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IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1965.
COUNTY OF GARFIELD, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

143 N. W. 2d 899

Filed July 1, 1966. No. 36182.

Taxation. Held: The final decision of the State Board of Equalization and Assessment ordering Garfield County to increase its assessed valuation of rural land 39 percent was arbitrary.

Appeal from the State Board of Equalization and Assessment. Reversed.

Keith J. Kovanda, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and DITTRICK, District Judge.

SMITH, J.

Garfield County has appealed from the same order of the State Board of Equalization and Assessment appealed from in other cases decided today, including County of Blaine v. State Board of Equalization & Assessment, *ante* p. 471, 143 N. W. 2d 880.

The board ordered Garfield County to increase its assessed valuation of rural land 39 percent. The adjustment increased the percentage assessment-sales ratio for Garfield County to 33.08, whereas the mean and median of adjusted ratios for all counties are 28.07 and 27.36 respectively. This deviate establishes arbitrary action, the record containing no contrary evidence. See County of Blaine v. State Board of Equalization & Assessment, *supra*.

The final decision of the board ordering Garfield Coun-

ty to increase its assessed valuation of rural land 39 percent is reversed.

REVERSED.

CARTER and SPENCER, JJ., concur in result.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1965.
COUNTY OF BOX BUTTE, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

143 N. W. 2d 900

Filed July 1, 1966. No. 36183.

Taxation: Appeal and Error. If a record on appeal from an order in a proceeding for equalization of assessed property valuations establishes an arbitrary adjustment, arbitrariness is not dispelled by speculation that extra-record information sufficient to support the adjustment may have been used.

Appeal from the State Board of Equalization and Assessment. Affirmed in part, and in part reversed.

John O. Anderson, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and DITTRICK, District Judge.

SMITH, J.

Box Butte County has appealed from the same order of the State Board of Equalization and Assessment appealed from in other cases decided today, including County of Blaine v. State Board of Equalization & Assessment, *ante* p. 471, 143 N. W. 2d 880.

The board ordered Box Butte County to increase its valuations of rural and urban real estate 10 percent. The resultant assessment-sales ratios in percents are

24.02 for rural land and 31.63 for urban land. For all counties the mean and median of rural ratios are 28.07 and 27.36 respectively, and of urban ratios, 28.83 and 28.36 respectively.

The county argues that the order should be reversed as to it because of the number of counties with lower ratios for one or both classes of property. The ratio for rural land in Box Butte County is well below the mean and median of ratios, and the county points to no circumstance indicating prejudice to it from the deviates. In this respect the order was not arbitrary or prejudicial.

Of a different quality is the ratio 31.63. The board of course is not to be straitjacketed by percents, but without other evidence the deviate is too great for us to hold that this increase was discretionary.

In defense of the equalization order, counsel resorts to the rule that members of the board may rely on their personal knowledge outside the record. Since we are in the dark concerning the nature of the extra-record information, extended discussion of the confusion in the law of official notice is undesirable. See, § 84-914, R. S. Supp., 1963; 2 Davis, Administrative Law Treatise, ch. 15, pp. 338 to 434. At a minimum extra-record information in some form ought to have been incorporated into the transcript or bill of exceptions. Arbitrariness on a record is not dispelled by speculation that the board may have used extra-record information sufficient to support an adjustment. See County of Blaine v. State Board of Equalization & Assessment, *supra*.

The part of the order increasing the valuation of rural land in the county 10 percent is affirmed. The part increasing the valuation of urban land 10 percent is reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

SPENCER, J., dissenting.

I concur in the reversal of a portion of the order, and dissent from the majority opinion because the entire order was not included in the reversal. I incorporate

herein by reference the dissent filed in County of Lancaster v. State Board of Equalization & Assessment, *post* p. 497, 143 N. W. 2d 885.

Additionally, I make the following observations. The sales assessment ratio given by the Tax Commissioner for Box Butte County is: Urban - 28.75; rural - 21.84. Despite the wide variance in the two figures, both of them were raised 10 percent. Considering the urban figure first, there were 29 counties with a lower sales-assessment ratio than 28.75 which were not changed, and Thurston County, with a sales-assessment ratio of 27.98 received a 14 percent reduction.

The rural figure for Box Butte County was based on 27 sales, and only 2 of them were sales of 160 acres or more, indicating that the other sales were either to round out existing holdings or were development sales in suburban areas. Gosper County, with a rural sales ratio of 21.51 and Dundy County, with a rural sales ratio of 12.14, were not changed in any way. How a raise can be made in one county, based upon the Tax Commissioner's figures, and no raise made in counties with a lower sales ratio, and determine that the action is not arbitrary and capricious, is beyond my comprehension.

