict with the First Amendment to the Constitution of the United States prohibiting any law respecting an establishment of religion, or prohibiting the free exercise thereof. We fail to see, and it has not been pointed out to us, how the Sunday closing ordinances before us have any relation to public safety, health, morals, or public welfare.

Changes in the economic order have brought new problems. The grocery, the meat market, and the drug store that sold only merchandise which their names implied are fast giving way to the department store, the chain store, and the supermarket. The classification of stores in accordance with commodities sold no longer provides a proper method of classification because the department store, chain store, and supermarket generally include all of the goods formerly sold

only in the "community stores." With the development of the new forms of retail business, the problems of classification correspondingly increase. The meaningful economic changes and their effect on the reasonableness of classification require a fresh look at an old question affected by these modern conditions.

Discriminations resulting from this type of ordinance have been discussed at length in previous cases before this court. Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475; Skag-Way Department Stores, Inc. v. City of Grand Island, 176 Neb. 169, 125 N. W. 2d 529. The same vices exist in the case before us as existed in those cases. Section 19.12.010 discriminates against a clothing store owner when he is required to be closed on Sunday but his competitor may sell clothing on Sunday if it is not his "main or primary business." Section 19.24.010 provides that groceries, meats, fruits, and vegetables may not be sold on Sunday and requires the closing of any store on Sunday that sells such goods, while other nonharmful merchandise such as dairy products, bakery goods, and other wholesome foods remain free to be sold on Sunday. As we said in Skag-Way Department Stores, Inc. v. City of Grand Island, *supra:* "Reason cannot explain how the sale of a loaf of bread, a pair of gloves, a child's toy, or a greeting card on Sunday affects the health, peace, and good order of society."

A Sunday closing ordinance under the police power will be sustained where it relates itself to the health, safety, peace, and good order of the inhabitants. But where the sole purpose of an ordinance is to use the authority of the state under its police power to lend its aid to support religious observance, it does not relate itself to the health, safety, peace, and good order of society. If the real purpose of these ordinances was to promote religious observance, it is difficult to understand why the legislation excludes from its scope those businesses which sell sporting goods, amusements, and other items of harmless merchandise which contribute

more to religious laxity than do those included within the ordinance provisions. The difficulties of classification under modern conditions lead us more in the direction of individual persuasion and private conscience as the proper solution of this complex problem. And it might well be said that it is not the province of the state and its subdivisions in the exercise of its police power to invade the realm of private conscience except where it is incidental to the proper exercise of the police power.

Reliance is placed on the theory that Sunday closing laws provide a day of rest one day of seven and that this relates to the health of the public subject to the law. In this connection it is also contended that it tends toward the preservation of family life and that the "togetherness" of the family is for the public welfare. In this connection we point out that the ordinances before us are to be applied only to a small segment of the population and they exclude from the penalty provision a great many others in the same class. We can see no reason why one day of rest in seven days, or the "togetherness" of families, relates to health, safety, peace, and good order of society as to those named in the ordinances, when a multitude of others in the same class engaged in manufacturing, construction, maintenance, service enterprises, farm labor, and professional work, are not so affected. The ordinances are discriminatory to those included in the ordinances as against those not included, who are subject to the same objects to be attained by the legislation. The classification and object to be accomplished must be germane. Continental Ins. Co. v. Smrha, 131 Neb. 791, 270 N. W. 122. The real purposes of the ordinances are not to provide a uniform day of rest, nor to promote family unity, nor to encourage religious observances. Their real purposes are to enlist the power of the state to protect business interests. We submit that the ordinances are discriminatory as to those businesses included within its terms as against those who

labor or sell merchandise no less harmful or no less against the public interest. The record fails to disclose a reasonable classification of persons for legislation concerning them. No real differences in situation and circumstances surrounding the members of the class are shown which reasonably differentiate it from others in the same class which are not included within the provisions of the ordinances. Discrimination is the very essence of classification and an ordinance is constitutionally objectionable unless grounded upon reasonable distinctions. A city ordinance providing for Sunday closing cannot prohibit that which is harmless in itself, or require that to be done which does not promote the health, safety, peace, and good order of society. Skag-Way Department Stores, Inc. v. City of Grand Island, *supra;* Terry Carpenter, Inc. v. Wood, *supra.*

We reaffirm our previous holdings that Sunday closing laws may be proper subjects of legislation. But their validity is dependent upon reasonable classification for purposes of legislation. A portion of a class may not be legislated against unless there are reasonable distinctions that warrant it to be treated as a class for purposes of legislation. United States Cold Storage Corp. v. Stolinski, 168 Neb. 513, 96 N. W. 2d 408. While it is true that our earlier cases upheld classifications to which Sunday closing was applied, it was under conditions then existing that avoided unfair discriminations. But because of the economic changes that have come about, particularly in the business retail field, the basis of former classification has disappeared. This poses a complex problem for legislative bodies and requires reconsideration by the courts in view of the changed conditions. The ordinances before us indicate an intent to promote religious considerations inherent in the provision permitting closing on Saturday by those who conscientiously observe Saturday as their Sabbath. But we do not place this decision on that ground. We put it on the ground that the ordinances are not related to the health, safety,

peace, and good order of society and, even if they did so relate themselves, they are discriminatory as to those in the same class. We hold that the prior decisions of this court based on conditions which no longer exist are inapplicable to modern conditions which present new factual situations. When prior decisions of a court are based on distinctions and circumstances which no longer exist, it is the province of the courts to reexamine their holdings in the light of changed conditions and circumstances in determining the constitutionality of legislation.

We think the trial court was in error in holding the ordinances valid. We reverse the judgment of the district court and remand the cause with directions to sustain the prayer of plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

HERMAN A. WEISS, APPELLANT, V. ELMER A. WEISS, APPELLEE.

140 N. W. 2d 15

Filed February 11, 1966. No. 36083.

1. **Limitations of Actions.** A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit.
2. ———. Generally, where a person is hired by the week, month, or year, the right to compensation accrues at the end of each week, month, or year, and the statute then begins to run, and only the amount that has accrued within the statutory period before the commencement of the action can be recovered.
3. ———. Where a contract for employment is continuous with no definite time of payment or termination, the statute of limitations does not commence to run until the services have been terminated.
4. **Contracts.** The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract.
5. **Trial: Appeal and Error.** The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside unless clearly wrong.

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

Dixon G. Adams, for appellant.

Crossman, Barton & Norris, for appellee.

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

BOSLAUGH, J.

This is an action by Herman A. Weiss to recover money alleged to be due him from the defendant, Elmer A. Weiss. A jury was waived and the action tried to the court. The trial court found that there was $5,200 due the plaintiff and entered judgment for that amount. The plaintiff's motion for new trial was overruled and he has appealed.

The plaintiff and the defendant are brothers. Following the death of their father, the members of the family entered into an agreement for a division of the family property. Under the agreement the plaintiff was to receive the east half of the southwest quarter of Section 20, Township 14 North, Range 12 East of the 6th P. M., in Sarpy County, Nebraska. The defendant was to receive the west half of the same quarter section.

Before the agreement was performed, the parties modified it so that the plaintiff was to receive no land and the defendant would receive the entire quarter section. On December 27, 1938, a deed was executed conveying the property to the defendant, which contained the following provision: "The grantee herein as part of the consideration due the said Herman A. Weiss, grantor, by this conveyance agrees to give to the said Herman A. Weiss the use of the large house now located on said premises, and he further agrees to pay him the sum of Two Hundred Forty (240.00) Dollars per year for each year that he works for the said Elmer A. Weiss. Should the said Herman A. Weiss decide to leave the employ of Elmer A. Weiss, then in that event the said Elmer A.

Weiss is to pay Herman A. Weiss the sum of Four Thousand (4000.00) Dollars. Said sum of $4000.00 in no event shall be due and payable until six (6) years after the date of this instrument, and said sum not to draw interest."

The trial court limited the plaintiff's recovery to the $4,000 payment and $240 per year for 5 years. The controversy here concerns the amount due the plaintiff for the work which he performed for the defendant under the agreement contained in the deed.

The plaintiff claims that he worked for the defendant continuously from December 1938 until about July 23, 1963. The defendant stipulated that the plaintiff was in the continuous employment of the defendant during this period and that the plaintiff performed his duties satisfactorily, The defendant alleged that the plaintiff's claim was barred by the statute of limitations. The question that must be determined is when did the statute of limitations commence to run against the plaintiff's claim for wages.

A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. Spath v. Morrow, 174 Neb. 38, 115 N. W. 2d 581. In this state an action upon a contract in writing must be commenced within 5 years after the cause of action has accrued. §§ 25-201 and 25-205, R. R. S. 1943.

Generally, where a person is hired by the week, month, or year, the right to compensation accrues at the end of each week, month, or year, and the statute then begins to run, and only the amount that has accrued within the statutory period before the commencement of the action can be recovered. See 54 C. J. S., Limitations of Actions, § 133, p. 49.

The parties to a contract of employment may agree that compensation for the services to be furnished shall be deferred until the completion of the work. Under such an agreement, the statute of limitations does not

commence to run until the work has been fully performed. See Ryan v. Bullion, 100 Neb. 705, 161 N. W. 167.

The plaintiff contends that the contract of employment between the parties was a continuous contract with no definite time of payment or termination and that the statute of limitations did not commence to run until the services had been terminated. Phifer v. Estate of Phifer, 112 Neb. 327, 199 N. W. 511, cited by the plaintiff, involved such a contract. In the Phifer case all of the interested parties interpreted the contract to be a contract for continuous service, without any fixed time of payment or termination.

There is evidence in this case that at the end of the first year the defendant attempted to pay the plaintiff for that year's work, but the plaintiff refused to accept payment. The defendant testified that he tendered a check in the amount of $240 to the plaintiff but that the plaintiff refused to accept it and said: " 'Keep that for feeding me.' " The defendant further testified that for several years he attempted to pay the plaintiff at the end of the year but that the plaintiff refused payment and said: " 'Give me a little money when I go to town.' " There is evidence that the defendant, at his own expense, purchased and maintained a truck for the plaintiff which is "in his name," purchased clothing and other small items for him, and gave him small amounts of money from time to time.

The plaintiff admitted that he had received small amounts of money from the defendant from time to time but denied that the defendant had ever offered to pay him the $240 per year mentioned in the deed. Although the evidence in that regard is in conflict, it is sufficient to sustain a finding that the parties interpreted the contract as providing for the payment of the $240 at the end of each year.

The interpretation given a contract by the parties themselves while engaged in the performance of it is

one of the best indications of the true intent of the contract. Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448.

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. Elgin Mills, Inc. v. Chicago & N. W. Ry. Co., 177 Neb. 110, 128 N. W. 2d 384. The record in this case sustains the judgment of the trial court upon the theory that the evidence shows a practical interpretation of the contract by the parties.

The judgment of the trial court is affirmed.

AFFIRMED.

CONRAD HARTWIG, APPELLANT, V. ROBERT E. BERGGREN ET AL., APPELLEES, A. C. WRENN ET AL., INTERVENERS-APPELLEES.

140 N. W. 2d 22

Filed February 11, 1966. No. 36085.

1. **Waters: Boundaries.** The meander lines of a river as established by the original government survey are not boundary lines unless made so by the instrument of conveyance.
2. ———: ———. The mean line establishing the center of a river as shown by the original survey is not evidence of the location of the thread of a river or stream.
3. ———: ———. The thread of a river or stream is the line which would give riparian owners on both sides access to the water whatever its stage may be, particularly at its lowest flow.
4. **Adverse Possession.** To invest a claimant with ownership and title to land by adverse possession he must show that he has had actual, continued, open, and exclusive possession under a claim of ownership for the statutory period of 10 years.
5. **Waters: Boundaries.** Title by prescription may be acquired to an island in a river or stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong.

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

Van Steenberg, Winner & Wood, for appellant.

Atkins, Ferguson & Nichols, Lovell & Raymond, and Wright, Simmons & Hancock, for appellees.

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

CARTER, J.

This is an action by Conrad Hartwig against the defendants Robert E. Berggren and H. Jerry Berggren, and their respective spouses, and the Island Cattle Company, a copartnership, to enjoin the use of certain lands claimed by the plaintiff, and to quiet title to the lands in the plaintiff. Oden Wrenn, W. A. McCain and wife, and Equitable Life Assurance Society of the United States were impleaded as defendants, claiming or having some interest in the lands in question. James A. McCain and wife and A. C. Wrenn intervened, also claiming an interest in the ownership of some of the disputed lands. The trial court found against the plaintiff and for the defendants and interveners, and quieted title to the lands in the defendants and interveners. The plaintiff has appealed.

The plaintiff is the owner of riparian lands on the south side of the North Platte River in Sections 6 and 7, Township 22 North, Range 55 West of the 6th P. M. in Scotts Bluff County, Nebraska, which he acquired by warranty deed from M. B. Quivey in 1953. Patents to plaintiff's lands were issued to his predecessors in title before the islands in the river, the titles to which are the subject matter of this dispute, were in existence. The evidence shows that, before the construction of irrigation dams and reservoirs and modern bridges, the river was approximately one-half mile wide, carrying a full stream between its banks. Reservoir and bridge construction,

commenced in 1909, reduced the flow of the river and the islands appeared for the first time.

This litigation involves three of these islands, two of which lie in Section 7, and one of which extends from Sections 6 and 7 into Sections 5 and 8 downstream to the east. The plaintiff makes no claim to any land east of the east boundary of Sections 6 and 7. The three islands involved are referred to in the record as Goat Island, Beaver Island, and Island No. 6. The claimed lands of the parties are described in the judgment of the district court by metes and bounds, descriptions which we shall not repeat here. For convenience we shall refer to them as Goat Island, Beaver Island, and Island No. 6.

Defendant Oden Wrenn is the owner of Island No. 3, which lies mostly in Section 8 but extends over into Section 7. Plaintiff has produced no evidence of title in himself as against Wrenn. Intervener A. C. Wrenn owns lands on Island No. 3, subject to a life estate in his father, Oden Wrenn. The trial court correctly found that plaintiff had no interest in the Wrenn lands and quieted title in the Wrenns as against the plaintiff.

The defendants H. Jerry Berggren and Doris L. Berggren, husband and wife, both as individuals and as the sole partners in the Island Cattle Company, assert ownership in the Berggrens of Island No. 4, which lies mostly in Section 8, but extends into Section 7. Plaintiff produced no evidence of ownership in any part of Island No. 4 and the trial court correctly quieted the title in the Berggrens to their lands on Island No. 4 as against plaintiff.

The contentions of plaintiff as against the McCains are identical and will be treated as such. The original government survey of the area, made in 1877, shows the north meander line of the river to be a considerable distance north of the present bank of the river. The south meander line is some distance south of the south bank in the western half of Section 7 and is close to the

present bank in the eastern half, in fact a channel of the river is south of the original south meander line in the northeast quarter of Section 7. The mean line of the river as established in 1877 is north of the western end of Goat Island. This island and its accretions are claimed by the McCains. Plaintiff contends that he is the owner of lands south of the 1877 mean line of the river by virtue of his ownership of the south bank of the river. Goat Island was not patented until February 8, 1938, as a result of a government survey made in 1933. It is contended that plaintiff's rights as a riparian owner extended to the thread of the stream which he asserts is presumed to be the mean line fixed by the original government survey in 1877. But we do not think these contentions are valid in this case because of proof of adverse possession of the lands in question for more than 10 years.

Goat Island was not in existence when the government survey was made in 1877. In fact the river was nearly a half mile wide at that time and devoid of any islands in the area. Goat Island was surveyed in 1933, and in 1938 a patent was issued to Arthur Savard. In August 1939, M. B. Quivey, plaintiff's immediate predecessor in title, conveyed that part of Goat Island lying south of the thread of the stream to Blanche Scoggan, McCain's grantor. In March 1940, the district court for Scotts Bluff County in a case entitled Blanche Deutsch Scoggan v. Arthur Savard, quieted title to the lands here involved in Blanche Scoggan as against Savard. No appeal was taken from this judgment. Pursuant to the title thus acquired, McCains took possession of said lands. They fenced in their lands, including Goat Island and its accretions, and used said lands actually, openly, exclusively, and continuously under claim of ownership for more than 20 years. Walker v. Bell, 154 Neb. 221, 47 N. W. 2d 504; Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384. The decision on this phase of the case is controlled by Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57, wherein it is said: "The established rule is: Title

by prescription may be acquired to an island in a stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong."

While there is some evidence that some of the lands were trapped for beaver and muskrat by lease or permission of M. B. Quivey, plaintiff's immediate predecessor in title to his riparian lands, it appears to have been done without the knowledge or consent of the McCains. Plaintiff never made a claim to the lands prior to 1960. The evidence preponderates in favor of the McCains on the issue of adverse possession, irrespective of all other considerations. The trial court properly quieted title in Goat Island and its accretions in the McCains.

Plaintiff also contends that he is the owner of Island No. 6. The island is also claimed by Robert E. Berggren and Sandra H. Berggren, husband and wife, H. Jerry Berggren and Doris L. Berggren, husband and wife, and the Island Cattle Company, or some of them, whom we shall refer to as the Berggrens. The Berggrens acquired title to Island No. 6 in September 1946 from M. B. Quivey, the deed reciting 16.47 acres, more or less, according to government survey. The island was surveyed in 1960 by the county surveyor of Scotts Bluff County, its acreage then was shown as 35.14 acres, indicating the extent of accretions to the island. The accretions belonged to the owner of Island No. 6 under the authority of Burket v. Krimlofski, heretofore cited. The evidence shows that Berggrens took possession of the island in 1946 under the deed of conveyance to them. The island was fenced at that time. In 1947 and 1948 the fence was removed and a new fence placed around the extremities of the island. Berggrens constructed a residence, barns, corrals, and a well-pressure system on the property. An electrical-power system was later installed. The island has been used since 1946 for pasturing cattle and horses.

Berggrens have paid taxes on the island since 1946. Some grading has been done by the Berggrens, principally for leveling for fences and the building of roads for access to the property. Since 1946 no one has questioned the ownership or possession of the Berggrens, including the plaintiffs, until 1960 when plaintiff claimed ownership. There is some evidence that hunters and trappers used parts of the island with the permission of the plaintiff. The evidence conclusively shows, however, that Berggrens have had actual, open, exclusive, and continuous possession of the island under claim of ownership for more than 10 years. The trial court so found and quieted title in Robert E. Berggren, the record title holder. The action of the trial court in this respect was correct.

The ownership of Beaver Island poses a more difficult problem. The Berggrens assert that they, or some of them, have claimed Beaver Island since they acquired the record title to Island No. 6 in 1946. Beaver Island lies to the southeast of Island No. 6 and north of plaintiff's land on the south bank of the river. Channels carrying the water of the North Platte River run on the north and south sides of the island. It is completely surrounded by water. The flowing channels are approximately the same width, although the north channel appears a little wider on the plats in evidence. The evidence of plaintiff's surveyor is to the contrary. The north channel flows between Island No. 6 and Beaver Island and the south channel flows between Beaver Island and the south bank of the river. The trial court found that Beaver Island accreted to Island No. 6 and that the Berggrens had established ownership by adverse possession as well. The plaintiff, the riparian bank owner to the south, alleges that this is error.

The record shows that Beaver Island, since 1946 to date of trial, was fit only for the grazing of livestock and hunting for wild game. The evidence of the Berggrens is that they have continuously used it for the grazing of cattle and horses, and for duck and pheasant

hunting by themselves and their friends. Their evidence is to the effect that they kept Beaver Island posted and kept hunters from using the island except by permission. They assert they knew nothing of hunters being on the island with plaintiff's permission except for one Krow whose duck blind was destroyed by them in 1960. This brought on a discussion between Robert E. Berggren and plaintiff in which each claimed title to the island. Berggren says this is the first notice he had that plaintiff claimed the island.

On the other hand, plaintiff produced three witnesses who testified that they had hunted on Beaver Island with plaintiff's permission in 1957. Two other witnesses testified that they hunted in the river with plaintiff's permission, but were uncertain as to whether or not they hunted on Beaver Island. It seems evident that friends or lessees of each hunted on Beaver Island at times without the knowledge of the other.

As to the contention of the Berggrens that they have obtained title by adverse possession, the evidence shows the following: H. Jerry Berggren testified that the Berggrens had driven cattle and horses across the north channel and grazed them on Beaver Island. He stated that the channel could be waded in hip boots. He testified further that they fenced Beaver Island in 1960. He says he never saw any livestock on the island other than that belonging to the Berggrens, or that anyone else ever made a claim to the island against them. Robert E. Berggren testified that Beaver Island was completely fenced in 1960. He said that from 1946 on the Berggrens grazed their cattle on Island No. 6 and Beaver Island during certain times in each year. He stated that he drove livestock across the north channel every year. He hunted on Beaver Island every year and directed poachers to leave if they had no permit from the Berggrens. He stated that he crossed the north channel with waders many times but that he was unable to cross the south channel in this manner because of its depth. In 1960 he

constructed a 50-foot bridge between Island No. 6 and Beaver Island. After completing the bridge and the fencing of the island, he proceeded no further in the development of the island because of notice of the present litigation. He has paid taxes on Beaver Island since the 1960 survey of the island by the county surveyor. He testified that the size of the island has remained constant since 1946.

The plaintiff, Conrad Hartwig, testified that he took possession of his lands on the south bank of the river in 1954. He made no objection to the use of the islands and accretions in the river until 1960 because he was not sure as to his land boundaries. He leased hunting rights on Beaver Island continuously since 1955 until the Krow incident in 1960 which brought the question of ownership and title to Beaver Island to a head. He says that he never saw the Berggrens making any use of Beaver Island, although he lived within two miles of it since 1927. He made some investigation in the area before taking possession to try to determine his boundary lines, with little success. There were no fences on Beaver Island at that time. Plaintiff's riparian lands were farmed by Henry Gorr before plaintiff bought them. Plaintiff saw cattle belonging to Gorr grazing on the east end of Beaver Island in 1952. He never saw cattle grazing on Beaver Island other than the one year. Plaintiff never used the island for grazing. He had no knowledge that any other person was claiming the island until 1959 and 1960. He said he leased Beaver Island for hunting from 1954 to 1960, which was verified by the testimony of the lessees.

Plaintiff contends that the mean line of the center of the river is a factor in determining ownership by a riparian owner of unplatted islands in a river. We think not. The meander lines of the river as fixed by the original government survey are not boundary lines unless designated as such in the instrument of conveyance. The mean center line of a river, determined by

dividing the distance between meander lines of the river, is an arbitrary location of the center of the stream and is not a determination of the thread of the stream in this jurisdiction. "The thread or center of a channel, as the term is employed, must be the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow." State v. Ecklund, 147 Neb. 508, 23 N. W. 2d 782. We cannot, therefore, say that any rights of a riparian owner are established or supported by such a mean center line. The evidence of the plaintiff as to adverse possession by him is insufficient to show that he has had open, notorious, exclusive, continuous, and adverse possession under a claim of ownership for the statutory period of 10 years.

The evidence sustains the trial court's holding that Robert E. Berggren acquired ownership of Beaver Island by adverse possession. In addition to the evidence we have recited herein, we point out, first, that the trial court went upon and inspected the lands that were the subject of the action. While such an inspection of the premises in an adverse possession case may be limited in effect in some cases as stated in Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647, it has some value in arriving at a decision where the evidence is in irreconcilable conflict. Second, where there are irreconcilable conflicts in the evidence in a case tried de novo in this court, this court will consider the fact that the trial judge saw and heard the witnesses, and adopted one version of the facts rather than the other. In considering all of the evidence, the inspection by the trial court, and the findings of the trial court on facts in irreconcilable conflict, we can find no reason for interfering with the conclusion of the trial court that Robert E. Berggren had obtained title to Beaver Island as against the plaintiff by adverse possession. Since title by adverse possession to an island in a river is superior to the claims of a riparian owner, it is unnecessary to

decide assignments of error based on the claimed riparian rights of the river-bank owner.

For the reasons stated, we find no prejudicial error in the record, and the judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF JACK H. STUCKEY, JR., FOR A WRIT OF HABEAS CORPUS.
JACK H. STUCKEY, JR., APPELLANT, V. JOHN ROHNERT, APPELLEE.

140 N. W. 2d 9

Filed February 11, 1966. No. 36092.

1. **Criminal Law.** A defendant in a criminal action who solicits that part of a judgment against him which delays the execution of his sentence cannot question any infirmity which may be involved in such suspension.
2. **Habeas Corpus.** Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court.

Appeal from the district court for Dawson County: HUGH STUART, Judge. Affirmed.

William S. Padley, for appellant.

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

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

SPENCER, J.

This is an appeal from the dismissal of an application for a writ of habeas corpus.

Jack H. Stuckey, Jr., hereinafter referred to as appellant, on September 16, 1964, in the justice of the

peace court of Roy L. Welch, a justice of the peace in and for Dawson County, pleaded guilty to a charge of driving on a suspended driver's license, first offense, and was found guilty as charged. Appellant was at all times represented by counsel. The penalty, and the only penalty provided for such offense, which is governed by section 60-430.01, R. R. S. 1943, is 30 days in the county jail. At the special request of appellant and his attorney, the justice of the peace agreed that the sentence should start December 26, 1964, and made the entry accordingly. On December 29, 1964, the appellant attempted to appeal the conviction to the district court. A motion to dismiss the appeal was sustained. Thereafter, on February 12, 1965, appellant was surrendered to the sheriff, the appellee herein, by his bondsman, and this habeas corpus action followed. A writ was issued immediately and a hearing was held thereon the afternoon of February 12, 1965. After trial the district court dismissed the writ and the appellant has perfected this appeal.

Appellant's contention is that the judgment of conviction is void because the justice of the peace had no authority to suspend the execution of the sentence for a period beyond 90 days by virtue of section 29-2202, R. R. S. 1943. This is a point we need not determine. The appellant, having solicited that part of the judgment against him which delayed the execution of the sentence beyond the 90-day period, is in no position to question it.

Here the justice of the peace court had jurisdiction of the offense and of the appellant. The sentence pronounced is the only one permitted by section 60-430.01, R. R. S. 1943. Appellant does not challenge the sentence but only the time it was to take effect. Because he himself induced the justice of the peace to postpone the effective date of the sentence, he cannot take advantage of any infirmity which may be involved therein. Habeas corpus, therefore, is not available to him. As we said in Sedlacek v. Hann, 156 Neb. 340, 56 N. W. 2d 138:

"Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court."

Appellant complains that he has been placed in a position where his right of appeal has been lost by the conduct of the court in attempting to commit him under a void sentence. It is obvious that appellant is attempting to substitute habeas corpus for an abortive attempt to appeal. It is equally obvious that the appellant did not attempt to appeal for more than 3 months after the pronouncement of the sentence. It is also evident that to permit the appellant to prevail in this instance would be to make a mockery of the judicial process.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VIRGIL NINNEMAN, APPELLANT.

140 N. W. 2d 5

Filed February 11, 1966. No. 36106.

1. **Criminal Law: Evidence.** Proof of prior convictions under section 39-727, R. S. Supp., 1963, is properly made by offering in evidence the complaint or information in the judgment rendered on the verdict or the plea of guilty, evidence that the judgment has become final, and that the defendant is the same person presently before the court.
2. **Criminal Law.** A plea of guilty to a complaint waives any objection to it which could have been asserted by a motion to quash or a plea in abatement.
3. ———. Defendant in any criminal prosecution must be given a reasonable opportunity to employ and consult with counsel.
4. **Criminal Law: Evidence.** The mere fact that testimony is uncontradicted does not mean that it must be accepted as true on the hearing. Credibility is for the triers of the facts.
5. **Criminal Law: Constitutional Law.** A plea of guilty by defendant does not necessarily waive his constitutional right to counsel.

6. **Constitutional Law.** Any constitutional right or guarantee may be waived although the waiver must be an intelligent relinquishment or abandonment of a known right or privilege.
7. **Criminal Law.** It is not the province of this court in a criminal case to pass on the credibility of witnesses or weigh the evidence unless it is lacking in probative force as a matter of law.

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

John McArthur, for appellant.

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

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

SPENCER, J.

Virgil Ninneman, hereinafter referred to as appellant, was found guilty after a jury trial of driving his automobile while under the influence of alcoholic liquor, which for convenience hereinafter will be referred to as drunk driving. Subsequently the court determined that appellant was guilty of drunk driving, second offense, and sentenced him to serve 5 days in the Lancaster County jail, to pay a fine of $300 and the costs of prosecution, and suspended his operator's license for 1 year. This appeal pertains only to the subsequent proceeding involving the proof of appellant's first conviction.

The complaint, the warrant, and the mittimus on the first conviction were received into evidence without objection. The proof made on the first conviction was in strict conformity with the procedure outlined in Danielson v. State, 155 Neb. 890, 54 N. W. 2d 56. We there said: "* * * proof of such convictions is properly made by offering in evidence the complaint or information, the judgment rendered on the verdict or the plea of guilty, evidence that the judgment has become final, and that defendant is the same person presently before the court."

Appellant presents two questions by this appeal: (1) Does failure to subscribe and swear to a complaint, as required by law, render subsequent proceedings thereunder void when the defendant pleads guilty to the allegedly defective complaint; and (2) does denial of counsel in a misdemeanor action create an infirmity which the defendant may raise in a subsequent proceeding under a second offense drunk driving prosecution?

Considering the first assignment, appellant's evidence would indicate that the complaint, which was signed by a deputy county attorney, was not sworn to before a judicial officer. There is little question on the record that the procedure adopted was irregular and was subject to a proper objection. If a plea in abatement had been filed, it would undoubtedly have been necessary to file an amended complaint. However, the appellant, by pleading guilty to the complaint, must be held to have waived any objection to it which could have been asserted by a motion to quash or a plea in abatement. Section 29-1812, R. R. S. 1943, provides: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue."

Appellant's second assignment is much more basic. His testimony is that he was arrested by officer Baumhover about 1 a. m., May 4, 1961, for drunk driving, and that when he was arrested he requested permission from Baumhover to use a telephone to contact an attorney and was told, " 'Not tonight.' " He further testified that Baumhover took him to the city jail and that he made the same request of the desk sergeant who checked him into the city jail, and was again refused. It was his testimony that about 9 a. m. the same morning he was taken from the city jail to the office of the deputy county attorney at the courthouse. On two occasions he requested permission to use a telephone to contact an attorney and the deputy county attorney ignored his

request and made no reply thereto. He was asked several questions by the deputy county attorney, who then had him sign a paper. He was taken from the courthouse to the city jail, and then up to the municipal court. His testimony then was as follows: "A- Well, Baumhover took me from the courthouse over to the city jail and up to the courtroom. And I just didn't know what to do; I felt under—I had no other choice but to plead guilty. I didn't feel good; I wanted to get out of there."

Appellant was fined $100 and costs on his plea of guilty, and his operator's license was suspended for a period of 6 months. He delivered his license to the court at that time. A mittimus was issued committing him to jail until the fine and costs were paid. He paid his fine shortly thereafter, and was discharged from custody. Although appellant was without his operator's license for at least the next 6 months, he made no attempt to question the proceeding involved in this first conviction until his conviction on his second offense.

Officer Baumhover was produced as a witness for the State, and denied that he was the officer who arrested the appellant. He testified that he did not see him at all in the early morning hours of May 4, 1961. His contact with the appellant occurred later in the morning. The record indicates he was the officer who took appellant to the municipal court and who delivered him to the city jail after his plea of guilty.

Appellant's charge of denial of counsel is a serious one, and no court can condone it when it occurs. Defendant in any criminal prosecution must be given a reasonable opportunity to employ and consult with counsel; otherwise the right to be heard by counsel would be of little worth. Chandler v. Fretag, 348 U. S. 3, 75 S. Ct. 1, 99 L. Ed. 4. However, after appellant's long procrastination, it is a charge which must be proved by clear and convincing evidence.

On the record presented to this court, there are two grounds on which the trial court may have based its

decision: (1) The trial court, considering all of the facts and circumstances, may have decided as a factual matter that the appellant had not been denied counsel; or (2) even if appellant had requested the use of a telephone previous to his court appearance, he effectively waived his right to counsel by his plea.

Appellant's testimony is not entirely uncontested, as he suggested in his brief. It is true he could have been mistaken or confused in the identity of the officer involved in his testimony as it concerned Baumhover. It is possible that he could be equally mistaken on some of his other testimony. It does test credulity to believe that a person of appellant's intelligence would answer questions and "sign a paper" for the deputy county attorney if he could not get an answer to his own question. In any event, the mere fact that testimony is uncontradicted does not mean that it must be accepted as true on the hearing. Credibility is for the triers of the facts. See Snowardt v. City of Kimball, 174 Neb. 294, 117 N. W. 2d 543.

By a plea of guilty, a defendant does not necessarily waive his constitutional right to counsel. Rice v. Olson, 324 U. S. 786, 65 S. Ct. 989, 89 L. Ed. 1367. However, any constitutional right or guarantee may be waived although the waiver must be an intelligent relinquishment or abandonment of a known right or privilege. Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837.

We are satisfied that the trial court could have determined that the appellant had sufficient intelligence to know his rights; that he understood the nature of his act; and that his plea of guilty constituted an effective waiver. Appellant was an adult who had at least a high school education. He had served 3 years in the Marine Corps, and has been steadily employed since he left the service. It is hard to understand why a person of appellant's intelligence, if he had made the four requests he testified to for an opportunity to contact counsel, would have failed to have made that fact known to the court at the time of

his arraignment on the complaint. Two of the requests are alleged to have been made within a few moments of the time he was taken to court.

The able trial judge who heard the testimony and who had an opportunity to observe the demeanor of the witnesses found against the appellant on the facts. It is not the province of this court in a criminal case to pass on the credibility of witnesses or weigh the evidence unless it is lacking in probative force as a matter of law. State v. Berg, 177 Neb. 419, 129 N. W. 2d 117. On the record presented to this court, we cannot say, as a matter of law, that the determination of the trial court is erroneous.

For the reasons given, the judgment of the trial court is affirmed.

AFFIRMED.

CARTER, J., concurring in result.

On May 7, 1965, defendant was sentenced for a second offense of drunken driving. No contention is advanced that the verdict of the jury finding him guilty of drunken driving was in any respect erroneous. The complaint charged this to be a second offense.

In 1961 the defendant was found guilty of drunken driving in the municipal court of the city of Lincoln. The complaint and judgment of the municipal court were received in evidence without objection. That no appeal was taken therefrom, and that the defendant was the same person as the person presently in court, was established. This court has held many times as follows: "We reiterate that proof of such convictions is properly made by offering in evidence the complaint or information, the judgment rendered on the verdict or the plea of guilty, evidence that the judgment has become final, and that defendant is the same person presently before the court." Danielson v. State, 155 Neb. 890, 54 N. W. 2d 56. The proof was made strictly in accordance with the rule of this court and defendant thereupon became subject to the penalty provision

for a second offense for drunken driving, contained in section 39-727, R. S. Supp., 1963.

Defendant contends, however, that he was denied the right to obtain counsel in his first conviction in 1961, and that it was therefore void and not useable to prove that he was subject to the increased penalty for a second violation. The finality of the previous conviction is established. Defendant did not appeal nor seek redress by habeas corpus. In fact, he entered a plea of guilty and satisfied the penalty for the 1961 offense. I submit that under the existing law of this state he may not collaterally attack irregularities in his first conviction to avoid the increased penalties for the second.

Defendant has been convicted of two drunken driving offenses which have been established in the manner that this court has prescribed. The majority opinion ignores the long-established law of this state and cites no authority for so doing. I disagree with this method of opinion writing. Having these views, I concur in the result but disagree with the basis of the decision.

IN RE APPLICATION OF CHAMBERS RURAL TELEPHONE COMPANY, INC.

CHAMBERS RURAL TELEPHONE COMPANY, INC., APPELLANT, v. K. & M. TELEPHONE COMPANY, INC., APPELLEE.

140 N. W. 2d 400

Filed February 18, 1966. No. 36076.

1. **Public Service Commissions: Telecommunications.** The object and purpose of Nebraska State Railway Commission control of common carriers is to secure adequate, sustained service for the public at the lowest reasonable cost and to protect and conserve investments made for that purpose.
2. ———: ———. In determining whether a certificate of convenience and necessity should be issued, the Nebraska State Railway Commission may consider whether the applicant is able or qualified to furnish the proposed service.
3. ———: ———. Before the Nebraska State Railway Commis-

sion can issue a certificate of convenience and necessity allowing one telephone company to invade the service area of another, it must make the specific finding required by section 75-604, R. S. Supp., 1963.

4. ———: ———. One of the purposes of requiring a certificate of convenience and necessity is to prevent unnecessary duplication of facilities and to protect the consuming public from inadequate service and higher rates which may result from such duplication.

5. **Public Service Commissions: Appeal and Error.** On appeal to this court from an order of the Nebraska State Railway Commission while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary.

Appeal from the Nebraska State Railway Commission. Affirmed.

Nelson, Harding & Acklie and Max G. Towle, for appellant.

Leo F. Clinch, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding before the Nebraska State Railway Commission upon an application of the Chambers Rural Telephone Company, Inc., for a certificate of public convenience and necessity authorizing it to operate as a wire common carrier of messages in Garfield, Holt, and Wheeler Counties, Nebraska. A protest to the granting of the application was filed by the K. & M. Telephone Company, Inc. The railway commission denied the application. The applicant's motion for rehearing was overruled and it has appealed.

The applicant is a corporation which was organized on September 8, 1964. Its stockholders are five service station companies, or switching companies, known as South Fork Telephone Company, East Division; Lone Tree Telephone Company; Bliss Martha Telephone Company; Dumas Telephone Company; and Short Line Tele-

phone Company. The service station companies owned their own telephone facilities, except a switchboard, and received switching service from the protestant.

The protestant is a common carrier furnishing telephone service at Chambers, Nebraska, and the rural area adjacent thereto. The protestant serves approximately 416 subscribers, of which 189 are service station subscribers. The service station subscribers receive telephone service through the facilities of the applicant except for switching service which is provided by the protestant.

At the time the application involved in this proceeding was filed, an application filed by the protestant was pending before the railway commission. The protestant proposed to make changes, improvements, and additions in its service and service area. With respect to service station subscribers, the protestant proposed to offer improved service upon a voluntary and company owned basis. The application of the protestant was granted in part, but the commission did not authorize the protestant to offer service to its service station subscribers upon a company owned basis. An appeal to this court from the order of the commission in that proceeding was perfected and was consolidated with this appeal for briefing and argument. See K. & M. Telephone Co., Inc. v. Schmidt, *post* p. 742, 140 N. W. 2d 404.

The protestant is a corporation owned by Kenneth Werner, his wife, and two children. It is the successor to the Chambers Independent Telephone Company, a sole proprietorship owned by Werner. In June 1952, Werner entered into a contract with South Fork Telephone Company, Lone Tree Telephone Company, Bliss-Martha Telephone Company, and Lyle-Dumas Telephone Company, four mutual telephone companies then serving Chambers, Nebraska, and surrounding territory. The contract provided that Werner would construct and operate a dial switchboard in Chambers, Nebraska, and supply telephone switching service to the mutual com-

panies; and that the mutual companies would assign their franchise rights within the village of Chambers to Werner and remove their equipment from within the corporate limits of Chambers.

In September 1952, the railway commission granted a certificate of convenience and necessity to Werner doing business as Chambers Independent Telephone Company. The commission found that Werner had entered into the agreement with the four mutual companies and that Werner proposed to provide switching service to the four mutual companies pursuant to the agreement.

On January 27, 1953, the railway commission established initial rates for the telephone exchange service to be furnished by Werner. The annual rate for service station service was established at $10.50. On March 18, 1955, the railway commission increased the annual rate for service station service to $15.60. The protestant's present rate for this service is $2.90 per month.

In 1959, the Legislature enacted what is now section 75-605, R. S. Supp., 1963, which requires anyone operating an exchange offering telephone service in Nebraska to file with the railway commission a map of the territory in which local exchange telephone service is offered. The rules of the commission provide that the exchange area of a telephone company shall include all subscribers receiving telephone service whether over company owned or service station facilities.

On April 24, 1961, Werner filed with the railway commission a map of the territory in which local exchange telephone service was then offered, including service station service. On June 28, 1961, the protestant, as successor to Werner, was granted a certificate of convenience and necessity to serve the area set forth in the exchange area map filed on April 24, 1961. On September 11, 1963, protestant was authorized to revise its service area to include an additional subscriber.

The object and purpose of commission control of common carriers is to secure adequate, sustained service for

the public at the lowest reasonable cost and to protect and conserve investments made for that purpose. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co., *ante* p. 470, 138 N. W. 2d 816. In determining whether a certificate of convenience and necessity should be issued, the commission may consider whether the applicant is able or qualified to furnish the proposed service.

In this proceeding the commission found that the primary issue was whether the applicant was qualified to operate a telephone system as a common carrier. The commission made the following specific finding in that regard: "No financial statements or projected financial data were submitted in evidence. There was testimony to the effect that the company had commitments from banks for loans up to $25,000.00, but the security required and other requirements were unknown. The cost of installing a switchboard was estimated at $29,700.00. Applicant's witnesses did not know what rate would be required or what their operating expenses might amount to. Applicant plans to employ a local man presently engaged in television and radio repair to maintain its telephone system. This prospective employee has had no experience in the telephone business and would require training."

This finding is fully supported by the record. The applicant had not obtained engineering advice as to the design, construction, or operation of a system and had not developed a definite plan. The applicant did not know what its financial requirements would be or what rates would be required in order to operate the system.

The commission also found that the service rendered by the protestant was adequate. This finding is sustained by the record.

The protestant holds a certificate of convenience and necessity which authorizes it to provide service station service in the area in which the applicant seeks authority to operate as a common carrier. Section 75-604, R. S. Supp., 1963, provides: "No person, firm, partnership,

corporation, cooperative, or association shall offer telephone service or shall construct a new telephone line in or extend an existing telephone line into the territory of another telephone company without first making an application for and receiving from the commission a certificate of convenience and necessity, after due notice and hearing under the rules and regulations of the commission. Before granting a certificate of convenience and necessity, the commission must find that (1) the territory in which the applicant proposes to offer telephone service is not receiving reasonably adequate telephone service, (2) that the portion of the territory of another telephone company in which or into which the applicant proposes to construct new lines or extend its existing lines is not and will not within a reasonable time receive reasonably adequate telephone service from the telephone company already serving the territory, or (3) the application is agreeable to the subscriber or subscribers and to both telephone companies involved in the matter, will not create a duplication of facilities, and is in the interest of the public and the party or parties requiring telephone service."

Before the railway commission can issue a certificate of convenience and necessity allowing one telephone company to invade the service area of another, it must make the specific finding required by section 75-604, R. S. Supp., 1963. Sherdon v. American Communication Co., 178 Neb. 454, 134 N. W. 2d 42.

The application filed in this proceeding recites: "It is proposed that applicant, as a corporation, by contract agreement arrange a continuation of switching or connecting line service with K. & M. Telephone Company as provided by Section 75-607, R. R. Nebr. 1943, as amended, and on such terms and conditions as this Commission shall find just and reasonable." The president of the applicant testified that if a certificate was issued to the applicant, it would be willing to enter into a contract with the protestant for switching service "if we

could reach an agreement"; and that if an agreement could not be reached or the protestant was unwilling to do business with the applicant, the applicant proposed to build and operate its own switchboard.

One of the purposes of requiring a certificate of convenience and necessity is to prevent unnecessary duplication of facilities and to protect the consuming public from inadequate service and higher rates which may result from such duplication. See 73 C. J. S., Public Utilities, § 42, p. 1097.

If the applicant were authorized to build its own switchboard, there would be a duplication of facilities in a certificated area in which reasonably adequate telephone service is available and is being furnished and without the agreement of a telephone company involved in the matter.

The record further shows that such a result would not be in the interest of the public or the parties requiring telephone service. At the present time the service station subscribers are able to call any station in Chambers, Nebraska, or in O'Neill, Nebraska. If the applicant were authorized to build its own system and switchboard, calls to Chambers, Nebraska, would become toll calls. Connection with Bell Telephone long distance lines is available to the service station subscribers through the protestant's switchboard.

A part of the applicant's brief is devoted to a discussion of a provision in the 1952 contract between Werner and the four mutual companies which related to the right of the four mutual companies to "divorce themselves from the facilities" of the protestant's switchboard in the event Werner desired to sell his telephone system. The contract further provided that Werner would give the four mutual companies the "opportunity of purchasing the property at an agreed price, should they so desire." The applicant claims that the incorporation of the protestant and the transfer of the property by Werner to the protestant was a sale of the system and that

the contract is no longer binding upon the applicant.

The commission made no determination in regard to this contention of the applicant. So far as this proceeding is concerned, the significant fact is that the protestant holds a certificate of convenience and necessity to furnish switching service to service station subscribers in the area. If the applicant has any claim against Werner or the protestant as a result of the contract, it should be adjudicated in a proper action brought for that purpose.

On appeal to this court from an order of the Nebraska State Railway Commission while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. Andrews v. Nebraska State Railway Commission, 178 Neb. 799, 135 N. W. 2d 712. The record in this case sustains the order of the commission and it is affirmed.

AFFIRMED.

IN RE APPLICATION OF K. & M. TELEPHONE COMPANY, INC. K. & M. TELEPHONE COMPANY, INC., APPELLEE, V. CHARLES SCHMIDT, APPELLANT.

140 N. W. 2d 404

Filed February 18, 1966. No. 36077.

Public Service Commissions: Appeal and Error. On appeal to this court from an order of the Nebraska State Railway Commission while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary.

Appeal from the Nebraska State Railway Commission. Reversed.

Nelson, Harding & Acklie and Max G. Towle, for appellant.

Leo F. Clinch, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding before the Nebraska State Railway Commission upon an application of the K. & M. Telephone Company, Inc., for authorization to make certain improvements, changes, and additions to its service and service area.

The applicant is the successor to the Chambers Independent Telephone Company. In 1961, the applicant was granted a certificate of convenience and necessity to furnish telephone exchange service in the Chambers, Nebraska, and Amelia, Nebraska, area.

The applicant proposed to improve its telephone system and for that purpose made application to the Rural Electrification Administration for a loan in the amount of $287,000. The application filed in this proceeding was made for the purpose of obtaining the authority necessary to make the proposed improvements, changes, and additions in its service and its service area.

The applicant provides exchange service to 416 subscribers, of which 189 are served over service station lines. The service station lines were owned by five service station or switcher service companies known as the Dumas Telephone Company; Lone Tree Telephone Company; South Fork Telephone Company, East Division; Bliss Martha Telephone Company; and Short Line Telephone Company.

A formal protest to the granting of the application was not filed, but representatives of the Dumas Telephone Company, Lone Tree Independent Telephone Company, and South Fork Telephone Company appeared at the hearing and testified in opposition to the application.

After the hearing in this proceeding, the Chambers Rural Telephone Company, Inc., was organized. It is owned by the five switcher companies and has acquired all of the facilities and equipment owned by them. On

September 15, 1964, the Chambers Rural Telephone Company, Inc., filed an application for a certificate of convenience and necessity authorizing it to operate as a common carrier in the same area.

With respect to the service station subscribers, the applicant proposed to install all new equipment with underground lines, four-party service, and full selective ringing. The applicant did not propose to buy any of the lines or equipment owned by the service station companies but would require that they execute abandonment agreements and dispose of their lines and equipment by themselves. The improved service was to be offered to the service station subscribers upon a voluntary basis and would be available only if a sufficient number of the service station subscribers elected to receive the service from the applicant upon a company owned basis.

On October 14, 1964, the railway commission granted the application filed in this proceeding except that part which requested authority to serve the service station subscribers on a company owned basis and to enlarge the service area of the applicant. There is no controversy concerning the October 14, 1964, order of the commission and it requires no further consideration in this opinion.

The commission deferred action upon the balance of the application filed in this proceeding until after the hearing upon the application filed by the Chambers Rural Telephone Company, Inc.

On February 3, 1965, the application filed by the Chambers Rural Telephone Company, Inc., was denied. An appeal in that proceeding was perfected to this court and consolidated with this appeal for briefing and argument. See Chambers Rural Telephone Co., Inc. v. K. & M. Telephone Co., Inc., *ante* p. 735, 140 N. W. 2d 400.

On February 3, 1965, the commission entered an order determining the issues reserved in the order of October 14, 1964. The commission granted a certificate of convenience and necessity to the applicant covering the

territory included in the service area map filed April 24, 1961, as amended on September 11, 1963, and as further modified by the addition of five small areas which are described by metes and bounds.

The commission found that the service station subscribers did not desire service from the applicant upon a company owned basis; that the applicant had not obtained any executed abandonment agreements; and that the service area map as proposed by the applicant should not be approved. The order granted a certificate of convenience and necessity as set forth in the findings of the commission and made no change in the applicant's rate for service station service. The record shows that the present rate for service station service is $2.90 per month.

The Chambers Rural Telephone Company, Inc., filed a motion for rehearing which was overruled. A notice of appeal was filed by Charles Schmidt. Schmidt is the president of the Chambers Rural Telephone Company, Inc., and testified in opposition to the application.

The record shows that the service which the applicant has furnished to the service station subscribers has been adequate and satisfactory. The record also shows that at this time there is no need or demand for service on a company owned basis in the service station area of the applicant's exchange service area.

As we interpret the record, the order of February 3, 1965, did not grant the applicant any authority that it did not already have, except in reference to the service area of the applicant which was increased by the addition of the five small areas described in the findings.

At the time the present application was filed, the applicant held a certificate of convenience and necessity authorizing it to furnish telephone exchange service in the area. The order of February 3, 1965, granted no additional authority except that the service area was enlarged slightly.

The record does not disclose the basis upon which the

commission determined that the five small areas should be added to the exchange service area of the applicant. Apparently, these areas were added to the applicant's service area by the commission upon its own motion. The applicant's brief suggests that the additions were made to include subscribers now being served by the applicant but which had been omitted from previous service area maps by inadvertence.

On appeal to this court from an order of the Nebraska State Railway Commission while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. Andrews v. Nebraska State Railway Commission, 178 Neb. 799, 135 N. W. 2d 712. The order of the commission in this proceeding is supported by the record except as to the addition of the five areas to the applicant's service area. To that extent the order is not supported by the record. The order, therefore, is reversed.

REVERSED.

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

140 N. W. 2d 406

Filed February 25, 1966. No. 36034.

1. **Attorney and Client.** Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.
2. ———. The ethical standards relating to the practice of law in this state shall be the Canons of Professional Ethics of the American Bar Association, including the additions and amendments as of January 1, 1945, thereto, and those which may from time to time be approved by the Supreme Court.
3. **Criminal Law.** The fact that a county attorney sat at the counsel table with the special prosecutor, and assisted him in the preparation and details of the trial as any other witness or interested officer of the State would have a right to do, is

not sufficient to require a reversal where he conducts himself in a manner consistent with his position as a witness or his interest as an officer of the State.

4. **Criminal Law: Attorney and Client.** The county attorney cannot be disqualified from performing his official duties by statements made to him, because the relation of attorney and client cannot be effected where unlawful conduct is involved.
5. **Criminal Law: Trial.** Instructions examined and found adequate under the circumstances.
6. **Criminal Law: Evidence.** A photograph to be admissible must be a direct reproduction of the person, place, or thing which it purports to represent before it is competent as evidence.
7. ———: ———. The admission or rejection of cumulative evidence is ordinarily within the discretion of the trial court, and a ruling thereon will not be held erroneous unless an abuse of such discretion clearly appears.

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

Francis D. Lee, T. Clement Gaughan, and Richard L. Goos, for appellant.

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

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

SPENCER, J.

This is a criminal action instituted in the district court for Holt County charging defendant James K. Newman with murder in the first degree. The jury found the defendant guilty of murder in the second degree. Defendant was sentenced to life imprisonment and has perfected an appeal to this court.

Defendant was charged with the murder of Delbert Addison, the marshal in the village of Stuart, Nebraska, hereinafter referred to as decedent. Defendant does not question the sufficiency of the evidence to sustain the conviction, so no useful purpose will be served by attempting to summarize it. We detail only enough to understand the errors assigned.

On the evening of September 27, 1964, defendant was advised that the decedent had jerked his minor son from an automobile, struck him, and thrown him in jail. The jail at Stuart is located in the same building with the light plant. Defendant immediately went to the jail. According to one Lane, who was an employee at the light plant and who served also as magistrate, defendant was pretty riled up and wanted to know the whereabouts of decedent. Lane testified defendant made remarks about going home to get his gun, and that he was going to shoot the decedent if he made a move or called him a dirty name. This defendant denies. The denial is corroborated by his son who, because the office door was open, could hear the conversation from his cell. Defendant left the jail and thereafter called the county attorney at O'Neill. The county attorney advised him he could be of no help because of his official position, and suggested that he call an attorney. The defendant thereafter reappeared at the light plant and demanded that he be permitted to post bond for his son. Lane testified he told the defendant he would first have to find out what the boy was charged with, and then he would go home to get some bond forms. Lane left and soon thereafter the defendant followed him.