CARTER, J., joins in this dissent.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1965.
COUNTY OF KEITH, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

143 N. W. 2d 902

Filed July 1, 1966. No. 36184.

1. **Taxation: Appeal and Error.** On appeal from an order of the State Board of Equalization and Assessment for equalization of assessed valuations of property among counties, the Supreme Court considers the entire record for the purpose of deciding whether the order was made arbitrarily.

2. **Taxation. In the absence of statute the State Board of Equalization and Assessment may adopt any reasonable method of equalization, including reasonably reliable assessment-sales ratios.**

Appeal from the State Board of Equalization and Assessment. Affirmed in part, and in part reversed.

Frank B. Svoboda, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and DITTRICK, District Judge.

SMITH, J.

Keith County has appealed from the same order of the State Board of Equalization and Assessment appealed from in other cases decided today, including County of Blaine v. State Board of Equalization & Assessment, *ante* p. 471, 143 N. W. 2d 880. The part of the order under review directed Keith County to increase its assessed valuation of rural land 43 percent and of urban land 12 percent.

We conclude from the entire record that the rural increase was ordered arbitrarily. During the hearing the attorney for the Tax Commissioner announced that the assessment-sales ratio for rural land in Keith County was 18.97 percent. The county assessor then testified that the commissioner had used biased data and that other sales data should be substituted. The attorney agreed and the assessor computed a corrected ratio of 24.239, which should have been accepted in the absence of evidence that the disputed data was unbiased. In effect the board increased the ratio to 34.66, although the mean and median of all county ratios for rural lands were 28.07 and 27.36 respectively. The deviate demonstrates arbitrary action. See County of Blaine v. State Board of Equalization & Assessment, *supra*.

The urban increase was not arbitrary. Since the per-

centage ratio of 27.23, which the Tax Commissioner had computed for urban land in Keith County, was not shown to be unreliable, we must assume its accuracy. See County of Kimball v. State Board of Equalization & Assessment, *ante* p. 482, 143 N. W. 2d 893. It is less than the mean, 28.83, and the median, 28.36, of all urban ratios for counties. In the absence of statute the board may adopt any reasonable method of equalization, including reasonably reliable assessment-sales ratios. County of Lancaster v. State Board of Equalization & Assessment, *post* p. 497, 143 N. W. 2d 885. Since the record does not show this part of the order to have been arbitrary, the part should be affirmed. See, County of Loup v. State Board of Equalization & Assessment, *ante* p. 478, 143 N. W. 2d 890; County of Kimball v. State Board of Equalization & Assessment, *ante* p. 482, 143 N. W. 2d 893.

The part of the order directing the rural increase is reversed. The part directing the urban increase is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

SPENCER, J., dissenting.

I concur in the reversal of a portion of the order, and dissent from the majority opinion because the entire order was not included in the reversal. I incorporate herein by reference the dissent filed in County of Lancaster v. State Board of Equalization & Assessment, *post* p. 497, 143 N. W. 2d 885.

Additionally, I make the following observations. The Tax Commissioner's sales-assessment ratio for Keith County is: Urban - 24.31; rural - 18.97. These were increased as follows: Rural - 43 percent; urban - 12 percent. To show arbitrary action, I call attention to the urban sales-assessment ratio in the following counties where no changes were made, each of which had an urban sales ratio less than Keith County:

COUNTY	SALES RATIO
Thomas	22.12

Logan	23.75
Hayes	22.77
Garden	23.72

Blaine, with approximately the same urban ratio, 24.68, also was not changed.

CARTER, J., joins in this dissent.

IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1965.
COUNTY OF LANCASTER, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.
IN RE VALUATION AND EQUALIZATION OF REAL PROPERTY IN THE STATE OF NEBRASKA FOR 1965.
COUNTY OF LANCASTER, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

143 N. W. 2d 885

Filed July 1, 1966. Nos. 36186 and 36192.

1. **Taxation.** In the absence of a specific statute the State Board of Equalization and Assessment is not required to notify taxpayers of a hearing to be held for the purpose of equalizing assessed valuations of property among counties.
2. **Taxation: Appeal and Error.** On review the question concerning the issues before the State Board of Equalization and Assessment is not the adequacy of the original notification but the fairness of the whole procedure.
3. **Taxation.** In the absence of statute the State Board of Equalization and Assessment may adopt any reasonable method of equalization, including use of reasonably reliable assessment-sales ratios.

Appeals from the State Board of Equalization and Assessment. Affirmed.

Paul L. Douglas, William D. Blue, Ronald D. Lahners, Floyd A. Sterns, Walter D. Weaver, and Janice L. Gradwohl, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Kennedy, Holland, DeLacy & Svoboda, Ralph D. Nelson, Vincent D. Brown, and Arlyss E. Brown, amici curiae.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and DITTRICK, District Judge.

SMITH, J.

The State Board of Equalization and Assessment ordered appellant Lancaster County and other counties to increase their assessed valuations of real estate for taxation in the year 1965. The lands in all counties having been classified rural or urban, adjustments of varying percents were ordered to be made horizontally in respect to one or both classes at the county level for the purpose of equalization among the counties. According to counsel for Lancaster County, the board ordered the increases without adequate notification of hearing and without referring to the evidence.

The county contends that failure of notification to taxpayers violated due process of law, although we read in appellant's brief that there are 80,000 parcels of real estate in Lancaster County alone. The board notified all counties as section 77-508, R. R. S. 1943, specifically called for, but the county argues that section 84-913, R. S. Supp., 1963, a counterpart of section 8 of the Model State Administrative Procedure Act of 1946, required notification to taxpayers.

The procedure in advance of hearing did not cut the ground from under the board. An explanation of the few precedents thought to lean in the other direction lies in the distinction, occasionally troublesome, between horizontal and vertical adjustments at the county level. See, County of Douglas v. State Board of Equalization & Assessment, 158 Neb. 325, 63 N. W. 2d 449; County of Howard v. State Board of Equalization & Assessment,

158 Neb. 339, 63 N. W. 2d 441. The hyperbole of every landowner participating in a statewide equalization hearing is instructive. "There must be a limit to individual argument in such matters if government is to go on." Bi-Metallic Inv. Co. v. State Board of Equalization of Colorado, 239 U. S. 441, 36 S. Ct. 141, 60 L. Ed. 372. In the absence of a specific statute, notification to taxpayers is unnecessary.

The county argues that the board stated the issues so indefinitely that the order should be reversed. The board notified the county that the assessed valuations on rural and urban real estate were to be increased or decreased. The county at no time moved for a continuance or a specification of proposed adjustments. "* * * the question on review is not the adequacy of the original notice * * * but * * * the fairness of the whole procedure." 1 Davis, Administrative Law Treatise, § 8.04, p. 525. We agree that in advance of hearing the board ought to have notified the affected counties of the proposed adjustments in percents, and our prior decisions to the contrary are disapproved. However, here the insufficiency of notice was nonprejudicial error in view of the absence of timely objection.

We turn to the contention that the board acted without referring to the evidence. After a hearing at which all 93 counties appeared and voluminous evidence was received, Lancaster County was ordered to increase its assessment of rural land 15 percent and of urban land 28 percent. Valuations of one or both classes were increased in 73 percent of the counties, the records showing aggregate assessments in counties which have appealed but not in other counties.

The board considered assessment-sales ratios in percents for each county. The mean and median of rural ratios were 24.73 and 23.91 respectively, and of urban ratios, 28.68 and 27.70 respectively. The board in effect increased the Lancaster rural ratio from 23.32 to 26.82 and its urban ratio from 23.03 to 29.48. The resultant

mean and median of rural ratios are 28.07 and 27.36 respectively, and of urban ratios 28.83 and 28.36 respectively.

Attacks on the ratios for Lancaster County were indirect. The county assessor testified generally that he had not been given sufficient time to examine the supporting data, but no continuance was requested. The county offered no ratio of its own, although it adduced evidence to the effect that it was bearing a fair share of taxes. Its rural adjustment relates closely to the overall adjustment indicated by the means and medians, and we find no data suggesting that this comparison is unreasonable.

The urban adjustment for Lancaster County was not arbitrary. The relationship between its assessment-sales ratio and the mean and median is close enough, although deviates for other counties are unexplained. In a classification of urban ratios by population Lancaster County, which ranks second in population, is fairly close to the line. The ratio for Douglas County, which ranks first, is 29.99. The mean and median of the first 10 ratios ranked by population are 29.39 and 29.16, respectively. Since Lancaster County seeks a decrease in its own adjusted valuations instead of increases elsewhere, on this record the deviates for other counties do not demonstrate arbitrary adjustment of Lancaster County valuations. "* * * substantial compliance with equality and uniformity is all that is required." County of Kimball v. State Board of Equalization & Assessment, *ante* p. 482, 143 N. W. 2d 893.