On the way back from his home, Lane stopped to visit with decedent who, with his wife, was sitting in a parked automobile a short distance from the jail. After Lane drove away, the defendant approached the parked car. There is a substantial dispute as to what then occurred. The testimony of decedent's wife would indicate that the defendant tried to precipitate a fight; that the decedent placed defendant under arrest; and that the defendant shot the decedent while he was attempting to take him to jail. The defendant's testimony would indicate that the decedent had a very short temper. Defendant testified that decedent became angry; took off his glasses and badge; and came after the defendant, cursing, and saying he would beat his brains out. De-

fendant testified that he retreated backwards toward his own automobile, with the decedent swinging at him; that when he reached his automobile the decedent had something in his hand which defendant thought was a gun; that when the decedent lunged at him with the object, defendant had reached and was trying to back into his own car; and that his hand touched a gun which was on the front seat. He brought the gun out, but does not remember firing it. The decedent was shot twice, and died at the hospital shortly thereafter.

Defendant's first five assignments of error pertain to what he terms the participation of the county attorney in the case after disqualifying himself so he could appear as a witness for the State. The county attorney, subsequent to the time the defendant was bound over to the district court, signified his intention to appear as a witness for the State, and withdrew his appearance as prosecuting attorney. Pursuant to statute, a special prosecutor was appointed. The name of the county attorney was then endorsed upon the information as a witness for the State. During the impaneling of the jury and the trial, the county attorney sat at the counsel table with the special prosecutor and consulted with him during the prosecution of the case. The evidence is undisputed that the special prosecutor consulted with the county attorney on the peremptory challenges to be exercised. At the time the county attorney was called as a witness, the defendant objected to his competency, "* * * because he has assisted in the prosecution of this case, and in the impanelling of the jury, by consulting with the specially appointed prosecuting attorney."

In Frank v. State, 150 Neb. 745, 35 N. W. 2d 816, we said: "A county attorney, being a quasi-judicial public officer, in whom the public has reposed confidence, his evidence is ordinarily given greater weight than that of an ordinary witness, and the natural tendency in such cases is for defendant to question the fairness of a trial when he becomes a witness for the state. Therefore, he

should, when that becomes necessary, so conduct himself as to foster and demonstrate the fact that he is not actively participating as a prosecutor, but only as a witness, truthfully and impartially giving competent testimony."

On the last day of the trial and after the defense had finished cross-examining the county attorney who was called as a rebuttal witness, the following record was made: "MR. GAUGHAN: Let this record show at this time, on the part of the defendant, that Mr. Griffin is still assisting in the prosecution of this case; that he has been discussing legal matters, or the legality of matters, with the court in chambers; that he has been conferring with the especially appointed prosecutor in this case throughout the trial, on matters pertinent to the prosecution of this case; and sitting at the counsel table with the specially appointed prosecutor throughout the trial; and has been consulting with the special prosecutor throughout the trial on the examination of each witness.

"MR. CRONIN: The State would like the record also to show that the trial of this lawsuit has been wholly and solely conducted by the special prosecutor, who has examined all the witnesses and presented the State's views on all legal questions in open court. The county attorney has been sitting at the counsel table with the special prosecutor; he has been absent from it a part of the time during this trial; and the prosecutor has talked with him at various times during the trial. The original investigation of this crime, on the day following its occurrence was conducted by the county attorney; but all the decisions on what actions to take in the trial of this case have all been made by the special prosecutor.

"MR. GAUGHAN: Would the court care to make a statement?

"THE COURT: The court states that the county attorney, Mr. Griffin, has not presented any legal problems, they have all been presented by Mr. Cronin, the special prosecutor; also that in chambers where some

problems were discussed as to legal matters he was present; all those matters were referred to the special prosecutor, Mr. Cronin."

What is the basis for our rule that an attorney who becomes a witness should withdraw from active participation in the trial of the case? In Roberts v. State, 100 Neb. 199, 158 N. W. 930, Ann. Cas. 1917E 1040, this court said: "To discuss in argument the reliability and weight of one's own evidence is embarrassing to counsel, and sometimes confusing to jurors."

Canon 19 of the Canons of Professional Ethics of the American Bar Association provides: "When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

The rules adopted by this court creating, controlling, and regulating the Nebraska State Bar Association, provide: "ARTICLE X Rules of Professional Conduct. The ethical standards relating to the practice of law in this state shall be the canons of Professional Ethics of the American Bar Association, including the additions and amendments as of January 1, 1945, thereto, and those which may from time to time be approved by the Supreme Court."

It should not be ignored that the county attorney, in addition to being a witness for the State, is also an officer of the state. The instant case is not too dissimilar from Frank v. State, 150 Neb. 745, 35 N. W. 2d 816, in which we said, relative to the participation of the county attorney: "The most that could be gleaned from the record now before us was that he sat at the counsel table with the special prosecutor and assisted him in the preparation and details of the trial as any other witness or interested officer of the state would have a right to do. As held in Roberts v. State, *supra* (100 Neb. 199,

158 N. W. 930, Ann. Cas. 1917E 1040), that alone would not require reversal if in doing so he conducted himself in a manner consistent with his position as a witness or his interest as an officer of the state." We are satisfied on the record produced that the county attorney conducted himself in a manner consistent with his position as a witness and his interest as an officer of the state.

Defendant's additional argument on the competency of the county attorney pertains to his contention that he called the county attorney to consult him as an attorney relative to his son's difficulty, and that he should therefore be disqualified to testify to any of the conversation under the provisions of section 25-1206, R. R. S. 1943. There is a dispute as to when the county attorney told the defendant he should consult another attorney. We view the defendant's call in the light that it was a complaint that his son's rights were being violated by the authorities in the village of Stuart, rather than an attempt to employ the services of the county attorney. In any event, anyone consulting with the county attorney must be presumed to know that it is the duty of the county attorney to prosecute law violators, and that the county attorney cannot be disqualified from performing his official duty by statements made to him, because the relation of attorney and client cannot be effected in such situations. There is no merit to defendant's contention.

Defendant's sixth assignment of error complains that the trial court wholly failed to instruct the jury on voluntary manslaughter. The trial court's instruction No. 8 was in the language of section 28-403, R. R. S. 1943, except that the comma appearing in the statute after the words "sudden quarrel" was omitted from the instruction, so that it read, so far as material here: "That the defendant unlawfully killed Delbert Addison without malice, either upon a sudden quarrel or untentionally (sic), while the slayer was in the commission of some unlawful act." It seems to be defendant's argument

that the omission of the comma deprived him of the defense of manslaughter unless the jury found him guilty of an unlawful act. In other words, defendant contends that the phrase *while the slayer was in the commission of some unlawful act* refers to and qualifies the words *or unintentionally* and not the words *upon a sudden quarrel,* and that the comma after the word *quarrel* is necessary to make the statute clear. Under defendant's interpretation, the instruction as given was more favorable to defendant than it would be with the comma. His interpretation would mean that a sudden quarrel, unaccompanied by the commission of some unlawful act, would not constitute manslaughter. The jury returned a verdict under instruction No. 7, covering murder in the second degree, which required a finding that the defendant killed the decedent *purposely and maliciously.* Under the circumstances here shown, defendant was not prejudiced by the omission of the comma in instruction No. 8.

Defendant's seventh assignment of error is directed to the refusal of the court to give a tendered instruction on voluntary manslaughter. The essence of the instruction was given, except that the trial court did not incorporate therein the reason the defendant gave for his provocation. With the exception noted in the omission of a comma from the language incorporated from the statute, the instruction given was adequate.

Defendant's assignment of error No. 8 complains of the giving of instruction No. 13, directing the jury that it was the sole judge of whether certain alleged admissions were voluntarily and intelligently made by the defendant. Defendant has not seen fit to argue this assignment in his brief. Our only observation is that the failure to have given it would have been error.

Defendant's ninth assignment of error involves the rejection as evidence of a newspaper containing a photograph purporting to identify the location of the shooting, with a broken line drawn thereon purporting to

show the bloodstained route the decedent traveled as his wife assisted him to their car. The photographer testified the photograph was made 2 days after the killing, and admitted that the marks thereon were drawn from gossip he picked up relative to the event. The exhibit was properly excluded. A photograph to be admissible must be a true representation of the person, place, or thing which it purports to represent before it is competent as evidence. See Fugate v. State, 169 Neb. 420, 99 N. W. 2d 868. Actually, if admitted, the photograph would have tended to substantiate the State's evidence rather than that of the defendant, because it locates the shooting considerably behind the defendant's car.

Defendant's assignment of error No. 10 is more serious because it involves the exclusion of the testimony of two witnesses who saw the decedent strike the defendant's son. While this incident occurred approximately 2 hours before the shooting, there is no question it was a precipitating factor. These witnesses were permitted to testify that the general reputation of decedent for violence, turbulence, and bloodthirstiness was bad, but they were not permitted to testify as to statements made by the decedent while he was taking defendant's son to jail, nor to the fact that they saw him strike the boy at that time. Defendant's son was permitted to describe the event in detail. The defendant was permitted to testify as to what his son told him, as well as to what he was told by the men who come to his home to tell him his son was in jail. One of these witnesses was permitted to testify that he told the defendant that there were four witnesses who would go to court and say that they had seen the decedent strike his son.

If we assume this evidence was admissible, we cannot say its exclusion was prejudicial error, in view of the fact that it had been otherwise elicited, could be considered cumulative, and the defendant was permitted to testify as to what he was told about it and its effect upon him. The admission or rejection of cumulative evi-

dence is ordinarily within the discretion of the trial court, and a ruling thereon will not be held erroneous unless an abuse of such discretion clearly appears. See Edmonds v. State, 163 Neb. 323, 79 N. W. 2d 453.

The eleventh and last assignment of error is directed to the fact that the court permitted definitions of certain words to be read in evidence from Webster's New International Dictionary (2d Ed.), Unabridged. While the special prosecutor for the State was cross-examining a witness produced by the defense to prove the bad reputation of the decedent, the following colloquy took place: "Q. Well, Gene, if I told you the meaning of the word 'Bloodthirstiness' as defined in Webster's New International Second Unabridged Dictionary, was 'Eager to shed blood, cruel, sanguinary, murderous,' would you say that the deceased, Delbert Addison was that kind of man? A. No. Q. Would you say that he had that kind of reputation at Stuart? MR. LEE: Your Honor, I object to that question as leading and suggestive, and something drawn from context; if he wishes to give a definition lets get the book here which gives the whole context; he asked if this said dictionary shows thus and so; I think if we take any part, it should all be in here. * * * (Short recess). * * * MR. CRONIN: I now have the dictionary I referred to in my examination of this witness here on the table; can we now stipulate to the definition? MR. GAUGHAN: No, Your Honor, I will object to this on the general grounds unless we get a legal definition from the court, because in my opinion the definition in this book is incompetent to be taken as a part of the evidence in this case before the court. THE COURT: Overruled. Defendant excepts. * * * Q. I call your attention now, Gene, to the word 'Bloodthirsty' which appears on page 292 of the book you just identified here; will you read the definition of the word 'Bloodthirsty' as shown in this book? MR. GAUGHAN: I will object to this as not proper cross examination; there was nothing in the direct examination in this case

that referred to Webster's dictionary, Your Honor. THE COURT: Overruled. You may answer. Defendant excepts. A. 'Eager to shed blood, cruel, sanguinary and murderous.' Q. Now, Gene, you don't want to tell this jury, do you, that Mr. Addison had a reputation in the Stuart, Nebraska, community for being blood thirsty, as defined in that dictionary, do you? MR. GAUGHAN: That is objected to as not proper cross examination, unless the definition of all the words given in that definition in that dictionary are given to the witness; a definition of all the words would certainly be necessary to show the true meaning, if this is to be permitted. THE COURT: Definition of what words, Mr. Gaughan? MR. GAUGHAN: Cruel, sanguinary, murderous; all of them separately and not all together; all those synnonyms (sic). THE COURT: How many of those words are there, Mr. Cronin? MR. CRONIN: Four, Your Honor. THE COURT: I will sustain that objection." The assignment of error is directed to the admission thereafter of the definition of all of the words requested into evidence. It appears to us that the defendant's counsel invited the offer and is in no position to challenge it.

For the reasons given, we have concluded that there is no error in the record herein sufficiently prejudicial to require the granting of a new trial, and the judgment of the trial court should be and is affirmed.

AFFIRMED.

LOUIS T. KOLAR, ADMINISTRATOR OF THE ESTATE OF JANE ANN KOLAR, DECEASED, APPELLANT, V. RAY L. DIVIS, APPELLEE.

140 N. W. 2d 658

Filed February 25, 1966. No. 36042.

1. **Automobiles: Infants.** Where a child beyond a tender age is in the position of a gratuitous passenger in a motor vehicle, such child is a "guest" within the meaning of the applicable guest statute.

2. ———: ———. A 13-year-old child riding as a gratuitous passenger in a motor vehicle is a guest within the purview of section 39-740, R. R. S. 1943.
3. **Negligence.** Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated.
4. ———. Negligence is not presumed and cannot be inferred from the fact that there was an accident.
5. **Trial.** The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery.
6. **Negligence.** Gross negligence means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.
7. ———. The line of demarcation between gross and ordinary negligence is not always clear. The cases however are clear in their declaration that negligence to be gross must be great or excessive; must be in a very high degree; not alone a momentary distraction of attention; and not alone the absence of slight care in the performance of a duty.

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

Ivan A. Blevens, for appellant.

Chambers, Holland & Dudgeon and Tomek & Tomek, for appellee.

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

BROWER, J.

This action was brought in the district court for Butler County to recover damages for the alleged wrongful death of Jane Ann Kolar, a minor, by the plaintiff Louis T. Kolar, her father, as administrator of her estate, against the defendant Ray L. Divis. At the conclusion of the plaintiff's evidence the trial court sustained a motion of the defendant for a directed verdict and dismissed the plaintiff's petition. From an order overrul-

ing his motion for a new trial the plaintiff appeals.

The deceased, Jane Ann Kolar, who will be called Jane at times herein, at the age of 13 years, suffered death by drowning in a tragic occurrence which took place Monday, June 24, 1963. She lived with her parents, Louis T. Kolar and Ruby Kolar, and her brother, Tom, in Dwight, Nebraska. The family of the defendant Ray L. Divis consisted of himself, his wife, Nora Divis, and their two daughters, Jeryl, aged 10, and Janel, aged 8, at the time herein related. They lived on a farm 1½ miles east of Dwight. The two families had been close friends and the three girls who attended the same school had visited back and forth, at times staying at each other's home.

Jane Kolar had gone with the defendant and the Divis children to a softball game on Sunday. After the game they all went to the Kolar home where it was arranged that Jane would stay with the Divis family that night. Permission also was given on Jane's request for her to ride to Lincoln on Monday with the Divis family if rain prevented the defendant from working.

During the night it rained 3 inches, according to the rain gauge at the Divis farm. On Monday morning the Divis family brought Jane back to her home to change her clothes for the trip to Lincoln. At the filling station at Dwight the defendant learned there was a heavy rain west of Dwight and floodwaters were on Plum Creek. They all got in the car at the Kolar residence and, bidding goodby, left while it was raining. Defendant drove the car throughout the day. They drove about 2½ miles west to Plum Creek and joined quite a gathering of people watching the flood with debris coming down. After staying there 20 or 30 minutes, they turned around and took a graveled road which extends eastward on a course ½ mile south of Dwight. On their way they drove past the Divis farm where a draw was running bank full of water. This road would take them to Lincoln by way of Valparaiso. After driving about 12 miles east this

road ends in a T intersection with a north and south country road. They took the north fork and drove less than ¼ mile north where the road again turns east. A short distance after making this turn they could see, from the hill they were on, the Oak Creek valley and the town of Valparaiso, its outskirts being about ¼ mile to the east. The creek drains a considerable area to the north. It was up and water was running across the road.

Turning around they went back to the T intersection and this time took the south fork of the road. Going south they saw no water as the trees concealed the creek. The north and south road ends 1 mile south of the hill where they had stopped. They turned east at its end and proceeded a distance of ½ mile to the road's intersection with Highway No. 79. This is a north and south black-topped highway which goes through Valparaiso which lies about 1½ miles to the north of this intersection. Highway No. 79 as it extends southward was on their route to Lincoln. Instead of turning they drove straight east past the schoolhouse on the southeast corner of the intersection about a quarter of a mile to the farmyard of Joe Machek whom the defendant knew. In so doing they crossed Oak Creek on a bridge on the country road. Defendant had seen Machek moving in the farmyard and called to him, saying, " 'You'd better move your machinery fast, there's high water coming.' " Without stopping they turned around in the Machek drive and went back to Highway No. 79 at the schoolhouse intersection. There the ground is higher than in the valley. The defendant then drove northward across the highway bridge on Oak Creek where the road drops into the valley to the north and went to Valparaiso. He had no reason for going there except to see any flooding there. In going there, there was no water on the highway although they did see some to their right in a field across the railroad which runs across the val-

ley parallel to the highway and a short distance to its west.

Arriving in Valparaiso they turned west on main street and drove a couple of blocks. Defendant saw water on the west end of main street. They did not get out of the car. A man named Tom Shanahan said to the defendant, " 'Don't block the traffic; don't block the road; we're evacuating; get out.' " Drivers of other cars there were told to get out also. People in the town were going east.

They did not stop but made a U-turn and returned the way they came, going at the same rate of 35 miles per hour. From the higher ground near the south edge of town defendant could see water on the west side of the railroad tracks about ¾ of a mile from where the tragedy occurred. Later the tracks obscured it. He also saw water west of the highway at about this point. Some distance from town he saw water on the highway 2 blocks ahead of him. It had not been there when they had driven into town just a few minutes before. Defendant did not continue to observe the water but drove on, watching a car which he was following about 100 yards ahead which proceeded through safely. He did not stop the car when he came to the water but reduced its speed to 20 miles per hour. There were three places where the water crossed the highway. The car ahead of him appeared to be going through 2 or 3 inches of water but when they got there in the second stretch, it was 5 or 8 inches deep. Defendant thought he could go through by driving slowly. There was so little water you could see the road clearly. After he got about 50 feet into the water the ignition system shorted and the motor stopped. He looked over his shoulder. He testified: "All behind me there was just no railroad track; it was just all like Niagara Falls coming. You couldn't see nothing; no fence or weeds; no railroad track behind us, and the railroad is close there; it's probably 100 feet from the road. Q And the water was pouring

over it? A Yes, and I knew we had very little time to get out of there. Q You knew you were in trouble? A Then, yes. Q Did you get out of the car? A Yes. I got out as fast as I could and I opened both doors and I said, 'Get out. We have to run for it.' "

Defendant and his wife and the three little girls got out of the car and joined hands in an effort to create a chain so that one could hold on to the other. The defendant led the way with his two daughters next, then his wife, and then Jane Ann Kolar. They attempted to go south towards the bridge as they were two-thirds of the way across the valley. Within these few seconds the water had become nearly waist deep on the defendant and after they got out past the car a short distance the defendant's wife and the Kolar girl were swept away by the force of the water.

Mrs. Divis and Jane Kolar were drowned. Ray Divis and his daughters were rescued by Gerald Resh in a 10-ton truck.

Gerald Resh was going south on Highway No. 79 behind the defendant's car. He described in some detail the buildup of water south of Valparaiso west of the highway. He states, "I was watching to my west; I was looking at the water; there was quite a build up of water to the west; when I first went over the hill I seen the water on the highway down there." To the right water extended almost as far as you could see. The defendant's car was ahead of him. When he first saw it the Divis car was either in the water a short distance or just starting. The water was rising rapidly. He was concerned about the rising water and stopped his truck about 10 or 20 feet from the water. When he stopped, the Divis car was driving approximately in the center of the highway. He sat in his truck, leaving the engine running, and watched the Divis car. He saw they needed help and decided to go in and pick them up, driving about 5 miles per hour in low gear. He passed the defendant's car on its right because the flood had moved it. Eventu-

ally the car was pushed off the road. The water was swift and he had a hard time holding his truck on the pavement and trying to judge where the pavement would be. When he got to them defendant put one girl in the cab and he and the other girl clung to the truck's high running boards. He could feel the pressure of the water against the truck. He saw Mrs. Divis and Jane go under. He was worried about losing the truck. He drove the truck on through, stopping at the schoolhouse intersection, and when they looked back the whole valley was covered with water.

The trial court sustained the defendant's motion to dismiss the plaintiff's petition on the ground that the deceased was a guest in the defendant's automobile and because of that relation the defendant was not liable for her death except for gross negligence which the trial court held was not shown as a matter of law.

The errors attributed by the plaintiff to the trial court will be stated as they are discussed.

The plaintiff first contends that a person who undertakes to look out for a child who was invited to accompany him has a duty to take reasonable precaution for the prevention of injury to the child. Citations are given to authorities where this abstract rule is stated with respect to negligence generally but do not involve the application of law in the case of a guest riding in an automobile. We think it unnecessary to discuss these authorities or the rule stated. Plaintiff cites the case of Schroeder v. Donlin, 79 S. D. 311, 111 N. W. 2d 609. There a 4-year-old boy was invited to ride in a truck loaded with grain. He was injured in the bin of an elevator in which the defendant driver had negligently permitted him to enter while stopping to unload the grain. In that case the operation of the truck had nothing to do with the injury or the negligence alleged, and the child was of tender years. Cases considering the question of the status of an infant as a guest within an automobile guest statute are assembled in an annotation

appended to the case of Kudrna v. Adamski, 188 Or. 396, 216 P. 2d 262, 16 A. L. R. 2d 1297, at page 1304. The annotation states that the courts have taken the view that where a child beyond the tender age is in the position of a gratuitous passenger in a motor vehicle, such child is a "guest" within the meaning of the applicable guest statute. Among the cases set forth in the annotation following the stated rule with the ages of the respective minor guests set forth are Shiels v. Audette, 119 Conn. 75, 174 A. 323, 94 A. L. R. 1206, where the boy was 13 years old; Letterel v. Cerniglia, 274 App. Div. 896, 82 N. Y. S. 2d 670, in which an 11-year-old boy was accompanied by his mother; and Tilghman v. Rightor, 211 Ark. 229, 199 S. W. 2d 943, involving three boys aged 7, 9, and 14, who had hitchhiked a ride, where the Arkansas court declared the statute defining a guest made no exception favoring minors and the court had no authority to write one into the law. The statute of this state, section 39-740, R. R. S. 1943, makes no such exception either. It is the province of the Legislature to change the statute and not that of this court. In the case before us Jane was 13 years of age, had been graduated from the eighth grade, and the evidence shows she was bright in school and dependable in the tasks assigned her. Her parents had given their permission for her to accompany the defendant and his family on the trip. Under the circumstances we hold a 13-year-old child riding as a gratuitous passenger in a motor vehicle is a guest within the purview of section 39-740, R. R. S. 1943.

Plaintiff points out that Jane did not perish while within the vehicle of the defendant. Plaintiff cites cases where courts of last resort in other states have held that the guest statutes there under consideration do not apply in certain instances where one has alighted from the vehicle. Defendant cites other authority where the decision under the facts therein stated was to the contrary. We do not find it necessary to discuss these au-

thorities. In the case before us plaintiff's counsel does not point out any negligent act of the defendant after leaving the car. The tragedy happened within a few seconds thereafter and all the evidence clearly indicates that on alighting from the car the whole party because of the phenomenal augmentation of the flood and its violence were helpless. It would appear that but for being rescued by the truckdriver all would have perished. Plaintiff suggests nothing to the contrary.

Plaintiff contends that if it be held the deceased was a guest in defendant's automobile the court nevertheless erred in holding as a matter of law that no gross negligence was shown and because thereof dismissing the plaintiff's petition. He points out that the defendant had notice of flooding conditions throughout the trip. He digressed from the usual course of his journey to warn his friend, Joe Machek, of the coming of floodwaters and proceeded into Valparaiso without reason where he himself was warned. It is urged he should have noted the rapid buildup of the floodwaters and should have stopped his vehicle before driving into them.

In Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710, this court, quoting from 1 Shearman & Redfield on Negligence (Rev. Ed.), § 24, p. 50, stated: " 'Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated.' " We think this rule must be kept in mind in considering the evidence in the case before us. In Moses v. Mitchell, 139 Neb. 606, 298 N. W. 338, it was held: "Where a person driving an automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which deliberate judgment might prove to be wrong." With

respect to the liability of a driver of an automobile to a guest passenger it was held in Davis v. Landis Outboard Motor Co., *ante* p. 391, 138 N. W. 2d 474: "* * * Negligence is not presumed and cannot be inferred from the fact that there was an accident.

"The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery.

"Gross negligence means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.

"The line of demarcation between gross and ordinary negligence is not always clear. The cases however are clear in their declaration that negligence to be gross must be great or excessive; must be in a very high degree; not alone a momentary distraction of attention; and not alone the absence of slight care in the performance of a duty."

We now consider the evidence in the case before us in the light of the rules of law herein set forth. It is true that as a result of the defendant's attempting to drive across the valley of Oak Creek at the precise time he did, the tragic death of the plaintiff's decedent as well as the defendant's wife occurred. The defendant had observed high water in the early stages of his driving. The plats in evidence clearly indicate those instances concerned other watersheds. Later he noticed the high water in the Oak Creek valley when stopping the car on the hill west of Valparaiso. In going south the creek was concealed by trees. He warned his friend Machek of high water coming and to move his machinery. In driving across the valley to Valparaiso there was no water on Highway No. 79 although some was observed across the railroad tracks. He saw high water in Valparaiso and was told to leave although the reason of the request appears to have been because of blocking traffic more than as a warning. He drove back without

delay. Instead of continuing to watch the buildup of water to the west of the railroad tracks as the truck-driver Resh did, defendant watched the car he was following which proceeded through the water on the road. It appeared to be going through 2 or 3 inches of water on the highway, and he proceeded evidently believing he could drive through without danger. When he reached that point it was 5 to 8 inches deep. The evidence all shows this flash flood came with a wall of water. The fact that the automobile only 100 yards ahead proceeded through safely, and in but a brief interval thereafter the defendant was in water up to his hips, shows this clearly. The weight of the water against the 10-ton truck, testified to by Resh, confirms it. Can the defendant's attempt to drive through the water on the highway which minutes before was dry, following a car ahead of him, under the circumstances be said to have been great and excessive negligence? Was it negligence in a very high degree which shows the absence of slight care? We think not. Again can we say that a reasonably prudent man in the defendant's position at the time would or should under the same circumstances have anticipated the danger caused by the almost incredible speed of the flood's augmentation? Again we think not. We find the plaintiff has failed to prove a prima facie case of gross negligence on the part of the defendant.

It follows that the trial court did not err in sustaining the defendant's motion for a directed verdict and in dismissing the plaintiff's petition, and its judgment is therefore affirmed.

AFFIRMED.

J. TOM ALLEN ET AL., APPELLANTS, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

140 N. W. 2d 413

Filed February 25, 1966. No. 36089.

1. **Intoxicating Liquors: Licenses.** The Nebraska Liquor Control Commission has a broad discretion in determining whether or not applications for licenses for the sale of liquor will be granted or denied, and the courts are without authority to interfere unless there is an abuse of that discretion.
2. **Municipal Corporations: Licenses.** The action of a city council of a city limiting the number of licenses to be issued within the city is a proper exercise of the police power in regulating the sale and the dispensing of alcoholic liquors, unless such action is shown to be arbitrary and unreasonable.
3. **Officers.** The presumption of validity attends official action, and the burden of proof to the contrary is upon one who challenges the action.
4. **Intoxicating Liquors: Licenses.** Under the Nebraska Liquor Control Act the commission is required to seek the recommendation of local authorities within 30 days as regards the grant or denial of an application. The effect of this provision is to afford evidence to sustain or deny an application, as the case may be, even though the commission is not bound by the recommendation.

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

Richard H. Hansen and Robert A. Weigel, for appellants.

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

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

CARTER, J.

On March 12, 1964, the applicants filed a joint application for a package liquor license with the Nebraska Liquor Control Commission. After a hearing the commission denied the application and the applicants appealed.

The application for a package liquor license was made to the commission in compliance with section 53-131, R. R. S. 1943. The application was referred to the city council of the city of Lincoln for its recommendation, as the law requires. After a hearing the city council recommended a denial of the application for the following reason: "That the granting of such license would increase the number of licenses in effect at this time in the City of Lincoln to a number further in excess of that fixed by this Council as the maximum." The record also shows that on March 9, 1964, the city council of the city of Lincoln, by resolution, limited the number of licenses for the sale of package liquor to 31. These licenses were in addition to those issued to bottle clubs, nonprofit corporations, and for the sale of beer.

The evidence shows that the place of business to be operated under the license, if granted, was to be in Indian Village, a new shopping center in southwest Lincoln. There are no package liquor stores within a mile of this location. There is evidence that the population of Lincoln in 1935 was 75,933 with 27 liquor licenses exclusive of clubs and nonprofit corporations. In 1963 the population is said to have been 143,000 with 31 package liquor licenses excluding clubs and nonprofit corporations. It is not questioned that the Indian Village Shopping Center is within the area prescribed by the city for the location of licensed package liquor stores.

In 1959 the Legislature for the first time required applications for liquor licenses to be filed with the Nebraska Liquor Control Commission rather than with local authorities. The legislation requires that notice be given to local authorities and that such authorities will have 30 days to make their recommendation. The city of Lincoln through its city council, recommended a denial of the application in the instant case. It is the commission, however, that determines whether or not the application shall be granted or denied, the recommenda-

tion of local authorities under the act being advisory only. The order of the commission denying the application was based on the recommendation of denial by the city council of the city of Lincoln. On appeal to the district court for Lancaster County the court upheld the right of the city council of Lincoln to place a limitation upon the number of package liquor licenses to be issued in the city and to recommend pursuant thereto, and affirmed the order of the commission.

The applicants contend that the trial court erred in holding that the limitation of package liquor licenses to 31 by the city of Lincoln was not arbitrary or capricious. The appeal is made primarily on this contention of the applicants.

The Nebraska Liquor Control Commission is an administrative agency of the state. It has been given authority by the Legislature to grant or deny applications for liquor licenses, after hearing, in accordance with the standards contained in the Nebraska Liquor Control Act. Its determinations made in accordance with the act will be sustained by the courts unless its action is shown to be unreasonable or arbitrary.

In this case the question is whether or not the commission acted arbitrarily and unreasonably in denying the application on the recommendation of the city council of Lincoln. This in turn relates itself to the power of the city council of Lincoln to recommend a denial based on its action in limiting the number of package liquor licenses to 31.

The question has been before this court on previous occasions. The principal case is In re Jugenheimer, 81 Neb. 836, 116 N. W. 966, 18 L. R. A. N. S. 386. In the consideration of that case the court took cognizance of the judgment of the district court, accompanied by a written opinion, sustaining every contention advanced by the applicants in the present case. Because of its length we shall only summarize the opinion in that case.

In reversing the judgment in the Jugenheimer case

the court said that in times not too remote there was little restriction on the sale of liquor but that the evils of the traffic became so pronounced that it presented to the Legislature the problem of satisfying the demands for their sale and at the same time minimizing its well-understood evils. Its purpose in so doing was not the raising of revenue, but rather to thoroughly regulate and as far as practicable to suppress a traffic, the tendency of which was believed to be productive of pauperism, vice, misery, and crime. The licensing of the sale on intoxicants was the method employed. The injurious results in the use of alcoholic liquors first fall upon the user in his health which the habit undermines; in his morals, which it weakens; and in self debasement, which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as the proper subject of legislative regulation. The police power of the state is fully competent to regulate the business—to mitigate its evils or suppress it entirely. The court then said that the appeal would be disposed of on the theory adopted in the district court—that the primary cause for the refusal of the license was the fact that the board had determined to limit the saloons to 35 in number. The power to regulate and control includes the power to do all that is deemed, in the judgment of the council, for the best interests of the municipality and its inhabitants. It necessarily confers the power to refuse a license, or to limit the number of licenses to be granted when the welfare of the city suggests such action. That such a limit is required in the interest of law and order must be accepted. When the number of licenses are issued beyond that to satisfy the

normal demand, the saloon keepers are compelled, in order to make the business profitable, to resort to all manner of vices to create an artificial demand for liquor and an increase in consumption of liquor beyond the normal. The evil consequences flowing from these practices can be readily seen. If the number of applicants were less than the board thought requisite to supply the normal demand, all could be accommodated; but, when it became evident that the applications were in excess of the number required, there was but one course to pursue, which was then adopted by the board, to refuse all applicants who applied therefor. Upon the foregoing reasoning the court concluded: "Such discretion (of the licensing board) extends to limiting the number of licenses which it will issue for the sale of liquors within the city, as well as the number that will be granted for any particular locality."

Other cases, consistent with the foregoing holding, are: Pleuler v. State, 11 Neb. 547, 10 N. W. 481; Jugenheimer v. State Journal Co., 81 Neb. 830, 116 N. W. 964; In re Application of Jorgensen, 75 Neb. 401, 106 N. W. 462; State ex rel. Brackett v. City of Alliance, 65 Neb. 524, 91 N. W. 387; and Fraser v. Hunter, 96 Neb. 134, 147 N. W. 124. In the Jorgensen case, a case dealing with the limiting of saloon licenses, this court said: "Its object is to limit the number of saloons in a certain locality. * * * That such a limit is required in the interests of law and order, and their due and orderly enforcement, must, we think, be accepted upon the mere statement of the proposition. * * * Many reasons for such restrictions readily suggest themselves and we need not, it would seem, enter into a discussion of any of them. This right of limitation as to numbers was distinctly recognized in State v. City of Alliance, *supra.*" We conclude that the power of a licensing board to limit the number of licenses for the sale of package liquor is a proper method of regulating the sale and dispensing of alcoholic beverages.

Under the Nebraska Liquor Control Act the commission is required to seek the recommendation of the city as regards the grant or denial of an application within 30 days. The effect of this provision is to afford evidence to sustain or deny an application, as the case may be, even though the commission is not bound by the recommendation.

The applicants contend that a denial of a liquor license by the commission on the basis that it would exceed the limitation of the number of said licenses set by the city, in the absence of a showing that the city took substantial evidence at a hearing conducted for that purpose, is incompetent. In other words, the applicants contend that the commission must have evidence before it to the effect that the city council of Lincoln held a hearing as regards the limiting resolution and that there was evidence which sustained its action. We think the regularity of the action taken by the city will be presumed and that the burden rests upon the applicants to show that the conclusion reached by the city was arbitrary and unreasonable.

The resolution of the city council of Lincoln, limiting the number of package liquor licenses to 31, was admitted into evidence by stipulation. It was also stipulated that 31 licenses had been issued before the application in this case was acted upon. No objection having been made to the admission of the resolution in evidence, it was before the commission for all purposes. By failing to object to the admission of the resolution of the city and irregularities as to its validity, even if such irregularities existed, they were waived. Even if the resolution were subject to objection on the ground of want of sufficient foundation, it is too late to raise that issue for the first time on appeal.

The trial court came to this same conclusion. The judgment of the trial court is affirmed.

AFFIRMED.

CITY OF O'NEILL, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS, V. CONSUMERS PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, ET AL., APPELLEES, LOUP RIVER PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, INTERVENER-APPELLANT.

140 N. W. 2d 644

Filed February 25, 1966. No. 36090.

1. **Constitutional Law: Franchises.** Payments made by a public power district to a municipality under the facts and the agreement here involved are not franchise payments within the meaning of Article VIII, section 11, of the Constitution of Nebraska.
2. **Corporations.** The authority given a public corporation to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances.
3. **Electricity: Public Policy.** The agreement of March 17, 1964, here involved does not violate the public policy of the State of Nebraska.
4. **Electricity: Municipal Corporations.** A second-class city has authority to execute a contract with a public power district to purchase the wholesale power requirements of the distribution system located in the municipality for a period of 25 years, effective when the municipality acquires the distribution system.
5. **Trial: Intervention.** A petition in intervention to be filed as a matter of right must be filed before trial.
6. ———: ———. The interest required to permit intervention is a direct and immediate legal interest of such a character that the person seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
7. ———: ———. An indirect, remote, or conjectural interest in the result of the suit is not enough to permit intervention.

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

Norman Gonderinger, for appellants.

Wilson, Barlow & Neff, Julius D. Cronin, and Robert G. Simmons, Jr., for appellees.

Schmid, Ford, Snow, Green & Mooney and Lyle Winkle, for intervener-appellant.

Crosby, Pansing, Guenzel & Binning, for amicus curiae.

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

MCCOWN, J.

This is a declaratory judgment action to determine whether or not an agreement between the City of O'Neill and Consumers Public Power District was valid and enforceable. The district court declared the agreement to be valid and enforceable, and dismissed the petition in intervention filed by Loup River Public Power District.

The City of O'Neill, Nebraska, will hereafter be referred to as O'Neill; Consumers Public Power District will be referred to as Consumers; and Loup River Public Power District will be referred to as Loup.

On March 17, 1964, an agreement was executed by O'Neill and Consumers, to which a wholesale power contract is attached. Essentially, the agreement provides that Consumers will convey its electric distribution system in O'Neill to the city on or after January 1, 1972, in accordance with the requirements of section 70-650.01, R. S. Supp., 1963. If and as of the time O'Neill acquires the electric distribution system, the wholesale power contract attached becomes effective for the 25-year term provided. Consumers agrees to pay to O'Neill 2 percent of the gross retail revenue received from its operations in O'Neill during the period from the date of the agreement until December 31, 1971, and at least 7 percent of the retail revenue received after December 31, 1971. At the option of O'Neill, Consumers will offer to enter into a contract to operate the distribution system if and at the time O'Neill requests that the distribution system be conveyed to it. If Consumers enters into any agreement with any other city or village in Consumers' eastern system granting larger payments of gross revenue, or

more favorable terms for the purchase of wholesale power from Consumers than are granted to O'Neill, Consumers will offer to renegotiate the agreement so as to give equal rights, terms, and conditions to O'Neill.

The wholesale power contract made a part of the agreement is for a period of 25 years beginning with the date O'Neill acquires the electric distribution system located in O'Neill. Under this contract, O'Neill agrees to purchase and Consumers agrees to sell all of the electric energy required in the operation of the electric distribution system. The contract gives O'Neill the right to obtain its "load growth" from a source other than Consumers upon 3 years' notice to Consumers. However, O'Neill remains obligated during the full 25-year term to purchase from Consumers power equal to the average of the maximum power furnished during the same month in each of the 3 years prior to the date set out in the notice. The contract requires O'Neill to pay for the wholesale power according to Consumers' standard wholesale rate schedule. Consumers is required to fix a new schedule of rates applicable to service under the contract effective on or before January 1, 1972, and is given power to revise its rate schedules not oftener than once each 5 years thereafter.

The factual background and expressed purpose of the agreement are important here. The preliminary recitals in the agreement are:

"Previous to 1944, Consumers purchased the electric distribution system located in the Municipality and borrowed the funds for such purchase by issuing and selling revenue bonds which were refunded in 1944 by the issuance of Refunding Revenue Bonds. Thereafter, in 1945, the Legislature passed what became Section 70-650.01, R. R. S. 1943 which has been interpreted to permit the Municipality to acquire the distribution system within its territorial limits without cost in accordance with that section, when the Refunding Revenue Bonds are fully paid on January 1, 1972.

"During the remaining years until 1972, Consumers is obligated to assure the Municipality and its inhabitants and those of approximately 300 other cities and villages and intervening rural customers served by Consumers of good service and an adequate supply of power to satisfy the ever growing electrical loads. To do this it will be necessary for Consumers to continue to sell additional revenue bonds to provide the funds to construct additional power supply facilities, consisting of transmission lines, substations and possibly electric generating plants.

"The excellent credit rating which Consumers now enjoys in financial circles has been developed over the years since the original acquisition and will permit Consumers to sell such additional bonds at very favorable interest cost and other terms provided there exists suitable guarantees to the buyers of the additional bonds that the additional power supply facilities will continue to be used for the life of the bonds remaining unpaid after 1972.

"The purpose of this Agreement is to fix the right of the Municipality to acquire the distribution system as provided in Section 70-650.01 R. R. S. 1943 as amended in 1963; to assure the municipalities of a firm and adequate supply of electric power; to give assurance that the Municipality will continue to use the electricity supplied by Consumers with facilities financed by revenue bonds in addition to those issued for the acquisition of distribution property; and to provide other considerations."

The evidence confirms the recitals and establishes that Consumers will be issuing bonds payable in part after 1972 and long-term contracts will result in very substantial savings in bond interest. Consumers is and will be planning electric facilities which will have the larger part of their useful life after 1972. In order to plan and carry out its operations efficiently with qualified personnel, and to hold costs down for supplying elec-

tricity both before and after 1972, Consumers needs to have contracts to provide electric service after 1972. In the absence of a contract with Consumers, the approximately 300 municipalities which may acquire their retail distribution systems from Consumers January 1, 1972, could either build their own generating plants or buy power from someone other than Consumers.

The primary contention of O'Neill and Loup is that the payments to be made by Consumers until O'Neill takes over its distribution system are franchise payments in violation of Article VIII, section 11, of the Constitution of Nebraska. This constitutional provision, together with implementing legislation, authorizes all public corporations organized primarily to provide electricity or irrigation to make certain in lieu of tax payments to governmental subdivisions. A portion of the constitutional provision is: "The payments in lieu of tax as made in 1957, together with any payments made as authorized in this section shall be in lieu of all other taxes, payments in lieu of taxes, *franchise payments*, occupation and excise taxes, but shall not be in lieu of motor vehicle licenses and wheel taxes, permit fees, gasoline tax and other such excise taxes or general sales taxes levied against the public generally." (Emphasis ours.)

It is the appellants' position that the payments to be made by Consumers are franchise payments and are therefore prohibited by the constitutional provision. They contend that the payments are made in exchange for the right to do business at retail within the city limits, and that O'Neill has nothing else to offer in exchange for these payments but a franchise.

Consumers' position is that the payments are not franchise payments, but are voluntary contractual payments in exchange for a wholesale power contract for 25 years to take effect on the date the municipality takes over its electric distribution system.

Consumers is presently operating the retail electric

distribution system in O'Neill under a franchise granted by O'Neill in 1960 and extending to January 1, 1972. That franchise is not in any way questioned here. The appellants cite numerous decisions which hold, in general, that a franchise confers the right to use or occupy the streets to conduct the business of a public utility; and is required to be conferred by public authority. Aside from the obvious fact that Consumers has had a franchise since 1960 which extends to 1972, the general proposition relied on by appellants is not determinative of the problem with which we are here concerned. As stated in Washington Fruit & Produce Co. v. City of Yakima, 3 Wash. 2d 152, 100 P. 2d 8, 128 A. L. R. 159: "There is a practical unanimity in the cases upon the subject, to the effect that a contract made with a municipality for the sale and delivery to it of light or power is not a franchise, even though there is an implied grant of such use of the city's streets as may necessarily be involved in the performance of the contract."

The appellants' position not only ignores the fact that Consumers already held a franchise, but also ignores the fact that the only thing given or granted by O'Neill under the agreement of March 17, 1964, is not a franchise, but is a contract to purchase electricity when and if O'Neill acquires the distribution system involved in the agreement. It might be noted here that the Legislature has subsequently indicated its clear intention not only that O'Neill will acquire the distribution system, but that Consumers shall divest itself of all such retail systems. Laws 1965, c. 58, p. 265.

In a transaction such as this, a municipality does not exercise its legislative functions, but only its business or proprietary powers. See Northern States Power Co. v. City of Granite Falls, 186 Minn. 209, 242 N. W. 714.

Payments made by a public power district to a municipality under the facts and the agreement here involved are not franchise payments within the meaning of Article VIII, section 11, of the Constitution of Nebraska.

The appellants next contend that the agreement of March 17, 1964, is in violation of public policy for a number of reasons. Among them are that the payments to be made by Consumers to O'Neill until O'Neill takes over the electric system are not authorized under implied powers of Consumers; would result in discriminatory rates for Consumers' other customers; and constitute the taking of funds from electrical customers of Consumers to aid the general welfare of taxpayers of O'Neill.

Consumers' powers are set out in sections 70-626 and 70-655, R. R. S. 1943, and 70-625, R. S. Supp., 1963. These powers have been summarized as intended to permit the business of the district to be operated in a successful and profitable manner. Under section 70-626, R. R. S. 1943, Consumers has specific power to own or operate any electric plants and to enter into any kind of contract or arrangements with any city for or incident to the exercise of those powers, and for the sale of electrical energy.

All the arguments of appellants that the payments by Consumers to O'Neill are in violation of public policy boil down to the contention that these payments are not proper operating expenses and result in an unauthorized gift to O'Neill. This argument ignores the fact that O'Neill has contracted to purchase power from Consumers for a period of 25 years from the date O'Neill takes over the distribution system. It also ignores the fact that from the standpoint of Consumers, and under the facts and circumstances then present, it was not only a reasonable operating expense, but almost an imperative one. The appellants rely upon cases such as United Community Services v. Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576. That case involved a gift to charitable organizations. Even though the court held a charitable gift unauthorized there, the following language was quoted with approval: " 'The authority given a municipality to engage in the operation of a busi-

ness enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances.' " See, also, Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., 137 Neb. 871, 291 N. W. 558.

The contention that the payments by Consumers to O'Neill result in discriminatory rates rests on the same assumption that only a gift is involved. If an indirect operating expense, justified by sound business reasons, may be treated as a gift, almost any indirect operating expense directed toward a particular class of customers would result in discrimination and a violation of public policy under the appellants' theory. The evidence shows that no increase in rates to any of Consumers' customers will be involved and also that Consumers offers agreements such as this to all of the municipalities in which it operates retail distribution systems.

The appellants also contend that the agreement here is against public policy because Consumers might continue to operate the electric system in O'Neill at retail perpetually, and on such an assumption, it has no termination date. Since the agreement here was signed, the Legislature has directed generally that Consumers shall not continue retail operations in municipalities after 1972. Laws 1965, c. 58, p. 265. It should be remembered also that both municipalities and public power districts are subject to the plenary control of the Legislature. Platte Valley Public Power & Irr. Dist. v. County of Lincoln, 144 Neb. 584, 14 N. W. 2d 202, 155 A. L. R. 412.

It is also contended that in any event, for a period of 25 years, O'Neill will be subservient to and at the mercy of Consumers, and that the agreement, in fact, is in restraint of trade and creates a monopoly. The appellants rely almost entirely upon the case of Custer Public Power Dist. v. Loup River Public Power Dist., 162 Neb. 300, 75 N. W. 2d 619, on rehearing, 162 Neb. 821, 77 N. W. 2d 590. Since that decision, however, the Legislature has

clearly indicated that public policy now requires the elimination of conflict and competition between public power agencies, whether public power districts or municipalities. The Legislature now imposes restraints on competition and encourages combinations and agreements between publicly owned power agencies. Whatever justification there may have been in 1956 for holding such contracts as violative of public policy has now been effectively removed by the Legislature. We stated in E. K. Buck Retail Stores v. Harkert, 157 Neb. 867, 62 N. W. 2d 288, 45 A. L. R. 2d 774: "The power of courts to invalidate contracts for being in contravention of public policy is a very delicate and undefined power which should be exercised only in cases free from doubt."

We hold that the agreement of March 17, 1964, does not violate the public policy of the State of Nebraska.

The appellants' next contention is that O'Neill does not have the authority to contract for the purchase of power for more than 5 years in view of the provisions of sections 17-528 and 17-528.03, R. R. S. 1943. Both of those sections are general sections dealing with franchises. They authorize second-class cities and villages to grant franchises for a period of not to exceed 25 years and to contract with the franchise holder for a period of not to exceed 5 years for the furnishing of light for the streets, lanes, alleys, and other public places and property of said city or village. The agreement here involved is not a franchise, nor does the power contract apply to the furnishing of light for the streets, lanes, alleys, and other public places and property of the city and the inhabitants thereof. Consequently, sections 17-528 and 17-528.03, R. R. S. 1943, do not apply.

The appellants concede that sections 70-501 and 70-502, R. R. S. 1943, and other statutory provisions authorizing power purchase contracts by cities would apply if O'Neill had acquired its electric distribution system from Consumers. None of these statutes place any time limitations on such contracts. Appellants rely on Inter-

state Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649, which held that sections 70-501 and 70-502, R. R. S. 1943, did not apply to a city which does not own any electric light or power plant or distribution system.

The power contract here becomes effective "If and as of the date the Municipality acquires the electric distribution system located within or partly within the Municipality * * *." When the power contract becomes effective, O'Neill will have its own distribution system. There is nothing in the legislative declarations which implies that there is anything wrong with a muncipality looking ahead and making contracts for the purchase of electricity for its distribution system when it obtains it. To require a city to wait until it has received its distribution system before contracting for electricity was certainly not intended by the Legislature, nor expressed in the statutes. A second-class city has authority to execute a contract with a public power district to purchase the wholesale power requirements of the distribution system located in the municipality for a period of 25 years, effective when the municipality acquires the distribution system. To the extent that Interstate Power Co. v. City of Ainsworth, *supra,* is in conflict, it is overruled.

Finally, the appellant Loup asserts that the district court erred in not allowing intervention of Loup after trial, but before judgment. A petition in intervention to be filed as a matter of right must be filed before trial. See Kirschner v. Gast, 169 Neb. 404, 100 N. W. 2d 65.

The interest required to permit intervention is a direct and immediate legal interest of such a character that the person seeking to intervene will either 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. Loup's allegations show that its interest in the contract involved here is its desire to compete in the furnishing of elec-

tric energy to O'Neill. Even if the contract here were held invalid, it is not at all certain that O'Neill would buy from Loup. An indirect, remote, or conjectural interest in the result of the suit is not enough to permit intervention. Cornhusker Electric Co. v. City of Fairbury, 131 Neb. 888, 270 N. W. 482.

For the reasons stated, the judgment of the district court was correct in all respects and is affirmed.

AFFIRMED.

IN RE APPLICATION NO. 10538 FILED BY THE METROPOLITAN UTILITIES DISTRICT OF OMAHA, NEBRASKA, FOR A PERMIT TO WITHDRAW, TRANSPORT, AND USE GROUND WATER. METROPOLITAN UTILITIES DISTRICT OF OMAHA, NEBRASKA, APPELLEE, V. MERRITT BEACH COMPANY ET AL., APPELLANTS.

140 N. W. 2d 626

Filed February 25, 1966. No. 36128.

1. **Constitutional Law: Courts.** The power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts.
2. **Constitutional Law.** The constitutionality of a legislative act must be raised at the earliest opportunity consistent with good pleading and orderly procedure, or it will be considered as waived.
3. **Administrative Law: Appeal and Error.** On a direct appeal from an order of an administrative agency to the Supreme Court the constitutionality of an act under which the administrative agency is proceeding may be raised for the first time in the Supreme Court, it being the first opportunity to raise such issue before a judicial tribunal.
4. **Constitutional Law.** It is a well-established rule that no one can complain that a statute is unconstitutional unless he is injuriously affected thereby, and that the courts will not set aside a law as violative of the Constitution for the reason that there is a possibility that one's interest may be injuriously affected in the future.
5. ———. A question of constitutionality will not be passed on if the situation is such that the rights of the complaining party would be the same whether or not the statute is held unconstitutional.

6. **Waters.** The common law rights of a riparian landowner have been modified in this state by limiting such rights to a reasonable and beneficial use upon the land he owns, especially if the exercise of such use in excess of the reasonable and beneficial use is injurious to others who have substantial rights to the water.
7. ———. Whether or not ground waters may be transported from one watershed to another is ordinarily a question of legislative policy.
8. **Waters: Public Policy.** All public waters of the state, whether they be surface or underground waters, are a natural want by constitutional declaration. The waste of such waters as a natural resource is against public policy.
9. ———: ———. Whether or not a diversion of ground water beyond the watershed of its source is lawful, in the absence of a legislative declaration of public policy, is determined from a consideration of the rights of appropriators and riparian owners having substantial rights in the use of such waters.
10. **Waters.** A riparian owner's contention that he requires the whole of the flow of a stream to moisten his land by subirrigation is not sufficient to establish a reasonable use of the entire amount of the water of a stream.
11. ———. The rule in this state as to the rights of riparian owners is that, while the owner of land is entitled to appropriate subterranean or other waters accumulating on his land, which thereby become a part of the realty, he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land he owns, unconnected with the beneficial use of the land, especially if the exercise of such use in excess of the reasonable and beneficial use is injurious to others who have substantial rights to the water.
12. **Waters: Municipal Corporations.** The use of ground water by a municipality for human needs as it relates to health, fire control, and sanitation, as provided by section 46-613, R. S. Supp., 1963, is a public use.
13. **Waters.** Where the evidence shows that the rights of appropriators and riparian owners are not damaged and the water diverted would be otherwise lost, the transportation of ground water beyond the watershed, in the absence of legislation to the contrary, does not offend the public interest or the doctrine of reasonable and beneficial use of the water resources of the state.

Appeal from the Department of Water Resources. Affirmed.

Charles S. Reed, Dixon Adams, and Herman Ginsburg, for appellants.

George C. Pardee, Cecil S. Brubaker, and Lester A. Danielson, for appellee.

Ralph D. Nelson, Henry L. Holst, Vincent D. Brown, Arylss E. Brown, Stewart, Calkins & Duxbury, David L. Crawford, and George E. Svoboda, for amici curiae.

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

CARTER, J.

This is an appeal from an order of the Director of Water Resources of Nebraska authorizing the Metropolitan Utilities District of the city of Omaha to supplement its water supply in the maximum amount of 60,000,000 gallons of ground water per day from a well field located in Sections 29, 30, 31, and 32, Township 13 North, Range 13 East of the 6th P.M., and tax lots and government lots associated therewith, all located in Sarpy County on the north bank of the Platte River and an island therein. Numerous objections were filed to the grant of the application. Five objectors have appealed from the grant of the application, to wit: Bellevue Rod and Gun Club, Mr. and Mrs. Gerald Merritt, Merritt Brothers Sand and Gravel Company, Merritt Beach Company, and the County of Sarpy, who will hereafter be referred to as Gun Club, the Merritts, Merritt Sand Company, Merrit Beach, and Sarpy County, respectively. The Metropolitan Utilities District will be referred to as M. U. D.

The M. U. D. produced evidence showing that it was in the business of furnishing water to the city of Omaha and its environs. It showed that it was in need of water in the maximum amount of 60,000,000 gallons per day to provide adequate service to its customers with an estimated average use per day of 40,000,000 gallons. The proposed water wells were to be located on the north

bank of the Platte River and an island adjacent thereto in Sarpy County approximately 5 miles west of the confluence of the Platte River and the Missouri River. The water was to be pumped from a number of wells on property purchased by M. U. D., treated, and conveyed by pipeline to the service area of M. U. D. in and around the city of Omaha.

The objectors, or some of them, raise each of the following issues: (1) Section 46-639, R. S. Supp., 1963, is in violation of Article III, section 14, and of Article I, sections 3, 16, and 21, of the Constitution of Nebraska. (2) The grant of the application amounts to an unlawful diversion of water from one watershed to another. (3) The statute fails to properly limit the legislative powers granted to the Director of Water Resources or to fix adequate standards by which the authority granted is to be administered. (4) The grant of the application to take water for industrial and commercial purposes violates the preferred rights of the objectors to use it for domestic purposes. (5) The grant of the application would constitute a violation of the vested rights of riparian property owners, in that great damage will accrue by the lowering of the underground water table below the surface of their lands. After a hearing on the application and the objections filed thereto, the Director of Water Resources granted the application.

The evidence shows that the present facilities of M. U. D. for the furnishing of water to its customers are 140,000,000 gallons per day. The water is taken from the Missouri River and treated at its Florence station. Its future need, based on projected population and customer increases, has been determined to be a maximum of 60,000,000 additional gallons per day. The studies made by engineers and hydrologists indicated that the most feasible plan was to construct a well field of approximately 35 wells on the north bank of the Platte River and the island adjacent thereto, about 5 miles west of the mouth of the river on the riparian lands here-

tofore described. The island is designated in the record as Cedar Island and we hereafter designate it as such. The proposal includes a treating plant on or near the well field and a pipe line to transport the treated water into the present facilities of M. U. D. The estimated cost of the project is $15,030,000.

M. U. D. has purchased 600 acres of land in or adjacent to the Platte River upon which the well field and treating plant are to be constructed. The main current of the Platte River is south of Cedar Island. The island is separated from the north bank of the river by a chute which carries water only a part of the time. The plans show that 18 water wells will be constructed on Cedar Island and the remaining wells on the north side of the river. All of the water will be pumped from the ground, a direct diversion of water from the river not being contemplated.

By expert evidence it is shown that the aquifer from which the water is to be pumped underlies some 1,200 acres of land more than a mile wide and 50 to 100 feet in depth. The Platte River flows over the south edge of the aquifer. The wells are to be located 175 feet or more from the river and will be from 50 to 65 feet in depth.

The aquifer, which includes the 600 acres of land purchased by M. U. D., has the capacity of producing 60,000,000 gallons of water per day. The evidence of the experts is that the source of the recharge of the aquifer, to replace the water pumped, will be 4,000,000 gallons per day from underground waters and 56,000,000 gallons per day from surface waters, primarily the Platte River. It is estimated that the aquifer would produce 60,000,000 gallons of water per day for 15 days after the Platte River contained no natural flow, if such an event would ever occur.

The expert testimony is to the effect that the operation of the pumps will lower the water table to its greatest depth at the location of the wells. This draw-down

of the water table tapers up and away from the bottom of the wells to the point where it has no effect on the static water table. The area thus affected between the point of productivity and the upward and outward slope to nonexistence is referred to as the cone of influence. The slope of the water table thus described produces the gradient which induces the movement of water that recharges the aquifer whatever be its source, including the surface water flowing in the Platte River. It is apparent from this evidence that there will be no lowering of the static water table beyond the cone of influence created by the pumping of 60,000,000 gallons of water per day. An expert hydrologist gave it as his opinion that the cone of influence would not extend beyond 5,000 feet to the north, 2,000 feet to the south, and 2,000 feet downstream to the east. The witness failed to express an opinion as to the extent of the cone of influence upstream to the west. All of the objectors own property or property interests to the east and below the proposed facility. The west or upstream extent of the aquifer is not therefore of any concern in this case.

The natural flow of the Platte River in years past was shown by the records of the United States Geological Survey. The natural flow and the corresponding rise and fall of the surface of the river was measured regularly for a period of years at the Louisville gauging station a few miles upstream from the site of the proposed well field. The average discharge of the river from May 1953 to September 1964, an 11-year period, was 5,220 cubic feet per second of time. The lowest discharge of the river on a single day occurred on September 3, 1955, the amount being 240 cubic feet per second of time. The average of the lowest flow of water on the lowest day in each year of this period is approximately 700 cubic feet per second of time. The average of the lowest consecutive 15-day periods of flow in each of the 10 years, 1954 to 1964, is 1,438 cubic feet per second of time. The lowest average 15-consecutive-day

period was 334 cubic feet per second of time, which occurred in the year 1954-1955. It is not disputed that the taking of 56,000,000 gallons of water is less than 93 cubic feet per second of time. This and other evidence indicates that the withdrawal of 60,000,000 gallons of water per day, the equivalent of 93 cubic feet per second of time, even if it all were diverted from the river, would not reduce the volume of the natural flow or the level of the river to the damage of the objectors.

Supported by this state of facts, M. U. D. made application to the Director of Water Resources for a permit as required by section 46-639, R. S. Supp., 1963, which provides: "An applicant which desires to avail itself of the provisions of sections 46-638 to 46-650 shall make application in writing to the Director of Water Resources for a permit. The application shall include (1) a statement of the amount of water for which a permit is desired together with an exhibit of maps showing the location of all wells, and (2) such other information as the director may deem necessary or desirable, and shall be accompanied by a fee in the amount of fifty dollars for the first five million gallons per day and an additional twenty dollars for each additional increment of five million gallons per day requested. The fee shall be based on the amounts of water requested on a daily average basis."

By section 46-638, R. S. Supp., 1963, the Director of Water Resources is authorized to grant and administer permits to cities, villages, or municipal corporations supplying water to cities and villages to develop ground water supplies in the area to be served by them. Other sections of the statute provide for the filing of an application for a permit, notice, the filing of objections, hearing, and review in the Supreme Court. Section 46-647, R. S. Supp., 1963, provides: "Nothing in sections 46-638 to 46-650 shall be construed as limiting any right of an owner of an estate or interest in or concerning land to recover damage for any injury done to his land or to

any water rights appurtenant thereto; nor shall sections 46-638 to 46-650 limit rights of condemnation which cities, villages and municipal corporations have under the laws of the State of Nebraska." Section 46-648, R. S. Supp., 1963, provides that the use of ground water pursuant to a permit granted by the Director of Water Resources shall be governed by the provisions of section 46-613, R. S. Supp., 1963. This section provides: "Preference in the use of underground water shall be given to those using the water for domestic purposes. They shall have preference over those claiming it for any other purpose. Those using the water for agricultural purposes shall have the preference over those using the same for manufacturing or industrial purposes. As used in this section, domestic use of ground water shall mean all uses of ground water required for human needs as it relates to health, fire control, and sanitation and shall include the use of ground water for domestic livestock as related to normal farm and ranch operations."

As we have heretofore stated, the objectors asserted in their objections filed with the Director of Water Resources, in opposing the issuance of a permit to M. U. D., that the grant of the permit would violate Article III, section 14, and Article I, sections 3, 16, and 21, Constitution of Nebraska. These same contentions are advanced in this court. In addition thereto, objectors contend in this court, for the first time, that the act is unconstitutional in that it delegates legislative authority to the Director of Water Resources without properly limiting the power delegated or providing the standards by which the granted powers are to be administered under our holding in Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227. It is the contention of M. U. D. that since this was not an issue raised by objectors in the hearing before the Director of Water Resources it cannot be raised in the first instance in this court in accordance with the long-established rule of

this court as stated in Lucas v. Board of Equalization, 165 Neb. 315, 85 N. W. 2d 638.

In this connection we point out that the power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts under the division of powers between the legislative, executive, and judicial branches of government set forth in the Nebraska Constitution. The Department of Water Resources is an administrative agency and, as such, has no authority to declare an act of the Legislature void because of unconstitutionality. Its function, in the performance of its delegated authority, is to give force to the presumption of constitutionality and comply with the provisions of the statute under which it is called upon to act. It would be a vain thing to require the raising of constitutional objections before a tribunal that has no authority to determine them.

It has been the practice in this court to consider constitutional questions in reviewing the orders of administrative agencies when raised in this court on direct review. City of Auburn v. Eastern Nebraska Public Power Dist., *ante* p. 439, 138 N. W. 2d 629. It is a general rule that the constitutionality of a legislative act must be raised at the earliest opportunity consistent with good pleading and orderly procedure, or it will be considered as waived.

This question appears to be one of first impression in this state. We think the proper rule is correctly stated in Wendlandt v. Industrial Commission, 256 Wis. 62, 39 N. W. 2d 854, wherein it is said: "However, the record does disclose that the unconstitutionality of the act was directly and positively asserted early and, certainly, as soon in the proceedings as it could be submitted to a judicial tribunal. The division between the power to make laws, to interpret and apply laws, and to execute laws may not be clear. In providing for enforcement of its enactments, the legislature may clothe administrative officers with power to ascertain whether certain specified facts exist, and thereupon to act in a

prescribed manner without delegating to such officers legislative or judicial power within the meaning of the constitution. (Citing authorities.) But the legislature cannot confer upon tribunals, other than courts, powers which are strictly and consistently judicial. The power to determine the constitutionality of a legislative enactment is strictly a judicial duty."

As to the time in which questions of constitutionality may be raised, it was said in Owen v. Mutual Benefit Health & Accident Assn., 171 Kan. 457, 233 P. 2d 706: "A similar statement of the rule is found in 12 C. J. 785 and 11 Am. Jur. 772. Each of these general authorities cites a number of federal and state decisions. And in Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 Law Ed. 834, the court had occasion to say (page 444): 'No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' " In Cotton v. Iowa Mut. Liability Ins. Co., 363 Mo. 400, 251 S. W. 2d 246, the court said: "A constitutional question should be raised at the earliest practical opportunity." (Citing authorites.) See, also, Wendlandt v. Industrial Commission, *supra*. We conclude therefore that in an appeal from an order of an administrative agency direct to the Supreme Court, the question of constitutionality of the act, under which the administrative agency assumes its authority, can be first raised in the Supreme Court since it is the first time afforded to raise such an issue before a judicial tribunal.

It is the contention of M. U. D. that the objectors have failed to show a sufficient interest to raise the question of constitutionality. In Peterson v. Anderson, 100 Neb. 149, 158 N. W. 1055, this court said: "It is a well-established rule that no one can complain that a statute is unconstitutional unless he is injuriously affected thereby, and that the courts will not set aside

a law as violative of the Constitution for the reason that there is a possibility that one's interest may be injuriously affected in the future." In State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683, this court said: "It is firmly established as the universal rule that a person 'may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his disadvantage; and to raise the question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right, and, of course, it is prerequisite that he establish in himself the claimed right which is alleged to be infringed.' 16 C. J. S., sec. 76, p. 162. We have held that, 'A party to a suit will not ordinarily be permitted to attack the constitutionality of a statute in a case where his rights and interests are not invaded or affected by its provisions.' State v. Brandt, 83 Neb. 656, 120 N. W. 196."

It is the contention of objectors, or some of them, that the withdrawal of 60,000,000 gallons of water from the ground at the site of the M. U. D. well field will reduce the water table under their lands to their damage. The M. U. D. called two expert witnesses, Vincent H. Dreeszen and Paul Bolton. Dreeszen is the assistant director, conservation and survey division, University of Nebraska. He has devoted most of his time since 1947 to the problems of ground water in Nebraska. Bolton is an engineer with Henningson, Durham & Richardson, an engineering firm in Omaha. He holds a bachelor of science degree in civil engineering with a major in rivers and streams and has worked considerably in hydrologics. No contention is made that these two witnesses were not qualified as experts in the field of hydrology.

The differences in their testimony were minor. They testify to their knowledge of the area here involved and to underground waters generally. They state that the operation of the pumps in the well field in withdrawing 60,000,000 gallons of water per day will lower the water

table approximately 50 feet at the point of withdrawal and that the water table will rise upward and outward until it meets the static underground water level. The cone-shaped depression in the water table thus created is designated as the cone of influence. It is the testimony of the experts that there will be no lowering of the water table beyond the perimeter of the cone of influence. Both experts testify that the cone of influence will not extend more than 5,000 feet to the north and not more than 2,000 feet to a half mile to the east. The land interests of the objectors are to the east or downstream from the well field and far beyond the cone of influence, relatively speaking. It is the opinion of the experts that the underground water level under objectors' lands will in no way be directly affected by the withdrawal of 60,000,000 gallons of water per day from the ground at the site of the well field. See Olson v. City of Wahoo, 124 Neb. 802, 248 N. W. 304, where this precise question was determined. The objectors produced no expert evidence and consequently the testimony of Dreeszen and Bolton is not disputed in the record.

It is the evidence, however, that the Platte River passes over the south edge of the aquifer and that the source of its recharge will be about 4,000,000 gallons per day from ground waters and 56,000,000 gallons per day from surface waters largely induced from the Platte River. It is asserted by the objectors that the operation of the well field will reduce the natural flow of the Platte River by 56,000,000 gallons per day and will result in the lowering of the water level of the Platte River by that amount. This is a fact beyond any dispute. From this it is argued that as the water table under their lands is influenced by the water level of the Platte River, it will lower the water table under their lands and damage their subirrigated lands and nearby lakes which have been put to industrial and recreational uses.

There is evidence in the record which shows the tabu-

lation of the gauging of the river at the Louisville gauging station as to the height of the surface of the river at stated times and the discharge of the river at corresponding times. From the gauging of the river and corresponding measurements of the volume of discharge over a period of time, it was established by relating one to the other that the drop in the surface of the river by the withdrawal of 56,000,000 gallons of water would be 1.06 inches. The withdrawal of 60,000,000 gallons of water would cause a surface drop in the river of 1.08 inches. This determination is not made from any recognized formula but from information gained from the regular gauging of the height of the river and the measurement of the volume of flow at corresponding times. From these statistics, kept over a long period of time, it has been determined that the lowering of the water level in the river carrying its average flow is approximately 1.1 inches per 100 cubic feet per second of time reduction in volume. Since the 60,000,000 gallons of water per day amounts to 93 cubic feet per second, and but 56,000,000 gallons per day is the draw-down from the river, it is evident from the record that the lowering of the water level at the point adjacent to the land of these objectors by the withdrawal of 56,000,000 gallons will not exceed 1.1 inches. Under this evidence the lowering of the river level will have only a negligible effect upon objectors' underground water which they assert is controlled by the rise and fall of the Platte River. In situations whereby the right of the riparian landowner to take percolating waters which interfere with the prior appropriation rights of persons on a nearby stream, the law of this state is silent. The question has been before the courts of California and Utah. Both courts prevented the taking by ground water users to the extent that such uses interfered with the prior appropriation rights. Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 45 P. 2d 972; Silver King Consol. Mining Co. v. Sutton, 85 Utah 297, 39 P. 2d 682.

In the Tulare case it is said: "The further finding that each riparian requires the 'whole of the underground flow of said stream * * * to moisten said land from beneath,' etc., is not sufficient under the new doctrine. The use of the entire flow of a stream, surface or underground, for subirrigation cannot be held to be a reasonable use of water in an area of such need as the Kaweah delta." If such is not the rule, every appropriation of water from a stream would be defeated by lower riparian owners having subirrigated lands because of the lowering of the water table which every diversion does to some extent. We determine therefore that the objectors have failed to show that their rights have been invaded and have such an interest as to entitle them to raise the question of constitutionality.

On the question as to whether or not the statute properly limits the powers granted to the director of water resources, and fixes adequate standards by which the authority granted is to be administered, the contentions of the objectors appearing to have great merit, a declaration of unconstitutionality at this time would leave M. U. D. in the position as before the act was passed, without any statutory limitation on its right to proceed with the construction of the facility. On this phase of the case the rights of the objectors to recover for damages to their property is not impaired. We fail to see where the declaration of unconstitutionality would benefit the objectors, the limitations proposed by the questioned act being solely a limitation upon the taker of water.

In this connection, however, it is asserted in effect that the objectors are owners of land or land interests in the watershed of the Platte River and, as such, are entitled to question the right of M. U. D. to take water from the Platte River watershed outside of that watershed for its municipal purposes. We think, because of the magnitude and importance of the question, and the interest of the objectors as resident riparian landowners

within the Platte River watershed, that this question must be determined. The right of a riparian owner to raise the issue was so sustained in Osterman v. Central Nebraska Public Power & Irr. Dist., 131 Neb. 356, 268 N. W. 334.

The objectors rely upon the Osterman case as supporting their contention that ground water cannot be transported and used outside of the Platte River watershed. In considering this question we point out that in 1866 the Legislature enacted the following: "So much of the common law of England as is applicable, and not inconsistent with the constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory, is adopted, and declared to be law within said territory." 2 Complete Session Laws of Nebraska, 1866-1877, p. 12. Except for the change of the word "territory" to "state," the same provision exists as in section 49-101, R. R. S. 1943. Consistent with this enactment, this court has held: "The common-law rules as to the rights and duties of riparian owners are in force in every part of the state, except as altered or modified by statutes." Meng v. Coffee, 67 Neb. 500, 93 N. W. 713, 108 Am. S. R. 697, 60 L. R. A. 910. At common law a riparian landowner is entitled to have the stream flow through or by his land, essentially undiminished in quantity and unimpaired in quality, and he may make whatever domestic use of the water he desires and he does not forfeit those rights by nonuser. As to ground water, a riparian landowner at common law could withdraw whatever quantity of water for any purpose he chose without regard to the possible effects on his neighbor. But in humid England, the birthplace of the common law, the problem of arid and semiarid areas did not exist, and accounts for the fact that the use of water in a stream was limited strictly to riparian lands. Since riparian lands were in the watershed of the stream they touched, transportation outside the watershed for irri-

gation purposes was a problem not necessary to be considered. But under the common law doctrine, a riparian landowner could withdraw all the water he wanted from below the surface of his land, for any purpose, without regard to the effect on his neighbor, and he could transport it to where he chose. In the Osterman case this court said: "This necessitates the further conclusion that at common law there was in general no right to transport waters beyond or over the divide or watershed that inclosed the source from which obtained."

The first irrigation laws in this state were adopted in 1877 and 1889. These acts placed no limitations upon the quantity of water that could be appropriated, save and except that it must be for a useful purpose and within the capacity of the diversion works. Laws 1877, p. 168; Laws 1889, c. 68, p. 503. In 1895 the Legislature limited for the first time the quantity of water that could be appropriated to a specific amount and protected the rights to water acquired and appropriated prior to the passage of the act. Laws 1895, c. 69, §§ 20, 49, pp. 249, 262. Subsequent amendments to the irrigation law have been made, the entire result being that the adjudication of water rights and the priority of appropriation of water by diversion from rivers and streams for irrigation purposes have become the settled legislative policy of this state. Farmers Canal Co. v. Frank, 72 Neb. 136, 100 N. W. 286. In Enterprise Irr. Dist. v. Willis, 135 Neb. 827, 284 N. W. 326, we said: "That the state may supervise and control the appropriation, diversion and distribution of the public waters of the state and impose that duty upon administrative officers is settled by our former decisions."

It was not, however, until 1957 that the Legislature undertook any form of regulation of ground waters. In that year the Legislature enacted three statutes providing for the registration of irrigation wells, the spacing of such wells, and preferences in the use of ground water. Laws 1957, cc. 199, 200, 201, pp. 701, 704. In

1959 the Legislature provided for the creation of ground water conservation districts. Laws 1959, c. 221, p. 773. In 1961 the Legislature clarified existing statutes relating to ground water; changed the conditions for the registration of irrigation wells, for the plugging of abandoned wells, and for replacement wells; and provided for well drillers' certificates. Laws 1961, cc. 227, 230, pp. 671, 683. In 1963 the Legislature defined ground water and required that a permit be obtained to pump underground water within 50 feet of the bank of a natural stream. Laws 1963, cc. 274, 275, p. 827. In 1963 the statute presently before this court was enacted into law. It will be observed that acts of the Legislature were mere beginnings in the exercise of possible control and regulation of ground water. While the rights of appropriators to the use of water from rivers and streams have been protected over the years, rights in the use of ground water have not been determined nor protected, nor the public policy with reference to the use of such underground waters legislatively declared. The difficulties in administering dual conflicting principles, and fixing the rights of users thereunder, are readily apparent.

The Constitution of Nebraska provides that the necessity of water for domestic use and for irrigation purposes in the State of Nebraska is a natural want. Art. XV, § 4, Constitution. While this section of the Constitution has been related primarily to the diversion of water from rivers and streams, its relation to underground water is no different. Historically the state adopted the riparian right theory of the common law of England and subsequently impressed upon it the doctrine of appropriation. The rights of appropriators under the latter doctrine have been spelled out by statute and judicial interpretation while the rights of riparian landowners remain unsettled and undefined.

Underground waters, whether they be percolating waters or underground streams, are a part of the waters referred to in the Constitution as a natural want. Such

waters are as much a part of the hydrologic cycle as the flow of water in a stream or river. It is true that such waters are not concentrated as in a river nor do they move with the velocity of a river, but they do percolate through underground formations and have the same source and termination as surface water flowing in a river. Underground waters are a part of the source of water supply to a growing population and an expanding economy the same as the surface waters flowing in a live stream on the surface of the ground. Because of the ever-increasing demands for water control of underground waters as well as the flow of rivers and streams, it is becoming more important and extremely necessary that regulation and control of all sources of water supply be attained. Without any declaration of public policy as to the use of underground waters other than the constitutional declaration that they are a natural want, we adhere to the rule that such waters must be reasonably used for a beneficial purpose without waste. It is axiomatic that waters which flow beyond the points of use to the sea are lost and constitute a form of waste, which is against public policy.

While it is true that riparian rights still exist in this state and they remain unsettled and ill-defined, such rights have been limited by the rules of reasonable use and public interest. Where the reasonable use of the riparian landowner is not impaired, the public interest demands that such waters be applied to a needed public purpose rather than be lost by proceeding unmolested to the sea. The use of ground water by the inhabitants of a city for the purpose of health, convenience, and comfort is a public use of such water. Olson v. City of Wahoo, *supra*.

The common law rights of riparian owners have been modified in this state by what is known as the American doctrine. This doctrine has been defined as follows: " 'The American, as distinguished from the English rule, is that, while the owner of the land is entitled to appro-

priate subterranean or other waters accumulating on his land, which thereby becomes a part of the realty, he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land he owns, unconnected with the beneficial use of the land, especially if the exercise of such use in excess of the reasonable and beneficial use is injurious to others, who have substantial rights to the water.' " Silver King Consol. Mining Co. v. Sutton, *supra*. Under the foregoing theory we conclude that where the taking of water beyond a watershed causes no injury to appropriators or riparian owners, no reason exists for not permitting the use of waters for a public and beneficial purpose which would be otherwise lost. It is argued that the Osterman case, by analogy, sustains a contrary holding. We do not think that this is so. That case involved a diversion of the natural flow of the Platte River into the watersheds of the Republican and Blue Rivers. The taking of the water there involved would damage the rights of lower appropriators on a river already over-appropriated. In the instant case, M. U. D. is a riparian landowner. No water is taken directly from the river. There are no appropriators or riparian owners who are injured by the taking between the well field and the mouth of the Platte River some 5 miles east. In any event, the Osterman case was decided on a statute first enacted in 1889 which prohibited transportation of water beyond the watershed. There is authority that one not damaged cannot raise the question of a diversion of ground water beyond the watershed. But we choose to decide the question on the ground of reasonable use and all the factors that enter into such a consideration, including the reasonableness of a watershed diversion, thus preserving the right of the Legislature, unimpaired, to determine the policy of the state as to underground waters and the rights of persons in their use. Under the record in this case and the applications of the declared law in this case, we can find no basis for holding the diversion from

the well field to be unlawful. Under the evidence in this case the transwatershed diversion was reasonable, for a public purpose, beneficial, not against public policy, and in the public interest.

The presumption of constitutionality prevails under the record in this case. Under the evidence a finding that appropriators and riparian landowners will sustain no damage by the withdrawal of 60,000,000 gallons of underground waters at the site of the well field is sustained by the record. The evidence also supports the finding of the Director of Water Resources that, under the circumstances shown, the withdrawal of such water is in the public interest. The objectors failed to show any damage resulting from the pumping of the water from the well field in the quantity applied for, their evidence resting solely upon surmise and speculation. Under these circumstances and the law as we have found it to be, the order of the Director of Water Resources granting the application must be sustained.

AFFIRMED.

SPENCER, J., dissenting.

There are several reasons why I cannot agree with the majority opinion. In my judgment, the act in question is clearly unconstitutional. Legislative power is vested in the director. Section 46-642, R. S. Supp., 1963, authorizes the director to grant permits without limitation. Nowhere in the act is there any criteria given to control the rulings or actions of the director.

I do not agree that the appellants have not shown a sufficient present interest to raise the issue of constitutionality. The assistant director of the conservation and survey division of the University of Nebraska, who testified for appellee, stated that in his judgment the appellants would not be affected by the appropriation. He did admit, however, that there would be an effect on the surface water that flowed down the stream, and the testimony of appellants is to the effect that the level of their lakes is dependent upon the level of the river. The

majority opinion fixes this lowering of the level of the river at not to exceed 1.1 inches. If this were true, the effect would be minimal.

There is evidence in the record that the operation of the well on Cedar Island, which was one of the four test wells put down by the appellee, lowered the level of a lake located midway between the M. U. D. site and the Merritt property 4 feet while it was in operation. Appellee's evidence would also indicate that in periods of low flow, the appropriation might be more than one-third of the flow of the river. The testimony of its expert was that 60 million gallons a day represented 38.7 percent of the lowest recorded flow. On the present record, I feel that appellants have a sufficient interest to raise the question of the constitutionality of the statute.

I also observe that the expert referred to above testified that although his opinion was that the appellants would not be affected, he could only be sure that this would be true by a period of observation after the M. U. D. wells became operative. It is apparent from the record that in determining the adequacy of the acquifer, M. U. D. was interested solely in the adequacy of the water for its own purpose and was not concerned with the effect on lower riparians.

Section 46-635, R. S. Supp., 1963, defines ground water as follows: "Ground water is that water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land."

By its expressed mandate, the act is applicable only to ground water. It would appear to me that we ignore the obvious when we describe the water involved herein as ground water and say no water is taken directly from the river. The testimony is undisputed that the waters of the Platte River are to be induced to move toward the appellee's well field under artificial gradient. Surface water does not become ground water by an act of an appropriator. As is well said in III Farnham, Waters and Water Rights, § 940, p. 2722: "The fact that the source

of a running stream is percolating water does not take the stream itself out of the rules applicable to other running water. And, therefore, the water cannot be diverted from its course. And what cannot be done directly cannot be done indirectly; so that, after the water has reached the stream, it cannot be diverted by sinking wells so close to the stream that the water is drawn from it by percolation." The acquifer as such does not have the storage capacity to furnish 60 million gallons of water a day. Fifty-six million gallons of water a day will come from the Platte River, and the balance of 4 million from the acquifer. Further, the testimony is undisputed that the surface flow of the river lies directly on the underground acquifer. Eighteen of appellee's 35 wells are to be placed on an island in the river. The most that can be said is that we are dealing here with the subflow of the Platte River which, from all the law I have found, should be treated as the river itself rather than as percolating or ground water.

I find some difficulty in understanding why the principles enunciated in Osterman v. Central Nebraska Public Power & Irr. Dist., 131 Neb. 356, 268 N. W. 334, are not applicable in this case. We are dealing substantially with surface water and riparians. In my judgment, the distinction drawn by the majority opinion is a distinction without a difference.

There is an inference in the opinion that even if the act were unconstitutional, appellee could still divert the water. There is no merit to the inference. As I view the law, in the absence of statute such act would amount to an unlawful diversion of waters from one watershed to another. I disagree with the statement in the opinion, without the citation of authority, that at common law a riparian in a like situation could transport the water wherever he chose. He could not do so if his well was so close to a stream or lake that he lowered the level of that body by doing so. See Grand Junction Canal Co. v. Shugar, 6 Chancery Appeals 483, in which

Lord Hatherley stated the rule as follows: "Although a landowner will not in general be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained if, in so doing, he draws off the water flowing in a defined surface channel through the adjoining land."

To the same effect, see Aetna Mills v. Brookline, 127 Mass. 69, one of the early American cases on percolating waters, which follows the English rule. This was the law applicable at the time the Legislature in 1866 adopted the act referred to in the majority opinion.

I am in full accord with the doctrine of reasonable use. So vital a resource as water should not be permitted to go to waste. In our present society, reasonable use for a beneficial purpose without waste is a necessity. I only insist that the law be observed and the rights of all parties involved be protected. In my view, neither the Legislature nor the courts have the power to abolish rights of riparian proprietors which have become vested, except as such rights be taken or impaired for a public use in an exercise of the powers of eminent domain for which compensation must be made for the injuries sustained. See Crawford Co. v. Hathaway, 60 Neb. 754, 84 N. W. 271.

DRYCLEANERS ACCEPTANCE CORPORATION, APPELLEE, V. FRANCIS E. THURSTON ET AL., APPELLANTS, IMPLEADED WITH JACK R. BOARTS, DOING BUSINESS AS BON TON CLEANERS, APPELLEE.

CONSOLIDATED WITH: DRYCLEANERS ACCEPTANCE CORPORATION, APPELLEE, V. ERNEST J. ARP, SHERIFF OF SARPY COUNTY, NEBRASKA, APPELLEE, FRANCIS E. THURSTON ET AL., INTERVENERS-APPELLANTS.

140 N. W. 2d 657

Filed March 4, 1966. No. 36054.

Sales. Under former section 36-207, R. R. S. 1943, recordation of

a conditional sale contract in the proper county was notice of the claim throughout the state, despite the nonresident buyer's removal of the property to another county.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

Robert Saxton, for appellants.

George H. Thompson and Edward J. Baburek, for appellee Drycleaners Acceptance Corp.

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

SMITH, J.

The single issue in both cases is the necessity for recordation of a conditional sale contract in the county to which the property was removed by the buyer, a nonresident of Nebraska, despite timely recordation in the county where the property had been located The seller's assignee claimed a lien senior to a creditors' lien under a writ of attachment. The district court rendered judgment for the assignee in both cases, and the attaching creditors have appealed.

The buyer resided in Council Bluffs, Iowa, at all times material here, but he operated a business in Douglas County, Nebraska, until January 1961. On August 29, 1960, the seller's assignee filed the conditional sale contract in the office of the county clerk of that county. The contract provided that its subject matter, drycleaning equipment, was not to be removed from the county without written permission of the seller. In January 1961, the buyer transported the equipment to Sarpy County, Nebraska, where he installed it in a building leased to him by the attaching creditors. Six months later the assignee learned independently that the equipment had been relocated, the buyer having failed to give notice or to obtain permission. The order of attachment was executed in November 1962. The conditional sale contract was not filed in Sarpy County.

The attaching creditors contend that the assignee lost the seniority of its lien by failure to file the contract in Sarpy County. The recording statute, former section 36-207, R. R. S. 1943, provided in part as follows:

"Where a vendee * * * obtains actual possession pursuant to a contract of sale * * * containing a stipulation which makes the transfer of title * * * depend on any condition, such stipulation shall not be valid against any * * * judgment creditor * * * without notice * * * unless the * * * contract * * * be filed in the office of the clerk of the county within which such vendee * * * resides, or if the vendee * * * is a nonresident of the state in the office of the clerk of the county where the property is located."

Analogies caution us against reading such a requirement into the statute. The public record in the county of the buyer's residence protected the seller, although the buyer had taken the property to another county. Crancer Co. v. Cooper, 98 Neb. 153, 152 N. W. 304. Cf. Sheridan v. Dudden Implement, Inc., 174 Neb. 578, 119 N. W. 2d 64. The constructive notice of a chattel mortgage in the county of the mortgagor's residence extended into whatever county he moved with the property. Cool v. Roche, Hall & Ray, 20 Neb. 550, 31 N. W. 367; Grand Island Banking Co. v. Frey, 25 Neb. 66, 40 N. W. 599, 13 Am. S. R. 478.

These cases applied the general rule which is controlling here. In the absence of further statutory requirement the public record of a security interest in the proper county is notice of the claim, despite the removal of the property to another county by a nonresident of the state. See, Montague Brothers v. Shepherd Co., Inc., 231 N. C. 551, 58 S. E. 2d 118; 2 Merrill on Notice, § 1084, p. 731.

The judgment is correct and it is affirmed.

AFFIRMED.

SPENCER, J., participating on briefs.

PERRY EARL DAVIS, APPELLANT, V. L. J. ROOSMAN, INDIVIDUALLY, ET AL., APPELLEES.
140 N. W. 2d 639

Filed March 4, 1966. No. 36061.

1. **Automobiles: Negligence.** The sudden emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it.
2. **Negligence: Trial.** Repetitious allegations of negligence may be summarized and the court has no duty to repeat them separately in its instructions.
3. **Trial.** When different instructions are given on the same subject, they should be considered together, and if they fairly submit the case, the judgment will not be reversed for indefiniteness or ambiguity in one of the instructions.
4. **Trial: Appeal and Error.** In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions, and the true meaning thereof will be determined not from the sentence or phrase alone but by a consideration of all that is said on the subject.
5. **Appeal and Error: Damages.** The finding of the jury that neither party was entitled to recover foreclosed the possibility of prejudicial error in the receipt or rejection of evidence on the subject of damages.

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

Mitchell, Taylor & Beatty, for appellant.

Smith Brothers and Lawrence F. Weber, for appellees.

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

BROWER, J.

The plaintiff Perry Earl Davis brought this action in the district court for Custer County to recover damages for personal injuries sustained in an automobile collision against the defendant Harold C. Butterfield, the driver

of a truck owned and being operated on the business of his employer, the defendant L. J. Roosman, doing business as Rural Gas Utility and Rural Welding Supply Co. The defendants' joint answer, so far as it is of significance here, denied the allegations of negligence alleged in the plaintiff's petition and alleged the collision was caused solely and proximately by the negligence of the plaintiff, and that any negligence on the part of the defendants was slight in comparison therewith. The defendant Roosman filed a separate cross-petition seeking to recover damages to his truck from the plaintiff. Hereafter where the defendant is used in the singular, it will refer to the driver of the truck, Harold C. Butterfield.

A trial to a jury resulted in a verdict finding that neither the plaintiff nor defendants were entitled to recover, and judgment was entered dismissing the plaintiff's petition and the cross-petition.

The plaintiff has appealed from an order overruling his motion for a new trial. There is no cross-appeal.

The accident happened about 11:45 a.m., on August 21, 1961. It occurred on a graveled road approximately 7 miles northeast of the town of Callaway in Custer County. There were floating clouds and at times sprinkles of rain. The road there extends north and south and the collision occurred a short distance south of the crest of a hill which both vehicles had but a brief time before approached. Plaintiff was driving a 1959 Ford owned by his employer, State of Nebraska, southward toward the hill from the north. The defendant approached the hill in a 1959 International truck from the south. The plaintiff had stopped at the foot of the hill to its north. There is a short, comparatively level place at the crest of the hill. The road curves slightly to the west, going north, some 70 feet south of the crest. The road is cut through the hill with high banks on each side.

Plaintiff testified that after getting back in his car he

started in low gear and thereafter shifted into second proceeding up the hill. He let up on the gas as he approached the crest. He saw the top of the truck coming north. It was directly in front of his car, coming up the hill and making the bend. It straddled the imaginary centerline of the road. Plaintiff was driving about 5 miles per hour when he first saw the truck. The grade going up hill was fairly steep. Plaintiff applied his brakes and kept them on until the point of impact. His Ford went straight up the road on its right side. Before the impact the defendant pulled the front end of his truck over toward its right side of the road but its rear wheels were still over on plaintiff's side. The bumper of the Ford sideswiped the bumper of the truck and the front of the truck box was what he hit. Plaintiff's Ford was straight with the side of the road. On impact the Ford was thus going straight and the truck at an angle. His car was practically stopped at the point of impact. On cross-examination the plaintiff testified he let up on the gas and applied the brakes when he knew the truck was coming toward him. When he let up on the gas he was going around 35 or 37 miles per hour. The car was practically stopped when the truck hit. The truck was proceeding at 35 to 45 miles an hour. Plaintiff, who was severely injured, had his car keys in his hand when he came to from the shock. At the trial he did not remember when he turned the ignition off but he had stated in a deposition it was when he applied his brakes.

The defendant testified he was driving the truck to the north up hill in third gear. The truck with its load weighed around 8 tons. It was being driven 15 to 20 miles an hour pulling the hill which is about all the loaded truck would make going upgrade in third gear. The truck was on the right side of the road. Defendant saw the plaintiff's car about 100 yards away. Outside of the traveled portion, the road was rough and eroded but the traveled portion was smooth. The defendant's truck was within a foot or so of the east edge of the road

at the point of impact. There were 5 feet of the traveled portion of the road to the plaintiff's right. Plaintiff was coming quite fast. The defendant proceeded on straight ahead and the left front of the two vehicles collided within 2 or 3 seconds. Plaintiff's car came straight for the truck and defendant had no place to go. He drove the truck on over the hill, applying his brakes on the other side, and stopped on the edge of the road 119 feet from where the plaintiff's car came to rest.

Exhibit 41 is an enlargement of the diagram originally contained in the report of the patrolman who testified as to the measurements and distances he marked thereon after the accident which the plaintiff and defendant both concede to be correct. The position of the crest of the hill is shown. Skid marks are shown laid down by plaintiff's car which commenced a short distance north of the crest. These marks run south in a straight line up over the crest and on south. The skid marks from the left front wheel are 68 feet and of the right front wheel 70 feet in length. At the south end of these marks on the exhibit is shown an area of debris. The skid marks of the rear wheels are shorter, those of the left wheel being 57 feet long. They end in an arc, showing the back of the car had swung around to the right, and the vehicle came to rest facing northeast with its rear in the ditch. At their beginning north of the crest of the hill, the left skid marks are 13 feet from the east edge of the traveled road to plaintiff's left. The right skid marks there were 5 feet from the right, or west edge of the traveled road. The car is 6 feet wide. The traveled road there is 23 feet wide. Throughout their entire length there is a space of 5 feet to the right of plaintiff's right skid mark on the traveled road. However, at and about the point of the debris the traveled road is narrower and varies from 19 to 20 feet wide. There is still 5 feet of traveled road to the right of the Ford's right skid marks but only 8 feet to the left of the car's left skid marks. It follows that plaintiff's car, at the place of the accident, had

usurped over half of the traveled portion of the road.

From photographs in evidence taken of the road after the accident, these skid marks are shown also and there is a gouge mark in the road at the south end of the left front skid marks laid down by plaintiff's car. The traveled road to the west of this gouge mark and the plaintiff's left skid mark is shown to be considerably less than half the traveled road. Photographs of plaintiff's car show damage to the left front bumper and the left front fender and side as far back as the trunk. The photographs of the truck show the front left bumper and fender were damaged to the greatest extent although a dent appears in the front portion of the lefthand skirt beneath the box.

Plaintiff assigns error to the trial court in refusing to give his tendered instruction by which he requested the submission to the jury of the sudden emergency doctrine. The physical facts shown from the plat of the highway testified to by the patrolman and conceded by the plaintiff to be correct as to the markings and measurements thereon as well as the photographs in evidence clearly show the plaintiff drove his car straight up the road with 5 feet of travelable road to its right after applying his brakes. It as plainly shows that there were only 8 feet, or less than half of the road, to the left of these skid marks near the area of debris in which the defendant could turn his truck in order to pass. Exceptions to the sudden emergency rule are stated in Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491, as follows: "The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it." In the present case the physical evidence shows that the plaintiff did not use due care in driving to the right of the center of the road and his own

acts brought about the emergency. The trial court did not err in refusing the instruction.

Plaintiff urges the court erred in not submitting to the jury all of the alleged ultimate acts of negligence. The plaintiff's petition alleged the defendant's truck had defective brakes but there is no evidence of such a defect. The plaintiff in four allegations alleged that the defendant failed to turn his truck to the right; that he drove into the left side of the road; that he failed to keep right of the road's center to permit passing; and that he failed to yield half of the road. Patently this is a different way of saying the same thing. The trial court's instruction stated that plaintiff alleged the defendant was negligent in driving his truck to the left side of the roadway. Repetitious allegations of negligence may be summarized and the court has no duty to repeat them separately in its instructions. Kroeger v. Safranek, 165 Neb. 636, 87 N. W. 2d 221. The contention is without merit.

Plaintiff contends that the court's instruction on contributory negligence is not accurate and hence was erroneous. He sets out a portion only of instruction No. 6, to wit: "* * * contributory negligence 'consists of doing the wrong thing at the time and place in question, or it may arise from doing nothing when something should have been done.' " He does not state the definition of negligence set forth in the first part of this same instruction, as follows: "By 'negligence' is meant 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." As given in instruction No. 6, contributory negligence is referred to generally and briefly. Instruction No. 12 applies contributory negligence to the case before the court. An examination of this latter instruction reveals that contributory negligence is defined in terms of negligence. That instruction sets forth the rules with respect to contributory

negligence and applies it to the doctrine of comparative negligence. No objection is made to instruction No. 12. The plaintiff quotes a brief statement in instruction No. 6 without relating it to all the instructions. In Myers v. Willmeroth, 151 Neb. 712, 39 N. W. 2d 423, this court in its syllabi stated: "When different instructions are given on the same subject, they should be considered together, and if they fairly submit the case, it will not be reversed for indefiniteness or ambiguity in one of the instructions.

"In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions, and the true meaning thereof will be determined not from the sentence or phrase alone but by a consideration of all that is said on the subject." We have reviewed all of the instructions on contributory negligence and, taken as a whole, we think they fairly submitted that issue to the jury. The plaintiff's contentions cannot be sustained.

The plaintiff objects to the reception of a photograph of the road looking south from a point not fully disclosed. It was introduced by the defendant on cross-examination of the plaintiff. The plaintiff, when asked if it generally reflected the course of the highway as he knew it, stated, "I think it would be." Later plaintiff asked from what point it was taken and indicated he could not swear it was the road. It was thereafter admitted over objection that it was immaterial and no sufficient foundation was laid. The judge in admitting it restricted its reception to a correct reflection of the road looking south but not from any particular point. It is quite evident that this is a photograph of the same road and scene portrayed in the photograph exhibit No. 1 previously introduced by the plaintiff, taken from a slightly different position without the plaintiff's wrecked Ford partially obstructing the view. It was but cumulative in any event and as restricted by the trial court

there was no abuse of discretion in its admission. Watson Bros. Transp. Co. v. Jacobson, 168 Neb. 862, 97 N. W. 2d 521.

Plaintiff's last claim is that the court erred in allowing defendant Roosman to testify over objection as to the cost of the repair to his truck. It is unnecessary to consider the alleged error. The finding of the jury that neither party was entitled to recover foreclosed the possibility of prejudicial error in the receipt or rejection of evidence on the subject of damages. Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677.

We find that the trial court committed no reversible error as urged by the plaintiff. The verdict and judgment of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES V. GUNN, APPELLANT.

140 N. W. 2d 651

Filed March 4, 1966. No. 36104.

Criminal Law. In a criminal action a finding of guilt based upon evidence without probative force is prejudicially erroneous.

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

Thomas J. Gorham, for appellant.

Ralph D. Nelson and Fred J. Swihart, for appellee.

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

SMITH, J.

The criminal complaint in this case charged that defendant motorist had violated a traffic signal displaying a red light. At the trial in the district court defend-

ant's motion for dismissal on the ground of insufficient evidence was overruled at the conclusion of the evidence, and the jury returned a verdict of guilty, the theory of a criminal prosecution having been adopted.

The alleged offense occurred at the intersection of Forty-eighth Street and Adams Street in the City of Lincoln, Nebraska. The State charged defendant under the following part of the municipal ordinance:

"Upon the display of a red light * * *, vehicular traffic facing it shall stop before entering the crosswalk on the near side of the intersection and remain stopped until a green light is displayed."

Several facts are undisputed. The east line of the crosswalk in Adams Street was located 14 feet east of the east curbline of Forty-eighth Street. The traffic signal displayed a yellow light for a period of 3 seconds before changing to red.

The single possible support of the verdict comes from the testimony by a police officer who was an eyewitness. He observed defendant traveling west on Adams Street at the alley between Forty-ninth and Forty-eighth Streets. At this time the automatic signal facing defendant changed from green to amber. Defendant then accelerated to 35 miles per hour. When the signal changed to red his automobile was approximately 10 feet east of the extended east curbline of Forty-eighth Street, testimony which the officer repeated on cross-examination. The officer later detailed his observations of these events, but this testimony on the whole amounted to a vague explanation. He mentioned split vision and said that he might have directed his attention more to the light than to the automobile. He was uncertain whether he had actually seen the change of signal, but he had noticed the red light prior to his observation of the automobile in the crosswalk.

The evidence is too indefinite to show that the change of signal had occurred when the automobile entered the crosswalk. In a criminal action a finding of guilt

based upon evidence without probative force is prejudicially erroneous. See State v. Martin, 177 Neb. 209, 128 N. W. 2d 583.

The judgment is reversed and the cause remanded with directions to dismiss the complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

SAFEWAY STORES, INCORPORATED, A CORPORATION, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION ET AL., APPELLEES.

140 N. W. 2d 668

Filed March 4, 1966. No. 36105.

1. **Constitutional Law: Statutes.** Where it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld.
2. **Statutes.** While it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.
3. **Statutes: Intoxicating Liquors.** The Legislature has plenary powers over the control and regulation of the manufacture, distribution, sale, and dispensing of alcoholic liquors.
4. ———: ———. Where exemptions from the operation of a general law dealing with intoxicating liquors are made applicable to persons of the same class similarly situated, such provisions are not invalid as granting special privileges or immunities.
5. ———: ———. A provision in a general law regulating and controlling the sale of intoxicating liquors exempting hotels with more than 25 sleeping rooms from a limitation of two package liquor licenses per person, is the grant of an exception or privilege not prohibited by the Constitution where it operates uniformly upon all alike in the same situation.
6. **Constitutional Law: Intoxicating Liquors.** The right to engage

in the sale of intoxicating liquors involves a mere privilege; and restrictive regulations or even a suppression of the traffic do not deprive persons of property without due process of law, violate the privileges or immunities clause, the due process clause, the uniformity provisions, nor, unless they contain irrational classifications or invidious discriminations, the equal protection of the law as prohibited by the state and federal Constitutions.

7. **Statutes: Intoxicating Liquors.** A statute providing that no person, with certain exceptions, should thereafter acquire more than two liquor retail licenses, but that persons holding multiple licenses on the effective date of the act would not be required to divest them, is to be read as limiting the holding of retail liquor licenses to two per person, without, however, disturbing existing multiple licenses in the hands of one person.
8. **Constitutional Law: Intoxicating Liquors.** Section 5 of L.B. 105, Laws 1963, c. 308, § 5, p. 910, now section 53-124.06, R. S. Supp., 1963, is unconstitutional for vagueness, indefiniteness, and uncertainty.
9. ———: ———. Section 5 of the act was not an inducement for the passage of L.B. 105 (Laws 1963, c. 308, p. 909), and, a workable and enforcible plan remaining, the valid portions will be upheld and the invalid parts rejected.
10. **Statutes.** A severability clause expressing legislative intent is not essential to a court's declaration of severability of the void portions of a statute. Such a clause when placed in a statute is merely an aid to judicial interpretation.

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

Kennedy, Holland, DeLacy & Svoboda, Yale C. Holland, and Robert A. Skochdopole, for appellant.

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

Jack W. Marer, Michael L. Lazer, and Emory P. Burnett, for amici curiae.

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

CARTER, J.

On February 8, 1963, Safeway Stores, Inc., filed an application with the Nebraska Liquor Control Commis-

sion for a "Beer Off Sale Only" license to engage in the sale of beer at 2924 Leavenworth Street in Omaha. The application was referred to the city council of Omaha, as the statute requires, and on February 19, 1963, the city council recommended to the commission that the application be granted. On March 7, 1963, the chief enforcement officer of the commission protested the grant of the application on the ground that the applicant already had more than two such licenses and that L.B. 105, Laws 1963, c. 308, p. 909 (now sections 53-124.02 to 53-124.07, R. S. Supp., 1963), made the applicant ineligible for further licenses. The commission sustained the protest of the chief enforcement officer and denied the application. On appeal to the district court for Lancaster County, the denial of the application was sustained. Safeway Stores, Inc., thereupon perfected its appeal to this court.

The parties stipulated that Safeway Stores, Inc., had all the qualifications for the granting of a license to it except for the restrictions contained in L.B. 105. It was further stipulated that Safeway was the holder of 10 "Beer Off Sale Only" licenses and one package liquor license on the date of the filing of the application herein. The evidence taken before the commission was also stipulated as evidence in the district court. The sole question is the constitutionality of L.B. 105. In this connection it was stipulated that L.B. 105 was passed on February 26, 1963, with the emergency clause attached, and was signed by the Governor on March 4, 1963. It was further stipulated that the chief enforcement officer filed his protest on March 7, 1963, and that the order of the commission denying the application was rendered on March 22, 1963.

The plaintiff contends that the act discriminates between hotels having more than 25 sleeping rooms, and other types of business in the same class, and, in addition thereto, that it discriminates between members of the same class in that it provides a different application

as between hotels containing 25 sleeping rooms and those containing less than 25.

The general rule as to classification for purposes of legislation has been stated many times by this court to be as follows: "The rule established by the authorities is that while it is competent for the legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified." State ex rel. Dawson County v. Farmers & Merchants Irr. Co., 59 Neb. 1, 80 N. W. 52. See, also, United States Cold Storage Corp. v. Stolinski, 168 Neb. 513, 96 N. W. 2d 408; Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N. W. 2d 475.

The Legislature has broad powers in the regulation and control of the sale and dispensing of alcoholic liquors. The statute before us is not a revenue law. Its purpose is the regulation and control of the liquor traffic and, as such, is in a somewhat different position than in the ordinary exercise of the police power for the protection of the health, safety, morals, and welfare of the public. But even so, justification for classification must exist; arbitrary treatment cannot be sustained. It is not always fatal for the Legislature to exempt certain members of a class from the operation of an act applicable to the whole class. In State ex rel. Meyer v. Knutson, 178 Neb. 375, 133 N. W. 2d 577, in dealing with this precise question, we said: "But the Legislature may properly prescribe the limits of its regulation. Here the Legislature concluded to exempt all persons from the statute while engaged in construction work for themselves, in the construction of buildings covering less than 5,000 square feet and the construction cost is less than $20,000, and other similar exemptions. The exemptions are uniform as to class. The extent of the regulation under such circumstances is within the scope of the Legislature's prerogative." On the other hand, we held in United

States Cold Storage Corp. v. Stolinski, *supra,* that a statute requiring warehousemen to furnish the tax assessor with lists of property in their warehouses was void because it excluded household goods from the act, thus creating an arbitrary classification of warehousemen and granted privileges and immunities to some which it denied to others. The question before us resolves itself into a determination of which of the two principles applies in the instant case.