An argument is made that no ratio should have been considered, although the county failed to show defects prejudicial to it. Cases in which ratios were found unreliable because of biased data or the like are inapposite. In the absence of statute the board may adopt any reasonable method of equalizing. Fromkin v. State, 158 Neb. 377, 63 N. W. 2d 332. We point out that the problem of determining the reasonableness or arbitrari-

ness of the action is complicated by the absence from the record of computations made or used by the board. If the board had shown in the record all computations made or used in reaching its conclusions, the problems of this court would be simplified.

The final decision of the board ordering Lancaster County to increase its valuations is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion because I cannot be a party to a guessing game in a judicial proceeding. To sustain the order of the State Board of Equalization and Assessment required the court to go outside the record, as the opinion itself suggests. There is absolutely nothing in the record to indicate the basis on which the board acted, unless we consider a self-serving resolution adopted at the close of the hearing, which finds no support in the record.

The testimony of the county officials of the appealing counties does not in any manner support the action taken, nor can anything be deduced from the testimony of the officials in the other counties which would serve that purpose. Actually, if the board acted only on the testimony appearing in the record from all sources, its action could not be sustained.

The board adduced testimony on perimeter studies, but it is evident from the record that these studies were given little if any consideration in the decision reached. If they had been considered, the results in many instances would have to be different.

The board makes a finding that the abstracts of assessment do not conform to law. In what way they do not conform is not disclosed, and I confess that if there is any clue to it in this record, I am unable to find it.

It is evident to me that the board, as it stated in the resolution, considered the personal knowledge of each and every member of the State Board of Equalization and Assessment, for its action cannot be explained on

any other basis, and the record itself suggests that the board has the feeling that its own conscience is its only guide as to what it may do. The board seems to draw this conclusion from some loose language appearing in previous cases. I call particular attention, however, to the fact that the dissenting opinion in Carpenter v. State Board of Equalization & Assessment, 178 Neb. 611, 134 N. W. 2d 272, stated: "At this point also, we should state that we disagree wth the holding that the Board is not bound by the record, but may act upon the knowledge of its members as to value and any other information satisfactory to it. If this be the rule, as applied to this case, it would be virtually impossible to successfully contest any action of the Board." In this respect, I point out that in the concurring opinion, the following appears: "I am not prepared to hold, however, that the Board is bound by other than competent evidence." From this it should be apparent that in the last case on the subject, a majority of the court stated that the board could only act on competent evidence. How this court can review a record which does not indicate the evidence on which the board acted, is a mystery to me.

With reference to the sales-assessment ratio, there is no testimony in the record to show how it was computed except for the observation made by an employee of the Tax Commissioner's office that the sales-assessment ratio study is made by averaging total valuation of all the land sold into the total assessed value. The actual sales-assessment figures were not put into the record except by questions asked, and except in only a few instances the sales on which the assessments were allegedly based do not appear in the record.

With reference to the figures used in the specific case of Lancaster County, the record indicates that figures sent by the Tax Commissioner to the county assessor to be checked were unintelligible and had to be returned for correction. When a corrected list, which is not in the record, was furnished to Lancaster County, it was

too late to permit the checking of those figures by the county for the hearing herein.

The mean and median averages referred to in the opinion are not in the record, but were compiled by the writer of the opinion from the figures referred to heretofore, which only appear in questions asked by an employee of the Tax Commissioner's office. There are counties for which no sales-assessment ratio figures are mentioned, and consequently the figures for these counties could not have been considered in arriving at the average or median figures. While in a group this large the absence of a few might not make too much of a difference, it would make some difference.

The first order of the board raised the urban property for Lancaster County 31 percent, but this figure was later corrected by the board because of a clerical error which is not explained in any manner in the record. If other errors exist, it is not possible to check them from the record. I also suggest that some counties with lower urban ratios were not changed, or received a lower increase. For example, Thomas, with 22.12, was not changed; Hayes, with 22.77, was not changed; and Saline, with 22.91, received a 16 percent increase; yet Lancaster, with a higher sales-assessment ratio based on the Tax Commissioner's figures, received a 28 percent increase.

I have come to the definite conclusion that the State Board of Equalization and Assessment is included as an agency subject to the provisions of the Administrative Procedures Act. Sections 84-901 to 84-919, R. S. Supp., 1963. Section 84-901, R. S. Supp., 1963, states that an agency, as used in the act, means each board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules, except the office of the Adjutant General, the courts, and the Legislature. Section 77-501, R. R. S. 1943, creates a State Board of Equalization and Assessment; and section 77-502, R. R. S. 1943, provides the Tax Commissioner shall be the secretary and as such

shall perform such duties as may devolve on him by law or rules and regulations of the board.