In the United States Cold Storage Corp. case the court was dealing with a taxation matter. All property in the warehouse was taxable. We held that the exclusion of household goods under a taxation statute, without any justifiable reason for its exclusion, was arbitrary and unreasonable, and lacking in uniformity of taxation. In the Knutson case we were dealing with a statute providing for the licensing of architects. The Legislature in determining the scope of the act exempted certain members of the class from the operation of the act. As an example, it excluded architects from the licensing provisions who were engaged in construction work for themselves on buildings of limited size and cost. Such exemptions were held to be reasonable and not in violation of the rule of uniformity as to class.

In the case before us the Legislature has broad powers in the regulation and control of the liquor traffic. Allen v. Nebraska Liquor Control Commission, *ante* p. 767, 140 N. W. 2d 413. In regulating and controlling the sale and dispensing of alcoholic liquors it is dealing with a business believed to have a tendency to produce pauperism, vice, misery, and crime. In re Jugenheimer, 81 Neb. 836, 116 N. W. 966, 18 L. R. A. N. S. 386. The right to engage in the sale of intoxicating liquors involves a mere privilege; and restrictive regulations or a suppression of the traffic do not violate provisions of the state and federal Constitutions relating to due process, privileges or immunities, uniformity, nor, unless wholly arbitrary in their discrimination between persons, the

equal protection of the law. Marsh & Marsh, Inc. v. Carmichael, 136 Neb. 797, 287 N. W. 616.

The primary issue is whether or not justification exists for exempting hotels with more than 25 sleeping rooms from the limitation of two licenses per person, contained in the act. The hotel is associated with the traveling public seeking a place where it might find lodging, food, and refreshment. The sale of alcoholic beverages is traditionally a part of the hotel business. The cocktail, the drink during the meal, the after-dinner drink, and the nightcap in the room are matters which the Legislature may consider, none of which are ordinarily associated with the chain-store operator. The chain-store operator with his ability to purchase in quantity and undersell the individual small liquor store retail operator can well produce conditions against the public interest in his competition with the small-store operator. Protection of the small package liquor licensee against the competition of multiple licensed operators is in the public interest. It is the province of the Legislature in mitigating the evils of competition between small retail operators and chain stores to so regulate in the public interest. The uncontrolled tendency toward monopoly, or at least the tendency to concentrate liquor licenses in the hands of a few, is a proper subject of legislation. The hotel has such differences in the operation of its business from that of the chain store that the basis exists for its exclusion from the limitation of two licenses per person. The exemption of present holders of multiple licenses from the limitation of the number of licenses in the hands of a single entity is also a reasonable one which the Legislature in its wisdom may grant or refuse. The applicable rule is stated in State ex rel. Meyer v. Knutson, *supra.*

In a similar case the court in Grand Union Co. v. Sills, 43 N. J. 390, 204 A. 2d 853, said: "The main point relied upon by the appellants in their brief on appeal is that 'the two license limitation does not bear a reasonable

relationship to any public purpose and denies due process and equal protection of the law.' The public purpose was to curb relationships and practices calculated to stimulate sales and impair the State's policy favoring trade stability and the promotion of temperance; and while some may consider other regulatory courses to be preferable, we cannot say that the course chosen by the Legislature and pursued in Chapter 152 is entirely without rational basis. * * * Nor do we find any infringement of the constitutional guarantees of due process and equal protection. * * * The Legislature may, without at all infringing upon the due process clause, either terminate or severely regulate all liquor sales within the State. * * * So long as the regulations contain no irrational classifications or invidious discriminations, they will not conflict with the equal protection clause."

We necessarily conclude that the exemption of hotels having more than 25 sleeping rooms from section 2 of the act, now section 53-124.03, R. S. Supp., 1963, is justified on a reasonable basis and it cannot have the effect of nullifying L.B. 105. Nor is the statute unconstitutional in limiting any one person or entity to two licenses.

It is contended that section 2 of L.B. 105 is unconstitutional in limiting hotels with no more than 25 rooms to two licenses while hotels with more than 25 rooms are exempted from the two license limitation. There is authority that Safeway Stores, Inc., is in no position to raise this issue in that the asserted discrimination affects only hotels with 25 sleeping rooms or less. Griffin v. Gass, 133 Neb. 56, 274 N. W. 193. The persons injured, if any, are the small hotels discriminated against. Grand Union Co. v. Sills, *supra*. But in any event, the exclusion is a reasonable one which the Legislature could properly grant in prescribing the scope of an act regulating and controlling alcoholic liquors. The exemption on the basis of the size of the hotel is no different in principle than the exemption of an architect from a

licensing statute when engaged in construction for himself of a building of limited size and cost.

In the State of Washington the question arose as to whether or not an act excluding short-order restaurants from eligibility for a liquor license was discriminatory when all other restaurants were eligible. The court said: "The appellants claim that initiative 171 discriminates in favor of the operator of a restaurant as that term is defined and limited therein, in that the operator of what is referred to as a 'short order' restaurant is not eligible to secure a class H license. Again bearing in mind the plenary power of the state over the dispensing of intociating liquor and its authority to make such classifications as it deems proper as to the places where such intoxicating liquors may be dispensed and consumed, we are of the opinion that the distinction made in the definition of the term 'restaurant' is one the lawmakers might lawfully draw. If the citation of adjudicated authority is deemed necessary, we refer to Guillara v. Liquor Control Comm., 121 Conn. 441, 185 Atl. 398, 105 A. L. R. 563; Berger v. Quinn, 149 Misc. 545, 268 N. Y. S. 514. The courts in those cases have given what we deem sufficient reasons for classifying those to whom such a license as a class H license should be issued." Randles v. Washington State Liquor Control Board, 33 Wash. 2d 688, 206 P. 2d 1209.

In another similar case the court said: "It will be noted that the section in question, above set forth, expressly excludes hotels from its operation. Appellants claim that such exclusion renders the statute discriminatory and amounts to a denial of the equal protection of the laws, * * *. Every reasonable intendment must be resolved in favor of the validity of the action of the legislature. It must be assumed that as a result of its consideration of the subject matter that body reached the conclusion that the restrictive provisions of section 26c were not necessary or practicable, insofar as hotels

were concerned." Beacon Club v. Kalamazoo County Sheriff, 332 Mich. 412, 52 N. W. 2d 165.

It is urged that section 1 of L.B. 105, now section 53-124.02, R. S. Supp., 1963, is not an attempt to limit the number of liquor licenses one person may hold, but rather an attempt to limit the number of additional licenses one person may acquire after the passage of the act. The act provides that no person, except as provided in the act, shall acquire an interest in more than a total of two alcoholic beverage retail licenses. The language is plain in indicating the legislative intent to limit the number of licenses to two, except that holders of multiple licenses at the time of the adoption of L.B. 105 will not be required to divest themselves of such licenses. This same question was before the Supreme Court of New Jersey on an act which appears to have been the source of the Nebraska law. That court said: "We are satisfied that the statute may not properly be stricken on the ground of vagueness; on the contrary, the legislative language may, within settled principles of statutory construction, readily be interpreted to effectuate the basic goal of the Legislature as it clearly appears from the history and context of the legislation. * * * There must be sensible rather than literal interpretation. * * * Notwithstanding its somewhat awkward terminology, section 1 is to be read as limiting the holding of retail liquor licenses to two per person, without, however, disturbing existing multiple holdings and their renewal." Grand Union Co. v. Sills, *supra.*

Section 5 of the act, now section 53-124.06, R. S. Supp., 1963, deals with the rights of persons having a beneficial interest in a liquor license to hold or acquire shares of stock in a corporation which are traded on a national security exchange or regularly traded in an over-the-counter market by a national securities association. The trial court held section 5 to be unconstitutional as being vague, indefinite, and uncertain. It also found that section 5 was not an inducement to the passage of the act and

that the valid portions of the act remained as enforcible legislation. Safeway Stores, Inc., contends that the declaration of unconstitutionality of section 5 has the effect of invalidating the whole of L.B. 105.

A mere reading of section 5 shows that it is vague, indefinite, and uncertain. L.B. 105 provides penalties for its violation, including section 5. The meaning of this section leaves one in complete darkness as to what constitutes a criminal violation of the act. The result is controlled by our holding in State v. Nelson, 168 Neb. 394, 95 N. W. 2d 678, wherein we said: "A legislative act which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

It is contended by Safeway Stores, Inc., that the declaration of invalidity of section 5 has the effect of invalidating the whole act. The rule in such cases is: Where it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld. State ex rel. Wheeler v. Stuht, 52 Neb. 209, 71 N. W. 941; State ex rel. Martin v. Howard, 96 Neb. 278, 147 N. W. 689; Laverty v. Cochran, 132 Neb. 118, 271 N. W. 354. In Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729, this court said: "In our opinion, a workable plan remains after the invalid portions are stricken out. An invalid proviso relating to the licensing of the sale of new motor vehicles has been herein nullified. Also, one cause for the denial of an application for a license or the revocation of an existing license, as the case may be, has been invalidated. Can it be said that these two sections of the act were such an inducement to its passage that it would not have been enacted if they had not been included?

We think not." See, also, Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451.

Admittedly, if the portion stricken was such a major part of the act that it was one of the inducements to its passage, the whole act must fall. The question is, then, was section 5 of such importance that it materially contributed to the passage of the act?

The purpose of the act before us, as shown by the title to the act, was to limit the number of alcoholic beverage retail licenses in which any person may be beneficially interested, to provide exemptions, to make certain acts unlawful, and to provide penalties. Section 5 of the act was in fact only incidental to the main purpose of the act. It is not clear to us how a limitation of a two percent interest in any corporation whose shares are traded on a national securities exchange or regularly traded in an over-the-counter market of a national securities association could be germane to the act. If the limitation applied to the stock of manufacturers, wholesalers, distributors, or retailers of alcoholic liquors only, reason might well exist to sustain the validity of the provision, but a limitation on stock of any corporation bears no reasonable relation to the purposes of the act. The striking down of section 5 leaves a working plan in existence by which the purposes of the act can be enforced independent of such section. Whether or not invalid portions of an act were an inducement to its passage is to be determined from the four corners of the act. It seems to us that section 5 was not an inducement to the passage of the act and that the latter would have been enacted into law irrespective of its presence therein. The remaining parts of the act are enforcible irrespective of the invalidity of section 5.

L.B. 105 contains no severability clause. It is contended that without such a clause the court may not separate the valid from the invalid and sustain the valid and reject the invalid parts. The issue was passed on in Hubbell Bank v. Bryan, 124 Neb. 51, 245 N. W. 20,

as follows: "Since the legislature expressed itself both ways upon the matter of legislative intention and of inducement, in contradictory language, it would seem to amount to the same thing as an absence of a clear-cut expression of intent. In such a case, it would seem necessary to arrive at the legislative intent without reference to such expression. Such a provision 'is an aid merely; not an inexorable command,' said Mr. Justice Brandeis in Dorchy v. Kansas, 264 U. S. 286. See, also, Nixon v. Allen, 150 Ark. 244; State v. Montgomery, 177 Ala. 212. The provision in this statute is novel and is apparently original with our legislature. The only cases reported which we have found are concerned with the provisions that various parts shall be separable. We adopt the rule that a provision expressing legislative intent as to the separability of the various parts of a statute is an aid merely to judicial interpretation." We conclude that a severability clause is not a condition precedent to a determination of the question of severability; that a severability clause in a statute is an aid merely to judicial interpretation.

We have examined the remaining assignments of error and determine that they cannot be sustained. The judgment of the trial court is correct and it is affirmed.

AFFIRMED.

JOHN WILLEY, ADMINISTRATOR OF THE ESTATE OF JOYCE LORRAINE WILLEY, DECEASED, APPELLANT, V. KENNETH H. PARRIOTT ET AL., APPELLEES.

140 N. W. 2d 652

Filed March 4, 1966. No. 36120.

1. **Trial. If there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law.**
2. **———. The party against whom a motion to dismiss is made**

is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence.

3. **Automobiles: Negligence.** The driver of a motor vehicle has a duty to keep a proper lookout and watch where he is driving even though he is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and to know what is in front of him for a reasonable distance.
4. ———: ———. Snow, mist, fog, or other conditions which affect visibility are not intervening causes but are conditions which require a driver to exercise a degree of care commensurate with the circumstances.
5. **Witnesses.** A party calling a witness is not bound by the testimony of the witness if the testimony is contradicted, either expressly or by inference, by evidence that would justify a different conclusion.
6. **Automobiles: Negligence.** A driver who is suddenly confronted by an emergency requiring instant decision is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong.
7. ———: ———. The sudden emergency rule cannot be invoked unless there is evidence to show that a sudden emergency actually existed, that the party invoking the rule did not create the emergency, and that he used due care to avoid it.
8. **Automobiles: Trial.** Where reasonable minds may differ as to whether the driver of a motor vehicle exercised the care, caution, and prudence required of him under the circumstances of the particular situation, the issue of his negligence is one of fact for the jury.

Appeal from the district court for Scottsbluff County: TED R. FEIDLER, Judge. Reversed and remanded.

Van Steenberg, Winner & Wood, for appellant.

Holtorf, Hansen & Kortum, for appellee Bort.

Wright, Simmons & Hancock and Stubbs & Metz, for appellee Parriott.

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

BOSLAUGH, J.

This is an action to recover damages for the wrongful

death of Joyce Lorraine Willey. The plaintiff, John Willey, is the administrator of the estate of the deceased.

The deceased died as the result of injuries sustained in an automobile accident on March 19, 1961. The deceased was a passenger in an automobile operated by the defendant, Kenneth H. Parriott, which collided with an automobile operated by the defendant, John Bort.

At the close of the plaintiff's evidence, both defendants moved for a directed verdict. The motions were sustained and the action dismissed. The plaintiff's motion for new trial was overruled and he has appealed. The assignment of error relates only to the direction of a verdict in favor of the defendant Bort and the dismissal of the action as to him.

The evidence shows that the accident happened shortly after 9 a. m. on March 19, 1961, on State Highway No. 92 approximately 2½ miles east of Gering, Nebraska. The highway at that point is straight and level. The traveled portion of the highway is surfaced with black-top and is 24 feet wide. There are depressions or troughs in the surface of the highway on each side of the centerline. Before the accident happened there had been rain mixed with snow. The surface of the highway was wet, and the depressions in the surface of the highway were filled with water.

The Parriott automobile was proceeding in an easterly direction. The Bort automobile was proceeding to the west. As the Bort automobile approached a semi-truck and trailer which was proceeding to the east, the Parriott automobile came out from behind the truck, crossed the centerline of the highway, and entered the westbound lane of traffic. The right front ends of the two automobiles collided at or near the north edge of the black-top.

Bort testified that as he met the truck it threw up a spray of water; that when he was near the front of the truck, pretty much by the cab of the truck, the Parriott automobile came out from behind the truck; that when

he first saw the Parriott automobile it was not too far behind the truck, possibly 80 or 90 feet or something like that; that the Parriott automobile came across the highway on a slant headed to the north; that Bort was driving from 40 to 45 miles per hour; that Bort braked his car somewhat but not hard and pulled a little bit to the north so that his right wheels were at the edge of the pavement; that the Parriott automobile hit the shoulder of the road, or the borrow pit, and jackknifed or spun around; that it happened real quick when there was about 50 feet between the automobiles; that he wasn't about to pull over towards the truck which was on its own side of the road; and that at the time of the impact the truck was alongside the automobiles.

Parriott did not testify, and the evidence is that he does not remember how the accident happened. There is no direct evidence as to the speed of the Parriott automobile.

After the accident, the Parriott automobile came to rest on the north shoulder of the highway, headed to the southeast. The Bort automobile came to rest facing west with its right wheels on the north shoulder of the highway with about half of its width extending onto the shoulder. There was a track on the north shoulder of the highway made by the left wheels of the Parriott automobile that was 96 feet in length. This track extended in almost a straight line from the edge of the black-top to a point 4 feet north of the black-top near the point of impact.

There is no issue of contributory negligence in this case. Any negligence of the defendant Parriott could not be imputed to the plaintiff's decedent who was a passenger in that automobile. Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557.

The plaintiff alleged that the defendant Bort was negligent in failing to keep a proper lookout, in failing to take steps to avoid the collision, in failing to give Parriott sufficient roadway to pass, in turning to the right

into the Parriott automobile when there was sufficient room to pass, and in not exercising his last clear chance to avoid the collision. If there was any evidence upon which the jury could properly find for the plaintiff upon one or more of the specifications of negligence alleged, the defendant's motion for a directed verdict should have been overruled. Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496. In determining this question the evidence must be considered most favorably to the plaintiff, every controverted fact must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be drawn from the evidence. Fritchley v. Love-Courson Drilling Co., Inc., 177 Neb. 455, 129 N. W. 2d 515.

The plaintiff contends that the evidence permits an inference that the defendant Bort did not maintain a proper lookout because he should have seen the Parriott automobile before he says that he did and when it was farther away than his testimony indicates that it was when he saw it for the first time. The plaintiff further contends that Bort was negligent in driving into the Parriott car on the north edge of the highway when he could have avoided the accident by stopping, turning sharply to the right, or passing to the left of the Parriott automobile.

There is evidence that the Parriott automobile traveled at least 96 feet on the north shoulder of the highway before the impact occurred. To this distance must be added the distance which the Parriott automobile traveled after starting across the centerline and before one of its wheels entered the north shoulder of the highway, and the distance that the Bort automobile traveled from the time that the Parriott automobile started across the centerline until the impact. The result is the distance or interval in which the Parriott automobile should have been visible to Bort and in which he might have taken some further action in an effort to avoid the accident.

The driver of a motor vehicle has a duty to keep a

proper lookout and watch where he is driving even though he is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and to know what is in front of him for a reasonable distance. Snow, mist, fog, or other conditions which affect visibility are not intervening causes but are conditions which require a driver to exercise a degree of care commensurate with the circumstances. Guynan v. Olson, 178 Neb. 335, 133 N. W. 2d 571.

There is evidence from which an inference could be drawn that the Bort automobile could have passed to the left of the Parriott automobile without crossing into the eastbound lane of the highway. Although Bort's testimony indicated that the eastbound lane of the highway was occupied by the truck from the time that he first saw the Parriott automobile until the impact, this evidence was not binding on the plaintiff because there was circumstantial evidence from which a contrary inference might be drawn. A party calling a witness is not bound by the testimony of the witness if the testimony is contradicted, either expressly or by inference, by evidence that would justify a different conclusion. Trask v. Klein, 150 Neb. 316, 34 N. W. 2d 396.

In Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491, the defendant's eastbound automobile collided with the plaintiff's westbound automobile near the edge of the pavement on the north side of the highway. This court held that the trial court erred in dismissing the defendant's counterclaim, and that it should have been submitted to the jury. Although the factual situation involved in the Roby case is not identical with the factual situation in this case, the decision in the Roby case supports the plaintiff's contention that the evidence in this case was sufficient to raise a jury question.

The defendant Bort argues that the doctrine of sudden emergency prevents a finding that he was guilty

of negligence in this case. A driver who is suddenly confronted by an emergency requiring instant decision is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong.

In Roby v. Auker, *supra,* the limitations upon the sudden emergency rule were stated. The sudden emergency rule cannot be invoked unless there is evidence to show that a sudden emergency actually existed, that the party invoking the rule did not create the emergency, and that he used due care to avoid it. In this case the evidence presents a jury question as to whether the sudden emergency rule is applicable to the defendant Bort.

Where reasonable minds may differ as to whether the driver of a motor vehicle exercised the care, caution, and prudence required of him under the circumstances of the particular situation, the issue of his negligence is one of fact for the jury. Middleton v. Nichols, 178 Neb. 282, 132 N. W. 2d 882.

This court is of the opinion that the evidence in this case presents a question for the jury. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

IN RE ESTATE OF JOSEPH R. SWANSON, DECEASED. BERNARD WALLMAN, EXECUTOR OF THE ESTATE OF JOSEPH R. SWANSON, DECEASED, APPELLEE, V. JOSEPH R. SWANSON, JR., ET AL., APPELLANTS.

140 N. W. 2d 665

Filed March 4, 1966. No. 36226.

1. **Wills. If a will contains an effective residuary provision, a lapsed legacy or devise will go to the residuary legatee or devisee.**
2. **———. Where there is no effective residuary clause, or where**

the residuary clause lapses, then the legacy or devise which lapses will descend as intestate property.

3. ———. A will may be executed for no other purpose than to revoke previously executed testamentary documents.

4. ———. A testator has a right to designate a personal representative to administer his estate even though he may wish his property to pass according to our statute of descent.

5. ———. The fact that a will expresses the intention of the testator to disinherit certain persons does not prevent such persons from sharing as heirs-at-law or next of kin in property as to which the testator died intestate.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. On motion to dismiss appeal. Appeal dismissed.

Ivan A. Blevens, for appellants.

Norval Brothers and Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellee.

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

SPENCER, J.

This is a motion to dismiss an appeal from an order of the district court admitting the last will and testament of Joseph R. Swanson, deceased, to probate. The will was admitted to probate in county court. A motion for summary judgment was sustained in the district court on appeal, the will was admitted to probate, and an appeal was perfected to this court.

The record discloses that Joseph R. Swanson died a resident of Lancaster County, Nebraska. An instrument, testamentary in character, by the action referred to above has been admitted to probate. The will, so far as material herein, is as follows: "I, the undersigned, Joseph R. Swanson, also known as Joe R. Swanson, of Milford, Nebraska, of the age of 66 years past, hereby make, publish and declare this to be my LAST WILL AND TESTAMENT, as follows:

"FIRST: I direct that all my lawful debts, including funeral expense, be first fully paid.

"SECOND: I give, will and bequeath all of the rest, residue and remainder of my estate to my sister, Julia Swanson, now residing at Lincoln, Nebraska, the same to be hers absolutely.

"THIRD: I have not forgotten my sons, David, Joe Jr., and Paul, but it is my wish that they take nothing from my estate.

"FOURTH: I hereby appoint Bernard Wallman, Executor of this my LAST WILL AND TESTAMENT, and I hereby revoke any and all former wills made by me.

"IN WITNESS WHEREOF, I have hereunto subscribed my name to this my LAST WILL AND TESTAMENT, at Seward, Nebraska, this 22nd day of March, 1962.

Joseph R. Swanson."

(Attestation Clause.)

The Julia Swanson named in paragraph Second was a sister of Joseph R. Swanson, was living at the time of the execution of the will but predeceased him, and was unmarried with no issue surviving. It is apparent on the face of the will that the testator did not contemplate the possibility of a lapse and made no provision for such contingency. Because no issue survived Julia Swanson, our antilapse statute, section 30-228.03, R. R. S. 1943, did not become effective.

If a will contains an effective residuary provision, a lapsed legacy or devise will go to the residuary legatee or devisee. Marble v. City of Tecumseh, 105 Neb. 594, 181 N. W. 528. Here, however, paragraph Second is actually the residuary clause, so that it is the residuary clause which lapses.

Where there is no effective residuary clause, or where the residuary clause lapses, then the legacy or devise which lapses will descend as intestate property. Marble v. City of Tecumseh, *supra.*

It is the contention of appellants that by reason of the death of Julia Swanson, the purported last will of Joseph R. Swanson, deceased, does not constitute a testa-

mentary disposition of property. It is their contention that no property descends under the terms and provisions of said will, and that it therefore is not entitled to probate.

The will does contain a direction that all lawful debts be paid, and it is apparent that appellants ignore the fact that it specifically revokes previous wills. While the will does not provide for the descent of property, it is effective to revoke all previous wills. Section 30-209, R. R. S. 1943, specifically provides that a will may be revoked by some other will or codicil in writing, executed as prescribed by law. As we interpret section 30-209, R. R. S. 1943, a will may be executed for no other purpose than to revoke previously executed testamentary documents. To be effective for that purpose, it must be admitted to probate. We also observe that a testator has a right to designate a personal representative to administer his estate even though he may wish his property to pass according to our statute of descent.

Appellants in no way contest the capacity of the deceased to make a will. There is no question presented as to undue influence or duress. Nor is there any question presented as to the proper execution of the will. The sole basis for appellants' objection is the death of Julia Swanson without issue. This does not constitute a valid objection to the admission of the will to probate. While all deceased's property may pass under our statute of descent and distribution as if deceased had died intestate, the will is effective for its remaining purposes.

Appellants are undoubtedly attempting to prevent the admission of the will to probate because of paragraph Third which expresses a wish that the sons, who from the pleadings are the sole surviving issue, take nothing from deceased's estate. This provision, however, can only apply to property actually passing through the will and has no effect as to intestate property. Kula v. Kula, 149 Neb. 347, 31 N. W. 2d 96, covers this exact situation. In that case, we said: "The fact that a will expresses the

intention of the testator to disinherit certain persons does not prevent such persons from sharing as heirs at law or next of kin in property as to which the testator died intestate." See, also, Katt v. Claussen, 174 Neb. 603, 118 N. W. 2d 1002.

There being no contest on the validity of the execution of the will, and the appellee having proved the jurisdictional facts necessary to entitle the will to probate, the will herein was properly admitted to probate. Appellee's motion to dismiss is well taken. Motion to dismiss sustained and appeal dismissed.

APPEAL DISMISSED.

WILLIAM SONES, APPELLANT AND CROSS-APPELLEE, V. RICHARD H. SPIEGAL ET AL., APPELLEES AND CROSS-APPELLANTS.

140 N. W. 2d 799

Filed March 11, 1966. No. 35959.

1. **Usury.** A loan of money made by a nonlicensee under the provisions of the Installment Loan Act, sections 45-114 to 45-155, R. R. S. 1943, which exacts interest and charges in excess of 9 percent per annum, is within the inhibitory provisions of the act.
2. **Statutes.** The Legislature may validate contracts which were illegal when made by the retroactive repeal of a previous law.
3. ———. Where the Legislature provides that a repeal shall be retroactive, contracts which were illegal when made, because of the law which has been repealed, are validated.

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

W. A. Ehlers, for appellant.

Jerome Grossman, Marks, Clare, Hopkins & Rauth, and J. William Gallup, for appellees.

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

WHITE, C. J.

This is an action in equity by the plaintiff to cancel two allegedly usurious notes and real estate mortgages, to recover all money paid to defendants, and to recover possession of abstracts of title. The essential facts are undisputed. The evidence shows that plaintiff obtained two loans from the defendants. On the first loan dated October 15, 1957, the plaintiff gave a note and mortgage of $850 payable at the rate of $35 per month with interest at 7 percent, but he only received $500 as consideration. The second loan was dated April 10, 1958, from which plaintiff received $7,789.31 consideration in cash, but executed a note for $10,500 at 6 percent interest, payments being due in installments of $150 per month. The total payments made on the first note were $175 and a total of $6,150 was paid on the second note. At the time of the making of the $10,500 note the balance due on the $850 note dated October 15, 1957, was deducted in the sum of $698.02. The difference between the actual amounts loaned and the amount of the notes was termed a "discount" by the parties. The evidence shows that the defendants paid delinquent taxes on the mortgaged property in the sum of $1,414.11.

The judgment of the lower court found that the plaintiff received a total consideration of $8,114.31 on the note of April 10, 1958, consisting of $7,789.31 in cash and the cancellation of the note of $850 upon which there was a balance of principal owing in the sum of $325. The court found that payments in the sum of $6,150, 41 installments of $150, have been made, leaving a balance due on principal in the sum of $1,964.31; that the defendants were entitled to reimbursement in the sum of $1,414.11 for taxes paid; that the total amount due defendants was $3,378.42; and that foreclosure be granted defendants for this amount with interest at 6 percent from date of entry of judgment.

The case was heard on its merits in May 1963. The court took the case under advisement and decided it on

August 3, 1964. The court found that L.B. 17, Seventy-fourth (Extraordinary) Session, was applicable; that under the terms of said act the penalty for violation of the Installment Loan Act was changed retroactively to be a forfeiture and refund of all interest and charges on the loan involved; that the interest and charges exceeded the 9 percent maximum permissible under the act; that the loan was not void; and that the defendants were entitled to recover the balance due on the principal, without interest or charges, in the sum of $3,378.42.

Plaintiff complains of the fact that the district court held the case under advisement from May 1963 to August 3, 1964. At the time of the trial of the case, the law in effect would have rendered the notes and mortgages void and entitled the plaintiff to recover all payments made with interest. A loan of money made by a nonlicensee under the provisions of the Installment Loan Act, sections 45-114 to 45-155, R. R. S. 1943, which exacts interest and charges in excess of 9 percent per annum, is within the inhibitory provisions of the act. Pattavina v. Pignotti, 177 Neb. 217, 128 N. W. 2d 817; Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122; State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215.

No one questions the fact that the amount charged on the loans involved herein far exceeded the permissible 9 percent per annum.

The Legislature, however, changed the penalty to forfeiture of interest and charges only. The Legislature did this during the period this case was under advisement by the district court and the change was made retroactive on all transactions not reduced to final judgment. That the Legislature could validly change the penalty and give it a retroactive effect was decided in Davis v. General Motors Acceptance Corp., 176 Neb. 865, 127 N. W. 2d 907.

We know of no authority or rule that requires the district court to decide a case within a particular time

except that found in the Canons of Judicial Ethics adopted by the American Bar Association at its forty-seventh annual meeting at Philadelphia, Pennsylvania, on July 9, 1924, and found on page 224 of the current Directory of Attorneys issued by the Nebraska State Bar Association. "6. Industry. A judge should exhibit an industry and application commensurate with the duties imposed upon him," to which we would add that justice delayed is justice denied. The district court had jurisdiction of the case and had the power to take it under advisement. However, the law was in a state of flux and many cases were pending on appeal. We cannot say that the trial judge abused his discretion herein on the facts presented. We know of no rule prohibiting the court from doing this just because the law may be changed or ruled on as to issues presented in the case during the period of submission. There is no merit to plaintiff's contention.

Plaintiff contends the rule has not been changed, and that a usurious lender, whether licensed or not, cannot collect any part of the loan, principal, interest, or charges. We disagree. The Legislature changed the penalty by the enactment of L.B. 17, Seventy-fourth (Extraordinary) Session. L.B. 17 retroactively validated contracts that were previously usurious and void providing in effect that the principal could be collected. The inhibitory provisions of the Installment Loan Act applied to this usurious loan.

At the time of the transaction the loan was completely void. But, the retroactive repeal of the penalty provision of the act validated the contract and did not make it absolutely void. In the Davis case, we specifically held: "The Legislature may validate contracts which were illegal when made by the retroactive repeal of a previous law. Where the Legislature provides that a repeal shall be retroactive, contracts which were illegal when made, because of the law which has been repealed, are validated."

The case had not been reduced to final judgment at the time of the enactment of L.B. 17. The act, therefore, was applicable and the defendants were entitled to recover the balance of principal owing, after deduction of all payments made by the plaintiff.

The plaintiff contends that the defendants are not entitled to recover their payments of delinquent taxes. But, the mortgage contained a clause giving them this right, and we know of no reason why it should not be enforced.

The plaintiff complains of the trial court's ruling that each party was to pay its own costs. This matter rests in the sound discretion of the court. While the effect of the court's decision was to grant each party part of the relief it asked on the record herein we would consider this to be an abuse of discretion and determine that all costs should be taxed to the defendants.

Defendants, on cross-appeal, assert that the court erred in finding that the notes were usurious. Defendants do not deny that the amount of the charges on these loans was far in excess of the legal maximum. Defendants argue that they were ignorant of the law and because of the plaintiff's superior knowledge the plaintiff is not coming into a court of equity with "clean hands."

The evidence shows that the plaintiff was in the real estate business and the defendant Richard Spiegal was in the furniture business. There is no evidence of fraud or deception. Both parties consummated the transaction with their eyes open. They went to a lawyer to have the papers drawn up. Each one of them was presumed to know the law. The evidence as to the inequality of the positions of the parties is unconvincing. It does show that the plaintiff was a necessitous borrower and initiated the transactions on the notes. The evidence simply shows that the plaintiff participated in an illegal and usurious transaction. This is insufficient to bar him from relief. In Lloyd v. Gutgsell, 175 Neb. 775, 124 N. W. 2d 198, this court said: "This court has in the past refused to apply

the so-called 'clean hands' doctrine in usury cases against the borrower as a participant in a usurious transaction, on the theory that the borrower is in vinculis and not in pari delicto to the lender as regards the usury. State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215. This is not a new doctrine. It is found in the early English and American cases. In 1781 Lord Mansfield, in summing up to the jury in Lowe v. Waller, 2 Doug. 735, told it: '* * * the statute of usury was made to protect men who act with their eyes open; to protect them against themselves.' * * * That is and has been the rule in this jurisdiction. To hold otherwise would make usury statutes a hollow mockery."

The undisputed facts demonstrate the usurious nature of these loans. There is no merit to defendants' cross-appeal.

The judgment of the district court is correct except as modified and is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE R. EBERHARDT, APPELLANT.

140 N. W. 2d 802

Filed March 11, 1966. No. 35995.

1. **Criminal Law.** This court, in a criminal action, will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. ———. When an affidavit of poverty is filed in a criminal case and stands uncontradicted, unobjected to, and no hearing on it is called for or had, the defendant is entitled to the benefits of sections 24-342 and 29-2306, R. R. S. 1943.
3. ———. In a criminal case, where the court, on its own motion or on objection, holds a hearing and inquires into the truthfulness or good faith of a poverty affidavit, the determination of the defendant's inability to pay the costs is within the sound

discretion of the trial court, and its decision thereon will not be disturbed on appeal unless it amounts to an abuse of discretion.

Appeal from the district court for York County: H. EMERSON KOKJER, Judge. Affirmed.

Joseph J. Cariotto, for appellant.

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

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

MCCOWN, J.

Defendant was convicted of second offense willful reckless driving, a misdemeanor. He was sentenced to 30 days in jail, fined $200 and costs, and his operator's license canceled for a period of 2 years.

At approximately 10:25 p.m. on an evening in March 1964, a trooper of the Nebraska Highway Patrol turned off a hard-surfaced highway and commenced pursuit of an automobile which had no taillights. The chase led through rough terrain to flat; was entirely on gravel roads except for 1 mile which was a dirt road; and led through areas on which there were houses and farm homes on both sides of the road. The trooper turned on his red lights shortly after the pursuit started, and they remained on throughout. Shortly after the commencement of the chase, the automobile was identified as a Chevrolet Corvette, white and red, with dealer's license plates, county No. 22, balance of the number unidentified. Only one person was in the Corvette. During the pursuit, the trooper traveled 85 to 90 miles per hour. At one point, the Corvette went into a ditch, up on the edge of a field for 100 yards, and then back out on to the road; and, during the chase, the Corvette proceeded past six stop signs without stopping at any of them.

Numerous square turns were made. The trooper never lost sight of the Corvette from a point near Cordova the

remainder of the distance to the city of York. During the chase, the trooper radioed to the York city police the description of the car, and that he would like to have a police car stand by. At some points during the chase, the trooper was as close as 45 to 50 feet behind the Corvette, but at the time the Corvette reached the city limits of York at the end of the chase, the trooper was approximately ¾ of a mile behind. The York police advised the trooper by radio that they had the car stopped. The trooper arrived a minute or two afterward, checked the Corvette from which the York police had removed the defendant, and found that the taillights were not burning, the engine was hot, and it had county No. 22 dealer's plates. From start to finish, the chase covered a distance of 30 miles, and that distance was traveled in approximately 25 minutes.

The defendant contends that the only evidence of speed is that of the patrol car; that the only specific evidence of defendant's violations is the failure to stop at the stop signs; and that the entire evidence is not sufficient to sustain a conviction for willful reckless driving. The foregoing résumé of the uncontradicted testimony answers the defendant's arguments quite effectively. There are clearly facts sufficient to establish a manner of driving which evidenced a disregard for the safety of persons and property sufficient to support the verdict of the jury.

This court, in a criminal action, will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. Buckley v. State, 131 Neb. 752, 269 N. W. 892. Where the evidence is uncontradicted, as in this case, the application of the rule is even more obvious.

The defendant also asserts error in the district court's denial of defendant's motion for payment of costs and expenses of appeal by the county. The defendant filed a

poverty affidavit into which he incorporated a motion for allowance of certain appeal costs covered under section 29-2306, R. R. S. 1943, together with the costs of preparation of the bill of exceptions under section 24-342, R. R. S. 1943. At the hearing on the affidavit of poverty, the defendant introduced evidence of his financial circumstances. The court found that a reasonable inference could be drawn that the termination of defendant's employment approximately 1 week before was with a view to the affidavit of poverty, and that the defendant would be financially able to perfect and complete his appeal. The district court thereupon overruled the defendant's motion.

The defendant now contends that under the provisions of section 29-2306, R. R. S. 1943, the mere filing of a poverty affidavit by a defendant in a criminal case, regardless of its truth, is final and conclusive and automatically puts the provisions of section 29-2306, R. R. S. 1943, into effect. The defendant's position is that no other act or showing is necessary on his part; that the court has no right of discretion as to whether the affidavit should be allowed; that no hearing on the affidavit is either necessary or proper; and that the court has no authority to inquire into the actual truth of the affidavit.

While there have been no cases on the issues raised here as to section 29-2306, R. R. S. 1943, this court has determined on at least three occasions related questions arising under section 24-342, R. R. S. 1943. While that section deals with the bill of exceptions and uses the word "may," the principles of those cases are equally applicable here.

In Altis v. State, 109 Neb. 776, 192 N. W. 327, the court stated: "From the wording of the statute and the purpose for which it was enacted, it is plain that it was not intended to require the trial court or judge, in a mere ministerial way when objection has been made, to grant the order on the presentation of the affidavit without

question and without the authority to inquire into the truthfulness or good faith of defendant's affidavit. If, however, the proof is sufficient to support the application, then, of course, it is the duty of the court or judge to grant the order. The court or judge has the power, under the statute, when objection is made, to receive evidence for and against the application, and on such hearing, if it appears that the defendant's affidavit is untrue or that defendant has wilfully dissipated his property or conveyed or given it away for the very purpose of putting the state to expense of furnishing the bill of exceptions, it cannot justly be said that, because of defendant's poverty, he is unable to pay the reporter's fee."

In Rice v. State, 120 Neb. 641, 234 N. W. 566, this court held that while ordinarily the matter is in the discretion of the trial court, where the evidence is sufficient, an order will be required.

In Fisher v. State, 153 Neb. 226, 43 N. W. 2d 600, a poverty affidavit was filed and it was stipulated that the husband of the affiant was employed and earning $50 a week. No other evidence was introduced. The trial court denied the application on the ground that the defendant "has money." This court, citing the Altis case, *supra,* held that where there was no showing of any kind that the claim of poverty was untrue, nor that there had been any willful act to avoid payment, and the affidavit of poverty stood uncontradicted, the order should be granted.

We believe the better rule to be that when an affidavit of poverty is filed in a criminal case and stands uncontradicted, unobjected to, and no hearing on it is called for or had, the defendant is entitled to the benefits of section 29-2306, R. R. S. 1943. In a criminal case, where the court, on its own motion or on objection, holds a hearing and inquires into the truthfulness or good faith of a poverty affidavit, the determination of the defendant's inability to pay the costs is within the sound dis-

cretion of the trial court, and its decision thereon will not be disturbed on appeal unless it amounts to an abuse of discretion. In the case at bar, it cannot properly be said that the court abused its discretion.

For the reasons stated, the action of the district court was correct in all respects, and the judgment is affirmed.

AFFIRMED.

SACK LUMBER COMPANY, A CORPORATION, APPELLANT, V. CITY OF SARGENT, CUSTER COUNTY, NEBRASKA, APPELLEE.

140 N. W. 2d 796

Filed March 11, 1966. No. 36108.

1. **Contracts: Rescission.** If a mistake is so fundamental in character that the minds of the parties have not, in fact, met, or if an unconscionable advantage has been gained by a mistake, the remedy is rescission.
2. **Contracts.** If a written contract contains a complete obligation without ambiguity as to its object and extent, it is conclusively presumed that the whole agreement of the parties was included therein.
3. ———. All oral negotiations or stipulations between the parties, preceding or accompanying the execution of a written instrument, are regarded as merged in it, and the instrument is treated as the exclusive medium of ascertaining the agreement of the parties to it.
4. **Contracts: Evidence.** The reason for this rule is that it is only reasonable, where parties have entered into a written agreement, to suppose that they have introduced into the instrument every material term and circumstance; and, consequently, all parol testimony of conversations made by either of them, whether before or after, or at the time of, the completion of the contract, will be rejected.

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

Vogeltanz & Kubitschek, for appellant.

William G. Birginal and Schaper & Schaper, for appellee.

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

SPENCER, J.

This is an action at law for materials and labor allegedly furnished pursuant to an oral contract. The action is brought by Sack Lumber Company, a corporation, hereinafter referred to as plaintiff, against the city of Sargent, Nebraska, hereinafter referred to as city, to recover the cost of certain electrical work performed in the erection of a bathhouse and the lighting of a swimming pool. Plaintiff perfected this appeal from the entry of a summary judgment dismissing the action.

Plaintiff filed a petition and three amended petitions in an attempt to state a cause of action. There are of record several depositions as well as interrogatories and admissions of the parties. Both of the parties moved for summary judgment.

On May 6, 1960, plaintiff submitted a written bid on the erection of a bathhouse for a swimming pool being constructed by defendant. This bid, as taken from the exhibit attached to plaintiff's third amended petition, so far as material herein, is as follows: "BID ITEM NO. 2: ALTERNATE 'A' Bathhouse constructed of concrete block, including all electrical work and pool lighting, complete in place. Total Base Bid, ALTERNATE 'A', Eighty Two Hundred Eleven & no/xx DOLLARS ($8211)."

Subsequently on a date which is not clear from the record but which we assume to be before May 31, 1960, because that is the date of the acceptance of the bids, the various bids on the entire project were opened. After the opening of the bids, plaintiff contends its manager stated that the bid submitted by the plaintiff did not include the electrical work. It is plaintiff's contention that after some discussion a motion was made and adopted by defendant's city council, before whom the bids were opened, permitting plaintiff to add $1,380 to

its bid to cover the electrical work, so that the bid would then be for $9,591 rather than $8,211. This is denied by the defendant.

Plaintiff filed a request for the production of the minutes of the meeting. They are not a part of the record, and no showing is made by the plaintiff that they were not produced, so we assume plaintiff did not see fit to make them a part of the record. Plaintiff admits that it filed a bid bond or a certified check with its bid of not less than 5 percent of the submitted bid of $8,211. It also admits that it did not at any time ask leave to withdraw the bid.

Attached to the plaintiff's third amended petition is a written contract executed by the parties, bearing the date of August 1, 1960, which is more than 2 months subsequent to the acceptance of the bids. This contract was executed on behalf of the plaintiff by its manager, who is the same person who submitted the bid and who was present at the opening of the bids. This contract, so far as material herein, is as follows: "WITNESSETH: In consideration of the sum to be paid by the Owner to the Contractor at the time and in the manner hereinafter provided, the said Contractor has agreed, and does hereby agree to furnish all labor, tools, equipment and material and to pay for such all items, and to construct complete in every detail, to wit: Bit (sic) Item No. 2. Alternate 'A' Total Price $8211.00 at the prices bid on the Proposal Form all to the satisfaction and under the general supervision of the City Engineer or other engineer, acting as and in these Contract Documents entitled the 'Special Engineer'."

This action is to recover the cost of the electrical work under an alleged oral contract before the bid letting, which we assume to be May 31, 1960. Plaintiff, in answer to an interrogatory, admits that the electrical lighting and the material, referred to in its third amended petition, were the items called for in the plans and specifica-

tions referred to in its bid or proposal, the material portion of which has been set out heretofore.

Plaintiff also admits that it was paid the sum of $8,211, as follows:

"Warrant dated May 2, 1961 for the sum of $2,614.60
Warrant dated Sep 9, 1961 for the sum of 4,596.40
Warrant dated Nov 7, 1961 for the sum of 1,000.00."

Plaintiff also admits that the warrant dated November 7, 1961, in the sum of $1,000, which it accepted and cashed, bore on its face the legend, "For Final Payment of Contract."

It is evident from plaintiff's pleadings and admissions that it executed a written contract subsequent to the date of the alleged oral contract, which from the documents themselves included the work purportedly covered by its oral contract. The subsequently executed contract includes also the words "Total Price $8211.00." It is difficult to understand on what theory plaintiff expects to add $1,380 to that figure. Plaintiff has some theory of mutual mistake, permitting it to vary the terms of the written contract. The cases on which plaintiff seeks to rely have no application herein, but are based upon fraud or mutual mistake.

If there was a mistake herein, it at most would be a unilateral one. But even if we adopt that theory, the plaintiff was fully cognizant of the situation, at least at the time the bids were opened. Under the authority of School Dist. of Scottsbluff v. Olson Constr. Co., 153 Neb. 451, 45 N. W. 2d 164, if a mistake is so fundamental in character that the minds of the parties have not, in fact, met, or if an unconscionable advantage has been gained by a mistake, the remedy is rescission. Here, however, plaintiff made no attempt to rescind its contract but actually ratified its erroneous bid, if it was in fact such, by the subsequent execution of the contract of August 1, 1960.

Plaintiff admits it accepted a check for the balance of the contract price, bearing the legend, "Final Pay-

ment of Contract." It seeks to avoid the effect of this act by the contention that the oral contract was not included in the written one and by the further contention that the defendant should not be permitted to turn plaintiff's mistake to its advantage but should be liable for property received and for benefits retained. The obvious answer to the last contention of unjust enrichment is that the defendant received only that for which it contracted. The original bid included the electrical work. The contract, executed after the plaintiff had knowledge that it may have made a bad bargain, included the electrical work.

Plaintiff's contention of a separate oral contract runs afoul of the rule that if a written contract contains a complete obligation without ambiguity as to its object and extent, it is conclusively presumed that the whole agreement of the parties was included therein. See Master Laboratories, Inc. v. Chesnut, 157 Neb. 317, 59 N. W. 2d 571. See, also, Reorganized Church of Jesus Christ v. Universal Surety Co., 177 Neb. 60, 128 N. W. 2d 361, in which we quoted the following from 33 A. L. R. 2d 968: " 'All oral negotiations or stipulations between the parties, preceding or accompanying the execution of the written instrument, are regarded as merged in it, and the instrument is treated as the exclusive medium of ascertaining the agreement of the parties to it. * * * The reason for this rule is that it is only reasonable, where parties have entered into a written agreement, to suppose that they have introduced into the instrument every material term and circumstance; and, consequently, all parol testimony of conversations made by either of them, whether before or after, or at the time of, the completion of the contract, will be rejected.' "

The entry of a summary judgment dismissing the plaintiff's action was in all respects proper, and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MILBOURNE W. MILLS, APPELLANT.

140 N. W. 2d 826

Filed March 11, 1966. No. 36117.

1. **Criminal Law: Recognizances.** Under section 29-611, R. R. S. 1943, a defendant is required to file a written bond with one or more sureties in the amount fixed by the court as a condition precedent to an appeal.
2. ———: ———. The bond required by section 29-611, R. R. S. 1943, is jurisdictional and objection to its validity may be raised at any time in any appropriate manner.
3. ———: ———. A defendant may not complain on appeal for the failure of the trial court to permit the posting of a valid appeal bond in lieu of a defective one, assuming that such right existed, when no request was made in the trial court to do so.

Appeal from the district court for Box Butte County: ALBERT W. CRITES, Judge. Affirmed.

Wade H. Ellis, for appellant.

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

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

CARTER, J.

Defendant was convicted in a justice of the peace court of Box Butte County on March 5, 1965, for operating a motor vehicle upon the public highways while under the influence of alcoholic liquor or drug. Defendant gave notice of appeal and filed an appeal bond. The State moved the court to dismiss the appeal for failure of the defendant to file a bond as required by law. The trial court sustained the motion and dismissed the appeal. The defendant has appealed from the order of the district court dismissing his appeal.

The bond filed by the defendant was conditioned that defendant "shall personally be and appear before The District Court, Box Butte County, Nebraska on the 27th

day of September 1965, at 10:00 o'clock A.M. of said day, and from day to day, and from term to term, until final judgment or as directed by said Court, until finally discharged, to answer the charge of Driving while under the influence of alcoholic liquor or drug and to do and receive what shall be enjoined by said Court upon him, and shall not depart said Court without leave."

The statute providing the terms and conditions for appeal in this type of case is 29-611, R. R. S. 1943. Insofar as material here, this section provides: "No appeal shall be granted or proceedings stayed unless the appellant, together with his surety or sureties, shall, within ten days after the rendition of such judgment, appear before such magistrate, and then and there enter into a written recognizance to the people of the State of Nebraska in a sum not less than one hundred dollars, with surety or sureties to be fixed and approved by the magistrate before whom such proceedings were had, conditioned for his appearance forthwith and without further notice, at the district court of such county, and from day to day thereafter until the final disposition of such appeal, to answer the complaint against him, and to abide the judgment of the district court and not depart therefrom without leave; * * *."

The appeal bond did not contain a surety. The bond was executed only by the defendant. In Zobel v. State, 72 Neb. 427, 100 N. W. 947, this court said in a case involving an appeal in a misdemeanor case: "If the sureties alone attempted to enter into a recognizance for defendant's appearance in the appellate court, it can hardly be doubted that the failure of the defendant to become a party thereto would invalidate the attempted appeal, and we cannot see any good reason, on the other hand, for disregarding the plain statutory provision as to sureties and holding that a recognizance is sufficient and in compliance with the statute when entered into by the defendant alone. Both provisions seem equally bind-

ing and mandatory, and a failure to comply with one would be as fatal as would be the failure to comply with the other. * * * The question is, has such a recognizance been entered into as the statute says must be given as a condition to the right of an appeal? May a defendant have more time or give a recognizance in a less amount than is provided by section 324, or give one without the sureties as therein provided? The answer, as has been indicated, must, we think, be in the negative."

The appeal bond in the instant case is defective in that it contains no surety. The trial court so found. The ruling of the court is correct.

The defendant asserts, however, that the trial court erred in not offering him an opportunity to file a proper bond. The difficulty with defendant's position is that he made no request for leave to file a sufficient bond. For aught the trial court knew defendant could not provide such a bond, or elected to stand on the bond filed. The trial court committed no error in this respect for the simple reason that defendant gave it no opportunity to pass on the question. It is a fundamental rule that to make error in a trial available for a reversal in the appellate court it should be called to the attention of the district court and be affirmatively shown on the record for review. Parker v. State, 164 Neb. 614, 83 N. W. 2d 347; Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868.

It is argued that section 29-901, R. R. S. 1943, permits a deposit of cash in lieu of a written bond with sureties and that such statute is applicable to an appeal under section 29-611, R. R. S. 1943. Defendant states in effect that he deposited $200 in cash in addition to the written bond. The record before us does not sustain such a factual situation. There is no bill of exceptions in this case. We are bound by the record contained in the transcript since it denotes absolute verity.

The transcript shows that the complaint was filed in the justice of the peace court on February 23, 1965. De-

fendant was brought into court and arraigned. He entered a plea of not guilty. Bond was set at $200, and furnished. The case was set for trial on March 5, 1965. Defendant appeared with his attorney for trial on that day. The transcript further shows "Bond for appearance refunded to Defendant." A notation in the transcript shows the appearance bond was refunded on March 5, 1965, by check numbered 1557. We find nothing else in the record which even remotely refers to a cash bond being provided in the furtherance of the appeal to the district court. The transcript does not sustain the conclusion of fact asserted by the defendant that defendant provided a cash bond in addition to the written bond containing no surety.

Defendant contends that the state may not question the regularity or validity of the bond 30 days after the transcript is filed in the district court. The filing of an appeal undertaking, as provided by section 29-611, R. R. S. 1943, is a condition precedent to the jurisdiction of the appellate court. The bond being jurisdictional, objection to its validity may be raised at any time in any appropriate manner. Security Mutual Life Ins. Co. v. Gilliam, 143 Neb. 673, 10 N. W. 2d 670.

The conclusions reached make it unnecessary to discuss other errors assigned. For the reasons herein stated, the judgment of the district court is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion for the reason that the case is decided on an issue which was not raised in the district court for what I think is an obvious reason. I refer to the fact that the majority opinion is predicated on the fact that an appearance bond in the case purports to have no surety.

I call attention to the following provision of section 29-611, R. R. S. 1943, covering appeals in minor criminal offenses: "Provided, that the party appealing may in lieu of such undertaking deposit with the clerk of such

court *a cash bond in a sum* to be fixed by the magistrate but not less than one hundred dollars; *and such cash bond shall be accepted in the cause, upon the same conditions and with like effect as undertakings hereinbefore set out,* such cash bond to be returned upon the fulfillment of the conditions of the bond. The magistrate from whose judgment the appeal is taken shall forthwith make return of the proceedings had before him, and shall certify the complaint and the warrant together with all such recognizances to the district court, * * *." (Italics supplied.)

It is true, the record does not specifically state that a cash bond was filed herein, and if one was filed the appellant's attorney should have had the record reflect that fact. Appellant's brief, which of course is not a part of the record, does state: "A Motion To Quash and Plea In Abatement were filed in the Justice Court on March 5, 1965, overruled and thereafter, on the same date, a plea of not guilty was entered; trial was held, the Defendant, Appellant, offered no evidence, was found guilty and gave immediate oral and written notice of appeal and simultaneously posted a $200.00 cash bond for his appearance in the District Court of Box Butte County, Nebraska. This Bond was taken, acknowledged, subscribed and approved by the Honorable N. T. Johnstone, Justice of Peace, Lake Precinct, Box Butte County, Nebraska."

The motion filed in the district court by the county attorney to dismiss the appeal for the insufficiency of the bond gave as the only reason therefor that the bond was conditioned "that the defendant shall personally appear before the District Court, Box Butte County, Nebraska, on the 27th day of September, 1965" rather than *forthwith* as required by law, and urges that this is jurisdictional and the bond is therefore void. No mention of any nature is made in his motion that no surety was furnished.

From the record it is apparent that the decision of the

trial court was predicated on the point raised in the motion. On this point, it would be my opinion that under our cases there is a substantial compliance with the statute.

The justice of the peace approved the bond in its present form and the county attorney did not raise any question relative to the fact that no surety was furnished. It is apparent that they acted as they did because they were aware that a cash bond had been furnished as suggested in the appellant's brief. While I admit that the burden was on the appellant to see that the notation that a cash bond had been filed was included in the transcript of the justice, it does not appear to me that we should decide the case on that point when there must have been some reason why so obvious a point would not have been raised in the lower court.

I call attention also to the fact that the majority opinion will result in a different rule for appeal bonds in criminal and in civil cases. See Jacobitz v. Bussinger, *ante* p. 524, 138 N. W. 2d 839.

I am authorized to say that Boslaugh, J., joins in this dissent.

WESTERN PIPE AND SUPPLY, INC., APPELLEE, V. HEART MOUNTAIN OIL COMPANY, INC., ET AL., APPELLANTS, IMPLEADED WITH H. R. NEUSBAUM ET AL., APPELLEES.
140 N. W. 2d 813

Filed March 11, 1966. No. 36118.

1. **Trial. The purpose of a pretrial conference is to simplify the issues; amend the pleadings, when necessary; and avoid unnecessary proof of facts at the trial.**
2. **———. The participants in a pretrial conference must adhere to the spirit of that procedure and are held to have waived questions not there presented.**
3. **———. Modification of a pretrial order may be had at the trial to prevent manifest injustice, but the modification should be by direction and not by indirection. That is, modification**

must be attended by a degree of directness and formality such as is appropriate to a court order of such magnitude that from the time of its entry it controls the subsequent course of the action.

4. ———. The subsequent course of an action is controlled by the agreements made at pretrial conference so long as they remain unmodified and that would be true on appeal.
5. **Appeal and Error.** When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
6. **Principal and Agent.** A principal may be liable for the apparent or ostensible authority of agency with which he clothes an alleged agent.
7. **Oil and Gas: Liens.** The purpose of section 57-811, R. R. S. 1943, is to furnish interested parties with sufficient information to enable them to understand the nature of the lien claimed.
8. ———: ———. The liens filed herein found to be in substantial compliance with section 57-811, R. R. S. 1943.
9. **Liens: Trial.** The burden is on the petitioner in a foreclosure action to make prima facie proof of a controverted allegation that no proceedings at law have been had for the recovery of the indebtedness.
10. **Pleading.** Every material allegation of a petition not controverted by the answer shall, for purposes of the action, be taken as true.
11. **Interest.** Where from the verdict and pleadings it appears that if plaintiff is entitled to recover at all he is entitled to recover interest, the court should make the computation and include such interest in the judgment.

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

Wright, Simmons & Hancock, for appellants.

Halcomb, O'Brien & Everson and Harry R. Meister, for appellees.

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

SPENCER, J.

This is an action brought by Western Pipe and Supply,

Inc., a corporation, hereinafter referred to as plaintiff, against Heart Mountain Oil Company, Inc., Fletcher G. Edwards, doing business as Heart Mountain Oil Company, and others, to foreclose an oil and gas lien filed against Heart Mountain Oil Company.

Four cross-petitioners, Robert L. Poundstone, who is also the president and sole stockholder of plaintiff and who will hereinafter be referred to as Poundstone, H. R. Neusbaum, hereinafter referred to as Neusbaum, Well Stimulation Service, Inc., and Bess Trucking Service, filed cross-petitions to foreclose their oil and gas liens against the same property. All of the liens are for labor performed and materials and supplies furnished pursuant to alleged oral contracts.

The trial court, in a pretrial order, defined the issues to be tried as follows: "Defendant Heart Mountain Oil Company denies that there was a specific contract for the supplying of material and labor, but concede that the plaintiff and the cross-petitioning defendants did some work upon the drill site and conferred some benefits, leaving the principal issues for trial, as to whether the work done by said plaintiff and cross-petitioners was necessary for the benefit of the drilling site and whether the items of charges were reasonable. The defendant, Heart Mountain Oil Company further contends that the cross-petitioner Poundstone failed to account for all of the oil produced from said well during the time that he was in charge of its operation. Defendant Heart Mountain further concedes that the particular items claimed by the plaintiff and the cross-petitioning defendants, both for material and time, were in fact supplied as pleaded. Parties further agree to check whether or not any items placed upon the drilling site were later returned for credit, and the amount of credit, if any, which should be allowed."

Based on those issues, the trial court found: (1) That Poundstone was an agent of and was appointed by Heart Mountain Oil Company, Inc., to order such work, serv-

ices, and materials as might be necessary; (2) that Heart Mountain Oil Company, Inc., through its president, had knowledge of the performance of said service and work immediately at or shortly after the time that said service, work, and materials were performed and supplied; that thereafter said corporation accepted all said work, service, and material, and affirmed and ratified the actions of Poundstone; and (3) that the plaintiff and each of the cross-petitioners were entitled to recover, but in three instances less was due than was claimed in the liens or the pleadings because of returns or credits.

The trial court entered judgment on October 27, 1964, in each instance for a principal amount found due plus interest thereon from a date 6 months from the date of the last item of the lien, as one total on which the court ordered interest to run thereafter.

Defendants have perfected an appeal to this court, and set out 16 specific assignments of error which will not be enumerated herein. The assignments of error considered pertinent will be referred to as they are discussed.

This appeal is perfected on behalf of defendants by counsel who took no part in the trial of the case. Defendants' brief raises some issues which may not be pertinent under the issues as defined by the pretrial limitation set out above. In Long v. Magnolia Petroleum Co., 166 Neb. 410, 89 N. W. 2d 245, this court held: "The purpose of a pretrial conference is to simplify the issues; amend the pleadings, when necessary; and avoid unnecessary proof of facts at the trial.

"The participants in a pretrial conference must adhere to the spirit of that procedure and are held to have waived questions not there presented.

"Modification of a pretrial order may be had at the trial to prevent manifest injustice, but the modification should be by direction and not by indirection. That is, modification must be attended by a degree of directness and formality such as is appropriate to a court order of

such magnitude that from the time of its entry it controls the subsequent course of the action.

"The subsequent course of an action is controlled by the agreements made at pretrial conference so long as they remain unmodified and that would be true on appeal."

As we interpret the pretrial order, there were three principal issues to be determined: (1) Whether the work done was necessary and for the benefit of the drilling site; (2) whether the items of charges were reasonable; and (3) did the cross-petitioner Poundstone account for all of the oil produced?

After trial, the court found Poundstone to be the agent of Heart Mountain Oil Company, Inc., and that said corporation accepted all of the work and affirmed and ratified Poundstone's actions; that all of the charges were reasonable; and that an accounting was made for all oil produced under Poundstone's direction. We will consider defendants' assignments of error within the ambit of these findings.

While the pretrial order does not make agency an issue, the case appears to have been tried upon that theory, and the trial court makes a specific finding on agency. There is no dispute Poundstone, a consulting engineer and geologist, was hired by Fletcher G. Edwards, president and general manager of Heart Mountain Oil Company, Inc., and a general partner in Heart Mountain Oil Company, to finish an oil well. In the words of Edwards, it was to bring "it up to the point of initial production." The well, which is referred to in the record as the Muhr well, had previously been abandoned and was to be reworked. It was to be developed by using second-hand equipment acquired by the well owners but still in place on a well in another location, referred to as the Huffman well. Edwards testified that Poundstone was employed to put the well on a permanent pumping basis.

The services covered in this action involve the dis-

mantling of the equipment at the Huffman well and moving it to and installing it in the Muhr well. After Poundstone was hired, he went with Edwards to the office of Neusbaum and in Edwards' presence requested a bid on the work to be done. A bid was presented by Neusbaum to Poundstone the same day. Neusbaum was thereafter hired by Poundstone to do certain portions of the work, involving the dismantling of the equipment at the Huffman well site and installing it at the Muhr site. Poundstone testified that he also contacted other contracting companies, seeking bids, and that the Neusbaum bid was the lowest.

Lee Gustin, a partner in Bess Trucking Service, which actually moved the equipment, testified to a conversation with both Edwards and Poundstone, in which Edwards verbally contracted for his services. Gustin and Poundstone both testified that Edwards assured them that the tanks to be moved had been cleaned and were ready to be moved.

The dealings with cross-petitioner, Well Stimulation Service, were all conducted by Poundstone, and resulted because the tanks had not been cleaned and oil was congealed therein which had to be removed before the tanks could be moved. The attempts on the part of Well Stimulation Service to remove the congealed oil were unsuccessful, but there is competent testimony that the methods employed by Well Stimulation Service were customary and proper but were ineffectual because of ice in the congealed oil. It was necessary to melt the ice and scoop the congealed oil out with shovels.

It was Edwards' testimony that Poundstone was not authorized to contract for any services or labor, but that he was only authorized to secure bids and to submit these bids to Edwards. It is also Edwards' contention that in each instance the bids were to be what is known in the trade as turn-key bids, or a firm contract price for each job undertaken. This is denied by Poundstone and all of the cross-petitioners.

We do not believe any useful purpose will be served by detailing the evidence adduced on the issue of agency herein. Suffice it to say there is conflict in the evidence. The trial court from his observation of the witnesses was in a better position than we are to pass on their credibility. We deem the following rule to be applicable: "When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Arnold v. Huenefeld, 176 Neb. 683, 127 N. W. 2d 196.

Defendants argue that evidence of the acts or declarations of an agent concerning the existence or extent of his authority, is not admissible against the principal to prove the existence of agency. Rodine v. Iowa Home Mutual Cas. Co., 171 Neb. 263, 106 N. W. 2d 391. As we interpret the evidence herein, it is based on apparent or ostensible authority or agency in Poundstone to bind the defendants. A principal may be liable for the apparent or ostensible authority or agency with which he clothes an alleged agent. See Rodine v. Iowa Home Mutual Cas. Co., *supra.*

We determine that the conduct and actions of Edwards were a sufficient manifestation of authority to clothe Poundstone with apparent or ostensible authority for which the defendants are liable.

The defendants devote several pages of their brief to the issue of ratification. While ratification is not pleaded and is not specifically covered by the pretrial order, the trial court did make a specific finding that Heart Mountain Oil Company, Inc., acting by and through its president, Edwards, affirmed and ratified the actions of Poundstone. We do not deem it necessary to discuss the issue of ratification. While we believe the record sufficient to sustain the finding, the determination that Poundstone was the agent of Heart Mountain Oil Com-

pany, Inc., on the record before us, makes a discussion of the question of ratification immaterial. There is no dispute that defendants accepted the services and the materials. The dispute centers on the necessity for certain services, the quality and use of certain materials, and the reasonableness of the charges. We find that the determinations of the trial court in these respects can be sustained on the record.

Defendants assign as error the finding that the oil and gas liens involved were properly filed and subject to foreclosure. Defendants' objections are as follows: Plaintiff's lien does not allege the dates on which the materials were furnished, but shows only invoice dates. It lists the name of the owner of the leasehold interest as Heart Mountain Oil Company and does not set out the owners of the leasehold interest as described in the pleading. Finally, the lien statement alleges plaintiff "sold and delivered material and supplies under a continuing oral contract" whereas one of the invoices was solely for services. The defects suggested in the liens of the cross-petitioners are of the same nature. When the liens were offered in evidence, in each instance the attorney for the defendants said "No objection."

It is defendants' contention that if the liens were not properly filed, this would go to jurisdiction, and that jurisdiction can be raised at any stage of the proceedings under section 25-808, R. R. S. 1943.

Section 57-811, R. R. S. 1943, provides: "Every person, claiming a lien under the provisions of sections 57-801 to 57-820, shall file in the office of the county clerk for the county in which the land identified with the leasehold interest, or pipe line, or some part thereof, is situated, a statement verified by an affidavit. This statement shall set forth the amount claimed and the items thereof, the dates on which labor was performed or material or services furnished, the name of the owner or owners of the leasehold interest or pipe line, if known, the name of the claimant and his mailing address, a

description of the leasehold interest or pipe line, and if the claimant be a claimant under the provisions of section 57-804, the name of the person for whom the labor was immediately performed or the material or services were immediately furnished. The statement of lien must be filed within four months after the date on which the claimant's labor was last performed or his material or services were last furnished under a single contract as provided for in section 57-810."

The exhibits attached to and made a part of the lien affidavits show what part of the claim is for materials and supplies and what part is for labor and services. The attachments to the Neusbaum and Bess Trucking Service liens give the date the material was furnished or labor performed, as well as the invoice date. The Well Stimulation Service statements bear an invoice date which from the evidence is apparently the day the service was rendered or materials furnished. The delivery or work tickets in evidence substantiate this fact. The affidavit of Poundstone contains the following: "That said material, supplies and labor were furnished or performed immediately prior to and including the 16th day of April, 1963, as set forth in copies of invoices attached hereto." The invoices are dated February 28, March 31, and April 16, 1963. The affidavit filed by the plaintiff contains the same statement as the Poundstone affidavit except that the date listed is the 22nd day of February 1963. The invoices are dated January 28, February 4, and February 22, 1963. It is evident to us that there has been a substantial compliance with the statute in listing the dates the services were rendered or the materials were furnished. There is nothing in the record which would in any way indicate otherwise, and the liens were sufficently specific to inform any interested person as to the dates involved.

The liens herein are filed against the Heart Mountain Oil Company rather than against the Heart Mountain Oil Company, Inc. When Edwards was called to the

witness stand by the defendants and was asked by whom he was employed, his answer was Heart Mountain Oil Company. Throughout his testimony the reference is to Heart Mountain Oil Company. The answer of the defendants admitted that Heart Mountain Oil Company, Inc., Barbara J. Edwards, and Fletcher G. Edwards, doing business as Heart Mountain Oil Company, and others, were the owners of the leasehold estate, including working interests and overriding royalty interests. The record does not show the exact ownership of the respective interests. It is to be noted that section 57-811, R. R. S. 1943, provides that the names of the owners of the leasehold interest be set forth *if known.*

There is no question the leasehold was handled exclusively by Edwards, who was the president of Heart Mountain Oil Company, Inc., and a general partner in Heart Mountain Oil Company. To draw a distinction as to exactly when he may have taken off one hat and donned another in an operation of this nature was to say the least short of impossible.

Defendants also argue that section 57-802, R. R. S. 1943, requires that the liens arise "under contract with the owner of any leasehold interest." We believe that the trial court drew the correct conclusion that Edwards was directing the operation in his capacity as president of Heart Mountain Oil Company, Inc., for all of the defendants, and that the contracts were made while he was acting in that capacity.

The purpose of section 57-811, R. R. S. 1943, is to furnish interested parties with sufficient information to enable them to understand the nature of the lien claimed. There was no problem in this regard in the instant case. Although defendants argue that some of the work was unnecessary and accomplished nothing, this is a matter of opinion, and has been decided contrary to the position of the defendants. We determine that there was a substantial compliance with the provisions of section 57-811,

R. R. S. 1943, and there is no merit to the defendants' assignments of error in that regard.

Defendants contend that plaintiff and cross-petitioners failed to sustain the burden to make prima facie proof that no proceedings at law had been had for the recovery of the indebtedness. They rely on Bankers Life Co. v. Peterson, 178 Neb. 205, 132 N. W. 2d 377, in which we held that the burden is on the petitioner in a foreclosure action to make prima facie proof of a controverted allegation that no proceedings at law have been had for the recovery of the indebtedness. The difficulty with defendants' position herein is that the allegation was not controverted. Defendants' answer consisted of admissions and specific denials. It does not contain, nor can any provision therein be construed as a general denial. Consequently, the allegation "that no action has heretofore been instituted * * * to recover the indebtedness above set forth" stands uncontroverted. On the theory on which this case was tried, we call attention to section 25-842, R. R. S. 1943, which provides, so far as material herein: "Every material allegation of the petition not controverted by the answer * * * shall, for the purposes of the action, be taken as true; * * *." See, also, State ex rel. Sorensen v. State Bank of Omaha, 128 Neb. 705, 260 N. W. 195.

Defendants assign as error the computation of interest by the trial court. It is apparent that the trial court proceeded under section 45-104, R. R. S. 1943. In Heusser v. McAtee, 151 Neb. 828, 39 N. W. 2d 802, we said: "Where from the verdict and pleadings it appears that if plaintiff is entitled to recover at all he is entitled to recover interest, the court could make the computation and include such interest in the judgment." Defendants' assignment of error in this respect is without merit.

There being no error in the record sufficient to require a reversal, the judgment herein is affirmed.

AFFIRMED.

ARLENE HARDIN, APPELLANT, V. MOORMAN MANUFACTURING COMPANY, APPELLEE.

140 N. W. 2d 820

Filed March 11, 1966. No. 36140.

1. **Workmen's Compensation.** In order to recover benefits under the Nebraska Workmen's Compensation Act, the plaintiff must prove by a preponderance of the evidence that the death or disability was the result of an accident arising out of and in the course of the employment.
2. **Master and Servant: Automobiles.** It is the general rule that where an employee is required to furnish and maintain an automobile at his own expense for use in his employment, the furnishing and maintaining of the automobile is the responsibility of the employee and not of the employer.
3. **Workmen's Compensation: Automobiles.** Where such an automobile is repaired to correct a defect occurring while the employee is engaged in the service of the employer, injuries incurred by the employee during the making of such repairs in the course of the employment are ordinarily considered as arising out of and in the course of the employment.
4. **Workmen's Compensation.** An inference to be drawn from facts to establish liability for the payment of benefits under the Nebraska Workmen's Compensation Act must be a reasonable one. An inference based solely on speculation or possibility will not sustain an award of compensation.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

James E. Schneider and Rush C. Clarke, for appellant.

Maupin, Dent, Kay & Satterfield, Clinton J. Gatz, Donald E. Girard, and Rady A. Johnson, for appellee.

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

CARTER, J.

This is an action for benefits under the Nebraska Workmen's Compensation Act. The case was first heard before a single judge of the compensation court, who, after hearing, entered an award for the plaintiff. An appeal from this award was taken directly to the district court for Lincoln County. After trial in the district court,

that court found that the accident did not arise out of and in the course of the employment, and dismissed the plaintiff's petition. The plaintiff has appealed to this court.

The plaintiff is the widow of Conrad W. Hardin, who was killed in a one-car accident about 3 miles south of North Platte, Nebraska, on U. S. Highway No. 83, on September 27, 1963. It is not questioned that the deceased was killed in the accident as alleged. The only issue is whether or not he was killed in an accident arising out of and in the course of his employment with the Moorman Manufacturing Company, his employer.

The evidence shows that on February 22, 1963, the deceased entered into a written contract of employment with the defendant company to solicit orders for its products from its customers and prospective customers as directed by the company and its authorized representatives. The deceased was to be paid a commission on all products sold. He was to work days and hours of his own choice, in other words, no working days or hours were fixed by the company. While the contract in evidence shows that it was entered into on February 22, 1963, the evidence shows that the deceased commenced work for the company on March 23, 1962. The discrepancy is not explained in the record.

The evidence shows that the company was engaged in the sale of commercial feeds for livestock. At the time of his employment the deceased was informed that he would need a truck for the delivery of feeds to customers. He purchased a used pickup truck for this purpose which he traded subsequently for a new pickup truck, which was being used at the time of the accident. The truck was owned by deceased and his wife. Deceased was to furnish and maintain his own truck, and pay its operating expenses, his commission on sales being the only remuneration for his services.

The evidence shows that on the morning of the day of the accident deceased told his wife that he was going

to Ogallala to borrow some cattle mineral feed, that he obtained 40 50-pound bags, and delivered one-half ton of it to a customer in Hershey. At 12 noon he entered a bar in Maxwell and drank a can of beer. At about 1 p.m. he entered a bar in North Platte where he remained until 5:20 p.m. The owner of the bar testified that he drank at least 3 bottles of beer before the owner left the bar at 3:30 p.m. A female bartender came to work at 4 p.m. She testified that deceased was there drinking with friends and having a good time. She testified that she served him several mixed drinks of whisky and Seven-up. She says the wife of deceased came into the bar about 5 p.m. and that they went out together.

Arlene Hardin, wife of deceased, testified that she drove the family car from her home in Hershey to her sister's home in North Platte during the forenoon, left the car because it was not operating well because of a faulty transmission, and went to Cozad with her sister to visit relatives. On their return to North Platte she saw the pickup truck parked on the street near the bar. She left her sister's car, looked for deceased, and found him in the bar. She asked him to check the family car and they left the bar together. Deceased got in the pickup and drove to the home of his wife's sister, followed by plaintiff and her sister in the latter's car. Deceased got in the family car, drove it away, was gone 5 or 10 minutes, and returned. He told the plaintiff the car would get her to their home in Hershey. He then left in the pickup without stating where he was going. Both ladies testified that there were 15 or 20 bags of feed in the pickup when the deceased left at about 5:45 p.m.

At about 6:30 p.m. deceased drove the pickup into a Frontier service station at the south edge of North Platte. He informed Robert Williams, the owner of the station, that the pickup was not operating properly. It appears that a part of the station building was operated by Darrell Sommers as an automobile repair shop. Som-

mers had gone home. Williams called Sommers by telephone and he came down to the repair shop within 20 or 30 minutes thereafter.

In the meantime Robert Bailey, a regular customer, came into the station to purchase gasoline for his car. Bailey was an automobile mechanic not in any way associated with the gas station or repair shop. Williams asked him to check deceased's pickup. Deceased made the same request. Bailey checked the pickup. He then drove the pickup, accompanied by deceased, for a distance of approximately 7 miles. He told decedent he could find nothing wrong with the truck. After their return to the gas station, Sommers checked the truck, and after so doing, he drove it several miles, accompanied by Timothy George, a friend of Sommers. Upon their return deceased got in the pickup and invited the others to go with him, to show them, as he said, how it performed. Sommers remained in the pickup. George got out because, as he said, he thought deceased was going to drive too fast.

There is evidence that deceased was under the influence of liquor. There was also evidence that deceased had a bottle of whiskey on his person from which he invited the others to drink. There was evidence that his speech was blurred and that he staggered when he walked. The evidence shows that there were 15 or 20, or more, bags of feed in the pickup when deceased drove it away, accompanied by Sommers. No witness saw them again prior to the fatal accident.

The accident occurred at about 7:15 to 7:30 p.m. on U. S. Highway No. 83 about 3 miles south of the Frontier service station which is located on the same highway. There was evidence the pickup had rolled over one or more times. Several witnesses testified that they were in and about the scene of the accident. Between 4 and 6 sacks of feed, all broken, were seen near the accident. The evidence sustains a finding that 4 to 6 sacks of feed bearing the defendant's brand were all that was

found at the scene of the accident. The trial court found that the proof of intoxication was insufficient to sustain a finding that deceased was drunk or intoxicated at the time of the accident. No cross-appeal having been taken, we shall not consider this issue on this appeal.

There are two issues in the case: (1) Whether or not the maintenance and road testing of the pickup, under the circumstances shown, were incidental to the employment of the deceased; and (2) whether or not the unaccounted-for disappearance of the 15 sacks of feed creates a reasonable inference that deceased was performing acts incidental to his employment at the time of the accident.

It is the contention of the plaintiff that, as the use of a truck was needed to perform the work of his employment, its repair and maintenance, even though a responsibility of deceased, were incidental to the employment. The evidence shows that deceased used the pickup in delivering feed and soliciting customers, as required by his employment contract. Deceased also made personal use of the pickup, as did the plaintiff.

The deceased was required to use the pickup in the employer's business and it was his responsibility to keep it in repair. Pursuant to this responsibility he drove the pickup to the gas station on his own volition. It was his responsibility to maintain his truck in any manner that he chose. The duty of the deceased under his contract of employment was to deliver feed and solicit customers for his employer, the repair of the pickup being no part of the employer's obligation. It is the general rule that where an employee is to provide and maintain a vehicle for use in his employment, the repair of the vehicle is a part of his responsibility to furnish and maintain it, and involves no responsibility or liability on the part of his employer. Pappas v. Yant Constr. Co., 121 Neb. 766, 238 N. W. 531.

There is, however, an exception to the general rule. Even though an employee is required to furnish and

maintain a vehicle at his own expense, the repair of the vehicle made necessary during the rendition of service to the employer arises out of and in the course of the employment. Plaintiff relies upon this principle and cites Perry v. Johnson Fruit Co., 123 Neb. 558, 243 N. W. 655, and Struve v. City of Fremont, 125 Neb. 463, 250 N. W. 663, in support thereof.

In the Johnson Fruit Company case Perry was a traveling salesman in the employ of the Johnson Fruit Company on a monthly salary. Perry furnished his own automobile and was paid $35 a week for expenses and the use of the automobile. At 7 a.m. on the day of the accident Perry left his home in performance of his duties of soliciting and receiving orders from customers. He returned home about an hour later and was informed by his wife that a customer had telephoned an order for a quantity of candy. Perry had the candy on hand in his home, which he obtained for the purpose of filling the order. Having some difficulty with his automobile, he undertook to fix it before leaving to deliver the candy. During his attempt to fix the automobile there was a fire or explosion which caused his death. In holding the injury compensable the court said: "From the facts and circumstances disclosed * * * he was engaged in making minor repairs and adjustments upon the automobile used by him in the employer's business, and on premises where his services required his presence as a part of his service as such employee at the time of the injury, and during the hours of service as such employee; and that making of such repairs and adjustments was incidental to, and his injuries arose out of and in the course of, his employment by the defendant, * * *."

In the City of Fremont case Struve was the fire chief of the Fremont fire department. He was assigned a regular shift but was on call for duty at all times. He went to the fire station early and late. On the day of the accident he was going to Omaha to attend a convention and firemen's school specifically authorized by

the city council. He got up early, telling his wife he could not sleep any longer and that he was going up to the fire station for a minute. He was found dead of monoxide gas poisoning in his garage. The hood of the car was up and the car was running. In sustaining an award of compensation, this court said: "The deceased was preparing his car to carry him to his fireman's duty, it matters not whether to his morning inspection or to Omaha to his firemen's school. He was a 24-hour-a-day man and his car was the means of conveyance designated by the council and actually operated at the expense of the city. * * * The distinction is plain; we repeat that Struve was about his master's business in the way designated by his master and in the use of a car devoted to his master's business."

The distinction between these two cases and the one at bar is also plain. In the two cases cited, the employees were shown by evidence to have been engaged in their employers' business at the time of the accident. In the case before us the pickup was used both in the business of the employer and for personal use. Prior to the repair, deceased had been drinking in a bar until he was called by his wife to check out their private automobile. There is no evidence whatever that deceased had been or was performing any service for the employer immediately prior to or at the time he was entering the gas station. In repairing and testing the pickup the deceased was performing acts of maintenance under his responsiblity to furnish and maintain the pickup. The burden of proof is upon the plaintiff to show that the repairs were incidental to service for the employer and not pursuant to the personal responsibility of deceased to furnish and maintain the pickup. Such evidence is entirely lacking. Under such circumstances the deceased must be deemed to have been engaged in his personal affairs in having the pickup repaired and road-tested.

The plaintiff contends also that deceased was engaged

in the employer's service because of the inference to be drawn from the disappearance of approximately 15 bags of cattle mineral feed between the time he left the gas station and the time of the accident. The evidence shows that deceased had about 20 bags of feed in the pickup when he left the gas station and that only 5 bags or so were found at the scene of the accident. The evidence shows that it was not unusual for the deceased to have unsold feed in the pickup. When deceased left the gas station with Sommers he announced his purpose was to demonstrate how the pickup performed. The commercial feed in the pickup was not mentioned in any way. The evidence of the witness George is that he came to the station at 6:30 p.m. Bailey and deceased had already road-tested the car for 6 or 7 miles, arriving back at the station about 6:45 p.m. Sommers and George then tested the pickup by driving it 3 or 4 miles. George testified that Sommers and deceased left in the pickup 15 or 20 minutes after Sommers and George returned to the gas station. After giving consideration to the approximations of time testified to by the witnesses, it would appear that the accident occurred 15 to 30 minutes after Sommers and deceased left the gas station on their fatal drive. The accident occurred 3 miles south of the gas station. The pickup was headed north toward North Platte at the time of the accident. How far they went south of the scene of the accident before returning north is not shown and evidently there was no way to determine this fact. As we have stated, the evidence shows that there were 20 or more sacks of feed in the pickup when it left the gas station and approximately 5 sacks were found at the scene of the accident. The disappearance of the 15 sacks is wholly unaccounted for in the record. The plaintiff contends that the evidence sustains a reasonable inference that it was delivered to a customer, or otherwise disposed of by the deceased in the course of his employment. We do not think the evidence sustains any such inference.

We suggest that, so far as this record shows, the 15 sacks of feed could have been delivered to a customer in North Platte before deceased drove south. Plaintiff contends that similar possibilities suggested by the trial court in its memorandum opinion are based on pure speculation. We think plaintiff is correct in this respect, but these speculative statements are no different than those on which the plaintiff asks this court to draw a reasonable inference that the feed was delivered to a customer. The statement of the deceased as to the purpose of the fatal trip, the time element involved, the lack of any statement indicating service to the employer, the nonaccountability for the disappearance of the 15 bags of feed, and deceased's activity during the afternoon of the day of the accident, considered together, point towards the carrying out of his personal affairs rather than the performance of service for his employer. Plaintiff's allegations on this point are not sustained by a preponderance of the evidence.

An award of workmen's compensation benefits cannot be based alone on speculation and conjecture. Hammond v. Doctor's Hospital, 145 Neb. 446, 17 N. W. 2d 9; Klentz v. Transamerican Freightlines, Inc., 173 Neb. 53, 112 N. W. 2d 405. The burden of proof is upon the plaintiff to establish by evidence the facts essential to a recovery. Klentz v. Transamerican Freightlines, Inc., *supra*. This the plaintiff has failed to do. An inference to be drawn from facts to establish liability for the payment of benefits under the Nebraska Workmen's Compensation Act must be a reasonable one. An inference based solely on speculation or possibility will not sustain an award of compensation.

The trial court having come to the same conclusion as this court, the judgment of the district court is affirmed.

AFFIRMED.

HAROLD D. BREESE, APPELLANT, V. DUANE NEWMAN ET AL., APPELLEES.

140 N. W. 2d 805

Filed March 11, 1966. No. 36146.

1. **Trial: Appeal and Error.** In determining the sufficiency of the evidence to sustain a judgment it must be considered in the light most favorable to the successful party.
2. **Arrest: Officers.** In making an arrest, an officer may use whatever force is reasonably necessary. Reasonable force is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary under the circumstances.
3. ———: ———. Generally, an officer has no right to shoot or kill a person who is committing a misdemeanor except in self-defense.
4. ———: ———. Where it is clear from the facts and circumstances which existed at the time that an officer intended to make an arrest, no further notice of the intention to make the arrest is necessary.
5. ———: ———. Ordinarily, it is a question for the jury whether, under all the facts and circumstances of the case, an officer who fired at the tires of an automobile operated by a misdemeanant used more force than was reasonably necessary to stop the automobile and arrest the misdemeanant.

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

William S. Padley, for appellant.

Russell, Colfer & Frazier, for appellees.

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

BOSLAUGH, J.

This is an action for damages brought by Harold D. Breese as plaintiff. The defendants are Duane Newman, the sheriff of Chase County, Nebraska; Harry Smith, a deputy sheriff of Chase County, Nebraska; and William Gleason, the night marshal of Imperial, Nebraska.

The petition alleged an assault upon the plaintiff by firing at his automobile while he was driving upon U. S.

Highway No. 6 in Chase County, Nebraska. The answer alleged that the plaintiff was operating his automobile at great speed and in a reckless manner; that upon warning, the plaintiff refused to stop or slow down; and that shots were fired at the right front tire of the plaintiff's automobile to cause it to deflate and stop the automobile.

The jury returned a verdict for the defendants. The plaintiff's motion for new trial was overruled and he has appealed. The assignments of error relate to the instructions to the jury and the sufficiency of the evidence to sustain the verdict.

In determining the sufficiency of the evidence to sustain a judgment it must be considered in the light most favorable to the successful party. Thompsen v. Miller, 177 Neb. 530, 129 N. W. 2d 498. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

There is evidence in this case that the defendant Newman delivered a summons for willful reckless driving to the plaintiff at Wauneta, Nebraska, on August 5, 1964. Shortly thereafter and at about 12:30 p.m., Newman saw the plaintiff drive by the Ford garage in Wauneta at a high rate of speed. Newman estimated the plaintiff's speed to be from 40 to 45 miles per hour. The owner of the Ford garage, who was standing beside Newman when the plaintiff went by, estimated the plaintiff's speed to be in excess of 60 miles per hour.

Newman immediately drove after the plaintiff. Although he traveled at speeds in excess of 100 miles per hour, he was unable to overtake the plaintiff. After Newman had followed the plaintiff for about 3 miles, he radioed ahead for Smith and Gleason to set up a roadblock. Smith and Gleason parked their cars at the intersection of Highway Nos. 6 and 61 approximately ½ mile east of the city limits of Imperial, Nebraska. The cars were parked on Highway No. 61 just off Highway No. 6 and facing to the southeast. Smith's automo-

bile was equipped with a rotary beacon light mounted just behind the windshield. Gleason's automobile was equipped with flashing lights on the bumper. Both of these devices were turned on.

When the plaintiff's automobile was about ½ mile east of the intersection, Gleason and Smith went out on the north lane of Highway No. 6 and waved their arms to signal the plaintiff to stop. Gleason was carrying a Thompson 45 caliber submachine gun. Smith was armed with a revolver.

As the plaintiff's automobile approached the intersection it did not slow down or stop but turned into the south lane of Highway No. 6. Gleason fired a "warning burst" across the path of the automobile as it approached and shot at the tires of the automobile as it went by. Smith shot at the right front tire of the plaintiff's automobile as it went by. The speed of the plaintiff's automobile at that time was estimated to be around 90 miles per hour.

Three bullets struck the right side of the plaintiff's automobile and one bullet passed through the right front tire causing it to deflate. The plaintiff's automobile stopped about 250 yards west of the intersection. The plaintiff was taken into custody and, on the following day, pleaded guilty to two charges of willful reckless driving.

The law of this state requires every sheriff, deputy sheriff, and marshal to arrest and detain any person found violating any law of this state, until a legal warrant can be obtained. § 29-401, R. R. S. 1943. The plaintiff in this case was operating his automobile in an illegal manner in the presence of the defendants, and it was their duty to arrest and detain the plaintiff.

In making an arrest, an officer may use whatever force is reasonably necessary. Reasonable force is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary

under the circumstances. See, 5 Am. Jur. 2d, Arrest, § 81, p. 768; 6 C. J. S., Arrest, § 13, p. 611. Ordinarily, it is a question of fact for the jury as to whether the force used in making an arrest was reasonable under all of the facts and circumstances.

The parties agree that the offense which the plaintiff was committing in this case was a misdemeanor. The plaintiff relies upon the rule that, generally, an officer has no right to shoot or kill a person who is committing a misdemeanor except in self-defense.

The defendants contend that they did not attempt to shoot or kill the plaintiff but that it was reasonable and necessary under the circumstances that they shoot at the tires of his automobile in an effort to stop it. Upon this basis the trial court submitted the case to the jury.

The plaintiff complains of instructions Nos. 9, 10, 11, and 12. Instruction No. 9 relates to the duty of an officer to notify a person who is to be arrested that the officer intends to make an arrest. The instruction stated that it is sufficient if the intention of the officer is clear to an ordinarily prudent person from the facts and circumstances which existed at the time. The instruction given was correct. See 5 Am. Jur. 2d, Arrest, § 70, p. 756. There was evidence in this case from which the jury could find that it would have been clear to an ordinarily prudent person that the defendants intended to arrest the plaintiff as he approached the intersection of Highway Nos. 6 and 61.

Instructions Nos. 10, 11, and 12 relate to the manner in which the arrest was accomplished. These instructions submitted to the jury the question of whether it was reasonable under all of the facts and circumstances for the defendants to shoot at the tires of the plaintiff's automobile to accomplish the arrest. The plaintiff contends that the instructions were erroneous because an officer has no right to shoot at an automobile in order to arrest a misdemeanant.

We think the better rule is that it is a question for the

jury whether, under all of the facts and circumstances of the case, an officer who fired at the tires of an automobile operated by a misdemeanant used more force than was reasonably necessary to stop the automobile and arrest the misdemeanant. State for Use of Holmes v. Pope, 212 Miss. 446, 54 So. 2d 658. See, also, Hutchinson v. Lott (Fla.), 110 So. 2d 442.

In the Holmes case the Supreme Court of Mississippi said: "In the case at bar the officers were likewise armed with high powered pistols, and if the jury had believed from a preponderance of the evidence that they were firing either at the plaintiff or his car generally and a bullet had either struck the plaintiff, or had struck the car and glanced and hit him, the officer firing the shot would have been guilty of culpable negligence. They would have also been liable for any damage done the car by shooting in that manner, but the jury in the instant case adopted the version of the officers when testifying that they did not shoot either at the plaintiff or at the car generally, but that they aimed the firearm at the rear tires and punctured each of them, and without any intention of injuring either the plaintiff or his automobile except that they shot at a particular place on the car with the view of damaging it only to the extent necessary to bring it to a stop so that they could effect the lawful arrest of the plaintiff.

"In 4 Am. Jur. 139, Sec. 20, it is said that 'The firing of shots to effect the arrest of a lawbreaker with no intention of injuring him, is not an assault and battery where they do not hit him or cause him physical injury.' Of course it is unnecessary that an assault and battery be committed on a plaintiff in order to render a defendant liable for any property damages that may be caused by using more force than would be reasonably necessary to effect his arrest.

"In affirming the judgment rendered on the verdict of the jury in the instant case, based upon what we deem to have been proper instructions as to the law, we do so

because of the facts of this particular case, and not as condoning any reckless or wilful use of firearms in arresting a misdemeanant under different facts and circumstances."

The evidence in this case shows that the plaintiff received a summons requiring him to appear and answer a charge of willful reckless driving. A short time after that he was observed driving at a speed of between 40 and 60 miles per hour upon the streets of Wauneta, Nebraska. The plaintiff was then on the way to Imperial, Nebraska, to answer the summons. He admits that he drove in excess of the speed limit on the trip to Imperial, and there is evidence that he was driving 90 miles per hour when he was within ½ mile of the city limits of Imperial, Nebraska. Although the offense committed was a misdemeanor under the facts and circumstances of this case, it affected the safety and welfare of other persons upon the highway. This was a circumstance that the defendants were entitled to consider.

The use of firearms to stop an automobile is an extreme measure which should be used in only the most serious cases. It involves the safety of persons not otherwise involved in the occurrence. It is fortunate that there were no personal injuries in this case as a result of the firing at the plaintiff's automobile.

The record in this case sustains the judgment of the district court and it is affirmed.

AFFIRMED.

EDWARD PETERSON COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES, V. ULYSSES S. SCHLUETER CONSTRUCTION CO., A PARTNERSHIP, APPELLANT.

140 N. W. 2d 830

Filed March 11, 1966. No. 36147.

1. **Trial. In every case, before the evidence is submitted to the jury there is a preliminary question for the court to decide**

when properly raised, not whether there is literally no evidence but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed.

2. **Contracts: Trial.** Where the evidence as to the terms of an oral contract is conflicting, it is for the jury to pass upon the facts and to determine what the contract was, under proper instructions.
3. **Trial.** Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law.

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

Sidner, Gunderson, Svoboda & Schilke, for appellant.

Hotz, Hotz, Taylor & Moylan, for appellees.

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

SPENCER, J.

This is an action brought by Edward Peterson Company and Stone Products, Inc., Nebraska corporations, against Ulysses S. Schlueter Construction Co., a partnership, for rock alleged to have been sold pursuant to the terms of an oral contract. The rock was sold by Stone Products, Inc., and the amount of the claim, which had been assigned to Edward Peterson Company, is $10,-946.85. For convenience, Stone Products, Inc., will be designated as plaintiff and the partnership as defendant. Any interest of Edward Peterson Company arises by virtue of the assignment, which is admitted.

Defendant filed an answer to the petition of the plaintiff, which consisted of a general denial, and a cross-petition. Plaintiff filed an answer to the cross-petition, consisting of a general denial. The case was tried to a jury, and a verdict was returned for the plaintiff. Judgment was entered thereon, and an appeal has been perfected to this court.

Defendant sets out three assignments of error, but each is directed to the sufficiency of the evidence. We concern ouselves therefore only with that question, and summarize the evidence we deem pertinent on this point.

In the summer of 1959, the defendant, who was in the earthmoving business, subcontracted to build certain roads on a missile site near Arlington, Nebraska. Defendant's contract was with Malan-Grove, who held the prime contract for the missile site with the Corps of Engineers. The defendant, to perform the contract, needed rock which met certain detailed specifications.

Plaintiff's office manager testified as to the delivery of the rock; that the plaintiff had to meet certain specifications for the rock which was delivered; and that the specifications influenced the price which was charged. Robert G. Peterson, vice president of plaintiff, testified that the office manager told him the rock was not meeting specifications but didn't think it was serious and could be corrected by adding sand.

The negotiations for the plaintiff were handled by plaintiff's president, Ralph Saathoff, who had been in the rock business for approximately 40 years. Saathoff, with plaintiff's salesmen, visited with Ulysses S. Schlueter, hereinafter referred to as Schlueter, and defendant's general foreman, Shanks, about furnishing rock for the project. They were told the rock required was crushed rock which had to meet the specifications set up by the Corps of Engineers. Saathoff was familiar with these specifications. They were not unusual except for the fact that they required a 2-millimeter test, which is a fineness test. This was the first time he recalled plaintiff had encountered this particular test. He testified the average construction man would not be able to tell by looking at the rock whether it met the tests required by the specifications. If there were deficiencies, the average person could not tell whether they were serious or minor. A copy of the specifications was furnished the plaintiff. Thereafter, Saathoff submitted an oral

bid for the plaintiff. About a week thereafter, plaintiff was advised to start delivering the rock and purchase orders would be sent, but no purchase orders were ever received.

It was Saathoff's testimony that Shanks told him that he would come down to the quarry and pick up a sample of the rock and would submit it to the testing laboratory. He was not advised that any of the samples did not meet specifications before he started delivery on approximately July 21, 1959. By July 27, plaintiff had information that the rock did not meet the specifications. Plaintiff submitted several samples of the rock on that date to the testing laboratory. None of these samples met the specifications. The results of these tests were not received until August 1, 1959, which was the date on which the last delivery was made. Saathoff testified that he was aware that the stone was being furnished on a government contract, and that he was aware that the rock was not meeting the specifications sometime before July 27, 1959. Saathoff was also aware that the Corps of Engineers or Malan-Grove, the prime contractor, had refused to accept the road because the rock did not meet specifications and that at least 500 feet of it had to be removed.

Plaintiff's salesman testified that the rock had to meet certain specifications, and that Shanks told Saathoff that he would get him a set of specifications. There was some discussion about samples to be taken from the quarry and that some samples were taken. His testimony then is as follows: "Q- Do you know whether or not the sample did meet the specifications? A- Well, the only thing I could say to that would be he made the statement at the time that if Stone Products got the rock to specifications that they would notify us to deliver so I just took it for granted that it met specifications when we were notified."

Plaintiff's salesman was the coordinator between the quarry and the missile site. He was told by Shanks that

the rock was not meeting the specifications. He testified: "We all agreed it was logical to start running tests to the Nebraska Testing Laboratories. I think you will find some run in July. I didn't pull the tests myself. I picked up the tests and put them in the car and took them to the testing laboratory in Omaha and turned them over to them. By the time that the reports had come back we had orders to stop our hauling of rocks to the missile site * * *."

Plaintiff produced the vice president of the testing laboratory as a witness. He identified test reports taken over the 10-day period the rock was being delivered, and in each instance the test sample failed to meet the specifications, and he testified that plaintiff was so advised. He also testified that the specifications would not change by the handling of the materials.

At the close of plaintiff's testimony, defendant moved to dismiss the petition. This motion was overruled, and defendant's testimony was adduced.

Ulysses S. Schlueter testified that he was present with Shanks at the conversation with Saathoff and plaintiff's salesman. The main topic of the conversation was whether or not rock could be furnished to meet the specifications. Samples were submitted before the rock was ordered. The first sample did not pass specifications. Subsequent samples were obtained and tested, and eventually one of them passed specifications. Stone Products, Inc., was then advised to start hauling the rock. Shanks, who is no longer employed by defendant, was in charge of the project under his direction. Shanks' present whereabouts is unknown, although defendant's attorneys have tried to locate him.

After the hauling started, a representative of the testing laboratories took samples on the job and furnished defendant and Malan-Grove with copies of their reports. These reports were received from 3 to 4 days after the tests were taken. The plaintiff was promptly advised that the rock was not meeting specifications. Defendant

made every effort to have the specifications relaxed and the road as constructed accepted, but was unsuccessful. Defendant was ordered by the principal contractor to remove the rock and to reconstruct the road with rock meeting the specifications. The rock delivered by plaintiff was removed, the road was torn up, and was replaced by defendant with other rock at a cost of $9,015.60. When the rock furnished by plaintiff was removed from the road, it was pushed to the side in a pile and the plaintiff was requested to remove it.

Exhibit 11, which was offered and received during the cross-examination of Saathoff, is a letter dated January 20, 1960, from the defendant to the plaintiff. It recites that the cost of removal of plaintiff's rock from the road and other expenses incident thereto incurred by the defendant was $9,015.60. Plaintiff had been requested to remove the rock and had failed to do so. Defendant had been able to sell 1,647.35 tons of it to the engineers for $5,600.99, leaving $3,414.61 due the defendant from the plaintiff. There were 1,487 tons of the rejected rock still piled near the point of its removal, defendant was obligated to have it removed, and unless the plaintiff moved it within 7 days, the defendant would be forced to do so. This letter was initially received for the limited purpose of showing notice, but the information therein was put into the record during the examination of Schlueter.

It is defendant's position that the evidence is insufficient to sustain a verdict for the plaintiff. The rock ordered was to meet established specifications. It did not meet these specifications. Defendant argues the motion to dismiss should have been sustained at the close of the plaintiff's evidence or, in any event, at the close of all of the evidence.

In every case, before the evidence is submitted to the jury there is a preliminary question for the court to decide when properly raised, not whether there is literally no evidence but whether there is any evidence upon

which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed. See Krichau v. Chicago, B. & Q. R.R. Co., 150 Neb. 498, 34 N. W. 2d 899.

It is plaintiff's position that there is a definite dispute as to the actual agreement of the parties, and that this raises a question of fact to be determined by the jury. Plaintiff cites Schwerin v. Andersen, 107 Neb. 138, 185 N. W. 321, in which we held: "Where the evidence as to the terms of an oral contract is conflicting, it is for the jury to pass upon the facts and to determine what the contract was, under proper instructions." We do not agree with plaintiff's premise. The evidence is conclusive that plaintiff knew the defendant was required to use rock meeting definite specifications. Plaintiff's evidence indicates it understood at all times it was to furnish rock which would meet these specifications. The following testimony of Saathoff is pertinent on these points: "Q- Mr. Saathoff, you were asked something concerning the fact that these tests were made after the road was completed. It surely wasn't your understanding that this rock could be anything you wanted to deliver as long as the— A- No, I don't think that is true. Q- You did understand that those samples had to be conducted throughout the delivery from the quarry at other points? This was your understanding, wasn't it? A- It wouldn't comply with the specifications. Q- Obviously if the rock you delivered didn't meet specifications the final load wouldn't meet specifications or the final road? A- That is correct. Q- And reading from the same specifications that you were asked to before, would you read the sentence beginning with Samples? A- Samples of aggregates shall be tested at regular intervals during production as required by the Contracting Officer. These samples will be obtained at the processing plant, from railroad cars, trucks, stockpiles, or other locations designed by the Contracting Officer and will be the basis for approval

of specific lots from the standpoint of all requirements. When deemed necessary, the sampling of materials will be observed and supervised by the Contracting Officer. Unless otherwise directed by the Contracting Officer the procedures outlined in ASTM D 75 will be followed for sampling of the materials. Q- That is far enough. And showing you Exhibit '8' again which is a test by the Nebraska Testing Laboratory and as to the method of test they were under the specifications that you were to meet on this contract? A- Yes. Q- And you never had any dispute or argument about this? A- The specifications? Q- Yes. A- No. Q- At all times you were aware that the rock you were to deliver to Mr. Schlueter was to comply with the specifications? A- That is correct."

The evidence is conclusive that the rock furnished by the plaintiff did not meet the specifications. It is also undisputed that the road built with the rock furnished by the plaintiff had to be torn up and rebuilt. If it is plaintiff's position that the rock was delivered on the basis of an order which waived the specifications, the plaintiff wholly failed to meet the burden of proving that fact. Plaintiff's preliminary negotiations disclosed the detailed specifications which the defendant had to meet. The negotiations concerned rock to meet those specifications, and plaintiff was furnished with a copy of them.

This case is governed by the rule that where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law. See Thomas v. Owen, 169 Neb. 369, 99 N. W. 2d 605.

The defendant's motion for a directed verdict on the plaintiff's petition at the close of the evidence should have been sustained.

For the reasons stated, the judgment herein is reversed and the cause remanded with directions to dismiss the

petition of the plaintiff and for a new trial on the cross-petition of the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

HAZEL CHRISMAN, APPELLEE, V. FARMERS COOPERATIVE ASSOCIATION OF BRADSHAW, NEBRASKA, APPELLANT.

140 N. W. 2d 809

Filed March 11, 1966. No. 36152.

1. **Workmen's Compensation.** In order to recover under the Workmen's Compensation Act the plaintiff must prove that the death or disability of the workman was the result of an accident arising out of and in the course of the employment.
2. ———. In determining whether or not a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether or not it is reasonably incident thereto, or if it is so substantial a deviation as to constitute a break in the employment which creates a formidable independent hazard.
3. ———. Whether or not an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the issue may be resolved.
4. ———. The term "arising out of" the employment in the Workmen's Compensation Act covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including matters of personal convenience and comfort, not in conflict with rules and specific instructions, in which an employee may normally be expected to indulge under the conditions of his work, are regarded as being within the scope or sphere of the employment.
5. ———. The Workmen's Compensation Act will be liberally construed to accomplish the beneficent purposes of the act.

Appeal from the district court for York County: H. EMERSON KOKJER, Judge. Affirmed.

John E. Dougherty, for appellant.

Gordon B. Fillman, for appellee.

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

CARTER, J.

The plaintiff, Hazel Chrisman, brought this action against the Farmers Cooperative Association of Bradshaw, Nebraska, to recover benefits resulting from the death of her husband, John W. Chrisman, alleged to be due under the Workmen's Compensation Act. After a hearing before a single judge of the compensation court, an award of benefits was denied. On appeal to the district court for York County the district court granted compensation benefits to the plaintiff. The defendant has appealed to this court for a review of that decision.

The evidence shows that on September 10, 1962, the date of the accident, John W. Chrisman was employed by the defendant as manager of its oil and gas service station in Bradshaw. He received a monthly salary of $350 per month and an annual bonus, the amount of which is not material. He was assigned regular hours from 7 a.m. to 11:30 a.m. and from 12:30 p.m. to 6 p.m. He had a regular helper who was on duty during deceased's lunch hour and the deceased likewise was on duty during the helper's lunch hour. The work was that which was usually performed in such service stations. The office was in one end of the building. In the other end was a hydraulic lift used for the oiling and greasing of automobiles. Between them was an area used for washing cars, the changing and repairing of tires, and the making of minor repairs on automobiles.

On the day of the accident the deceased went home for lunch at his usual hour of 11:30 a.m. On leaving home just before 12:30 p.m., he told his wife he was going to take the family car, a 1958 Ford, to the service station; that the generator needed some work to be done on it. At about 1:15 p.m., the deceased was found dead on a creeper under his automobile in the middle area of the station. It was evident that he had jacked up the car,

rolled under it on the creeper to work on the car, the car had slipped off the jack which was found nearby, and the car had crushed him, causing his death.