On many occasions, we have determined that the State Board of Equalization and Assessment is an administrative board, and have determined that the sole question on appeal from its final order is ordinarily limited to questions of law *and whether the evidence is sufficient to sustain the order.* The sole question then is whether such order was arbitrarily made. See Laflin v. State Board of Equalization & Assessment, 156 Neb. 427, 56 N. W. 2d 469.

The notice used by the board, which was a blanket notice to every county to appear to show cause why its values should not be increased or decreased, has been specifically approved by this court heretofore. See County of Buffalo v. State Board of Equalization & Assessment, 158 Neb. 353, 63 N. W. 2d 468. However, these decisions were previous to the passage in 1959 of section 84-913, R. S. Supp., 1963, of the Administrative Procedures Act, which requires the board to give notice, stating the specific issues involved. A reading of the record fails to disclose any mention of the issues which the board considered pertinent for the individual counties. In this regard, it should be mentioned that section 77-508, R. R. S. 1943, provides, so far as material herein: "* * * the board *shall issue a notice to the counties which the board deems either undervalued or overvalued,* * * *." (Italics supplied.) A reasonable interpretation of this language to me would indicate that the board is required to tell a county that it considers its property undervalued, so that the county may appear to make proper showing in the specific instances mentioned. It would seem to me that to send out a general notice to appear to show cause why valuations should not be increased or decreased is a subversion of the statute. As I read Chapter 77, R. R. S. 1943, the board is to meet and examine the abstracts which have been returned by the counties, and then after such examination, to call in those counties

where some change is to be made. It is not the intent of the statute that the board issue a general notice to all of the counties for a social or political gathering, and then subsequently examine the abstracts.

Some of the previous decisions of our court have held that the State Board of Equalization and Assessment, in the equalization of property as between counties, is not required to have a formal hearing. See Boyd County v. State Board of Equalization & Assessment, 138 Neb. 896, 296 N. W. 152. These decisions are previous to the 1959 amendment to the Administrative Procedures Act. It is my conviction that the State Board of Equalization and Assessment is now required by the Administrative Procedures Act to have a formal hearing when a change is to be made, and that the board is required to make a record which will substantiate the change made. It must also include findings of facts on which the decision is based. See § 84-915, R. S. Supp., 1963. This fact has been ignored by the majority opinion, although it is properly raised and argued.

I would hold that when the board reviews the abstracts, as required by law, that the action of the board becomes final except as to those counties which are notified of a proposed raising or lowering of their valuation. In the event this procedure is not followed, the board is without authority to act. The counties notified are entitled to the ordinary rules of due process.

How this court can even start a review of a decision of the State Board of Equalization and Assessment unless we are furnished a finding of the basic facts on which the ultimate fact or conclusion is based, is beyond my comprehension. I cannot agree to town meetings or even star chamber proceedings, or to conclusions which depend upon mere whimsey, or, to use the language of one of the board members, the conscience of the board. I cannot be a party to any holding which suggests, by inference or even by inaction, that the board is beyond the law. I consider it my duty as an appellate judge to act

only on the record presented. That record requires reversal herein.

CARTER, J., joins in this dissent.

JOHN C. KLOSTERMAN, APPELLEE, V. FRANK MARSH, AS SECRETARY OF STATE OF THE STATE OF NEBRASKA, APPELLANT.

143 N. W. 2d 744

Filed July 1, 1966. No. 36361.

1. **Constitutional Law: Elections.** Under Nebraska constitutional provisions vesting the legislative power of the state in the Legislature but reserving to the people the right of initiative and referendum, the Legislature, on the one hand and the electorate on the other, are coordinate legislative bodies, and there is no superiority of power between the two. In the absence of specific constitutional restraint, either may amend or repeal the enactments of the other.
2. **Constitutional Law: Statutes.** An "act of the Legislature" under Article III, section 3, of the Constitution of Nebraska, means a particular legislative bill which has been passed by the Legislature and becomes law either by the necessary passage of time for veto, or by the signature of the Governor.
3. **Constitutional Law: Elections.** Constitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed to make effective the powers reserved.
4. **Constitutional Law: Statutes.** The initiative and referendum provisions of the Constitution of Nebraska reserve to the people the right to act in the capacity of legislators. The presumption should be in favor of the validity and legality of their acts.
5. **Statutes: Elections.** Signatures on a referendum petition obtained after the act sought to be referred was passed are not rendered invalid merely because they were obtained before the adjournment of the legislative session at which the act was passed.
6. ———: ———. Under the facts shown, the title and text of an act set out in a referendum petition were sufficient.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Reversed and dismissed.

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

Bernard S. Gradwohl, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and COLWELL, District Judge.

MCCOWN, J.