The evidence shows that the Farmers Cooperative operated a grain elevator at another location in Bradshaw. One R. G. Hewitt was the general manager of both the elevator and the oil station. The deceased managed the oil station under the general supervision of Hewitt. Hewitt testified that employees were permitted with his full knowledge to make adjustments and minor repairs on their personal cars during their spare time at the service station. Donald Kamtz, a part-time bookkeeper and helper, corroborated this statement.

There is evidence that employees sometimes used their own automobiles in the company's business when transportation provided by the defendant was not available. We gather from the evidence that minor use of employees' cars was not paid for, but for distance driving the board of directors of the defendant paid mileage for such use.

The general rule is that injuries sustained in repairing a personal automobile, where there is no contractual obligation for its use, does not arise out of and in the course of the employment except when such repairs are made while the automobile is actually being used in the service of the employer. The defendant contends that deceased's automobile was not being used in the service of the employer at the time of the accident and that it does not fall within the stated exception. This is undoubtedly true. The contention that recovery can be justified on the ground that it was beneficial to the employer for deceased to have his automobile in good repair for possible use in the employer's service under the circumstances here shown cannot be sustained.

We have said, however, that whether or not an accident arises out of and in the course of the employment must be determined by the facts and circumstances of each case. Seger v. Keating Implement Co., 157 Neb.

560, 60 N. W. 2d 598. The facts and circumstances in this case show the following: The deceased was on duty at defendant's place of business during the assigned hours of his employment. One of his duties was to make adjustments and minor repairs on customers' automobiles. He was engaged in repairing his personal automobile on company time with the permission of the employer. The effect of the permission was to allow him to do for himself without charge what he did for customers for compensation to the defendant. The inference is clear that the permission to employees for making minor repairs on their own cars at the service station was an accommodation by the defendant for accommodations accorded by employees to the defendant. It appears to us that the comity thus shown makes the adjustment and minor repairs of automobiles of employees an incident of the employment. The deceased was doing on the defendant's time what he was permitted to do, he was violating no instructions, and he was engaged in doing permitted work which the defendant felt was in the best interest of the employer-employee relation.

In order to recover under the Workmen's Compensation Act, the plaintiff must prove that the death or disability of the workman was the result of an accident arising out of and in the course of the employment.

In determining whether or not a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether or not it is reasonably incident thereto, or if it is so substantial a deviation as to constitute a break in the employment which creates a formidable independent hazard. Oline v. Nebraska Natural Gas Co., 177 Neb. 851, 131 N. W. 2d 410.

In Uzendoski v. City of Fullerton, 177 Neb. 779, 131 N. W. 2d 193, a case similar in principle, this court said: "It is argued by the defendant that plaintiff's assigned duties did not require him to be on the springboard and that he was not at the station where he was assigned,

and was therefore outside the employment. On the other hand he was on the premises where he was required to be. He was permitted to use the pool while on duty and was not violating any rule or instruction of the employer. He was not, however, performing the precise work of his employment at the time of the accident. The act of diving into the pool was reasonably incident to the employment in that it was a matter of personal convenience immediately connected with his work. The case is similar in principle to Appleby v. Great Western Sugar Co., Inc., *supra,* and is controlled by that case wherein it is said: 'The term arising out of the employment in the Workmen's Compensation Act covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment.' We think, under all the circumstances shown, that plaintiff was on the springboard for a purpose that was reasonably incidental to his work, and that the accident arose out of his employment." See, also, Appleby v. Great Western Sugar Co., Inc., 176 Neb. 102, 125 N. W. 2d 103; Speas v. Boone County, 119 Neb. 58, 227 N. W. 87.

Defendant insists that there can be no recovery because deceased was repairing his own car when the accident occurred. Ordinarily, when an employee leaves the service of the employer to perform work of his own, he will be held to have deviated from his employment. But the work of deceased was so interwoven with that of the employer, particularly with the permission given to perform it on the employer's time at the employer's place of business, that, after a consideration of all the evidence and circumstances, we conclude that it was inci-

dental to the employment and within the scope of the Workmen's Compensation Act.

The facts are not in dispute. The question is solely whether or not the factual situation placed the deceased within the scope of the Workmen's Compensation Act. We have many times said that a liberal construction of the law should be given to it to accomplish its beneficent purposes. Oline v. Nebraska Natural Gas Co., *supra;* Spangler v. Terry Carpenter, Inc., 177 Neb. 740, 131 N. W. 2d 159.

Since the trial court came to this same conclusion, its judgment must be affirmed. An attorney's fee of $500 is allowed to plaintiff for services rendered by her attorney in this court.

AFFIRMED.

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51. In dealing with the admission of questions calling for expert testimony, much must be left to the discretion of the trial court; and its rulings will ordinarily not be revised unless they are plainly prejudicial to the rights of the excepting party. Fowler v. Bachus ---------- 558

52. In an appeal to the district court from an order of a freeholder's board, it is jurisdictional that a notice of appeal be served upon the county clerk and a bond be executed and approved by the county clerk within 20 days after the action of the board has been entered upon the records of the board by the county clerk of the county in which the real estate is located. Reiber v. Harris ---------- 582

53. In a summary judgment proceeding a finding that no genuine issue existed as to any material fact is presumed to have been correct in the absence of a bill of exceptions, and the only issue on appeal is the sufficiency of the pleadings to support the judgment. State ex rel. Stulp v. Muscheites ---------- 674

54. The requirement that a plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified within the time specified is mandatory and jurisdictional. Adams v. City of Omaha ---------- 684

55. The filing of a copy of a final judgment or order, not purporting to be a transcript of the proceedings containing it, and without evidence as to its source, does not constitute a transcript of the proceedings within the meaning of statute regulating error proceedings. Adams v. City of Omaha ---------- 684

56. Ordinarily the Supreme Court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties. Kansas-Nebraska Nat. Gas Co., Inc. v. Consumers P. P. Dist. ---------- 687

57. 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. Weiss v. Weiss ---------- 714

58. On a direct appeal from an order of an administrative agency to the Supreme Court the constitutionality of an act under which the administrative agency is proceeding may be raised for the first time in the Supreme Court, since it is the first opportunity to raise such issue before a judicial tribunal. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783

59. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions, and the true meaning thereof will be determined not from the sentence or phrase alone but by a consideration of all that is said on the subject. Davis v. Roosman ---------- 808

60. The finding of the jury that neither party was entitled to recover foreclosed the possibility of prejudicial error in the receipt or rejection of evidence on the subject of damages. Davis v. Roosman ---------- 808

61. In determining the sufficiency of the evidence to sustain a judgment it must be considered in the light most favorable to the successful party. Breese v. Newman ---------- 878

Appearances.

1. An appearance is special when its sole purpose is to question the jurisdiction of the court over the person or subject matter of the action. Busboom v. Gregory ---------- 254

2. The request of an unsuccessful litigant for the court to enter a judgment or final order is not a general appearance or a consent judgment barring an appeal where the entry of a final order or judgment is necessary only to the obtaining of the right of review to which he is entitled as a matter of law. Busboom v. Gregory ---------- 254

3. Where a defendant files a cross-petition asking for affirmative relief, it constitutes a general appearance and gives the court jurisdiction of the cross-petitioner. Graff v. Graff ---------- 345

Arrest.

1. In making an arrest, an officer may use whatever force is reasonably necessary. Reasonable force is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting

officer, would have deemed necessary under the circumstances. Breese v. Newman ---------- 878

2. Generally, an officer has no right to shoot or kill a person who is committing a misdemeanor except in self-defense. Breese v. Newman ---------- 878

3. Where it is clear from the facts and circumstances which existed at the time that an officer intended to make an arrest, no further notice of the intention to make the arrest is necessary. Breese v. Newman ---------- 878

4. Ordinarily, it is a question for the jury whether, under all the facts and circumstances of the case, an officer who fires at the tires of an automobile operated by a misdemeanant used more force than was reasonably necessary to stop the automobile and arrest the misdemeanant. Breese v. Newman ---- 878

Attorney and Client.

1. In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. State ex rel. Nebraska State Bar Assn. v. Nielsen ---------- 55

2. An attorney, as an officer of the Supreme Court, must so conduct himself as to assist in maintaining confidence in the integrity and impartiality of the court. State ex rel. Nebraska State Bar Assn. v. Nielsen ---------- 55

3. The ethical standards relating to the practice of the law in this state are the Canons of Professional Ethics of the American Bar Association which have been or may be, from time to time, approved by the Supreme Court. State ex rel. Nebraska State Bar Assn. v. Nielsen ---------- 55

4. Violation of a code of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Nielsen ---------- 55

5. The findings to sustain disbarment must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal

action. State ex rel. Nebraska State Bar Assn. v. Nielsen ---------- 55
6. An action to discipline an attorney at law is not a criminal proceeding and constitutional provisions guaranteeing the right to counsel do not apply. State ex rel. Nebraska State Bar Assn. v. Nielsen -- 55
7. Where adultery by a wife is established, she is not entitled to an award of alimony and ordinarily will not be allowed an attorney's fee or an award of costs. Houghton v. Houghton ---------- 275
8. The disbarment of an attorney is required where he converted the proceeds of a judgment collected for a client and refused to return an unearned retainer after his withdrawal from a case. State ex rel. Nebraska State Bar Assn. v. Blanchard ------ 452
9. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client. State v. Newman ---------- 746
10. The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association, including the additions and amendments as of January 1, 1945, thereto, and those which may from time to time be approved by the Supreme Court. State v. Newman ---------- 746
11. The county attorney cannot be disqualified from performing his official duties by statements made to him, because the relation of attorney and client cannot be effected where unlawful conduct is involved. State v. Newman ---------- 746

Automobiles.

1. Rule as to intervening cause in automobile cases stated. Stevens v. Shaw ---------- 34
2. Stopping for different causes, and according to the exigencies of the occasion, is a natural part of the "travel." The right to stop when the occasion demands is incident to the right to travel. Stevens v. Shaw ---------- 34
3. A momentary stop to discharge a passenger does not constitute parking or stopping in a negligent manner. Stevens v. Shaw ---------- 34
4. Rule for determination of damages to an automobile stated. Sober v. Smith ---------- 74
5. A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence

which may be considered with all the other facts and circumstances in determining whether or not a party was negligent. Morrissey v. Johnson ---- 219

6. The giving of the statutory signal for a turn at a highway intersection will not alone absolve the driver from a charge of negligence when he fails to exercise ordinary care for his own safety and that of others by looking to the front and rear for the approach of other vehicles. Morrissey v. Johnson 219

7. In a case where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact for the jury. Morrissey v. Johnson ---------- 219

8. An automobile accident is a "transaction" within the meaning of the dead man's statute. Bowers v. Maire ---------- 239

9. A guest by the terms of statute is a person who accepts a ride in a motor vehicle without giving compensation therefor. Davis v. Landis Outboard Motor Co. ---------- 391

10. The words of the statute "without giving compensation therefor" do not limit compensation to persons paying for transportation in cash or its equivalent and do not require that the compensation be exclusively from the passenger to the driver. Davis v. Landis Outboard Motor Co. ---------- 391

11. Rule stated as to who is and who is not a guest within the meaning of motor vehicle guest statute. Davis v. Landis Outboard Motor Co. ---------- 391

12. A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation. Davis v. Landis Outboard Motor Co. ---------- 391

13. The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise or other relationship, is generally one for determination in the individual case. It must be ascertained from facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident. Davis v. Landis Outboard Motor Co. ---------- 391

14. An essential element necessary to be proved to entitle a passenger in an automobile to recover damages from the host on the ground of negligence less than gross is that he is a passenger for hire. Davis v. Landis Outboard Motor Co. ---------- 391
15. The fact that an automobile got out of the driver's control does not establish negligence and much less gross negligence, nor does it prove the proximate cause of the accident. Negligence is not presumed and cannot be inferred from the fact that there was an accident. Davis v. Landis Outboard Motor Co. 391
16. Proof that an employee was performing service for his employer at the time employee's automobile collided with the automobile of another because of employee's negligence may be proved by circumstantial evidence. Watts v. Zadina ---------- 548
17. The accidental discharge of a loaded gun in an automobile being used to transport a minor home after a hunting trip is not an accident within the contemplation of the term "arising out of the use" of an automobile, under the facts in this case. National Union Fire Ins. Co. v. Bruecks ---------- 642
18. Where a child beyond a tender age is in the position of a gratuitous passenger in a motor vehicle, such child is a "guest" within the meaning of the applicable guest statute. Kolar v. Divis ---------- 756
19. A 13-year-old child riding as a gratuitous passenger in a motor vehicle is a guest within the purview of the motor vehicle guest statute. Kolar v. Divis -- 756
20. The sudden emergency rule in automobile cases stated. Davis v. Roosman ---------- 808
21. Duty of driver of motor vehicle to keep a proper lookout stated. Willey v. Parriott ---------- 828
22. Snow, mist, fog, or other conditions which affect visibility are not intervening causes but are conditions which require a driver to exercise a degree of care commensurate with the circumstances. Willey v. Parriott ---------- 828
23. A driver who is suddenly confronted by an emergency requiring instant decision is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong. Willey v. Parriott ---------- 828
24. The sudden emergency rule cannot be invoked unless there is evidence to show that a sudden emergency actually existed, that the party invoking the rule

did not create the emergency, and that he used due care to avoid it. Willey v. Parriott ---------- 828

25. Where reasonable minds may differ as to whether the driver of a motor vehicle exercised the care, caution, and prudence required of him under the circumstances of the particular situation, the issue of his negligence is one of fact for the jury. Willey v. Parriott ---------- 828

26. Where an employee is required to furnish and maintain an automobile at his own expense for use in his employment, the furnishing and maintaining of the automobile is the responsibility of the employee and not of the employer. Hardin v. Moorman Manuf. Co. ---------- 869

27. Where an automobile is repaired to correct a defect occurring while the employee is engaged in the service of the employer, injuries incurred by the employee during the making of such repairs in the course of the employment are ordinarily considered as arising out of and in the course of the employment. Hardin v. Moorman Manuf. Co. ------- 869

Bonds.

1. Ordinarily an appellant is not a competent surety for himself, but a bond signed by a principal, who also signs as the only surety, while it may be insufficient or defective or invalid as a bond, is not void for the purpose of determining whether jurisdiction on appeal is acquired. Jacobitz v. Bussinger 524

2. Where the record shows that an appeal bond was delivered to the proper official within the time provided by law, a delay by the official, for his own reasons, in actually performing, entering, or recording the official filing should not prevent the district court from acquiring jurisdiction on appeal. Jacobitz v. Bussinger ---------- 524

Boundaries.

1. The meander lines of a river as established by the original government survey are not boundary lines unless made so by the instrument of conveyance. Hartwig v. Berggren ---------- 718

2. The mean line establishing the center of a river as shown by the original survey is not evidence of the location of the thread of a river or stream. Hartwig v. Berggren ---------- 718

3. The thread of a river or stream is the line which

would give riparian owners on both sides access to the water whatever its stage may be, particularly at its lowest flow. Hartwig v. Berggren ---------- 718

4. Title by prescription may be acquired to an island in a river or stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong. Hartwig v. Berggren ---------- 718

Carriers.

1. It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. 470
2. Although the Nebraska State Railway Commission has broad powers of regulation, it does not enjoy the freedom of an owner of the carrier. Unless public necessity requires it, the discretion of the carrier in establishing and maintaining its stations should not be interfered with by the commission. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. 470

Conspiracy.

1. An action of conspiracy sounds essentially in tort. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. Without the scienter persons cannot conspire. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 169
2. Where a conspiracy to take plaintiff's business was involved, the actionable character of the means that may be used is determined from the use to which they are put. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 169

Constitutional Law.

1. The constitutional validity of an act of the Legislature is to be tested and determined not by what has been or possibly may be done under it, but by what the law authorized to be done under and by virtue of its provisions. Bachus v. Swanson ------ 1

2. Legislative act imposing penalty for failure to return intangible property for taxation was unconstitutional. Bachus v. Swanson ---------- 1
3. 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 ---- 49
Alumni Control Board v. City of Lincoln ---------- 149
4. Constitutionality of law relating to annexation of property is not determined. Shields v. City of Kearney ---------- 49
5. Due process of law is the right to a fair hearing before some tribunal having jurisdiction to determine the controversy in question. Weiner v. State 297
6. The Constitution of Nebraska guarantees the right to be heard in all civil cases in the court of last resort, but that guarantee is dependent upon its exercise in strict conformity to law. Weiner v. State 297
7. Under the facts and circumstances in this case, the failure to appoint counsel for the defendant at the time of the preliminary hearing was not a denial of procedural due process or a violation of the defendant's constitutional right to the assistance of counsel. State v. Sheldon ---------- 377
8. An act of the Legislature stating the fact of emergency, without stating the nature of or the grounds constituting the emergency, is sufficient. Read v. City of Scottsbluff ---------- 410
9. A corporation may be dissolved by a surrender of its charter with the consent of the sovereignty creating it. Such a dissolution is not invalid as impairing the obligation of the contracts of the corporation with third persons. Christensen v. Boss -- 429
10. Statute creating Nebraska Power Review Board is not violative of the impairment of contract clauses, the due process clauses, and the equal protection clauses of the state and federal Constitutions. City of Auburn v. Eastern Nebraska Public Power Dist. 439
11. Statute providing for transfer of land from one school district to another is not invalid in that it confers legislative powers upon a local board in violation of the provisions of the Constitution of Nebraska. De Jonge v. School Dist. of Bloomington 539
12. The use of any confession obtained in violation of due process clause of the state and federal Constitutions requires reversal of the conviction even though

unchallenged evidence adequate to convict remains. State v. Long ---------- 606

13. A secret interrogation of a defendant charged with a felony, when the accused has asked for and been denied the presence of his counsel, is a violation of his constitutional rights. State v. Long -- 606

14. Constitutional provisions are not subject to rules of strict construction. Carpenter v. State ---------- 628

15. Where a constitutional amendment is duly and regularly adopted by the electorate with notice on the ballot as to two specific provisions of the amendment, the fact that one of the provisions is unconstitutional does not invalidate both, where the remaining provision is capable of enforcement alone, and is not dependent upon nor interwoven with the other, and can be operative with the void portions eliminated. Carpenter v. State ---------- 628

16. Each and every clause in a constitution has been inserted for some useful purpose, and the fact that the provision was an amendment rather than an original part of the constitution in no sense changes that principle. Carpenter v. State ---------- 628

17. Article III, section 5, of the Constitution of Nebraska, as amended in 1962, is a valid and subsisting part of the Constitution, and is in full force and effect, except the last sentence thereof, which sentence has been declared to be violative of the United States Constitution. Carpenter v. State -- 628

18. The provisions of Article III, section 5, of the Constitution of Nebraska, require any apportionment or reapportionment of legislative districts to be based solely on population. Carpenter v. State -------- 628

19. Legislative act on apportionment did not constitute a delegation of power to the City of Beatrice to alter legislative boundaries, or deprive the city of its power of annexation. Carpenter v. State -- 628

20. Legislative act on apportionment did not create any unconstitutional hindrance or impediment to the right of a qualified voter to exercise the elective franchise, and does not violate Article I, section 22, of the Constitution of Nebraska. Carpenter v. State ---------- 628

21. An ordinance of a city which has for its sole purpose the closing of legitimate business on Sunday and other Sabbatical days to promote religious observance does not promote the health, safety, peace, and

good order of the city's inhabitants. Skag-Way Department Stores, Inc. v. City of Omaha 707

22. A legislative body may make a reasonable classification of persons for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate its enactment. Skag-Way Department Stores, Inc. v. City of Omaha 707

23. In determining whether or not a classification of persons is unconstitutional, discrimination is the essence of classification and is not objectionable unless founded upon distinctions which the court is compelled to find unreasonable. Skag-Way Department Stores, Inc. v. City of Omaha 707

24. A city ordinance providing for Sunday closing cannot prohibit that which is harmless in itself, or require that to be done which does not promote the health, safety, peace, and good order of society. Skag-Way Department Stores, Inc. v. City of Omaha 707

25. A prohibition of activities on Sunday for the promotion of the health, safety, peace, and good order of society by requiring a periodic day of rest is sustainable as a proper exercise of the police power if the classification of persons to which it applies is reasonable. Skag-Way Department Stores, Inc. v. City of Omaha 707

26. In order to determine whether or not persons or transactions within the provisions of an act are on a different basis from those excluded, the purpose of the act is of great importance. The objects and purposes of a legislative act afford the basis for determining the propriety of the classification. Skag-Way Department Stores, Inc. v. City of Omaha 707

27. Legislation which is directed to a portion of a class, and the object of the legislation applies equally to the whole as well as the part, the legislation is discriminatory and contravenes constitutional provisions requiring uniformity as to class. Skag-Way Department Stores, Inc. v. City of Omaha 707

28. Where prior decisions of a court are based on distinctions and circumstances which no longer exist, it is the province of the courts to reexamine their holdings in the light of the changed conditions and circumstances in determining the constitutionality of

legislation. Skag-Way Department Stores, Inc. v. City of Omaha ---------- 707

29. A plea of guilty by defendant does not necessarily waive his constitutional right to counsel. State v. Ninneman ---------- 729

30. Any constitutional right or guarantee may be waived although the waiver must be an intelligent relinquishment or abandonment of a known right or privilege. State v. Ninneman ---------- 729

31. Payments made by a public power district to a municipality under the facts and the agreement here involved are not franchise payments within the meaning of Article VIII, section 11, of the Constitution of Nebraska. City of O'Neill v. Consumers Public Power Dist. ---------- 773

32. The power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783

33. The constitutionality of a legislative act must be raised at the earliest opportunity consistent with good pleading and orderly procedure, or it will be considered as waived. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783

34. No one can complain that a statute is unconstitutional unless he is injuriously affected thereby. The courts will not set aside a law as violative of the Constitution for the reason that there is a possibility that one's interest may be injuriously affected in the future. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783

35. A question of constitutionality will not be passed on if the situation is such that the rights of the complaining party would be the same whether or not the statute is held unconstitutional. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783

36. Where it appears that unconstitutional portions of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld. Safeway Stores, Inc. v. Nebraska Liquor Control Commission ---------- 817

37. The right to engage in the sale of intoxicating liquors involves a mere privilege. Restrictive regu-

lations or even a suppression of the traffic do not violate constitutional prohibitions on legislation. Safeway Stores, Inc. v. Nebraska Liquor Control Commission ---------- 817

38. A specified section of act regulating sale of intoxicating liquors was unconstitutional for vagueness, indefiniteness, and uncertainty. Safeway Stores, Inc. v. Nebraska Liquor Control Commission ---------- 817

39. The valid parts of legislative act will be upheld and invalid part rejected where the invalid part was not an inducement to the passage of the act. Safeway Stores, Inc. v. Nebraska Liquor Control Commission 817

Continuances.

A motion for continuance is addressed to the sound discretion of the court. In the absence of a showing of an abuse of discretion, the ruling on the motion will not be disturbed. White Motor Co. v. Reynolds ---------- 91

Contracts.

1. Any person may do business with whomsoever he desires. Also, he may refuse business relations with any person whomsoever. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 169

2. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. Hawthorne v. Cassidy ---------- 245

3. A written contract expressed by clear and unambiguous language is not subject to interpretation or construction. Hawthorne v. Cassidy ---------- 245

4. In construing a writing it is the duty of the court to give the words used their ordinary and popularly accepted meaning in the absence of explanation or qualification. Hawthorne v. Cassidy ---------- 245

5. Words of condition in a promise may indicate a request for a consideration if the happening of the condition will be a benefit to the promisor. Mitchell v. Wilcox ---------- 553

6. The terms of a written contract may be changed by a subsequent parol agreement of the parties at any time before breach. United States F. & G. Co. v. Missouri V. C. Co. ---------- 565

7. A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect because it turns out to be difficult or burdensome

to perform. Kansas-Nebraska Nat. Gas Co., Inc. v. Consumers P. P. Dist. ---------- 687
8. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract. Weiss v. Weiss ---------- 714
9. If a mistake is so fundamental in character that the minds of the parties have not, in fact, met, or if an unconscionable advantage has been gained by a mistake, the remedy is rescission. Sack Lumber Co. v. City of Sargent ---------- 848
10. If a written contract contains a complete obligation without ambiguity as to its object and extent, it is conclusively presumed that the whole agreement of the parties was included therein. Sack Lumber Co. v. City of Sargent ---------- 848
11. All oral negotiations or stipulations between the parties, preceding or accompanying the execution of a written instrument, are regarded as merged in it, and the instrument is treated as the exclusive medium of ascertaining the agreement of the parties to it. Sack Lumber Co. v. City of Sargent ------ 848
12. Reason for rule stated precluding introduction of parol testimony to vary the terms of a written contract. Sack Lumber Co. v. City of Sargent ------ 848
13. Where the evidence as to the terms of an oral contract is conflicting, it is for the jury to pass upon the facts and to determine what the contract was, under proper instructions. Edward Peterson Co. v. Ulysses S. Schlueter Constr. Co. ---------- 883

Corporations.

1. An officer or director of a corporation has a fiduciary relationship to the corporation and its stockholders. Nature of fiduciary relationship stated. Frank H. Gibson, Inc. v. Omaha Coffee Co. -------- 169
2. A corporation must act through its officers and agents. The presumption is that their acts are authorized by the corporation. Koepplin v. Pfister Hybrid Co. ---------- 423
3. While the minutes of the meetings of the board of directors of a corporation are the best evidence of its affirmative actions, parol testimony by a person present at a directors' meeting is competent to prove action actually taken though not recorded in the minutes. Koepplin v. Pfister Hybrid Co. --------- 423
4. A corporation may be dissolved by a surrender of

its charter with the consent of the sovereignty creating it. Such a dissolution is not invalid as impairing the obligation of the contracts of the corporation with third persons. Christensen v. Boss 429

5. The surrender of a charter can be made only by some formal, solemn act of the corporation, and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve that there was to form the compact. It is the acceptance which gives efficacy to the surrender. Christensen v. Boss ---------- 429

6. Where a corporation has had its charter forfeited and its legal existence terminated by dissolution in law, it is no longer a corporation, either de jure or de facto. Such fact may be shown in any case in which the existence of the corporation is properly in issue, and by private individuals as well as by the state. Such dissolution may be shown in a collateral proceeding. Christensen v. Boss ------- 429

7. Where a corporation has in fact been dissolved and no longer exists as a legal entity, the rule of its incapacity to sue or be sued applies regardless of the mode of dissolution. In the absence of statutory provisions to the contrary no action at law can be maintained by or against it as a corporate body or in its corporate name. Christensen v. Boss -- 429

8. By statute in this state, a corporation's existence is prolonged for 5 years after dissolution for the purpose of prosecuting or defending suits by or against it and of enabling it to wind up its affairs as stated therein. Christensen v. Boss ---------- 429

9. Where a statute continues the existence of a corporation for a certain period after its dissolution for the purpose of prosecuting and defending suits, the corporation becomes defunct upon the expiration of such period. In the absence of a provision to the contrary, no action can afterwards be brought by or against it. Christensen v. Boss ---------- 429

10. Statute providing for dissolution of corporation does not distinguish between mature and contingent claims. The section is a limitation on the existence of the corporation itself. Christensen v. Boss ----- 429

11. In a merger of corporations to which Kansas law is applicable, all debts, liabilities, and duties of the respective constituent corporations shall thenceforth attach to such corporation as has resulted from the consolidation or merger, and may be enforced against

it to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it. Kansas-Nebraska Nat. Gas Co., Inc. v. Consumers P. P. Dist. ---------- 687

12. The authority given a public corporation to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances. City of O'Neill v. Consumers Public Power Dist. ---------- 773

Counties.

1. The county board of equalization has never been given authority by the Legislature to impose penalties, nor to hear any protests involving the penalties imposed or the waiver of them. Bachus v. Swanson ---------- 1
2. The duty imposed on the county board by statute on incorporating a village is mandatory and the action of the board is ministerial in nature. Little v. Board of County Commissioners ---------- 655
3. Where a proper petition is presented under statute for incorporating a village complying with the jurisdictional provisions, the county board has no discretion and a failure on its part to act would justify the interference of the courts by mandamus. Little v. Board of County Commissioners ---------- 655

Courts.

1. The district court has exclusive jurisdiction to adjudicate controversies between the executor and persons claiming adversely to the estate. Graff v. Graff 345
2. A court is not at liberty to ignore an erroneous legislative declaration of emergency when the validity of the law depends upon the actual existence of an emergency of a kind which will justify the action taken. Read v. City of Scottsbluff ---------- 410
3. The power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783

Criminal Law.

1. The State's right to appeal in a criminal case is limited by the terms of statute. State v. Taylor -- 42
2. The right of the county attorney to seek review of questions of law in criminal cases is limited to

those cases in which a final order or judgment in the criminal case has been entered. State v. Taylor -- 42

3. On an appeal by the State, a judgment or order of the district court may not be reversed nor in any manner affected where the defendant in the trial court has been legally placed in jeopardy. State v. Taylor ---------- 42

4. The Legislature did not intend to provide a procedure by which appeals could be taken from the district court to the Supreme Court for the purpose of securing advisory opinions to govern the rulings of the trial court in a pending criminal case. State v. Taylor ---------- 42

5. While a criminal case is still pending in the district court as a result of sustaining a motion for new trial, an appeal may not be had to the Supreme Court for the purpose of securing rulings on questions of law that may arise on retrial of the case. State v. Taylor ---------- 42

6. The legitimate scope and purpose of statute authorizing appeals by the State are to secure authoritative expositions of law to be used as precedent and govern in similar cases, or cases arising thereafter, but not to affect the right of the defendant in a particular case, except to the limited extent wherein a final order has been entered discharging the defendant before the defendant has been placed in jeopardy. State v. Taylor ---------- 42

7. A motion for a new trial in a criminal case upon grounds other than newly discovered evidence must be filed within 10 days after rendition of the verdict unless the movant is unavoidably prevented from doing so. State v. Losieau ---------- 54

8. The testimony of a witness in a criminal action which identifies a defendant as a participant in the commission of a crime is sufficient to sustain a finding of guilt if the witness had a reasonable opportunity to observe and recognize the defendant. State v. Konvalin ---------- 95

9. In a criminal action, an appellate court will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that it can be said as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Konvalin ---- 95

10. A gun found under circumstances tending to show that it was used in the commission of a crime and

tending further to show ownership or possession by the accused is admissible as evidence. State v. Konvalin ---------- 95

11. The credibility of witnesses and the weight of the evidence in a criminal action are for the jury to determine. State v. Konvalin ---------- 95

12. The verdict of a jury based upon conflicting evidence in a criminal action will not be disturbed by the Supreme Court unless it is clearly wrong. State v. Konvalin ---------- 95

13. When the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Konvalin ---------- 95

14. In the sentencing of a defendant after conviction of a criminal offense, the words "consecutive into the sentences defendant is now serving" mean consecutive to the sentences defendant is now serving. Shultz v. Sigler ---------- 155

15. The use of the word "into" in such a criminal sentence does not create an ambiguity from which the term of the sentence cannot be determined. Shultz v. Sigler ---------- 155

16. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Swiney 230
State v. Sheldon ---------- 377

17. The Supreme Court will not interfere with a verdict of guilty which is based on conflicting evidence unless the evidence is so lacking in probative force that it is insufficient as a matter of law to support a finding of guilt beyond a reasonable doubt. State v. Swiney ---------- 230
State v. Sheldon ---------- 377
State v. Brown ---------- 386
State v. Hizel ---------- 661
State v. Swanson ---------- 693
State v. Eberhardt ---------- 843

18. Any person who is present at the place of the crime, aiding and assisting in the commission of the crime, is a principal. State v. Swiney ---------- 230

19. Evidence of other similar acts and offenses is admissible where an element of the crime charged is

motive, criminal intent, or guilty knowledge. State v. Swiney ---------- 230

20. In the absence of the showing of an abuse of discretion, the Supreme Court will not disturb a sentence imposed within the limits prescribed by the statute. State v. Swiney ---------- 230
State v. Sheldon ---------- 377

21. The purpose of a preliminary hearing stated. State v. Sheldon ---------- 377

22. Under the facts and circumstances in this case, the failure to appoint counsel for the defendant at the time of the preliminary hearing was not a denial of procedural due process or a violation of the defendant's constitutional right to the assistance of counsel. State v. Sheldon ---------- 377

23. The habitual criminal act does not create a new offense but provides a greater penalty for repetition of criminal conduct. State v. Sheldon ---------- 377

24. The testimony of an accomplice, if it satisfies the jury beyond a reasonable doubt of the guilt of the defendant, may be sufficient to warrant a conviction, although not corroborated. State v. Brown -- 386

25. Rule as to sufficiency of circumstantial evidence to sustain a conviction stated. State v. Brown ---------- 386

26. An appeal by the State from a final order in a criminal case will be dismissed if no application for leave to docket error proceedings is presented to the Supreme Court within 1 month from the date of the final order. State v. Satterfield ---------- 451

27. The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such a conclusive nature as to exclude every reasonable hypothesis except that of guilt. State v. McCreary 589

28. In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce written confessions, statements, and other evidence for the inspection of defendant's counsel before the trial. Error may be predicated only for an abuse of such discretion. State v. McCreary ---------- 589

29. In a criminal trial a confession of guilt alleged to have been made by the defendant is not competent as evidence, unless first shown to have been voluntarily made. State v. Long ---------- 606

30. Procedure necessary to justify admission of confession in evidence stated. State v. Long --------- 606
31. The admission of a confession in evidence constitutes the court's independent determination that the confession is voluntary. State v. Long -------- 606
32. The question of whether or not in the first instance the State has laid proper and sufficient foundation for the admission of a confession is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid, then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact for the jury. State v. Long ---------- 606
33. The use of any confession obtained in violation of due process clause of the state and federal Constitutions requires reversal of the conviction even though unchallenged evidence adequate to convict remains. State v. Long ---------- 606
34. A confession prompted by remorse and a gnawing consciousness of guilt is not because thereof inadmissible. State v. Long. ---------- 606
35. A secret interrogation of a defendant charged with a felony, when the accused has asked for and been denied the presence of his counsel, is a violation of his constitutional rights. State v. Long -------- 606
36. Where the accused was informed of his right to counsel and warned of his right to remain silent, and thereafter confesses to participation in a crime, there is no rule excluding the use of such a confession because of lack of counsel. State v. Long -- 606
37. The generally accepted test of responsibility for crime is the capacity to understand the nature of the act alleged to be criminal, and the ability to distinguish between right and wrong with respect to such act. State v. Long ---------- 606
38. Where the evidence and circumstances of the crime are such that different conclusions may properly be drawn therefrom as to degree, the trial court is without error in submitting the different degrees to the jury for its determination. State v. Hizel -- 661
39. A defendant in a criminal action who solicits that part of a judgment against him which delays the execution of his sentence cannot question any infirmity which may be involved in such suspension. Stuckey v. Rohnert ---------- 727
40. Proof of prior convictions under motor vehicle

statute is properly made by offering in evidence the complaint or information in the judgment rendered on the verdict or the plea of guilty, evidence that the judgment has become final, and that the defendant is the same person presently before the court. State v. Ninneman ---------- 729

41. A plea of guilty to a complaint waives any objection to it which could have been asserted by a motion to quash or a plea in abatement. State v. Ninneman -- 729

42. Defendant in any criminal prosecution must be given a reasonable opportunity to employ and consult with counsel. State v. Ninneman ---------- 729

43. The mere fact that testimony is uncontradicted does not mean that it must be accepted as true on the hearing. Credibility is for the triers of the facts. State v. Ninneman ---------- 729

44. A plea of guilty by defendant does not necessarily waive his constitutional right to counsel. State v. Ninneman ---------- 729

45. It is not the province of the Supreme Court in a criminal case to pass on the credibility of witnesses or weigh the evidence unless it is lacking in probative force as a matter of law. State v. Ninneman ---------- 729

46. The fact that a county attorney sat at the counsel table with the special prosecutor, and assisted him in the preparation and details of the trial is not sufficient to require a reversal where he conducts himself in a manner consistent with his position as a witness or his interest as an officer of the State. State v. Newman ---------- 746

47. The county attorney cannot be disqualified from performing his official duties by statements made to him, because the relation of attorney and client cannot be effected where unlawful conduct is involved. State v. Newman ---------- 746

48. Instructions were adequate under the circumstances. State v. Newman ---------- 746

49. A photograph to be admissible must be a direct reproduction of the person, place, or thing which it purports to represent before it is competent as evidence. State v. Newman ---------- 746

50. The admission or rejection of cumulative evidence is ordinarily within the discretion of the trial court, and a ruling thereon will not be held erroneous unless an abuse of such discretion clearly appears. State v. Newman ---------- 746

51. In a criminal action a finding of guilt based upon evidence without probative force is prejudicially erroneous. State v. Gunn ---------- 815
52. When an affidavit of poverty is filed in a criminal case and stands uncontradicted, unobjected to, and no hearing on it is called for or had, the defendant is entitled to the benefits of a free bill of exceptions and docketing of case without charge. State v. Eberhardt ---------- 843
53. In a criminal case, where the court, on its own motion or on objection, holds a hearing and inquires into the truthfulness or good faith of a poverty affidavit, the determination of the defendant's inability to pay the costs is within the sound discretion of the trial court, and its decision thereon will not be disturbed on appeal unless it amounts to an abuse of discretion. State v. Eberhardt -------- 843
54. Under statute, a defendant is required to file a written bond with one or more sureties in the amount fixed by the court as a condition precedent to an appeal in a misdemeanor case. State v. Mills ---- 853
55. The bond required by statute for appeal in misdemeanor case is jurisdictional and objection to its validity may be raised at any time in any appropriate manner. State v. Mills ---------- 853
56. A defendant may not complain on appeal of the failure of the trial court to permit the posting of a valid appeal bond in lieu of a defective one, assuming that such right existed, when no request was made in the trial court to do so. State v. Mills ---- 853

Damages.

1. The measure of recovery in all civil actions in this state is compensation for the injury sustained. Sober v. Smith ---------- 74
2. Rule for determination of damages to an automobile stated. Sober v. Smith ---------- 74
3. In an action at law for the loss of good will, the evidence must contain sufficient data to enable a jury, with a reasonable degree of certainty and exactness, to estimate the actual damages. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 169
4. The question of the amount of damages is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the

elements of injury and damage proved. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 169
5. The measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement. Wolfe v. State ---------- 189
6. The compensation due the landowner is to be determined by the difference in the value of the property before and after the taking and not by a method which separately values the easement or right that is taken. Wolfe v. State ---------- 189
7. In condemnation proceedings the burden of proof is upon the landowner to prove the nature and amount of his pecuniary damages. Wolfe v. State 189
8. In a personal injury action future loss of earnings is not necessarily measured by plaintiff's calling or income at the time of injury. Morford v. Lipsey Meat Co., Inc. ---------- 420
9. The finding of the jury that neither party was entitled to recover foreclosed the possibility of prejudicial error in the receipt or rejection of evidence on the subject of damages. Davis v. Roosman -- 808

Deeds.

1. Whether a deed is delivered or not ordinarily depends on the intention of the grantor, determinable from the circumstances of the case. DeLong v. Mohr 114
2. No particular acts or words are necessary to constitute delivery, but anything done by the grantor, by words or acts from which it is apparent that delivery was intended and that the instrument passed beyond his dominion, control, or authority is sufficient. DeLong v. Mohr ---------- 114
3. It is not necessary that the grantor deliver the deed to the grantee personally, it is sufficient if it is delivered to a third person unconditionally for the use of the grantee. DeLong v. Mohr ---------- 114
4. A grantor's wife or other cograntor may be the third person to whom lawful delivery of a deed may be made by a grantor for the use and benefit of the grantee. DeLong v. Mohr ---------- 114
5. The exercise of control over property after the date of a deed and the failure to record it are not controlling as to delivery and are consistent with the valid unconditional delivery of a title for the use and benefit of a grantee. DeLong v. Mohr ------ 114
6. Conditions subsequent contained in a deed of real

estate will be construed most strongly against contingent devisees and a forfeiture will not be enforced unless clearly established. McArdle v. School Dist. of Omaha ---------- 122

7. To constitute a breach of condition subsequent in a deed relating to maintenance or use of the land conveyed, there must be such neglect to comply as to indicate an intention to disregard the condition. McArdle v. School Dist. of Omaha ---------- 122

8. In a case of a claimed breach of condition subsequent, it is not enough to show that the letter of the condition is violated; it must appear that its true spirit and purpose have been intentionally disregarded by the grantee. McArdle v. School Dist. of Omaha ---------- 122

9. To neglect and to omit are not synonymous terms. There may be an omission to perform an act or condition which is altogether involuntary and inevitable; but neglect to perform must be either voluntary or inadvertent. To neglect is to omit by carelessness or design, not from necessity. McArdle v. School Dist. of Omaha ---------- 122

10. Effect of long continued use of property conveyed upon a condition subsequent stated. McArdle v. School Dist. of Omaha ---------- 122

11. A reservation need not be expressed in the granting clause of the deed but may be contained in the warranty clause, habendum or reddendum clause, or within the four corners of the deed. Bulger v. McCourt ---------- 316

12. Statute relating to construction of instruments requires the Supreme Court to carry into effect the true intent of the parties so far as it can be ascertained from the whole instrument, if not inconsistent with law. Bulger v. McCourt ---------- 316

13. Each word and provision in a conveyance must be given such significance as will make effective the intention of the parties. Bulger v. McCourt ---------- 316

14. Language used in a conveyance prepared by one of the parties thereto which is susceptible to more than one construction should receive such construction as the party preparing the same at the time supposed the other party would give to it, or such construction as the other party would be fairly justified in giving to it. Bulger v. McCourt ---------- 316

15. In the conveyance construed in this case, the words "subject to" excepted one-half of all oil, gas, and

mineral rights from the operation of the questioned conveyance. Bulger v. McCourt ---------- 316

Descent and Distribution.

1. When one claims the estate of a deceased person under an alleged oral contract, the evidence of such contract must be clear, satisfactory, and unequivocal. Kimmel v. Roberts ---------- 8
2. Oral agreements to devise property by will are unenforcible under the statute of frauds because not in writing, even if proved, unless there has been such part performance as the law requires. Kimmel v. Roberts ---------- 8
3. In a suit to enforce an oral agreement embraced within the statute of frauds on the ground of part performance, the acts alleged to constitute part performance must refer to, result from, or be in pursuance of the oral contract sought to be enforced, and not from some other relation. Kimmel v. Roberts ---------- 8

Divorce.

1. The earning capacity of the husband is an element to be considered in the allowance of alimony. Sowder v. Sowder ---------- 29
2. The district court may at any time within 6 months of the trial and decision of a divorce case, if no appeal is taken therefrom, vacate or modify the decree therein. Dennis v. Dennis ---------- 200
3. The right to vacate or modify a decree of divorce within 6 months of the trial and decision of the cause is not absolute but must be exercised within a sound discretion. Dennis v. Dennis ---------- 200
4. In order that it may be said that the court exercised a sound judicial discretion in vacating or modifying a decree of divorce, good reason therefor must be shown and it must also appear that such action did not produce an unconscionable result. Dennis v. Dennis ---------- 200
5. It is the duty of the Supreme Court, on appeal of proceedings to modify a decree of divorce, to try it de novo on the record and to reach a conclusion uninfluenced by what was done by the trial court, except if there is irreconcilable conflict in the evidence the Supreme Court may consider that the trial court saw the witnesses and accepted one version of the facts. Dennis v. Dennis ---------- 200

6. The petitioner or moving party who seeks to vacate a divorce degree has the burden of proving the grounds charged by a preponderance of evidence, and where this burden is not sustained, a refusal to vacate the decree is proper. Dennis v. Dennis ----- 200
7. What constitutes good reason for setting aside a decree of divorce or what constitutes an unconscionable result prohibiting it depends upon the facts and circumstances of each particular case. Dennis v. Dennis ---------- 200
8. Where a married person commences an action for a divorce, such party is conclusively bound to know the contents and legal effect of the decree which she herself sought, and where the decree did not purport to grant an absolute divorce such person is estopped from asserting fraud and deceit in contracting a void marriage. Loringer v. Kaplan 215
9. Where the evidence in a divorce action establishes adultery on the part of one of the parties thereto, the court is required to grant the prayer of the other party seeking a divorce on that ground unless prevented from doing so by applicable statutory provisions. Houghton v. Houghton ---------- 275
10. Where a wife is found to be guilty of adultery she is ordinarily an unfit person to have the care and custody of her minor children as against the husband she has wronged. Houghton v. Houghton -- 275
11. Where adultery by a wife is established, she is not entitled to an award of alimony and ordinarily will not be allowed an attorney's fee or an award of costs. Houghton v. Houghton ---------- 275
12. Where in an action for divorce both parents are found to be unfit or unsuitable to have the care and legal custody of the minor children of the parties, the welfare and best interests of the children will constitute the sole consideration in determining the right of custody. Houghton v. Houghton ---- 275
13. Under statute, where the parents of minor children are unfit or unsuitable to have their custody, the separate juvenile court may properly place their legal custody in the chief juvenile probation officer on such terms and conditions as the court may prescribe. Houghton v. Houghton ---------- 275
14. A decree of divorce should only be granted when the evidence brings the case within the definition of the statute providing for such relief. Hahn v. Hahn ---------- 481

15. Corroborative evidence other than the declarations, confessions, or admissions of the parties is required of the acts of conduct asserted as grounds for a divorce. Hahn v. Hahn ---------- 481
16. Divorce cases are tried de novo on appeal in the Supreme Court. Read v. Read ---------- 637
17. A general rule by which to measure the exact amount or degree of corroboration required in a divorce case cannot be formulated. Each case must be determined on its own facts and circumstances. Read v. Read ---------- 637
18. Rule for determination of alimony in divorce case stated. Read v. Read ---------- 637

Drains.

1. The proceeding for the establishment of a drainage district as a body corporate is purely statutory. Kuhlman v. Folkers ---------- 80
2. In a proceeding for the establishment of a drainage district under statute referred to in opinion, an objector may properly show that his land will not be benefited by drainage as a basis for the noninclusion of his lands within the proposed district. Kuhlman v. Folkers ---------- 80
3. The feasibility and route of a drainage ditch is an engineering matter and is not an issue for consideration in the organization of a drainage district. Kuhlman v. Folkers ---------- 80
4. Where the owner of lands included in a proposed drainage district seeks to have such lands excluded on the ground that they will not be benefited, the burden of proof is on him to satisfy the court that they will not be benefited. Kuhlman v. Folkers ---- 80
5. The fact that it may be necessary for the owner of property in a drainage district to incur expense to avail himself of its benefits is not a valid objection to the inclusion of the land in a drainage district. Kuhlman v. Folkers ---------- 80
6. In determining if lands will be benefited by drainage as provided by drainage statute, it is proper to consider whatever will come to the land by drainage to make it more valuable for tillage and more valuable in the general market, the true and final test being what the influence of the proposed improvement will be on the market value of the property. Kuhlman v. Folkers ---------- 80
7. The diversion of seepage and floodwaters by an

irrigation canal built across a natural drain carries with it no right on the part of lower landowners to insist on the continuance of such artificial condition in the absence of evidence affording a basis for an equitable estoppel. Kuhlman v. Folkers ---------- 80

8. An upper riparian owner constructing and maintaining an artificial structure diverting the flow of seepage and floodwaters for a purpose advantageous to him is not obligated by mere lapse of time to maintain the structure and the conditions produced thereby, although it incidentally benefits lower landowners. Kuhlman v. Folkers ---------- 80

9. An irrigation district under such circumstances may discontinue the diversion of seepage and floodwaters at any time by restoring them to their original course through which they were wont to run in a state of nature. Kuhlman v. Folkers -- 80

Elections.

1. Legislative act on apportionment did not create any unconstitutional hindrance or impediment to the right of a qualified voter to exercise the elective franchise, and does not violate Article I, section 22, of the Constitution of Nebraska. Carpenter v. State 628

2. If a candidate for public office gives property of value as compensation for votes, his election will be void. State ex rel. Stulp v. Muscheites -------- 674

Electricity.

1. The statutory authority granted to the Nebraska Power Review Board extends to all electrical transmission lines carrying more than 700 volts, whether for retail or wholesale distribution, to be constructed by any public corporations specified in the act. City of Auburn v. Eastern Nebraska Public Power Dist. ---------- 439

2. Statute creating Nebraska Power Review Board constitutes a legislative entry into a field not theretofore occupied, covers the whole subject to which it relates, and is an independent act complete in itself. City of Auburn v. Eastern Nebraska Public Power Dist. ---------- 439

3. Statutory provisions referred to in opinion are modified by later legislative act to the extent that the powers granted in the latter modify those granted

in the former. City of Auburn v. Eastern Nebraska Public Power Dist. ---------- 439

4. A contract made by one city with another for electric power, which requires the construction of an electric distribution line carrying more than 700 volts, is subject to the provisions of legislative act referred to in opinion unless excepted therefrom, and such line may not be constructed without the approval of the Nebraska Power Review Board. City of Auburn v. Eastern Nebraska Public Power Dist. -- 439
5. The Nebraska Power Review Board is authorized to grant an application, after hearing, when the evidence sustains findings that the granting of an application will serve the public convenience and necessity and that the applicant can most economically and feasibly supply the electric service resulting from the proposed construction without duplication of facilities or operations. City of Auburn v. Eastern Nebraska Public Power Dist. -------- 439
6. Where it appears that the Nebraska Power Review Board has complied with the requirements of the controlling statutes in exercising the powers granted to it by legislative authority, and the evidence is sufficient to support its findings of fact, the Supreme Court may not substitute its judgment for that of the board, and the action of the board will be sustained. City of Auburn v. Eastern Nebraska Public Power Dist. ---------- 439
7. The agreement here involved does not violate the public policy of the State of Nebraska. City of O'Neill v. Consumers Public Power Dist. -------- 773
8. A second-class city has authority to execute a contract with a public power district to purchase the wholesale power requirements of the distribution system located in the municipality for a period of 25 years, effective when the municipality acquires the distribution system. City of O'Neill v. Consumers Public Power Dist. ---------- 773

Eminent Domain.

1. The measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement. Wolfe v. State ---------- 189
2. The compensation due the landowner is to be determined by the difference in the value of the property before and after the taking and not by a

method which separately values the easement or right that is taken. Wolfe v. State ---------- 189
3. In condemnation proceedings the burden of proof is upon the landowner to prove the nature and amount of his pecuniary damages. Wolfe v. State 189
4. The statutory requirement that there be an attempt to agree with the owner prior to the institution of condemnation proceedings is satisfied by an offer made in good faith with a reasonable effort made to induce the owner to accept it. Wolfe v. State -- 189
5. Either condemner or condemnee may appeal from the assessment of damages by the appraisers to the district court of the county where the petition to initiate proceedings was filed. Such appeal is taken by filing a notice of appeal with the county judge within 30 days from the date of filing of the report of appraisers. Weiner v. State ---------- 297
6. Condemnation proceedings become judicial proceedings only when appealed to the district court. Weiner v. State ---------- 297
7. The power conferred upon a county judge by the eminent domain act and the duties required of him by that act are not judicial powers and duties but are purely ministerial in character. Weiner v. State 297
8. Statute on manner of rendition of judgment of district court has no applicability to the filing of the report of the appraisers with the county judge. Weiner v. State ---------- 297
9. In an eminent domain proceeding an unaccepted promise to do something in the future cannot affect the character of the extent of the rights acquired or the amount of damages to be recovered as such compensation. Blobaum v. State ---------- 304
10. Where a statute requires that an attempt to agree with the owner shall first be made before the institution of condemnation proceedings to take private lands for public use, such provision is mandatory. Condemnation proceedings instituted without first making a bona fide attempt to agree with the owner are subject to direct attack. Prairie View Tel. Co. v. County of Cherry ---------- 382
11. The attempt and failure to agree with an owner must be alleged and proved. This must appear on the face of the record. Prairie View Tel. Co. v. County of Cherry ---------- 382
12. In order to satisfy the statutory requirement of attempting to agree with the owner prior to the

institution of condemnation proceedings, there must be a good faith attempt to agree, consisting of an offer made in good faith and a reasonable effort to induce the owner to accept it. Prairie View Tel. Co. v. County of Cherry ---------- 382

Equity.