This is an action to enjoin the Secretary of State from permitting L.B. 797 of the 1965 Legislature, the Income Tax Act, Laws 1965, chapter 465, page 1476, to be placed on the ballot and referred to the electorate for approval or rejection at the 1966 general election. The district court enjoined the Secretary of State from certifying the title and text of L.B. 797 to the election officials or in any other manner causing the same to be referred to the electorate. This appeal followed.

On June 22, 1965, the 75th Session of the Nebraska Legislature passed L.B. 797 providing for Nebraska's first state income tax. It became law on July 1, 1965, without the signature of the Governor. On July 23, 1965, a form of referendum petition to be used for circulation was filed with the Secretary of State to refer L.B. 797 to the electors of the state for their approval or rejection. Four days later, on July 27, 1965, L.B. 932, Laws 1965, chapter 467, page 1509, was introduced on first reading. On August 5, 1965, L.B. 932 was amended to provide that it was to amend section 1 (1) of L.B. 797. On August 16, 1965, L.B. 932 was passed by the Legislature. The Legislature adjourned sine die on August 17, 1965. On August 18, 1965, L.B. 932 was approved by the Governor. L.B. 932 was not included in or made a part of the referendum petition against L.B. 797.

On September 29, 1965, a referendum petition and the required affidavit as to persons contributing money or other things of value in connection with the referendum petition were filed, and on November 15, 1965, addi-

tional certificates and a supplemental statement were filed. On December 13, 1965, the Secretary of State certified that sufficient signatures had been properly filed in accordance with Article III, section 3, of the Constitution of Nebraska, and section 32-704, R. R. S. 1943, to refer L.B. 797 to the electors of the state. The Secretary of State found 82,132 valid signatures which were more than the 5 percent requirement of the Constitution of Nebraska (28,905), and also more than the 10 percent required to suspend the taking effect of such act and showed the required distribution among counties.

A number of the petition signers actually signed petitions on or before August 17, 1965. It is conceded that if these signatures obtained prior to August 17, 1965, are invalid as a class, there would be an insufficient number of counties having a 5 percent total to meet the constitutional requirements.

L.B. 932 changed a part of subsection (1) of section 1 of L.B. 797 by deleting a portion of a sentence which provided, in effect, that the income of a cooperative should be considered its net income before any payments obligated or paid as dividends or patronage refunds. It substituted for the deleted part a provision which permitted deduction of patronage dividends, as specified, in determining the net income of a cooperative. This constituted the entire effect of L.B. 932. The evidence introduced by the plaintiff showed that there were 369 cooperatives headquartered in Nebraska, and more than 278,600 members of the Nebraska cooperatives, and that the annual business transacted by cooperatives in Nebraska is very substantial.

The right of the people to exercise the initiative and referendum is specifically reserved to them in Article III, section 1, of the Constitution of Nebraska, in part: "The people reserve for themselves, however, the power to propose laws, and amendments to the constitution, and to enact or reject the same at the polls, independent of the Legislature, and also reserve power at their own option

to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature."

Article III, section 3, of the Constitution of Nebraska, specifically applies to the referendum. "The second power reserved is the referendum which may be invoked, by petition, against any act or part of an act of the Legislature, except those making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act. Petitions invoking the referendum shall be signed by not less than five per cent of the electors of the state, distributed as required for initiative petitions, and filed in the office of the Secretary of State within ninety days after the Legislature at which the act sought to be referred was passed shall have adjourned sine die or for more than ninety days. Such petition shall set out the title of the act against which the referendum is invoked, and in addition thereto, when only a portion of the act is sought to be referred, the number of the section or sections or portion of sections of the act designating such portion. When the referendum is thus invoked, the Secretary of State shall refer the same to the electors for approval or rejection at the first general election to be held not less than thirty days after the filing of such petition.

"When the referendum is invoked, as to any act or part of act, other than emergency acts or those for the immediate preservation of the public peace, health or safety, by petition signed by not less than ten per cent of the electors of the state, distributed as aforesaid, it shall suspend the taking effect of such act or part of act until the same has been approved by the electors of the state."

Article III, section 4, of the Constitution of Nebraska, specifically provides in part: "The provisions with respect to the initiative and referendum shall be self-executing, but legislation may be enacted to facilitate their operation."

Section 32-702, R. R. S. 1943, requires that the form of referendum petition shall be substantially as specified in that section. The statutory form requires a concise statement in large type of the legal effect of the filing of the petition and the objective sought to be secured by submitting the measure to the voters. The statutory form reads in part: "*Legislative Bill* No. ——, entitled (title of act, and if the petition is against less than the whole act then set forth here the part or parts on which the referendum is sought), * * *." (Emphasis supplied.)