1. A claim that a subsequent revoking will is a breach of an agreement for the making of irrevocable reciprocal wills may properly be asserted in a court of equity, but not in the probate court by contesting the later will or by objection to a decree of distribution. Kimmel v. Roberts ---------- 25
2. If a defendant in an action in equity moves at the close of the evidence of the plaintiff for a dismissal of the action for want of proof to support a judgment, he admits the truth of the evidence and any reasonable conclusions deducible from it. Graff v. Graff ---------- 345
3. A cross-petition is maintainable either to aid in the defense of the original suit, where affirmative equitable relief is required to make such defense effective, or to obtain a complete adjudication of the controversies between the original complainant and the cross-complainant over the subject matter of the original suit. Rogers v. Western Electric Co. ---------- 359
4. The rules of chancery practice are so far enlarged under the code that although a cross-petition is more than merely defensive and seeks affirmative relief beyond the purposes of defense, such relief need not be equitable nor need the cross-petition be based on equitable grounds. Rogers v. Western Electric Co. ---------- 359
5. When a defendant in an action in equity moves for a dismissal at the close of plaintiff's evidence, he admits the truth of the evidence and any reasonable inferences deducible therefrom. Koepplin v. Pfister Hybrid Co. ---------- 423
6. Equity will decree the reformation of a contract only for fraud, mutual mistake, or inequitable conduct. Koepplin v. Pfister Hybrid Co. ---------- 423
   Kansas-Nebraska Nat. Gas Co., Inc. v. Consumers P. P. Dist. ---------- 687
7. Where rescission for unilateral mistake of one party would result in serious prejudice to the other party aside from the bargain, and where enforce-

ment of the contract is not unconscionable, equitable relief by way of rescission is improper. Kansas-Nebraska Nat. Gas Co., Inc. v. Consumers P. P. Dist. 687

Estates.

1. Estates upon condition subsequent, which after having become fully vested may be defeated by a breach of condition, are not favored in law. McArdle v. School Dist. of Omaha ---------- 122
2. Conditions subsequent contained in a deed of real estate will be construed most strongly against contingent devisees and a forfeiture will not be enforced unless clearly established. McArdle v. School Dist. of Omaha ---------- 122
3. To constitute a breach of condition subsequent in a deed relating to maintenance or use of the land conveyed, there must be such neglect to comply as to indicate an intention to disregard the condition. McArdle v. School Dist. of Omaha ---------- 122
4. In a case of a claimed breach of condition subsequent, it is not enough to show that the letter of the condition is violated; it must appear that its true spirit and purpose have been intentionally disregarded by the grantee. McArdle v. School Dist. of Omaha ---------- 122
5. To neglect and to omit are not synonymous terms. There may be an omission to perform an act or condition which is altogether involuntary and inevitable; but neglect to perform must be either voluntary or inadvertent. To neglect is to omit by carelessness or design, not from necessity. McArdle v. School Dist. of Omaha ---------- 122
6. Effect of long-continued use of property conveyed upon a condition subsequent stated. McArdle v. School Dist. of Omaha ---------- 122
7. Where there is an outstanding life estate, a remainderman cannot maintain an action for partition of real estate over the objection of the holder of the life estate. Fisher v. Peden ---------- 150
8. A homestead life estate may be conveyed and the grantee of such life estate has a life estate in the property during the life of the original grantor. Fisher v. Peden ---------- 150
9. Ordinarily the homestead rights incidental to a homestead life estate are waived and terminated by the transfer of the homestead property, and the grantee takes an ordinary life estate divested of

the homestead rights of the original grantor. Fisher v. Peden ---------- 150

10. To constitute a merger of title it is necessary that the two estates be in one and the same person, at one and the same time, and in one and the same right. Fisher v. Peden ---------- 150

11. An election of the owner of a homestead life estate to partition the premises subject to the life estate constitutes a forfeiture of the life estate, as provided by homestead statute, but such statute does not by analogy provide that the conveyance of such life estate constitutes an election to partition the life estate. Fisher v. Peden ---------- 150

12. Words in partition statute construed and held to mean that a judgment in partition may be defeated by a title paramount to the rights of the joint tenants or tenants in common in the hands of a third person or by such a paramount title acquired by a party to the partition proceeding after the judgment became final. Bender v. Fuchs ---------- 162

13. Forfeitures of estates under leases are not favored in law and covenants will not be extended by implication to sustain a claim of forfeiture. Hawthorne v. Cassidy ---------- 245

14. Where a conveyance of property is made to two or more persons and the instrument is silent as to the interest which each is to take, the rebuttable presumption is that their interests are equal. Giles v. Sheridan ---------- 257

15. The statute of limitations does not begin to run against a remainderman until knowledge is clearly brought home to him that another is claiming title adversely. Graff v. Graff ---------- 345

16. The statute of limitations does not commence to run against an action brought by a remainderman to recover property from a life tenant who has placed it in his own name until knowledge is clearly brought home to the remainderman that there is such property. Graff v. Graff ---------- 345

17. A transfer of property by a donee of a power of sale annexed to a life estate must be made in good faith for an adequate consideration; and if the donee exceeds his authority, the court will revise his judgment. Mitchell v. Wilcox ---------- 553

Estoppel.

1. An estoppel, which would operate as a bar to the

return of drainage waters to the original water-course existing in a state of nature, requires a change of condition such as the construction of works or the expending of money in reliance on the permanence of the diversion. Kuhlman v. Folkers 80

2. A party to a partition action who has been properly served with process and raises no issue of title is estopped by judgment from subsequently asserting ownership of the partitioned premises by adverse possession. Bender v. Fuchs ---------- 162

3. A party to a partition judgment who has acquiesced therein and accepted his share of the partitioned estate is estopped from questioning the title of the purchaser of the partitioned property as described and determined by the court. Bender v. Fuchs -- 162

4. A single previous transaction, standing alone, is ordinarily insufficient to establish a course of conduct that will sustain liability by estoppel or agency by apparent authority. Johnson v. Francis ------ 342

5. Equitable estoppel cannot in the nature of things be subjected to fixed and settled rules of universal application like legal estoppel, nor be hampered by the narrow confines of a technical formula. National Union Fire Ins. Co. v. Bruecks ---------- 642

6. Equitable estoppel rests largely on the facts and circumstances of the particular case. National Union Fire Ins. Co. v. Bruecks ---------- 642

7. Assumption of complete control of a matter involving a possible claim for a period of 17 months, with the consequent need of cooperation under the terms of the policy, constituted a sufficient showing of prejudice as a basis for urging estoppel. National Union Fire Ins. Co. v. Bruecks ---------- 642

Evidence.

1. A gun found under circumstances tending to show that it was used in the commission of a crime and tending further to show ownership or possession by the accused is admissible as evidence. State v. Konvalin ---------- 95

2. Whenever the point is reached at which a trier of fact is being told that which it is itself entirely equipped to determine without a witness' aid, the testimony is superfluous. Sears v. Mid-City Motors, Inc. ---------- 100

3. Where no motion for a more specific statement is filed, it is competent under the general allegation

of negligence to offer evidence of any fact which contributed to the injury. Bunselmeyer v. Hill -- 140
4. A party should not be permitted to cross-examine a witness as to a matter foreign to the scope of his direct examination. The rule of strict cross-examination has been adopted and is in force in this state. Bunselmeyer v. Hill ---------- 140
5. A ruling of the trial court in regard to the scope of cross-examination will be sustained unless it is an abuse of discretion. Bunselmeyer v. Hill -------- 140
6. The jury is the sole judge on all fact questions. To justify the Supreme Court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of the reviewing court to correct the mistake. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 169
7. Evidence of other similar acts and offenses is admissible where an element of the crime charged is motive, criminal intent, or guilty knowledge. State v. Swiney ---------- 230
8. Where evidence is wholly circumstantial, it is insufficient unless the circumstances proved are of such a nature and so related to each other that the conclusion reached is the only one that can be fairly and reasonably drawn therefrom. Bowers v. Maire ---------- 239
9. The report and testimony of a qualified pathologist as to the results of blood grouping tests are admissible in evidence. Houghton v. Houghton ------ 275
10. Judicial recognition should be accorded the accuracy and reliability of blood grouping tests to disprove paternity. Houghton v. Houghton ------ 275
11. In the absence of evidence of a defect in the testing methods, blood grouping tests are conclusive on the issue of nonpaternity. Houghton v. Houghton 275
12. The admissions of fact contained in the pleadings are treated as established and do not require support in the evidence. Bulger v. McCourt ---------- 316
13. Before a party is entitled to introduce the testimony of a witness given on a former trial, he must show that by exercising reasonable diligence he has been unable to secure the attendance of the witness at the trial. Runyan v. State ---------- 371
14. In a criminal action the Supreme Court will not interfere with a verdict of guilty based on conflicting evidence unless the evidence is so lacking in

probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Brown ---------- 386
15. The testimony of an accomplice, if it satisfies the jury beyond a reasonable doubt of the guilt of the defendant, may be sufficient to warrant a conviction, although not corroborated. State v. Brown 386
16. Rule as to sufficiency of circumstantial evidence to sustain a conviction stated. State v. Brown ------ 386
17. When the facts which form the basis of a conclusion cannot be exhibited adequately, an estimate made by a witness who observed them is competent evidence unless it is based on pure speculation. Redman Industries, Inc. v. Morgan Drive Away, Inc. 406
18. Exclusion of cumulative evidence is ordinarily discretionary. Redman Industries, Inc. v. Morgan Drive Away, Inc. ---------- 406
19. While the minutes of the meetings of the board of directors of a corporation are the best evidence of its affirmative actions, parol testimony by a person present at a directors' meeting is competent to prove action actually taken though not recorded in the minutes. Koepplin v. Pfister Hybrid Co. ------ 423
20. Courts will not as a rule take notice of municipal ordinances unless required to do so by special charter or general law. Chicago Lumber Co. v. Gibson -- 461
21. Under circumstances where the opinion of an expert medical witness becomes, in effect, a "fact" in the case, such an opinion may be included as a basis for a hypothetical question propounded to another expert, where it is not upon the precise question upon which the opinion is expressed. Fowler v. Bachus ---------- 558
22. If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient. Fowler v. Bachus ---------- 558
23. Review is limited where a general objection has been overruled. It reaches only an obvious flaw; otherwise specification is required. Fowler v. Bachus 558
24. In dealing with the admission of questions calling for expert testimony, much must be left to the discretion of the trial court; and its rulings will ordinarily not be revised unless they are plainly prejudicial to the rights of the excepting party. Fowler v. Bachus ---------- 558

25. Rule stated as to when opinion of an expert witness is sufficient to sustain a verdict. Fremont Farmers Union Coop. Assn. v. City of Fremont ---------- 576
26. Under ordinary circumstances, an opinion of an expert witness is to be considered and weighed by the triers of the facts like any other testimony. Fremont Farmers Union Coop. Assn. v. City of Omaha ---------- 576
27. Where evidence based upon opinion of expert witnesses is in conflict, it becomes a question for the jury. Fremont Farmers Union Coop. Assn. v. City of Fremont ---------- 576
28. The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to to connect accused with the crime charged are of such a conclusive nature as to exclude every reasonable hypothesis except that of guilt. State v. McCreary ---------- 589
29. In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce written confessions, statements, and other evidence for the inspection of defendant's counsel before the trial. Error may be predicated only for an abuse of such discretion. State v. McCreary ---------- 589
30. In a criminal trial a confession of guilt alleged to have been made by the defendant is not competent as evidence, unless first shown to have been voluntarily made. State v. Long ---------- 606
31. Procedure necessary to justify admission of confession in evidence stated. State v. Long ---------- 606
32. The admission of a confession in evidence constitutes the court's independent determination that the confession is voluntary. State v. Long ---------- 606
33. The question of whether or not in the first instance the State has laid proper and sufficient foundation for the admission of a confession is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid, then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact for the jury. State v. Long ---------- 606
34. A confession prompted by remorse and a gnawing consciousness of guilt is not because thereof inadmissible. State v. Long ---------- 606

35. Where the accused was informed of his right to counsel and warned of his right to remain silent, and thereafter confesses to participation in a crime, there is no rule excluding the use of such a confession because of lack of counsel. State v. Long 606
36. Proof of prior convictions under motor vehicle statute is properly made by offering in evidence the complaint or information in the judgment rendered on the verdict or the plea of guilty, evidence that the judgment has become final, and that the defendant is the same person presently before the court. State v. Ninneman 729
37. The mere fact that testimony is uncontradicted does not mean that it must be accepted as true on the hearing. Credibility is for the triers of the facts. State v. Ninneman 729
38. A photograph to be admissible must be a direct reproduction of the person, place, or thing which it purports to represent before it is competent as evidence. State v. Newman 746
39. The admission or rejection of cumulative evidence is ordinarily within the discretion of the trial court, and a ruling thereon will not be held erroneous unless an abuse of such discretion clearly appears. State v. Newman 746
40. Reason for rule stated precluding introduction of parol testimony to vary the terms of a written contract. Sack Lumber Co. v. City of Sargent 848

Executors and Administrators.
1. The district court has exclusive jurisdiction to adjudicate controversies between the executor and persons claiming adversely to the estate. Graff v. Graff 345
2. The statute of limitations does not commence to run against an action brought by a remainderman to recover property from a life tenant who has placed it in his own name until knowledge is clearly brought home to the remainderman that there is such property. Graff v. Graff 345

False Pretenses.
1. In a prosecution for obtaining credit by false pretenses a causal connection between the false pretenses and the obtaining of the credit is an element of the offense and must be proved beyond a reasonable doubt. State v. Swanson 693

2. Intent to defraud may be proved by the circumstances surrounding the transaction. State v. Swanson ---------- 693
3. Where there is competent evidence to support a finding of intent to defraud, the verdict of the jury will not be disturbed because there is testimony tending to indicate that there was no such fraudulent intent. State v. Swanson ---------- 693
4. The gravamen of the offense of obtaining money by false pretenses stated. State v. Swanson ---------- 693
5. If the money and credit were procured through the means of false pretenses and representations, it is immaterial whether the victim thereof might by diligence have recouped its loss. State v. Swanson 693

Franchises.

Payments made by a public power district to a municipality under the facts and the agreement here involved are not franchise payments within the meaning of Article VIII, section 11, of the Constitution of Nebraska. City of O'Neill v. Consumers Public Power Dist. ---------- 773

Fraud.

1. It is a general rule that fraud and deceit cannot be predicated upon misrepresentation of law for the reason that everyone is presumed to know the law. Loringer v. Kaplan ---------- 215
2. An exception to the rule that everyone is presumed to know the law may exist under some circumstances where there is a relation of trust and confidence between the parties or where the speaker has, or professes to have, superior knowledge of the law. Loringer v. Kaplan ---------- 215

Frauds, Statute of.

1. When one claims the estate of a deceased person under an alleged oral contract, the evidence of such contract must be clear, satisfactory, and unequivocal. Kimmel v. Roberts ---------- 8
2. Oral agreements to devise property by will are unenforcible under the statute of frauds because not in writing, even if proved, unless there has been such part performance as the law requires. Kimmel v. Roberts ---------- 8
3. In a suit to enforce an oral agreement embraced within the statute of frauds on the ground of part

performance, the acts alleged to constitute part performance must refer to, result from, or be in pursuance of the oral contract sought to be enforced, and not from some other relation. Kimmel v. Roberts ---------- 8

Gifts.

1. It is essential to the validity of a gift that the donor shall have sufficient mental capacity to make the gift. McPherson v. Minier ---------- 212
2. A transfer of property by a donee of a power of sale annexed to a life estate must be made in good faith for an adequate consideration; and if the donee exceeds his authority, the court will revise his judgment. Mitchell v. Wilcox ---------- 553

Good Will.

1. The good will connected with the establishment of any particular trade or occupation may be the subject of barter and sale. It is a valuable right, and if it be unlawfully destroyed or taken away, the law will award compensation to the injured party. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 169
2. In an action at law for the loss of good will, the evidence must contain sufficient data to enable a jury, with a reasonable degree of certainty and exactness, to estimate the actual damages. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 169

Habeas Corpus.

1. Where a petition for habeas corpus shows on its face as a matter of law that petitioner is not entitled to the issuance of a writ, it is proper for the trial court to so find and dismiss the petition. Shultz v. Sigler ---------- 155
2. Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court. Stuckey v. Rohnert ---------- 727

Highways.

1. A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be considered with all the other facts and

circumstances in determining whether or not a party was negligent. Morrissey v. Johnson 219
2. The giving of the statutory signal for a turn at a highway intersection will not alone absolve the driver from a charge of negligence when he fails to exercise ordinary care for his own safety and that of others by looking to the front and rear for the approach of other vehicles. Morrissey v. Johnson 219

Homesteads.
1. A homestead life estate may be conveyed and the grantee of such life estate has a life estate in the property during the life of the original grantor. Fisher v. Peden 150
2. Ordinarily the homestead rights incidental to a homestead life estate are waived and terminated by the transfer of the homestead property, and the grantee takes an ordinary life estate divested of the homestead rights of the original grantor. Fisher v. Peden 150
3. An election of the owner of a homestead life estate to partition the premises subject to the life estate constitutes a forfeiture of the life estate, as provided by homestead statute, but such statute does not by analogy provide that the conveyance of such life estate constitutes an election to partition the life estate. Fisher v. Peden 150

Homicide.
1. A purpose to kill and malice are essential elements of murder in the second degree and, under a charge therefor, both must be proved beyond a reasonable doubt. State v. Hizel 661
2. Malice is never implied or presumed as a matter of law where the circumstances of the killing are testified to on the trial by eyewitnesses. State v. Hizel 661
3. Where the evidence does not prove a higher degree of homicide than manslaughter, it may be prejudicial error to submit to the jury the issue of murder in the second degree. State v. Hizel 661

Husband and Wife.
1. It is presumed that the passing of property from one spouse to the other by will results from and in pursuance of the marriage relation and it is not of itself referable to an oral agreement to make

irrevocable and reciprocal wills as part performance. Kimmel v. Roberts ---------- 8
2. The right of a husband to prevent his wife from testifying against him is personal to him and may be waived by him. State v. Swiney ---------- 230

Indictments and Informations.

A defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads to the general issue, provided the information contains no jurisdictional defect and is sufficient to charge an offense under the law. State v. Swanson ---------- 693

Infants.

1. Where a child beyond a tender age is in the position of a gratuitous passenger in a motor vehicle, such child is a "guest" within the meaning of the applicable guest statute. Kolar v. Divis ---------- 756
2. A 13-year-old child riding as a gratuitous passenger in a motor vehicle is a guest within the purview of the motor vehicle guest statute. Kolar v. Divis 756

Injunction.

A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle him to relief. Injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. Aro Inv. Co. v. City of Omaha 569

Insurance.

1. An untrue representation made by an insured in response to a question in an application calling for an opinion, judgment, or belief will not avoid a policy issued on the application, unless the misrepresentation was knowingly made with intent to deceive. Vackiner v. Mutual of Omaha ---------- 300
2. In an action on a policy, an insurance company cannot prevail on a defense of fraudulent representations by the insured in his application, unless the representations were material to the risk. Vackiner v. Mutual of Omaha ---------- 300
3. The words "arising out of" are very broad, general, and comprehensive terms, and are ordinarily understood to mean originating from, growing out of, or

flowing from. National Union Fire Ins. Co. v Bruecks ---------- 642
4. The term "accident arising out of the use" in the insurance policies herein contemplates an accident immediately identifiable with the ownership, maintenance, or use of the vehicle. National Union Fire Ins. Co. v. Bruecks ---------- 642
5. The accidental discharge of a loaded gun in an automobile being used to transport a minor home after a hunting trip is not an accident within the contemplation of the term "arising out of the use" of an automobile, under the facts in this case. National Union Fire Ins. Co. v. Bruecks ---------- 642
6. Assumption of complete control of a matter involving a possible claim for a period of 17 months, with the consequent need of cooperation under the terms of the policy, constituted a sufficient showing of prejudice as a basis for urging estoppel. National Union Fire Ins. Co. v. Bruecks ---------- 642
7. An insurer's duty to defend an action against the insured is measured in the first instance by the allegations of the pleadings in the action against the insured. National Union Fire Ins. Co. v. Bruecks 642
8. If such pleadings state facts bringing the injury within the coverage of the policy, insurer must defend irrespective of the insured's ultimate liability to the plaintiff. National Union Fire Ins. Co. v. Bruecks ---------- 642

Interest.

Where from the verdict and pleadings it appears that if plaintiff is entitled to recover at all he is entitled to recover interest, the court should make the computation and include such interest in the judgment. Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc. ---------- 858

Intervention.

1. Leave to intervene in an action after the entry of final judgment is not allowable as a matter of right, and will be permitted only for cogent and compelling reasons. Lincoln Bonding & Ins. Co. v. Barrett ---------- 367
2. A right to intervene must be asserted within a reasonable time. Where it appears intervention was not sought for more than 7 months after judgment, of which he had knowledge, intervener's appli-

cation was properly denied on the ground of laches. Lincoln Bonding & Ins. Co. v. Barrett ---------- 367

3. A petition in intervention to be filed as a matter of right must be filed before trial. City of O'Neill v. Consumers Public Power Dist. ---------- 773

4. The interest required to permit intervention is a direct and immediate legal interest of such a character that the person seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. City of O'Neill v. Consumers Public Power Dist. ---------- 773

5. An indirect, remote, or conjectural interest in the result of the suit is not enough to permit intervention. City of O'Neill v. Consumers Public Power Dist. 773

Intoxicating Liquors.

1. The Nebraska Liquor Control Commission has a broad discretion in determining whether or not applications for licenses for the sale of liquor will be granted or denied, and the courts are without authority to interfere unless there is an abuse of that discretion. Allen v. Nebraska Liquor Control Commission ---------- 767

2. Under the Nebraska Liquor Control Act the commission is required to seek the recommendation of local authorities within 30 days as regards the grant or denial of an application. The effect of this provision is to afford evidence to sustain or deny an application, as the case may be, even though the commission is not bound by the recommendation. Allen v. Nebraska Liquor Control Commission ---- 767

3. The Legislature has plenary powers over the control and regulation of the manufacture, distribution, sale, and dispensing of alcoholic liquors. Safeway Stores, Inc. v. Nebraska Liquor Control Commission ------ 817

4. Where exemptions from the operation of a general law dealing with intoxicating liquors are made applicable to persons of the same class similarly situated, such provisions are not invalid as granting special privileges or immunities. Safeway Stores, Inc. v. Nebraska Liquor Control Commission ---------- 817

5. A provision in a general law regulating and controlling the sale of intoxicating liquors exempting hotels with more than 25 sleeping rooms from a limitation of two package liquor licenses per per-

son, is the grant of an exception or privilege not prohibited by the Constitution where it operates uniformly upon all alike in the same situation. Safeway Stores, Inc. v. Nebraska Liquor Control Commission ---------- 817

6. The right to engage in the sale of intoxicating liquors involves a mere privilege. Restrictive regulations or even a suppression of the traffic do no violate constitutional prohibitions on legislation. Safeway Stores, Inc. v. Nebraska Liquor Control Commission 817

7. A statute providing that no person, with certain exceptions, should thereafter acquire more than two liquor retail licenses, but that persons holding multiple licenses on the effective date of the act would not be required to divest them, is to be read as limiting the holding of retail liquor licenses to two per person, without, however, disturbing existing multiple licenses in the hands of one person. Safeway Stores, Inc. v. Nebraska Liquor Control Commission ---------- 817

8. A specified section of act regulating sale of intoxicating liquors was unconstitutional for vagueness, indefiniteness, and uncertainty. Safeway Stores, Inc. v. Nebraska Liquor Control Commission 817

9. The valid parts of legislative act will be upheld and invalid parts rejected where the invalid part was not an inducement to the passage of the act. Safeway Stores, Inc. v. Nebraska Liquor Control Commission ---------- 817

Joint Tenancy.

1. An estate in joint tenancy can be destroyed by any act of one joint tenant which is inconsistent with joint tenancy, and such act has the effect of destroying the right of survivorship incidental to it. Giles v. Sheridan ---------- 257

2. Where one of two joint tenants severs a joint tenancy, it extinguishes the right of survivorship. Where, however, one of three or more joint tenants destroys one or more of the necessary coexistent unities, this operates as a severance of the joint tenancy as to the share held by him, but the other joint tenants continue to hold their interests in joint tenancy. Giles v. Sheridan ---------- 257

3. The purchase by a tenant in common or a joint tenant of an outstanding title to or the payment of an encumbrance on the joint estate which inures to

the common benefit entitles the purchaser or payer to contribution. Giles v. Sheridan ---------- 257

Judges.

District judges have the power to promulgate reasonable rules for pre-trial procedure. Chicago Lumber Co. v. Gibson ---------- 461

Judgments.

1. A judgment exonerating a servant and holding his master liable in a negligence action against them jointly is self-consistent if it is logically justifiable by a difference in evidence, although liability of the master is only vicarious. Sears v. Mid-City Motors, Inc. ---------- 100
2. A judgment in partition determines the title of the joint tenants or tenants in common and fixes their respective shares and, when reduced to a judgment that is not appealed from, is a final judgment as in any other civil action. Bender v. Fuchs ---------- 162
3. The title determined by a partition judgment which has become final is presumptive evidence of title in all cases, and as between the parties it is conclusive evidence of title. Bender v. Fuchs ---------- 162
4. Where a default has been regularly entered, it is largely within the discretion of the trial court to say whether the defendant shall be permitted to come in afterwards and make his defense and, unless an abuse of discretion is made to appear, the Supreme Court will not interfere. Dennis v. Dennis 200
5. A judgment is "rendered" when the decision is announced upon the law and the facts, and the transmittal of the judgment or order to the parties concerned is not an integral part of the judicial act of rendering judgment. Brown v. City of Omaha -- 224
6. The county court is vested by the Constitution and statutes with exclusive original jurisdiction in all matters concerning the probate of wills and the settlement of estates of deceased persons. The adjudication by the court of a matter within its authority is, unless appealed from, final and not subject to collateral attack. Estate of Colman v. Redford ---------- 270
7. Statute on manner of rendition of judgment of district court has no applicability to the filing of the report of the appraisers with the county judge. Weiner v. State ---------- 297

8. Summary judgment procedure is useful only to pierce pleadings and show that the controlling facts are otherwise. Vackiner v. Mutual of Omaha ----- 300
Prairie View Tel. Co. v. County of Cherry -------- 382
9. Nonexistence of a genuine issue of material fact is not established merely by evidence which would be insufficient to carry the issue to a jury, because the record may constitute only a part of the evidence available at a trial on the merits. Vackiner v. Mutual of Omaha ---------- 300
10. Where an order sustaining a motion for summary judgment necessarily determined that appellants had no rights in the portion of the oil, gas, and mineral rights excepted from the deed, the trial court properly dismissed appellees' petition for a declaration of rights. Bulger v. McCourt ---------- 316
11. A party who moves for summary judgment shows the nonexistence of a genuine issue of material fact by proof beyond a reasonable doubt that his opponent in a trial on the merits would be unable to raise an issue for the fact finder. Frenchy v. City of Scottsbluff ---------- 324
12. Where a default judgment has been regularly entered it is largely within the discretion of the trial court as to whether or not the judgment shall be set aside to permit the defendant to make his defense, and, unless an abuse of discretion is shown, the Supreme Court will not interfere with the trial court's ruling thereon. Lincoln Bonding & Ins. Co. v. Barrett ---------- 367
13. Where the record shows that the failure of a defendant to appear at a trial is due to his own negligence or indifference, it is not an abuse of discretion by the trial court to deny a motion to set aside the judgment to permit a defense to be made. Lincoln Bonding & Ins. Co. v. Barrett ---------- 367
14. Leave to intervene in an action after the entry of final judgment is not allowable as a matter of right, and will be permitted only for cogent and compelling reasons. Lincoln Bonding & Ins. Co. v. Barrett ---------- 367
15. A right to intervene must be asserted within a reasonable time. Where it appears intervention was not sought for more than 7 months after judgment, of which he had knowledge, intervener's application was properly denied on the ground of laches. Lincoln Bonding & Ins. Co. v. Barrett ---------- 367

16. When the allegations of the pleadings have been pierced and the resistance to the motion fails to show that a genuine issue of fact exists, a summary judgment will be granted. Prairie View Tel. Co. v. County of Cherry ---------- 382
17. The order or determination of an administrative body acting with jurisdiction and under authority of law is not subject to collateral attack in the absence of fraud or bad faith. Christensen v. Boss 429
18. In a summary judgment proceeding a finding that no genuine issue existed as to any material fact is presumed to have been correct in the absence of a bill of exceptions, and the only issue on appeal is the sufficiency of the pleadings to support the judgment. State ex rel. Stulp v. Muscheites ------ 674
19. To justify the entry of a summary judgment, the record must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wilson Grain Co., Inc. v. Resso ---------- 676

Labor Relations.

1. Public employees are generally not entitled to collective bargaining in the sense that private industrial employees are. International Brotherhood of Electrical Workers v. City of Hastings ---------- 455
2. A public agency or governmental employer has no legal authority to bargain with a labor union in the absence of express statutory authority. International Brotherhood of Electrical Workers v. City of Hastings ---------- 455
3. The Court of Industrial Relations has no power to compel a public utility operated by government in its proprietary capacity to bargain or negotiate with a labor union. International Brotherhood of Electrical Workers v. City of Hastings ---------- 455

Landlord and Tenant.

1. Forfeitures of estates under leases are not favored in law and covenants will not be extended by implication to sustain a claim of forfeiture. Hawthorne v. Cassidy ---------- 245
2. A tenant on a farm who purchases fertilizer for use on his leased farmland is the original promisor or debtor, and is primarily liable to the seller as such. Johnson v. Francis ---------- 342

3. An agreement between a landlord and tenant contained in a written lease by which each is to pay for one-half the cost of applying fertilizer to the leased cropland gives a third party no cause of action against the landlord for one-half the value of applying fertilizer sold to the tenant. Johnson v. Francis ---------- 342

Licenses.

1. The Nebraska Liquor Control Commission has a broad discretion in determining whether or not applications for licenses for the sale of liquor will be granted or denied, and the courts are without authority to interfere unless there is an abuse of that discretion. Allen v. Nebraska Liquor Control Commission ---------- 767
2. The action of a city council of a city limiting the number of licenses to be issued within the city is a proper exercise of the police power in regulating the sale and the dispensing of alcoholic liquors, unless such action is shown to be arbitrary and unreasonable. Allen v. Nebraska Liquor Control Commission ---------- 767
3. Under the Nebraska Liquor Control Act the commission is required to seek the recommendation of local authorities within 30 days as regards the grant or denial of an application. The effect of this provision is to afford evidence to sustain or deny an application, as the case may be, even though the commission is not bound by the recommendation. Allen v. Nebraska Liquor Control Commission -- 767

Liens.

1. The purpose of the statute with respect to oil well liens is to furnish interested parties with sufficient information to enable them to understand the nature of the lien claimed. Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc. ------ 858
2. The liens filed herein are found to be in substantial compliance with statute. Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc. ---------- 858
3. The burden is on the petitioner in a foreclosure action to make prima facie proof of a controverted allegation that no proceedings at law have been had for the recovery of the indebtedness. Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc. ---- 858

Limitations of Actions.

1. The statute of limitations does not begin to run against a remainderman until knowledge is clearly brought home to him that another is claiming title adversely. Graff v. Graff ---------- 345
2. A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. Weiss v. Weiss ---------- 714
3. Generally, where a person is hired by the week, month, or year, the right to compensation accrues at the end of each week, month, or year, and the statute then begins to run. Only the amount that has accrued within the statutory period before the commencement of the action can be recovered. Weiss v. Weiss ---------- 714
4. Where a contract for employment is continuous with no definite time of payment or termination, the statute of limitations does not commence to run until the services have been terminated. Weiss v. Weiss ---------- 714

Mandamus.

An action to procure the issuance of a writ of mandamus is not begun until a motion and affidavit, or a petition verified positively, is filed in the district court. Little v. Board of County Commissioners ---------- 655

Marriage.

1. Public policy will not permit a married person to contract for or enter into a marriage with another when his or her spouse is alive and not divorced. Loringer v. Kaplan ---------- 215
2. A person contracting marriage has a primary duty to know his or her marriage status and to know that he or she is eligible to marry. Loringer v. Kaplan ---------- 215

Master and Servant.

1. A judgment exonerating a servant and holding his master liable in a negligence action against them jointly is self-consistent if it is logically justifiable by a difference in evidence, although liability of the master is only vicarious. Sears v. Mid-City Motors, Inc. ---------- 100
2. Where the existence of a master-servant relation-

ship is in issue, the right of control is ordinarily a question of fact. Sears v. Mid-City Motors, Inc. 100

3. The burden of proof is upon the plaintiff in an action against an employer for the negligence of his employee to establish by a preponderance of the evidence that the employee was acting in the scope of his employment at the time the act of negligence was committed. Watts v. Zadina ---- 548

4. Proof that an employee was performing service for his employer at the time employee's automobile collided with the automobile of another because of employee's negligence may be proved by circumstantial evidence. Watts v. Zadina ---------- 548

5. Circumstantial evidence, to be sufficient to sustain a verdict or require submission of the case to a jury, must be of such character and the circumstances so related to each other that an inference fairly and reasonably arises that the fact sought to be established is true. Watts v. Zadina ---------- 548

6. Whether or not an act was done by an employee in the execution of his employer's business, and within the scope of his employment, is a question of fact. Each case must be determined in the light of the surrounding facts and circumstances, the character of the employment, and the nature of the wrongful act. Watts v. Zadina ---------- 548

7. Where the facts and circumstances are such that a reasonable inference may be drawn that an employee was performing services incidental to his employment when an accident occurred, the question is for the trier of the facts. Watts v. Zadina 548

8. Where an employee is required to furnish and maintain an automobile at his own expense for use in his employment, the furnishing and maintaining of the automobile is the responsibility of the employee and not of the employer. Hardin v. Moorman Manuf. Co. ---------- 869

Mines and Minerals.

1. In the conveyance construed in this case, the words "subject to" excepted one-half of all oil, gas, and mineral rights from the operation of the questioned conveyance. Bulger v. McCourt ---------- 316

2. The term "minerals" ordinarily embraces oil, petroleum, and natural gas. Bulger v. McCourt -------- 316

Mortgages.

1. The cancellation of a mortgage on the record is not conclusive as to its discharge, or as to the payment of the indebtedness secured thereby. Where the holder of a senior mortgage discharges it of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien. Larson Cement Stone Co. v. Redlim Realty Co. ---------- 134
2. A mortgage is a mere security. It has no efficacy if unaccompanied by a debt or obligation. Larson Cement Stone Co. v. Redlim Realty Co. ---------- 134
3. An instrument can only take effect as a mortgage from the time some debt or liability will be created, or some binding contract is made which is to be secured thereby. Larson Cement Stone Co. v. Redlim Realty Co. ---------- 134
4. A mortgage need not be founded on a present debt. The mortgage may be given to secure future advances. Larson Cement Stone Co. v. Redlim Realty Co. ---------- 134
5. If an owner of real estate contracts to borrow money to erect buildings thereon, and gives a mortgage upon the real estate to secure the loan, which, by agreement, is to be advanced as the buildings progress, the lien of the mortgage begins upon the recording thereof. Larson Cement Stone Co. v. Redlim Realty Co. ---------- 134
6. Under an agreement for future advances on a loan secured by a present mortgage, the advancement of money is not optional with the mortgagee, but must be advanced as the building has progressed. Larson Cement Stone Co. v. Redlim Realty Co. ---------- 134

Motor Carriers.

1. In a proceeding before the Nebraska State Railway Commission to obtain a certificate authorizing irregular route transportation of property, the burden of proof is on the applicant to show that the service is or will be required by the present or future public convenience and necessity. If there is any lack of such a showing, the application should be denied. Simmerman v. National Trailer Convoy, Inc. ---------- 400
2. In determining public convenience and necessity, the controlling questions are whether the operation

will serve some 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 as well by applicant without endangering or impairing the operations of existing carriers contrary to the public interest. Simmerman v. National Trailer Convoy, Inc. ---------- 400

3. Where the fitness of the applicant is in issue and evidence both affirmative and negative in nature is presented, the Supreme Court will not substitute its judgment for that of the Nebraska State Railway Commission if the order of the commission is supported by competent evidence. Simmerman v. National Trailer Convoy, Inc. ---------- 400

4. A common carrier is not liable for loss of cargo during interstate transportation if an act of God is the sole proximate cause to the exclusion of concurrent negligence of the carrier. Redman Industries, Inc. v. Morgan Drive Away, Inc. ---------- 406

Municipal Corporations.

1. A city of the first class may annex contiguous or adjacent lands which are urban or suburban in character but not agricultural lands which are rural in character. Shields v. City of Kearney -------- 49

2. "Rural" means of or pertaining to the country as distinguished from a city or town, whereas "urban" means of or belonging to a city or town. Shields v. City of Kearney ---------- 49

3. A city is required to exercise ordinary care to keep its crosswalks in a reasonably safe condition for pedestrians. Frenchy v. City of Scottsbluff ------ 324

4. A contract made by one city with another for electric power, which requires the construction of an electric distribution line carrying more than 700 volts, is subject to the provisions of legislative act referred to in opinion unless excepted therefrom, and such line may not be constructed without the approval of the Nebraska Power Review Board. City of Auburn v. Eastern Nebraska Public Power Dist. -- 439

5. Courts will not as a rule take notice of municipal ordinances unless required to do so by special charter or general law. Chicago Lumber Co. v. Gibson -- 461

6. A party to have the benefit of a municipal ordinance must generally plead and prove the existence of the ordinance. Chicago Lumber Co. v. Gibson ----- 461

7. The provision of the Omaha municipal code pro-

viding that violations of a stated section shall be punished by reprimand, suspension, demotion, or dismissal is so clearly phrased in the alternative that it is not open to any other construction. Ostler v. City of Omaha ---------- 515

8. The rules and regulations of the Omaha department of public safety, police division, are not applicable to the chief of police of the city of Omaha in their present form. Ostler v. City of Omaha -- 515

9. The personnel board of the city of Omaha is required to reduce its findings and decision thereon to writing and to transmit the same to the department head and the employee concerned. Ostler v. City of Omaha ---------- 515

10. The findings required by the home rule charter of the city of Omaha and the Omaha municipal code are a concise statement of the conclusions upon each contested allegation. Ostler v. City of Omaha -- 515

11. It is not necessary that a municipality accept and open a street for public use until public necessity requires it. Aro Inv. Co. v. City of Omaha -------- 569

12. Even though a dedication of a street is accepted by the city, until the city manifests some intent to use it or it has been used as a street there is no public use and no rights will accrue in said street as against the city. Aro Inv. Co. v. City of Omaha -- 569

13. It is not essential that there should be any prescribed formal declaration, but there must be use or some other act indicating its status as a street by those authorized in such matters to represent the public to complete the dedication. Aro Inv. Co. v. City of Omaha ---------- 569

14. Where a street had never been opened, a party could not force the city to use the street or permit contest of its vacation. Aro Inv. Co. v. City of Omaha 569

15. Legislative act on apportionment did not constitute a delegation of power to the City of Beatrice to alter legislative boundaries, or deprive the city of its power of annexation. Carpenter v. State -- 628

16. The duty imposed on the county board by statute on incorporating a village is mandatory and the action of the board is ministerial in nature. Little v. Board of County Commissioners ---------- 655

17. Where a proper petition is presented under statute for incorporating a village complying with the jurisdictional provisions, the county board has no dis-

cretion and a failure on its part to act would justify the interference of the courts by mandamus. Little v. Board of County Commissioners -------- 655

18. An ordinance of a city which has for its sole purpose the closing of legitimate business on Sunday and other Sabbatical days to promote religious observance does not promote the health, safety, peace, and good order of the city's inhabitants. Skag-Way Department Stores, Inc. v. City of Omaha -------- 707

19. A legislative body may make a reasonable classification of persons for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate its enactment. Skag-Way Department Stores, Inc. v. City of Omaha ---------- 707

20. In determining whether or not a classification of persons is unconstitutional, discrimination is the essence of classification and is not objectionable unless founded upon distinctions which the court is compelled to find unreasonable. Skag-Way Department Stores, Inc. v. City of Omaha ---------- 707

21. A city ordinance providing for Sunday closing cannot prohibit that which is harmless in itself, or require that to be done which does not promote the health, safety, peace, and good order of society. Skag-Way Department Stores, Inc. v. City of Omaha 707

22. The action of a city council of a city limiting the number of licenses to be issued within the city is a proper exercise of the police power in regulating the sale and the dispensing of alcoholic liquors, unless such action is shown to be arbitrary and unreasonable. Allen v. Nebraska Liquor Control Commission ---------- 767

23. A second-class city has authority to execute a contract with a public power district to purchase the wholesale power requirements of the distribution system located in the municipality for a period of 25 years, effective when the municipality acquires the distribution system. City of O'Neill v. Consumers Public Power Dist. ---------- 773

24. The use of ground water by a municipality for human needs as it relates to health, fire control, and sanitation is a public use. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783

Negligence.

1. Negligence must be proved by direct evidence, or by facts from which negligence can reasonably be inferred. Stevens v. Shaw ---------- 34
2. Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicates with reasonable certainty the negligent act charged. Stevens v. Shaw ---------- 34
3. Contributory negligence is ordinarily an affirmative defense and the burden of proving it is on the party asserting it. Stevens v. Shaw ---------- 34
4. Rule as to intervening cause in automobile cases stated. Stevens v. Shaw ---------- 34
5. Stopping for different causes, and according to the exigencies of the occasion, is a natural part of the "travel." The right to stop when the occasion demands is incident to the right to travel. Stevens v. Shaw ---------- 34
6. A momentary stop to discharge a passenger does not constitute parking or stopping in a negligent manner. Stevens v. Shaw ---------- 34
7. Rule of res ipsa loquitur stated. Sober v. Smith -- 74
   Nownes v. Hillside Lounge, Inc. ---------- 157
8. A general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent. Bunselmeyer v. Hill ---------- 140
9. Where no motion for a more specific statement is filed, it is competent under the general allegation of negligence to offer evidence of any fact which contributed to the injury. Bunselmeyer v. Hill -- 140
10. It is the duty of the operator of a bar to use due care to keep the premises and facilities of the bar reasonably safe for the purpose for which they are to be used by its customers. Nownes v. Hillside Lounge, Inc. ---------- 157
11. Negligence is never presumed and cannot be inferred from the fact that an accident occurred. Bowers v. Maire ---------- 239
    Kolar v. Divis ---------- 756
12. Where evidence is wholly circumstantial, it is insufficient unless the circumstances proved are of such a nature and so related to each other that the conclusion reached is the only one that can be

fairly and reasonably drawn therefrom. Bowers v. Maire ---------- 239

13. An essential element necessary to be proved to entitle a passenger in an automobile to recover damages from the host on the ground of negligence less than gross is that he is a passenger for hire. Davis v. Landis Outboard Motor Co. ---------- 391

14. Gross negligence means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. Davis v. Landis Outboard Motor Co. 391
Kolar v. Divis ---------- 756

15. The fact that an automobile got out of the driver's control does not establish negligence and much less gross negligence, nor does it prove the proximate cause of the accident. Negligence is not presumed and cannot be inferred from the fact that there was an accident. Davis v. Landis Outboard Motor Co. -- 391

16. Line of demarcation between gross and ordinary negligence stated. Davis v. Landis Outboard Motor Co. ---------- 391

17. A negligent defendant may be liable for bodily harm to plaintiff, although the injury is greater than usual due to a physical condition which predisposed plaintiff to the injury. Morford v. Lipsey Meat Co., Inc. ---------- 420

18. In a personal injury action future loss of earnings is not necessarily measured by plaintiff's calling or income at the time of injury. Morford v. Lipsey Meat Co., Inc. ---------- 420

19. The burden of proof is upon the plaintiff in an action against an employer for the negligence of his employee to establish by a preponderance of the evidence that the employee was acting in the scope of his employment at the time the act of negligence was committed. Watts v. Zadina ------ 548

20. Where a verdict is directed against the defendant on the issue of negligence, the plaintiff is not relieved from the burden of proving that the injuries were proximately caused by the negligence of the defendant, and the amount and nature of the damages. Fowler v. Bachus ---------- 558

21. A party is answerable for the natural, probable, reasonable, and proximate consequences of his act. Wilson Grain Co., Inc. v. Resso ---------- 676

22. Liability for sale of dangerous or noxious food products stated. Wilson Grain Co., Inc. v. Resso 676

23. Foresight, not retrospect, is the standard of diligence. Negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated. Kolar v. Divis -- 756
24. The line of demarcation between gross and ordinary negligence is not always clear. The cases however are clear in their declaration that negligence to be gross must be great or excessive; must be in a very high degree; not alone a momentary distraction of attention; and not alone the absence of slight care in the performance of a duty. Kolar v. Divis 756
25. The sudden emergency rule in automobile cases stated. Davis v. Roosman ---------- 808
26. Repetitious allegations of negligence may be summarized and the court has no duty to repeat them separately in its instructions. Davis v. Roosman 808
27. Duty of driver of motor vehicle to keep a proper lookout stated. Willey v. Parriott ---------- 828
28. Snow, mist, fog, or other conditions which affect visibility are not intervening causes but are conditions which require a driver to exercise a degree of care commensurate with the circumstances. Willey v. Parriott ---------- 828
29. A driver who is suddenly confronted by an emergency requiring instant decision is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong. Willey v. Parriott ---------- 828
30. The sudden emergency rule cannot be invoked unless there is evidence to show that a sudden emergency actually existed, that the party invoking the rule did not create the emergency, and that he used due care to avoid it. Willey v. Parriott ---------- 828

New Trial.

1. A motion for a new trial in a criminal case upon grounds other than newly discovered evidence must be filed within 10 days after rendition of the verdict unless the movant is unavoidably prevented from doing so. State v. Losieau ---------- 54
2. The sufficiency of evidence in support of a motion for a new trial on the ground of newly discovered evidence cannot be reviewed without a bill of exceptions. State v. Losieau ---------- 54
3. Rule stated as to procedure to be followed upon

appeal where trial court grants a new trial and gives no reason for its decision. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 169
4. An order granting a new trial will not be reversed by the Supreme Court unless it clearly appears that there was no tenable ground. Blobaum v. State -- 304
5. An order granting a new trial in a civil action is appealable. Morford v. Lipsey Meat Co., Inc. ---- 420

Officers.
1. If the law directs an officer to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Little v. Board of County Commissioners -------- 655
2. An act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act. Little v. Board of County Commissioners ---------- 655
3. The presumption of validity attends official action, and the burden of proof to the contrary is upon one who challenges the action. Allen v. Nebraska Liquor Control Commission ---------- 767
4. In making an arrest, an officer may use whatever force is reasonably necessary. Reasonable force is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary under the circumstances. Breese v. Newman ---------- 878
5. Generally, an officer has no right to shoot or kill a person who is committing a misdemeanor except in self-defense. Breese v. Newman ---------- 878
6. Where it is clear from the facts and circumstances which existed at the time that an officer intended to make an arrest, no further notice of the intention to make the arrest is necessary. Breese v. Newman ---------- 878
7. Ordinarily, it is a question for the jury whether, under all the facts and circumstances of the case, an officer who fired at the tires of an automobile operated by a misdemeanant used more force than was reasonably necessary to stop the automobile and arrest the misdemeanant. Breese v. Newman 878

Oil and Gas.

1. The purpose of the statute with respect to oil well liens is to furnish interested parties with sufficient information to enable them to understand the nature of the lien claimed. Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc. ---------- 858
2. The liens filed herein are found to be in substantial compliance with statute. Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc. ---------- 858

Parent and Child.

1. The report and testimony of a qualified pathologist as to the results of blood grouping tests are admissible in evidence. Houghton v. Houghton ---- 275
2. Judicial recognition should be accorded the accuracy and reliability of blood grouping tests to disprove paternity. Houghton v. Houghton ---------- 275
3. In the absence of evidence of a defect in the testing methods, blood grouping tests are conclusive on the issue of nonpaternity. Houghton v. Houghton ---------- 275
4. Under statute, where the parents of minor children are unfit or unsuitable to have their custody, the separate juvenile court may properly place their legal custody in the chief juvenile probation officer on such terms and conditions as the court may prescribe. Houghton v. Houghton ---------- 275

Partition.

1. Where there is an outstanding life estate, a remainderman cannot maintain an action for partition of real estate over the objection of the holder of the life estate. Fisher v. Peden ---------- 150
2. A judgment in partition determines the title of the joint tenants or tenants in common and fixes their respective shares and, when reduced to a judgment that is not appealed from, is a final judgment as in any other civil action. Bender v. Fuchs ---------- 162
3. The title determined by a partition judgment which has become final is presumptive evidence of title in all cases, and as between the parties it is conclusive evidence of title. Bender v. Fuchs ---------- 162
4. A party to a partition action who has been properly served with process and raises no issue of title is estopped by judgment from subsequently asserting ownership of the partitioned premises by adverse possession. Bender v. Fuchs ---------- 162

5. Words in partition statute construed and held to mean that a judgment in partition may be defeated by a title paramount to the rights of the joint tenants or tenants in common in the hands of a third person or by such a paramount title acquired by a party to the partition proceeding after the judgment became final. Bender v. Fuchs ---------- 162
6. A party to a partition judgment who has acquiesced therein and accepted his share of the partitioned estate is estopped from questioning the title of the purchaser of the partitioned property as described and determined by the court. Bender v. Fuchs -- 162

Penalties.
1. A penalty statute is to be strictly construed, and courts will not interpolate conditions omitted by the Legislature or extend the language used by implication. The courts must assume that the Legislature intended to do what it did. Bachus v. Swanson 1
2. The county board of equalization has never been given authority by the Legislature to impose penalties, nor to hear any protests involving the penalties imposed or the waiver of them. Bachus v. Swanson ---------- 1

Pleading.
1. A want of legal capacity to sue is waived unless raised in the trial court by demurrer or answer. Hinze v. School Dist. No. 34 ---------- 69
2. A general allegation of negligence is good against a demurrer, and under such an allegation evidence of any fact which contributed to the injury sued for is competent. Bunselmeyer v. Hill ---------- 140
3. The consideration for the contract of a vendee to pay for goods sold and delivered is the goods themselves. If failure of warranty of the goods is not sufficiently pleaded and proved, it cannot be relied upon as a defense of failure of consideration. Hrdlicka v. Allen ---------- 250
4. A breach of warranty is not available to the buyer as a defense in an action by the seller unless both the warranty and the breach are pleaded. Hrdlicka v. Allen ---------- 250
5. The admissions of fact contained in the pleadings are treated as established and do not require support in the evidence. Bulger v. McCourt ---------- 316
6. A defendant in an action is not restricted to the

counterclaim provided for by statute but, in a proper case may seek affirmative relief either against the plaintiff or against codefendants by cross-petition. Rogers v. Western Electric Co. ---------- 359

7. The basis of the right to bring a cross-suit is to be found in the consideration that in cases where the code is silent, remedies furnished by the common law or equity practice, not inconsistent with its provisions, may be resorted to in order to prevent failure of justice. Rogers v. Western Electric Co. -- 359

8. A cross-petition is maintainable either to aid in the defense of the original suit, where affirmative equitable relief is required to make such defense effective, or to obtain a complete adjudication of the controversies between the original complainant and the cross-complainant over the subject matter of the original suit. Rogers v. Western Electric Co. 359

9. The rules of chancery practice are so far enlarged under the code that although a cross-petition is more than merely defensive and seeks affirmative relief beyond the purposes of defense, such relief need not be equitable nor need the cross-petition be based on equitable grounds. Rogers v. Western Electric Co. 359

10. The criterion of the right to file a cross-petition stated. Rogers v. Western Electric Co. ---------- 359

11. The matters set up in a cross-petition must be germane to the original suit under the code quite as much as under the chancery practice. Rogers v. Western Electric Co. ---------- 359

12. A party to have the benefit of a municipal ordinance must generally plead and prove the existence of the ordinance. Chicago Lumber Co. v. Gibson ---------- 461

13. By statute, the court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. An appeal bond or undertaking is within the purview of the statute. Jacobitz v. Bussinger ---------- 524

14. An insurer's duty to defend an action against the insured is measured in the first instance by the allegations of the pleadings in the action against the insured. National Union Fire Ins. Co. v. Bruecks 642

15. If such pleadings state facts bringing the injury within the coverage of the policy, insurer must defend irrespective of the insured's ultimate liability

to the plaintiff. National Union Fire Ins. Co. v. Bruecks ---------- 642

16. Every material allegation of a petition not controverted by the answer shall, for purposes of the action, be taken as true. Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc. ---------- 858

Pre-Trial Procedure.

District judges have the power to promulgate reasonable rules for pre-trial procedure. Chicago Lumber Co. v. Gibson ---------- 461

Principal and Agent.

A principal may be liable for the apparent or ostensible authority of agency with which he clothes an alleged agent. Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc. ---------- 858

Public Lands.

1. While the statute is mandatory in requiring an appeal bond on appeals from appraisals of improvements on school lands, and the bond must be filed within the time prescribed by statute, the filing date stamped on it, or the time the official records the formal filing, is merely prima facie evidence of the time it was received. Jacobitz v. Bussinger -- 524
2. A statute provides the procedure for the appraisement of improvements on school land when a lease has been terminated by expiration or forfeiture. The procedure prescribed therein is an exclusive remedy that is binding upon all lessees of school lands. O'Neil v. Haarberg ---------- 531

Public Policy.

1. The agreement here involved does not violate the public policy of the State of Nebraska. City of O'Neill v. Consumers Public Power Dist. ---------- 773
2. All public waters of the state, whether they be surface or underground waters, are a natural want by constitutional declaration. The waste of such waters as a natural resource is against public policy. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783
3. Whether or not a diversion of ground water beyond the watershed of its source is lawful, in the absence of a legislative declaration of public policy, is determined from a consideration of the rights of

appropriators and riparian owners having substantial rights in the use of such waters. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783

Public Service Commissions.

1. The grant of a request for a suspension of a certificate of public convenience and necessity by the Nebraska State Railway Commission is, in effect, a finding of nondormancy of the certificate, and, during the existence of the suspension order, the commission may not suspend, change, or revoke such certificate. Watson Bros. Van Lines & Heavy Hauling Co. v. Hart ---------- 64
2. The Nebraska State Railway Commission may, however, after the termination of a suspension order granted by it on the request of the certificate holder, consider the question of willful dormancy and take into consideration the failure of the certificate holder to render service authorized by the certificate during the time a suspension order requested by the certificate holder was not in effect. Watson Bros. Van Lines & Heavy Hauling Co. v. Hart ---- 64
3. The Nebraska State Railway Commission is authorized by statute to suspend, change, or revoke a certificate of public convenience and necessity. Where the action of the commission in so doing is sustained by evidence of a willful failure to comply with the statute or the lawful regulations of the commission, the Supreme Court ordinarily will not interfere with the action of the commission thereon. Watson Bros. Van Lines & Heavy Hauling Co. v. Hart ---------- 64
4. An order of the Nebraska State Railway Commission revoking a certificate of public convenience and necessity without a finding of willful violation on the part of the certificate holder is not authorized by statute, is irregular, and will be set aside on appeal. Watson Bros. Van Lines & Heavy Hauling Co. v. Hart ---------- 64
5. In a proceeding before the Nebraska State Railway Commission to obtain a certificate authorizing irregular route transportation of property, the burden of proof is on the applicant to show that the service is or will be required by the present or future public convenience and necessity. If there is any lack of such a showing, the application should be denied. Simmerman v. National Trailer Convoy, Inc. 400

6. In determining public convenience and necessity, the controlling questions are whether the operation will serve some 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 as well by applicant without endangering or impairing the operations of existing carriers contrary to the public interest. Simmerman v. National Trailer Convoy, Inc. ---------- 400

7. Where the fitness of the applicant is in issue and evidence both affirmative and negative in nature is presented, the Supreme Court will not substitute its judgment for that of the Nebraska State Railway Commission if the order of the commission is supported by competent evidence. Simmerman v. National Trailer Convoy, Inc. ---------- 400

8. The statutory authority granted to the Nebraska Power Review Board extends to all electrical transmission lines carrying more than 700 volts, whether for retail or wholesale distribution, to be constructed by any public corporations specified in the act. City of Auburn v. Eastern Nebraska Public Power Dist. 439

9. The Nebraska Power Review Board is authorized to grant an application, after hearing, when the evidence sustains findings that the granting of an application will serve the public convenience and necessity and that the applicant can most economically and feasibly supply the electric service resulting from the proposed construction without duplication of facilities or operations. City of Auburn v. Eastern Nebraska Public Power Dist. -------- 439

10. Where it appears that the Nebraska Power Review Board has complied with the requirements of the controlling statutes in exercising the powers granted to it by legislative authority, and the evidence is sufficient to support its findings of fact, the Supreme Court may not substitute its judgment for that of the board, and the action of the board will be sustained. City of Auburn v. Eastern Nebraska Public Power Dist. ---------- 439

11. The object and purpose of Nebraska State Railway Commission control of common carriers is to secure adequate, sustained service for the public at the lowest reasonable cost and to protect and conserve investments made for that purpose. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. ---------- 470

Chambers Rural Tel. Co., Inc. v. K. & M. Tel. Co., Inc. ---------- 735

12. It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. --- 470
Chicago, B. & Q. R.R. Co. v. Wilber Chamber of Commerce ---------- 489

13. Although the Nebraska State Railway Commission has broad powers of regulation, it does not enjoy the freedom of an owner of the carrier. Unless public necessity requires it, the discretion of the carrier in establishing and maintaining its stations should not be interfered with by the commission. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. 470

14. The test for determination of the need for agency service stated. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. ---------- 470

15. The time necessary to be devoted to the performance of duties by an agency service of a railroad is a matter of importance in determining whether an application to discontinue the agency may be denied. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. ---------- 470
Chicago, B. & Q. R.R. Co. v. Wilber Chamber of Commerce ---------- 489

16. When an application is made to discontinue an existing service or facility, the need for the service or facility and not mere local convenience provides the yardstick. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. ---------- 470
Chicago, B. & Q. R.R. Co. v. Wilber Chamber of Commerce ---------- 489

17. Although the comparison between the cost of providing the service and the revenue derived therefrom is an element which should be considered, it is not necessarily controlling. Expenditure of earnings in a particular community is not required. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. ---------- 470

18. The matter of allocation of revenue and the cost of station operation is important only insofar as the sums involved measure the public need for the service in question. A carrier is not required to maintain standby station agency service not comprehensibly used by the public, or to be used only when

other established carriers fail to meet the need. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. 470

19. A ruling on an application for the discontinuance of an agency relates only to the time and conditions presented in the record and is not an adjudication for the future. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. ---------- 470

20. On appeal to the Supreme Court from an order of the Nebraska State Railway Commission while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. Chicago, B. & Q. R.R. Co. v. Wilber Chamber of Commerce ---------- 489
Chambers Rural Tel. Co., Inc. v. K. & M. Tel. Co., Inc. 735
K. & M. Tel. Co., Inc. v. Schmidt ---------- 742

21. When the service sought to be discontinued or modified is one of convenience rather than necessity, the question of expense to a railroad, the volume of business done, the community need, the revenue return, and the relative benefit to the public are factors that cannot be disregarded. Chicago, B. & Q. R.R. Co. v. Wilber Chamber of Commerce ---- 489

22. In determining whether a certificate of convenience and necessity should be issued, the Nebraska State Railway Commission may consider whether the applicant is able or qualified to furnish the proposed service. Chambers Rural Tel. Co., Inc. v. K. & M. Tel. Co., Inc. ---------- 735

23. Before the Nebraska State Railway Commission can issue a certificate of convenience and necessity allowing one telephone company to invade the service area of another, it must make the specific finding required by statute. Chambers Rural Tel. Co., Inc. v. K. & M. Tel. Co., Inc. ---------- 735

24. One of the purposes of requiring a certificate of convenience and necessity is to prevent unnecessary duplication of facilities and to protect the consuming public from inadequate service and higher rates which may result from such duplication. Chambers Rural Tel. Co., Inc. v. K. & M. Tel. Co., Inc. -- 735

Quo Warranto.

In a quo warranto proceeding by a claimant to public office a recovery by relator must be based upon the strength of his own title and not upon weak-

ness in the claim of his adversary. State ex rel. Stulp v. Muscheites ---------- 674

Railroads.

1. The time necessary to be devoted to the performance of duties by an agency service of a railroad is a matter of importance in determining whether an application to discontinue the agency may be denied. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. 470
2. When an application is made to discontinue an existing service or facility, the issue presented should be determined by the public need therefor, as distinguished from local convenience. In the final analysis, the question to be determined is the public need or lack or need for the service. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. ---------- 470
3. Although the comparison between the cost of providing the service and the revenue derived therefrom is an element which should be considered, it is not necessarily controlling. Expenditure of earnings in a particular community is not required. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. 470
4. The matter of allocation of revenue and the cost of station operation is important only insofar as the sums involved measure the public need for the service in question. A carrier is not required to maintain standby station agency service not comprehensibly used by the public, or to be used only when other established carriers fail to meet the need. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. ---------- 470
5. A ruling on an application for the discontinuance of an agency relates only to the time and conditions presented in the record and is not an adjudication for the future. Chicago, B. & Q. R.R. Co. v. Stamford Elevator Co. ---------- 470
6. The time necessary to be devoted to the performance of duties by station agents is a matter of importance in determining whether or not the Nebraska State Railway Commission acted arbitrarily and unreasonably in a dualization case. Chicago, B. & Q. R.R. Co. v. Wilber Chamber of Commerce -------- 489
7. The facilities and services to be furnished by a railroad company at any station need only be just, reasonable, and adequate to the requirements of the station. Chicago, B. & Q. R.R. Co. v. Wilber Chamber of Commerce ---------- 489

8. There is no requirement that a railroad expend the earnings received from a particular community in that community contrary to the requirements of reasonable service. Chicago, B. & Q. R.R. Co. v. Wilber Chamber of Commerce ---------- 489

9. It is the function of management to operate economically and it is charged with the duty of reducing costs where it can do so and still continue to perform essential services to the public. Chicago, B. & Q. R.R. Co. v. Wilber Chamber of Commerce 489

10. It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent. This duty is not limited to localities where the railroad is losing money. Chicago, B. & Q. R.R. Co. v. Wilber Chamber of Commerce ---------- 489

11. When an application is made to discontinue an existing service or facility, the need for the service or facility and not mere local convenience provides the yardstick. Chicago, B. & Q. R.R. Co. v. Wilber Chamber of Commerce ---------- 489

12. When the service sought to be discontinued or modified is one of convenience rather than necessity, the question of expense to a railroad, the volume of business done, the community need, the revenue return, and the relative benefit to the public are factors that cannot be disregarded. Chicago, B. & Q. R.R. Co. v. Wilber Chamber of Commerce ---------- 489

Recognizances.

1. Under statute, a defendant is required to file a written bond with one or more sureties in the amount fixed by the court as a condition precedent to an appeal in a misdemeanor case. State v. Mills -- 853

2. The bond required by statute for appeal in misdemeanor case is jurisdictional and objection to its validity may be raised at any time in any appropriate manner. State v. Mills ---------- 853

3. A defendant may not complain on appeal of the failure of the trial court to permit the posting of a valid appeal bond in lieu of a defective one, assuming that such right existed, when no request was made in the trial court to do so. State v. Mills -- 853

Reformation of Instruments.

1. In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory; and, until overcome by such proof, the terms of the instrument must stand as evidencing the intention of the parties. Koepplin v. Pfister Hybrid Co. ------ 423
2. Equity will decree the reformation of a contract only for fraud, mutual mistake, or inequitable conduct. Koepplin v. Pfister Hybrid Co. ---------- 423
   Kansas-Nebraska Nat. Gas Co., Inc. v. Consumers P. P. Dist. ---------- 687

Rescission.

1. Where rescission for unilateral mistake of one party would result in serious prejudice to the other party aside from the bargain, and where enforcement of the contract is not unconscionable, equitable relief by way of rescission is improper. Kansas-Nebraska Nat. Gas Co., Inc. v. Consumers P. P. Dist. ---------- 687
2. If a mistake is so fundamental in character that the minds of the parties have not, in fact, met, or if an unconscionable advantage has been gained by mistake, the remedy is rescission. Sack Lumber Co. v. City of Sargent ---------- 848

Sales.

1. In the absence of an agreement to the contrary the making of advancements to a salesman against future commissions creates no legal obligation on his part to repay them. Martin Milling Co. v. Evelyn ----- 31
2. The consideration for the contract of a vendee to pay for goods sold and delivered is the goods themselves. If failure of warranty of the goods is not sufficiently pleaded and proved, it cannot be relied upon as a defense of failure of consideration. Hrdlicka v. Allen ---------- 250
3. A breach of warranty is not available to the buyer as a defense in an action by the seller unless both the warranty and the breach are pleaded. Hrdlicka v. Allen ---------- 250
4. Unless the purchaser gives notice of a breach of warranty within a reasonable time, it is not a defense in an action by the seller. Hrdlicka v. Allen 250
5. A tenant on a farm who purchases fertilizer for use on his leased farmland is the original promisor

or debtor, and is primarily liable to the seller as such. Johnson v. Francis ---------- 342
6. An agreement between a landlord and tenant contained in a written lease by which each is to pay for one-half the cost of applying fertilizer to the leased cropland gives a third party no cause of action against the landlord for one-half the value of applying fertilizer sold to the tenant. Johnson v. Francis ---------- 342
7. A single previous transaction, standing alone, is ordinarily insufficient to establish a course of conduct that will sustain liability by estoppel or agency by apparent authority. Johnson v. Francis ------ 342
8. In a products liability case against a manufacturer the plaintiff must show that the offending condition existed when the product left defendant's control. Sundet v. Olin Mathieson Chemical Corp. -------- 587
9. Liability for sale of dangerous or noxious food products stated. Wilson Grain Co., Inc. v. Resso -- 676
10. By statute, the recording of a conditional sale contract in the proper county was notice of the claim throughout the state, despite the nonresident buyer's removal of the property to another county. Drycleaners Acceptance Corp. v. Thurston 805

Schools and School Districts.

1. A school district may not maintain an action involving a change in boundaries of the school district, and has no legal interest in maintaining the boundaries of the district. Hinze v. Schoool Dist. No. 34 69
2. A school district has no fixed territorial integrity and a change or alteration in the boundaries must originate with the legal voters thereof. Hinze v. School Dist. No. 34 ---------- 69
3. Statutory requirements for transfer of land from one school district to another stated. Hinze v. School Dist. No. 34 ---------- 69
4. The state is supreme in the creation and control of school districts and may if it thinks proper modify or withdraw any of the powers, or destroy such school districts without the consent of the residents thereof or even over their protest. De Jonge v. School Dist. of Bloomington ---------- 539
5. The state has the power to permit the transfer of property from a nonaccredited high school district to an accredited one without regard to whether said property is contiguous to the accredited high

school district. De Jonge v. School Dist. of Bloomington ---------- 539
6. The fixing of boundaries of school districts is exclusively a legislative function, but it may properly be delegated provided the Legislature prescribes the manner and the standards under which the power may be exercised. De Jonge v. School Dist. of Bloomington ---------- 539
7. The Legislature has prescribed the manner and standards necessary to permit the transfer of land from a nonaccredited high school district to an accredited one. De Jonge v. School Dist. of Bloomington ---------- 539
8. The fact that a board or a court inquires into and determines whether or not the evidence produced shows a sufficient compliance with the procedure and statutory requirements to justify the transfer of land from a nonaccredited high school district to an accredited one does not constitute a delegation of legislative discretion. De Jonge v. School Dist. of Bloomington ---------- 539
9. Statute providing for transfer of land from one school district to another is not invalid in that it confers legislative powers upon a local board in violation of the provisions of the Constitution of Nebraska. De Jonge v. School Dist. of Bloomington 539
10. In an appeal to the district court from an order of a freeholder's board, it is jurisdictional that a notice of appeal be served upon the county clerk and a bond be executed and approved by the county clerk within 20 days after the action of the board has been entered upon the records of the board by the county clerk of the county in which the real estate is located. Reiber v. Harris ---------- 582
11. Statutory provision that prohibits the transfer of property from an accredited school district to a nonaccredited school district is applicable to proceedings under another statutory section for the transfer of property between school districts upon petition. Pribil v. French ---------- 602

Searches and Seizures.

1. Technical refinements should not be indulged in to defeat an apparently valid search warrant. State v. McCreary ---------- 589
2. A search of an apartment by law enforcement officers without a search warrant but with the consent

of the occupant who paid the rent and controlled the premises is not unlawful as an unreasonable search. State v. McCreary ---------- 589

3. A reasonable seizure under a search warrant can only be made of instrumentalities connnected with the crime charged. State v. McCreary ---------- 589

Set-Off and Counterclaim.

1. A defendant in an action is not restricted to the counterclaim provided for by statute but, in a proper case, may seek affirmative relief either against the plaintiff or against codefendants by cross-petition. Rogers v. Western Electric Co. ---------- 359
2. The basis of the right to bring a cross-suit is to be found in the consideration that in cases where the code is silent, remedies furnished by the common law or equity practice, not inconsistent with its provisions, may be resorted to in order to prevent failure of justice. Rogers v. Western Electric Co. ---------- 359
3. New and distinct matter not maintainable under the provisions of the code as a counterclaim and not involved in a proper determination of the subject matter of the original suit must be litigated in a separate action. Rogers v. Western Electric Co. -- 359

Statutes.

1. General rule for construction of statutes stated. Bachus v. Swanson ---------- 1
2. A penalty statute is to be strictly construed, and courts will not interpolate conditions omitted by the Legislature or extend the language used by implication. The courts must assume that the Legislature intended to do what it did. Bachus v. Swanson 1
3. There is no vested right in a usury law and it may be repealed or changed so as to affect causes of action and defenses in pending suits. White Motor Co. v. Reynolds ---------- 91
4. A litigant who invokes the provisions of a statute may not challenge its validity. He may not seek the benefit and in the same action and at the same time question its constitutionality. Alumni Control Board v. City of Lincoln ---------- 194
   Read v. City of Scottsbluff ---------- 410
5. The term "calendar month" is a period terminating with the day of the succeeding month, numerically

corresponding to the day of its beginning, less one. Brown v. City of Omaha ---------- 224

6. Statute relating to construction of instruments requires the Supreme Court to carry into effect the true intent of the parties so far as it can be ascertained from the whole instrument, if not inconsistent with law. Bulger v. McCourt ---------- 316

7. The intention of the Legislature should be determined from a legislative act as a whole rather than from the loose words or phrases of isolated paragraphs. Runyan v. State ---------- 371

8. An act of the Legislature stating the fact of emergency, without stating the nature of or the grounds constituting the emergency, is sufficient. Read v. City of Scottsbluff ---------- 410

9. A determination that a statute should take effect immediately rather than 3 months after adjournment of the session is so obviously a matter of legislative policy, that no court should disregard or question the determination unless, in the manner of its adoption, or in substance, there has been plain violation of some constitutional mandate. Read v. City of Scottsbluff ---------- 410

10. A court is not at liberty to ignore an erroneous legislative declaration of emergency when the validity of the law depends upon the actual existence of an emergency of a kind which will justify the action taken. Read v. City of Scottsbluff ---------- 410

11. The determination of whether or not an emergency exists which makes it necessary that an act should go into effect immediately is a question for the Legislature, to be conclusively evidenced by a declaration of emergency. Read v. City of Scottsbluff -- 410

12. Statute creating Nebraska Power Review Board constitutes a legislative entry into a field not theretofore occupied, covers the whole subject to which it relates, and is an independent act complete in itself. City of Auburn v. Eastern Nebraska Public Power Dist. ---------- 439

13. Where a legislative act is complete in itself but is repugnant to or in conflict with a prior statute which is not referred to nor repealed by the latter, the earlier statute is repealed or modified by implication by the later act, but only to the extent of the repugnancy or conflict. City of Auburn v. Eastern Nebraska Public Power Dist. ---------- 439

14. Statutory provisions referred to in opinion are

modified by later legislative act to the extent that the powers granted in the latter modify those granted in the former. City of Auburn v. Eastern Nebraska Public Power Dist. ---------- 439

15. The enumeration of certain powers in a statute implies the exclusion of all others not fairly incidental to those enumerated. An affirmative description of specific circumstances in which certain powers may be exercised implies a negative as to the exercise of such powers in circumstances not enumerated. International Brotherhood of Electrical Workers v. City of Hastings ---------- 455

16. The construction of a statute of doubtful meaning given it by those whose duty it is to enforce it, which construction the Legislature has, by its continued noninterference for a number of years, acquiesced in, will be approved unless, as thus construed, it contravenes some provision of the Constitution or is clearly wrong. International Brotherhood of Electrical Workers v. City of Hastings -- 455

17. The fixing of boundaries of school districts is exclusively a legislative function, but it may properly be delegated provided the Legislature prescribes the manner and the standards under which the power may be exercised. De Jonge v. School Dist. of Bloomington ---------- 539

18. The Legislature has prescribed the manner and standards necessary to permit the transfer of land from a nonaccredited high school district to an accredited one. De Jonge v. School Dist. of Bloomington ---------- 539

19. The fact that a board or a court inquires into and determines whether or not the evidence produced shows a sufficient compliance with the procedure and statutory requirements to justify the transfer of land from a nonaccredited high school district to an accredited one does not constitute a delegation of legislative discretion. De Jonge v. School Dist. of Bloomington ---------- 539

20. The fundamental purpose of statutory construction is to ascertain the intent of the Legislature from the language of the act itself. Pribil v. French -- 602

21. Legislative act on apportionment meant and referred to boundaries as established as of April 1, 1960. Carpenter v. State ---------- 628

22. Where it appears that unconstitutional portions of an act can be separated from the valid portions and

the latter enforced independent of the former, and it further appears that the invalid portions did not constitute such an inducement to the passage of the valid parts that they would not have been passed without them, the former may be rejected and the latter upheld. Safeway Stores, Inc. v. Nebraska Liquor Control Commission ---------- 817

23. While it is competent for the Legislature to classify for purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. Safeway Stores, Inc. v. Nebraska Liquor Control Commission ---------- 817

24. The Legislature has plenary powers over the control and regulation of the manufacture, distribution, sale, and dispensing of alcoholic liquors. Safeway Stores, Inc. v. Nebraska Liquor Control Commission 817

25. Where exemptions from the operation of a general law dealing with intoxicating liquors are made applicable to persons of the same class similarly situated, such provisions are not invalid as granting special privileges or immunities. Safeway Stores, Inc. v. Nebraska Liquor Control Commission ------ 817

26. A provision in a general law regulating and controlling the sale of intoxicating liquors exempting hotels with more than 25 sleeping rooms from a limitation of two package liquor licenses per person, is the grant of an exception or privilege not prohibited by the Constitution where it operates uniformly upon all alike in the same situation. Safeway Stores, Inc. v. Nebraska Liquor Control Commission ---------- 817

27. A statute providing that no person, with certain exceptions, should thereafter acquire more than two liquor retail licenses, but that persons holding multiple licenses on the effective date of the act would not be required to divest them, is to be read as limiting the holding of retail liquor licenses to two per person, without, however, disturbing existing multiple licenses in the hands of one person. Safeway Stores, Inc. v. Nebraska Liquor Control Commission ---------- 817

28. A severability clause expressing legislative intent is not essential to a court's declaration of severability of the void portions of a statute. Such a

clause when placed in a statute is merely an aid to judicial interpretation. Safeway Stores, Inc. v. Nebraska Liquor Control Commission ---------- 817

29. The Legislature may validate contracts which were illegal when made by the retroactive repeal of a previous law. Sones v. Spiegal ---------- 838

30. Where the Legislature provides that a repeal shall be retroactive, contracts which were illegal when made, because of the law which has been repealed, are validated. Sones v. Spiegal ---------- 838

Sunday.

A prohibition of activities on Sunday for the promotion of the health, safety, peace, and good order of society by requiring a periodic day of rest is sustainable as a proper exercise of the police power if the classification of persons to which it applies is reasonable. Skag-Way Department Stores, Inc. v. City of Omaha ---------- 707

Taxation.

1. Legislative act imposing penalty for failure to return intangible property for taxation was unconstitutional. Bachus v. Swanson ---------- 1

2. Under tax statute, notice by an assessor of an increase in the assessment for taxation of previously assessed lands or improvements is mandatory in that collection of the tax on an increase made without notice or waiver of notice may be enjoined. Keller v. Keith County ---------- 111

3. If a notice is defective in omitting the date when the county board of equalization will convene but the board seasonably acquires jurisdiction over the assessee at his request, the defect is waived. Keller v. Keith County ---------- 111

4. A testator may direct in his will the ultimate liability for estate taxes, but an effective direction must be at least clearly inferable. Naffziger v. Cook ---------- 264

5. A testamentary provision for payment of debts and administration expenses out of the residue does not clearly imply ultimate liability of the residue for estate taxes. Naffziger v. Cook ---------- 264

6. The ownership and exclusive use of property determines whether or not it is entitled to exemption from taxation. Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization ---------- 326

7. The primary or dominant use, and not an incidental use, is controlling in determining whether or not property is exempt from taxation. Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization ---------- 326
8. It is the use of the property as distinguished from the use of the income from the property that determines whether or not it is exempt. Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization ---------- 326
9. 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 the statute. Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization ---------- 326
10. In proving a claim that property is exempt from taxation, the evidence must show that such property is reasonably needed and predominately used for one of the purposes specified in the exemption statute. Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization ---------- 326
11. Residence buildings located on real estate which is exempt from taxation because of its predominate use for educational purposes are exempt from taxation when used for the primary purpose of carrying out the educational program of such school. Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization ---------- 326
12. Ordinarily the valuation by the assessor is presumed to be correct. There is also a presumption that a board of equalization has faithfully performed its official duties, and in making an assessment, acted upon sufficient competent evidence to justify its action. Josten-Wilbert Vault Co. v. Board of Equalization ---------- 415
13. Evidence that a sale was made at a price different than the value for tax purposes is not sufficient competent evidence to overcome the presumption without proof of the character and circumstances of sale. Josten-Wilbert Vault Co. v. Board of Equalization ---------- 415
14. The burden of proof is upon a taxpayer to establish his contention that the value of his property has been unlawfully fixed by the county board of equalization in an amount greater than its actual value. Josten-Wilbert Vault Co. v. Board of Equalization ---------- 415

15. Evidence that a sale of real estate was made at a price less than the value for tax purposes is not ordinarily sufficient to establish that the value of the property has been unlawfully fixed by the county board of equalization. Josten-Wilbert Vault Co. v. Board of Equalization ---------- 415
16. The action of a county board of equalization with respect to actual value of property will be affirmed on appeal unless the contention of unreasonable valuation has been established. Scudder v. Board of Equalization ---------- 478

Telecommunications.
1. The object and purpose of Nebraska State Railway Commission control of common carriers is to secure adequate, sustained service for the public at the lowest reasonable cost and to protect and conserve investments made for that purpose. Chambers Rural Tel. Co., Inc. v. K. & M. Tel. Co., Inc. ---------- 735
2. In determining whether a certificate of convenience and necessity should be issued, the Nebraska State Railway Commission may consider whether the applicant is able or qualified to furnish the proposed service. Chambers Rural Tel. Co., Inc. v. K. & M. Tel. Co., Inc. ---------- 735
3. Before the Nebraska State Railway Commission can issue a certificate of convenience and necessity allowing one telephone company to invade the service area of another, it must make the specific finding required by statute. Chambers Rural Tel. Co., Inc. v. K. & M. Tel. Co., Inc. ---------- 735
4. One of the purposes of requiring a certificate of convenience and necessity is to prevent unnecessary duplication of facilities and to protect the consuming public from inadequate service and higher rates which may result from such duplication. Chambers Rural Tel. Co., Inc. v. K. & M. Tel Co., Inc. 735

Tenancy in Common.
The purchase by a tenant in common or a joint tenant of an outstanding title to or the payment of an encumbrance on the joint estate which inures to the common benefit entitles the purchaser or payer to contribution. Giles v. Sheridan ---------- 257

Torts.
1. One who causes intended or unintended harm to

another by refusing to continue a business relation with him, terminable at his will, is not liable for that harm. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 169

2. Rule stated as to liability of one who assists in tortious conduct. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 169

Trial.

1. Negligence must be proved by direct evidence, or by facts from which negligence can reasonably be inferred. Stevens v. Shaw ---------- 34
2. Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicates with reasonable certainty the negligent act charged. Stevens v. Shaw ---------- 34
3. Contributory negligence is ordinarily an affirmative defense and the burden of proving it is on the party asserting it. Stevens v. Shaw ---------- 34
4. It is the duty of the trial court to instruct the jury on the issues presented by the pleadings and evidence, whether requested to do so or not, and a failure to do so constitutes prejudicial error. Sober v. Smith ---------- 74
5. Whenever the point is reached at which a trier of fact is being told that which it is itself entirely equipped to determine without a witness' aid, the testimony is superfluous. Sears v. Mid-City Motors, Inc. ---------- 100
6. The overruling of a general objection to a question will not be disturbed on appeal unless the error was obvious. Sears v. Mid-City Motors, Inc. ---------- 100
7. Instructions given to a jury must be construed together and if, when considered as a whole, they properly state the law that is sufficient. Bunselmeyer v. Hill ---------- 140
8. Where the evidence is contradictory, it is for the jury to decide and its verdict will not be interfered with unless clearly wrong. The credibility of witnesses and the weight to be given their testimony are for the jury's determination, and not for the court. Bunselmeyer v. Hill ---------- 140
9. A party should not be permitted to cross-examine a witness as to a matter foreign to the scope of his

direct examination. The rule of strict cross-examination has been adopted and is in force in this state. Bunselmeyer v. Hill ---------- 140

10. A ruling of the trial court in regard to the scope of cross-examination will be sustained unless it is an abuse of discretion. Bunselmeyer v. Hill ------ 140

11. Violation of the strict rule of cross-examination will not be considered ground for reversal unless it clearly results in prejudice to the substantial rights of the party complaining. Bunselmeyer v. Hill -- 140

12. In determining the sufficiency of the evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 169

13. The jury is the sole judge on all fact questions. To justify the Supreme Court in interfering with the findings of a jury on a fact question, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of the reviewing court to correct the mistake. Frank H. Gibson, Inc. v. Omaha Coffee Co. -------- 169

14. The instructions of the court must be considered in toto, and if when so considered they cover the issues raised by the pleadings and supported by the evidence, they are adequate. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 169

15. A party desiring a more explicit instruction than that given should offer such an instruction. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 169

16. Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. And, unless this is done, the judgment will not ordinarily be reversed for such defects. Frank H. Gibson, Inc. v. Omaha Coffee Co. ---------- 169

17. It is the spirit and policy of the law to give every party an opportunity to prosecute or defend his case in court, and the courts will not ordinarily deny such right except for the fault or gross laches of such party or his authorized attorney. Dennis v. Dennis ---------- 200

18. In a case where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence re-

quired of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact for the jury. Morrissey v. Johnson ---------- 219

19. An instruction will not be held erroneous because of a mere typographical error which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining. State v. Swiney ---------- 230

20. Summary judgment procedure is useful only to pierce pleadings and show that the controlling facts are otherwise. Vackiner v. Mutual of Omaha ---- 300

21. Nonexistence of a genuine issue of material fact is not established merely by evidence which would be insufficient to carry the issue to a jury, because the record may constitute only a part of the evidence available at a trial on the merits. Vackiner v. Mutual of Omaha ---------- 300

22. Where an order sustaining a motion for summary judgment necessarily determined that appellants had no rights in the portion of the oil, gas, and mineral rights excepted from the deed, the trial court properly dismissed appellees' petition for a declaration of rights. Bulger v. McCourt ---------- 316

23. A party who moves for summary judgment shows the nonexistence of a genuine issue of material fact by proof beyond a reasonable doubt that his opponent in a trial on the merits would be unable to raise an issue for the fact finder. Frenchy v. City of Scottsbluff ---------- 324

24. On a motion to dismiss, made at the close of plaintiff's case, every fact which is alleged and which the evidence tends to support will be considered as proved. Johnson v. Francis ---------- 342

25. If a defendant in an action in equity moves at the close of the evidence of the plaintiff for a dismissal of the action for want of proof to support a judgment, he admits the truth of the evidence and any reasonable conclusions deducible from it. Graff v. Graff ---------- 345

26. The purpose of a summary judgment proceeding is to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. Prairie View Tel. Co. v. County of Cherry ---------- 382

27. When the allegations of the pleadings have been pierced and the resistance to the motion fails to show

that a genuine issue of fact exists, a summary judgment will be granted. Prairie View Tel. Co. v. County of Cherry ---------- 382

28. If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case, unless proper instruction has been requested by the party complaining. State v. Brown ---------- 386

29. The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery. Davis v. Landis Outboard Motor Co. ---------- 391

30. In argument to the jury the party required first to produce his evidence has the opening. Redman Industries, Inc. v. Morgan Drive Away, Inc. ---------- 406

31. When a defendant in an action in equity moves for a dismissal at the close of plaintiff's evidence, he admits the truth of the evidence and any reasonable inferences deducible therefrom. Koepplin v. Pfister Hybrid Co. ---------- 423

32. The trial court has discretion in determining the limits of cross-examination and the extent to which repetition should be permitted must necessarily be within the discretion of the trial court. Chicago Lumber Co. v. Gibson ---------- 461

33. A prerequisite to review on appeal of alleged improper conduct of and statements by a trial judge, on the trial in the presence of the jury, is an objection thereto. Chicago Lumber Co. v. Gibson ---------- 461

34. A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time. Chicago Lumber Co. v. Gibson ---------- 461

35. To require the granting of a new trial, an error must be prejudicial to the rights of the unsuccessful party. Chicago Lumber Co. v. Gibson ---------- 461

36. Circumstantial evidence, to be sufficient to sustain a verdict or require submission of the case to a jury, must be of such character and the circumstances so related to each other that an inference fairly and reasonably arises that the fact sought to be established is true. Watts v. Zadina ---------- 548

37. Whether or not an act was done by an employee in

the execution of his employer's business, and within the scope of his employment, is a question of fact. Each case must be determined in the light of the surrounding facts and circumstances, the character of the employment, and the nature of the wrongful act. Watts v. Zadina ---------- 548

38. Where the facts and circumstances are such that a reasonable inference may be drawn that an employee was performing services incidental to his employment when an accident occurred, the question is for the trier of the facts. Watts v. Zadina ---- 548

39. Where a verdict is directed against the defendant on the issue of negligence, the plaintiff is not relieved from the burden of proving that the injuries were proximately caused by the negligence of the defendant, and the amount and nature of the damages. Fowler v. Bachus ---------- 558

40. Rule stated as to when opinion of an expert witness is sufficient to sustain a verdict. Fremont Farmers Union Coop. Assn. v. City of Fremont -- 576

41. Under ordinary circumstances, an opinion of an expert witness is to be considered and weighed by the triers of the facts like any other testimony. Fremont Farmers Union Coop. Assn. v. City of Fremont ---------- 576

42. Where evidence based upon opinion of expert witnesses is in conflict, it becomes a question for the jury. Fremont Farmers Union Coop. Assn. v. City of Fremont ---------- 576

43. The right to intervene under statute providing for intervention may be exercised at any time before trial. An intervener is not required to set forth any reasons why he did not intervene at an earlier time. Pribil v. French ---------- 602

44. To justify the entry of a summary judgment, the record must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wilson Grain Co., Inc. v. Resso ---------- 676

45. A party cannot complain of an instruction that is more favorable to him than he deserves although it is technically erroneous to the issues. State v. Swanson ---------- 693

46. An inconsistency between instructions is not fatal unless one of the inconsistent instructions errs wrongfully against the accused. State v. Swanson 693

47. 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. Weiss v. Weiss ---------- 714

48. Instructions were adequate under the circumstances. State v. Newman ---------- 746

49. The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery. Kolar v. Divis ---------- 756

50. A petition in intervention to be filed as a matter of right must be filed before trial. City of O'Neill v. Consumers Public Power Dist. ---------- 773

51. The interest required to permit intervention is a direct and immediate legal interest of such a character that the person seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. City of O'Neill v. Consumers Public Power Dist. ---------- 773

52. An indirect, remote, or conjectural interest in the result of the suit is not enough to permit intervention. City of O'Neill v. Consumers Public Power Dist. ---------- 773

53. Repetitious allegations of negligence may be summarized and the court has no duty to repeat them separately in its instructions. Davis v. Roosman 808

54. When different instructions are given on the same subject, they should be considered together, and if they fairly submit the case, the judgment will not be reversed for indefiniteness or ambiguity in one of the instructions. Davis v. Roosman ---------- 808

55. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions, and the true meaning thereof will be determined not from the sentence or phrase alone but by a consideration of all that is said on the subject. Davis v. Roosman ---------- 808

56. If there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law. Willey v. Parriott ---- 828

57. The party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence. Willey v. Parriott ---------- 828

58. Where reasonable minds may differ as to whether the driver of a motor vehicle exercised the care, caution, and prudence required of him under the circumstances of the particular situation, the issue of his negligence is one of fact for the jury. Willey v. Parriott ---------- 828

59. The purpose of a pretrial conference is to simplify the issues; amend the pleadings, when necessary; and avoid unnecessary proof of facts at the trial. Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc. ---------- 858

60. The participants in a pretrial conference must adhere to the spirit of that procedure and are held to have waived questions not there presented. Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc. ---------- 858

61. Rule stated respecting requirements for modification of pretrial order. Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc. ---------- 858

62. The subsequent course of an action is controlled by the agreements made at pretrial conference so long as they remain unmodified and that would be true on appeal. Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc. ---------- 858

63. The burden is on the petitioner in a foreclosure action to make prima facie proof of a controverted allegation that no proceedings at law have been had for the recovery of the indebtedness. Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc. 858

64. In determining the sufficiency of the evidence to sustain a judgment it must be considered in the light most favorable to the successful party. Breese v. Newman ---------- 878

65. Rule for consideration of motion for directed verdict stated. Edward Peterson Co. v. Ulysses S. Schlueter Constr. Co. ---------- 883

66. Where the evidence as to the terms of an oral contract is conflicting, it is for the jury to pass upon the facts and to determine what the contract was, under proper instructions. Edward Peterson Co. v. Ulysses S. Schlueter Constr. Co. ---------- 883

67. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law. Edward Peterson Co. v. Ulysses S. Schlueter Constr. Co. ------ 883

Usury.

1. There is no vested right in a usury law and it may be repealed or changed so as to affect causes of action and defenses in pending suits. White Motor Co. v. Reynolds ---------- 91
2. A loan of money made by a nonlicensee under the provisions of the Installment Loan Act, which exacts interest and charges in excess of 9 percent per annum, is within the inhibitory provisions of the act. Sones v. Spiegal ---------- 838

Waters.

1. The diversion of seepage and floodwaters by an irrigation canal built across a natural drain carries with it no right on the part of lower landowners to insist on the continuance of such artificial condition in the absence of evidence affording a basis for an equitable estoppel. Kuhlman v. Folkers 80
2. An upper riparian owner constructing and maintaining an artificial structure diverting the flow of seepage and floodwaters for a purpose advantageous to him is not obligated by mere lapse of time to maintain the structure and the conditions produced thereby, although it incidentally benefits lower landowners. Kuhlman v. Folkers ---- 80
3. An irrigation district under such circumstances may discontinue the diversion of seepage and floodwaters at any time by restoring them to their original course through which they were wont to run in a state of nature. Kuhlman v. Folkers -------- 80
4. An estoppel, which would operate as a bar to the return of drainage waters to the original watercourse existing in a state of nature, requires a change of condition such as the construction of works or the expending of money in reliance on the permanence of the diversion. Kuhlman v. Folkers 80
5. Where a dam has been built for the private convenience and advantage of the owner, he is not required to maintain and operate it for the benefit of an upper riparian proprietor who obtains advantages from its existence. The construction and maintenance of such a dam does not create any reciprocal rights in upstream riparian proprietors based on prescription, dedication, or estoppel. Kiwanis Club Foundation, Inc. v. Yost ---------- 598
6. The owner of a dam and the prescriptive right to overflow the land of upper riparian owners may

abandon his rights, and may also return the river to its natural state by removing or destroying the dam. Kiwanis Club Foundation, Inc. v. Yost ---- 598

7. The meander lines of a river as established by the original government survey are not boundary lines unless made so by the instrument of conveyance. Hartwig v. Berggren ---------- 718

8. The mean line establishing the center of a river as shown by the original survey is not evidence of the location of the thread of a river or stream. Hartwig v. Berggren ---------- 718

9. The thread of a river or stream is the line which would give riparian owners on both sides access to the water whatever its stage may be, particularly at its lowest flow. Hartwig v. Berggren ---------- 718

10. Title by prescription may be acquired to an island in a river or stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong. Hartwig v. Berggren ---- 718

11. The common law rights of a riparian landowner have been modified in this state by limiting such rights to a reasonable and beneficial use upon the land he owns, especially if the exercise of such use in excess of the reasonable and beneficial use is injurious to others who have substantial rights to the water. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783

12. Whether or not ground waters may be transported from one watershed to another is ordinarily a question of legislative policy. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783

13. All public waters of the state, whether they be surface or underground waters, are a natural want by constitutional declaration. The waste of such waters as a natural resource is against public policy. Metropolitan Utilities Dist. v. Merritt Beach Co. -- 783

14. Whether or not a diversion of ground water beyond the watershed of its source is lawful, in the absence of a legislative declaration of public policy, is determined from a consideration of the rights of appropriators and riparian owners having substantial rights in the use of such waters. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783

15. A riparian owner's contention that he requires the

whole of the flow of a stream to moisten his land by subirrigation is not sufficient to establish a reasonable use of the entire amount of the water of a stream. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783

16. Rule as to the rights of riparian landowners in this state stated. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783

17. The use of ground water by a municipality for human needs as it relates to health, fire control, and sanitation is a public use. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783

18. Where the evidence shows that the rights of appropriators and riparian owners are not damaged and the water diverted would be otherwise lost, the transportation of ground water beyond the watershed, in the absence of legislation to the contrary, does not offend the public interest or the doctrine of reasonable and beneficial use of the water resources of the state. Metropolitan Utilities Dist. v. Merritt Beach Co. ---------- 783

Wills.

1. The mere concurrent execution of reciprocal wills, with the full knowledge of their contents by both testators, is not enough to prove a legal obligation to forbear revocation in the absence of a valid and enforcible contract. Kimmel v. Roberts ---------- 8

2. It is presumed that the passing of property from one spouse to the other by will results from and in pursuance of the marriage relation and it is not of itself referable to an oral agreement to make irrevocable and reciprocal wills as part performance. Kimmel v. Roberts ---------- 8

3. A reciprocal will, like any other, is revoked by the execution of a later inconsistent will. Kimmel v. Roberts ---------- 25

4. Where a party to an agreement to make reciprocal wills makes a later will, before or after the other's death, his reciprocal will cannot be admitted to probate because it is not his last will. Kimmel v. Roberts ---------- 25

5. The last will of a party who has previously entered into an agreement with another for reciprocal wills and has executed such a will pursuant thereto, must be admitted to probate even though it is in violation

of and does not comply with the agreement. Kimmel v. Roberts ---------- 25
6. The power of a probate court in the contest of a will is to determine only if the purported will is in fact the last will of the decedent. Kimmel v. Roberts ---------- 25
7. An agreement to execute reciprocal wills cannot be asserted as a ground for contesting the probate of a later revoking will. Kimmel v. Roberts ---------- 25
8. A claim that a subsequent revoking will is a breach of an agreement for the making of irrevocable reciprocal wills may properly be asserted in a court of equity, but not in the probate court by contesting the later will or by objection to a decree of distribution. Kimmel v. Roberts ---------- 25
9. A testator may direct in his will the ultimate liability for estate taxes, but an effective direction must be at least clearly inferable. Naffziger v. Cook 264
10. A testamentary provision for payment of debts and administration expenses out of the residue does not clearly imply ultimate liability of the residue for estate taxes. Naffziger v. Cook ---------- 264
11. A testator may designate in his will the source for payment of debts, and in interpretation of it the court will give full effect to his true intention so far as it can be collected from the whole instrument if the interpretation is consistent with a permissible appropriation of assets for that purpose. Naffziger v. Cook ---------- 264
12. First cousins of a testator are not prima facie heirs-at-law, and without more appearing would have no standing to question probate proceedings. Estate of Colman v. Redford ---------- 270
13. The county court is vested by the Constitution and statutes with exclusive original jurisdiction in all matters concerning the probate of wills and the settlement of estates of deceased persons. The adjudication by the court of a matter within its authority is, unless appealed from, final and not subject to collateral attack. Estate of Colman v. Redford ---------- 270
14. Anyone, who at the time of the execution of his will understands the nature of the act, the extent of his property, the proposed disposition of it, and the natural objects of his bounty, is competent to make a will. Skochdopole v. Bays ---------- 307
15. In a will contest where the proponent has made a

prima facie case that the testator was mentally competent to make a will, the contestant must produce sufficient evidence to support a contrary finding by a jury, otherwise there is no disputed question of fact to submit to a jury. Skochdopole v. Bays ---------- 307

16. It is essential to the validity of a will that the testator know and understand the contents thereof at the time of its execution. Skochdopole v. Bays 307

17. It is not essential that the testator understand the meaning of all the technical terms and legal phraseology employed in the will or be able to correctly interpret the will in a legal sense. It is sufficient that he understand the meaning and effect of the instrument as a whole. Skochdopole v. Bays ---- 307

18. There is no requirement that a will be read to the testator or the witnesses thereto prior to its execution. It is sufficient if the court is satisfied by competent evidence that the contents of the will were known to and approved by him. Skochdopole v. Bays ---------- 307

19. If a testator, of sound mind and under no restraint, executes a will, it will be presumed, in the absence of evidence of mistake, fraud, and the like that he executed it with knowledge of its contents, although it is not read at execution. Skochdopole v. Bays ---- 307

20. If a will contains an effective residuary provision, a lapsed legacy or devise will go to the residuary legatee or devisee. Wallman v. Swanson -------- 834

21. Where there is no effective residuary clause, or where the residuary clause lapses, then the legacy or devise which lapses will descend as intestate property. Wallman v. Swanson ---------- 834

22. A will may be executed for no other purpose than to revoke previously executed testamentary documents. Wallman v. Swanson ---------- 834

23. A testator has a right to designate a personal representative to administer his estate even though he may wish his property to pass according to our statute of descent. Wallman v. Swanson -------- 834

24. The fact that a will expresses the intention of the testator to disinherit certain persons does not prevent such persons from sharing as heirs-at-law or next of kin in property as to which the testator died intestate. Wallman v. Swanson ---------- 834

Witnesses.

1. The testimony of a witness in a criminal action which identifies a defendant as a participant in the commission of a crime is sufficient to sustain a finding of guilt if the witness had a reasonable opportunity to observe and recognize the defendant. State v. Konvalin ---------- 95
2. The credibility of witnesses and the weight of the evidence in a criminal action are for the jury to determine. State v. Konvalin ---------- 95
3. Where the evidence is contradictory, it is for the jury to decide and its verdict will not be interfered with unless clearly wrong. The credibility of witnesses and the weight to be given their testimony are for the jury's determination, and not for the court. Bunselmeyer v. Hill ---------- 140
4. The right of a husband to prevent his wife from testifying against him is personal to him and may be waived by him. State v. Swiney ---------- 230
5. An automobile accident is a "transaction" within the meaning of the dead man's statute. Bowers v. Maire ---------- 239
6. An opinion of an expert witness has no probative force unless the assumptions for it are shown to be true. Blobaum v. State ---------- 304
7. Before a party is entitled to introduce the testimony of a witness given on a former trial, he must show that by exercising reasonable diligence he has been unable to secure the attendance of the witness at the trial. Runyan v. State ---------- 371
8. Under circumstances where the opinion of an expert medical witness becomes, in effect, a "fact" in the case, such an opinion may be included as a basis for a hypothetical question propounded to another expert, where it is not upon the precise question upon which the opinion is expressed. Fowler v. Bachus ---------- 558
9. If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient. Fowler v. Bachus ---------- 558
10. A party calling a witness is not bound by the testimony of the witness if the testimony is contradicted, either expressly or by inference, by evidence that would justify a different conclusion. Willey v. Parriott ---------- 828

Words and Phrases.

The expression "subject to" is a term of qualification which acquires its meaning from the context in which it appears, although ordinarily it will mean subordinate to, subservient to, governed or affected by, dependent upon, or limited by. Bulger v. McCourt ---------- 316

Workmen's Compensation.

1. In order to recover under the Workmen's Compensation Act, the plaintiff must prove that the death or disability of the workman was the result of an accident arising out of and in the course of the employment. Bohy v. Pfister Hybrid Co. ---------- 337
   Hardin v. Moorman Manuf. Co. ---------- 869
   Chrisman v. Farmers Coop. Assn. ---------- 891
2. The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties. Bohy v. Pfister Hybrid Co. ---------- 337
3. The issue as to whether or not a workman is an employee, as distinguished from an independent contractor, is to be determined from all the facts in the case. There is no single test by which that determination can be made. Bohy v. Pfister Hybrid Co. 337
4. An independent contractor is one who renders the service in the course of an independent occupation representing the will of his employer only as to the result of the work and not as to the means by which it is accomplished. Bohy v. Pfister Hybrid Co. ---------- 337
5. In order to receive workmen's compensation from the Second Injury Fund, a claimant must in fact have a permanent total disability. Runyan v. State 371
6. A workman who is unable to perform or to obtain any substantial amount of labor, either in his particular line of work or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act. Runyan v. State ---------- 371
7. The Workmen's Compensation Act should be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation. Runyan v. State ---------- 371
8. Rule for allowance of claim progressive in nature in workmen's compensation case stated. Welke v. City of Ainsworth ---------- 496
9. A workmen's compensation award cannot be based

on possibility or speculation. If an inference favorable to the claimant can only be reached on the basis thereof, he cannot recover. Welke v. City of Ainsworth ---------- 496

10. "Probably" is usually defined as reasonably; credibly; presumably; in all probability; so far as the evidence shows; and, very likely. Welke v. City of Ainsworth ---------- 496

11. If a claimant had adduced competent evidence having probative value which preponderantly convinces the trier or triers of the facts that claimant had an accident and incurred a disability arising out of and in the course of his employment, notwithstanding the trier or triers of facts may recognize a possibility or even a probability that this was not true, an award of compensation thereon is proper. Welke v. City of Ainsworth ---------- 496

12. To recover in a workmen's compensation case a claimant must offer proof which preponderates in his favor on each of the indispensable elements of his claim. Welke v. City of Ainsworth ---------- 496

13. Where the testimony gives rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture, a workmen's compensation award cannot be sustained. Welke v. City of Ainsworth ---------- 496

14. Where, however, the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, then the claimant sustains his burden of proof on the element involved. Welke v. City of Ainsworth ---------- 496

15. In an action under the Workmen's Compensation Act the burden is on the claimant to establish by a preponderance of the evidence an accident arising out of and in the course of his employment and the disability resulting therefrom. Schoenrock v. School Dist. of Nebraska City ---------- 621

16. Objective symptoms of an injury are those which may be observed by others as distinguished from those which are apparent only to the injured person. An objective symptom may be any symptom which indicates a deleterious change in the bodily condition of the injured person. Schoenrock v. School Dist. of Nebraska City ---------- 621

17. The requirement that objective symptoms of an injury be produced "at the time" of the accident is satisfied if the symptoms manifest themselves ac-

cording to the natural course of such matters without any independent intervening cause being shown. Schoenrock v. School Dist. of Nebraska City ------ 621

18. The Workmen's Compensation Act does not require that the objective symptoms of an injury produced at the time of the accident be observed by others or that their existence be proved by independent testimony. Schoenrock v. School Dist. of Nebraska City ---------- 621

19. If conflicting evidence on rehearing in the Nebraska Workmen's Compensation Court is specially resolved according to the demeanor of witnesses, the resulting findings will be considered correct on de novo review in the Supreme Court. Schoenrock v. School Dist. of Nebraska City ---------- 621

20. Where the evidence shows that certain medical and hospital expenses have been incurred by an injured employee, a prima facie case is made out, and in the absence of any showing that the expenses incurred were unreasonable, the proof will be held sufficient. Schoenrock v. School Dist. of Nebraska City ---------- 621

21. Where an automobile is repaired to correct a defect occurring while the employee is engaged in the service of the employer, injuries incurred by the employee during the making of such repairs in the course of the employment are ordinarily considered as arising out of and in the course of the employment. Hardin v. Moorman Manuf. Co. ---------- 869

22. An inference to be drawn from facts to establish liability for the payment of benefits under the Workmen's Compensation Act must be a reasonable one. An inference based solely on speculation or possibility will not sustain an award of compensation. Hardin v. Moorman Manuf. Co. ---------- 869

23. In determining whether or not a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his work is whether or not it is reasonably incident thereto, or if it is so substantial a deviation as to constitute a break in the employment which creates a formidable independent hazard. Chrisman v. Farmers Coop. Assn. 891

24. Whether or not an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula

by which the issue may be resolved. Chrisman v. Farmers Coop. Assn. ---------- 891
25. Scope of term "arising out of" the employment stated. Chrisman v. Farmers Coop. Assn. -------- 891
26. The Workmen's Compensation Act will be liberally construed to accomplish the beneficent purposes of the act. Chrisman v. Farmers Coop. Assn. ------ 891

Zoning.
1. The disposition of a case involving an area variance and "practical difficulty" under a zoning ordinance depends on the facts and circumstances of each particular case. Alumni Control Board v. City of Lincoln ---------- 194
2. The acts of a board of zoning appeals are subject to review and reversal only if they constitute an abuse of discretion and are unreasonable, arbitrary, or illegal. Alumni Control Board v. City of Lincoln 194