Section 32-704, R. R. S. 1943, provides: "Upon each sheet for petitioners' signatures shall be printed a full and correct copy of the title and text of the law or amendment to the Constitution so proposed or the measure sought to be referred to the electors by the initiative or referendum petition, as the case may be, * * *. Prior to obtaining any signatures to the petition, a copy of the form to be used shall be filed with the Secretary of State, * * *."

This is apparently a case of first impression on the specific factual situation presented. It involves a situation in which the Legislature passed a legislative bill embodying a complete act. Circulation of a referendum petition against that act was commenced after the passage and adoption of the bill, but before the adjournment of that session of the Legislature. The Legislature then introduced and passed a separate bill amending a part of one section of the original bill. The referendum petition against the original act was not changed and was then completed and filed after the amendment and after the adjournment of that session of the Legislature. We have been cited to no cases directly in point from this or any other jurisdiction.

The plaintiff contended and the lower court determined that the Constitution contemplates that the proceedings of the Legislature and the operation of the referendum proceedings shall be consecutive and not

concurrent legislative processes, and that the power to refer legislation can be construed consistently only if referral is delayed until final action of the Legislature on any particular legislative proposal. To the extent this conclusion implies that the legislative power of initiative and referendum reserved to the people and the legislative authority granted to the Legislature may not be exercised concurrently, we disagree. Both the initiative and the referendum involve the exercise of legislative power reserved to the people by the Constitution. The initiative is in no sense limited as to the time of its exercise. Neither are initiated laws limited to matters on which the Legislature has not acted. By the initiative process, the people may amend or even expressly repeal laws already enacted by the Legislature. By the referendum, the people may also reinstate an act which the Legislature has expressly repealed.

Under Nebraska constitutional provisions vesting the legislative power of the state in the Legislature, but reserving to the people the right of initiative and referendum, the Legislature, on the one hand, and the electorate on the other, are coordinate legislative bodies, and there is no superiority of power between the two. In the absence of specific constitutional restraint, either may amend or repeal the enactments of the other. See, 28 Am. Jur., Initiative, Referendum and Recall, § 45, p. 469; Annotation, 33 A. L. R. 2d 1118 at p. 1121, and cases there cited. The time and effect of the exercise of legislative power by the Legislature on the one hand and by the people on the other, and their consequent intereffect pose the problem here.

In effect, the plaintiff's position is that under the Constitution, no act of the Legislature is complete or final for purposes of the referendum until the Legislature adjourns. To reach this result, the plaintiff relies on the language of Midwest Popcorn Co. v. Johnson, 152 Neb. 867, 43 N. W. 2d 174: "The Legislature during a session may do and undo, consider and reconsider, as

often as it thinks proper, as only the final result will be regarded as the thing done." This is a statement as to legislative power and the effect of its exercise. The real question is: When is an act final in the sense that it is an "act of the Legislature" against which the referendum may be invoked? It seems to us that the Constitution itself answers the question. Article III, section 1, reserves the power of the referendum as to "any act, item, section, or part of any act *passed by the Legislature.*" Article III, section 3, specifically applying to the referendum grants the power against "any act or part of an act of the Legislature, except those making appropriations for the expense of the state government or a state institution, existing *at the time of the passage of such act.*" Article III, section 14, applying to legislative bills, refers to "*final passage.*" Article III, section 27, provides "No *act* shall take effect until three calendar months after the adjournment of the session at which it *passed,* unless in case of emergency, * * *." (Emphasis supplied.) The right of referendum under our Constitution extends even to emergency acts which go into effect immediately, except that a referendum cannot suspend the taking effect of an emergency act.

Ordinarily "act" means "a bill which has been enacted by the Legislature into a law." See 82 C. J. S., Statutes, § 115, p. 193. There is no suggestion anywhere in our Constitution that the right of referendum was intended to be applied to a general principle of law, nor even to a specific principle of law except as embodied in a specific act of the Legislature. A thorough examination of the constitutional provisions, and the statutory provisions of the enabling and facilitating legislation leads us to the conclusion that an "act of the Legislature" under Article III, section 3, means a particular legislative bill which has been passed by the Legislature and becomes law, either by the necessary passage of time for veto, or by the signature of the Governor. At that point it is an enactment and becomes an "act of the

Legislature." It is final in the sense that it is done and completed, although an act of the Legislature is not final in the sense that the same or any subsequent Legislature may not change, amend, modify, or even completely repeal it. In such a sense, few acts of a Legislature are ever final. From the time it becomes a law, it can only be changed, amended, modified, or repealed by a separate legislative act.

Constitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed to make effective the powers reserved. The case of State ex rel. Ayres v. Amsberry, 104 Neb. 273, 177 N. W. 179, although later vacated on procedural grounds stated: "The amendment under consideration reserves to the people the right to act in the capacity of legislators. The presumption should be in favor of the validity and legality of their act. The law should be construed, if possible, so as to prevent absurdity and hardship and so as to favor public convenience." The court later said: "Any legislation which would hamper or render ineffective the power reserved to the people would be unconstitutional."

The plaintiff specifically contends that signatures to a referendum petition may not be validly secured prior to the adjournment of the legislative session at which the referred act was passed. This rests on the interpretation of one sentence in Article III, section 3, Constitution of Nebraska, which reads: "Petitions invoking the referendum shall be signed by not less than five per cent of the electors of the state, distributed as required for initiative petitions, and filed in the office of the Secretary of State within ninety days after the Legislature at which the act sought to be referred was passed shall have adjourned sine die or for more than ninety days." The plaintiff contends this sentence requires that petitions must be signed, as well as filed, within 90 days after adjournment and, therefore, they may not be signed before adjournment. A reading of this sen-

tence in context would indicate that the time limitations were intended to refer only to a cut-off date after which no referendum petition could be filed and was not intended to fix the date that the right of referendum became exercisable, nor the date before which signatures could not be validly obtained. We do not find it necessary to go outside the language of the constitutional provision itself. We hold that signatures on a referendum petition obtained after the act sought to be referred was passed are not rendered invalid merely because they were obtained before the adjournment of the legislative session at which the act was passed.

The Constitution requires that the referendum petition set out the title of the act. Section 32-704, R. R. S. 1943, requires a full and correct copy of the title and text of the measure sought to be referred. The plaintiff contends that because the title of L.B. 797 does not reflect the subsequent and separate title of L.B. 932, and because the text of section 1 of L.B. 797 does not reflect the amendment made by L.B. 932, therefore, the referendum petition did not contain a full and correct copy of either the title or the text of the act or measure sought to be referred.

With respect to what must be set out in the petition, the framers of the Constitution specifically distinguished between an initiative petition and a referendum petition. The Constitution provides that with respect to an initiative petition "the proposed measure shall be set forth at length." With respect to the referendum, the Constitution requires only that the petition shall "set out the title of the act against which the referendum is invoked * * *" unless it is against only a portion of an act, in which case, the number of the section or sections is required to be set out. It is unmistakable that where an entire act of the Legislature, rather than only a portion of it, is referred, the constitutional convention determined that only the title was sufficient. The reason for the differentiation is likewise clear. In the case of

the referendum, the bill has been before the Legislature and is known all through its legislative course by its title. The Constitution requires that the title shall clearly reflect what is in the bill. In State ex rel. Ayres v. Amsberry, *supra,* this court also pointed out the distinction between the initiative and the referendum as to this point in the following language: "It is to be observed that to secure intelligent petitioning the need for an attached copy is not at all the same when referring legislation as when initiating it. In the one instance, the voter presumably knows the law and is informed, except in cases where only a portion of the law is being referred, and, if not, can get exact information. In the other, presumptions are to the contrary."

In this case, had all the provisions of L.B. 932 been included in L.B. 797 at the time of the passage and adoption of L.B. 797, no change would have been required in the title of L.B. 797. Here a full and correct copy of the title of L.B. 797 was on the petition and each sheet of it. Under such circumstances, the title of the act set out in the referendum petition here was sufficient and in compliance with constitutional and statutory provisions.

The referendum petition here also included the full and correct copy not only of the title, but also of the text of L.B. 797 as passed. The only requirement that the text of the measure sought to be referred shall be set out in full is in section 32-704, R. R. S. 1943. That statute applies to both initiative and referendum petitions without regard to the distinctions between them made by the Constitution. Without passing on the constitutionality of that statute with respect to requiring the petition to set out the complete text of the "act" in the case of the referendum, we hold that it was not mandatory to include the text of the amendment made by L.B. 932 where only L.B. 797 was being referred.

In this case we are not faced with the problem of a referendum petition against a specific legislative act in

which changes or amendments made by the Legislature in a subsequent amending act might be such as to make them inseverable. Nor is this a case where the later amendment was so major and extensive as to make the issue to be presented to the voters unintelligible or so misleading as to be unfair or constitute fraud. Neither is this a case in which rejection of the act under referral by the voters would create confusion or upset the orderly process of legislation.

For the reasons stated, the referendum petition against L.B. 797 here involved was proper and sufficient. The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

IOWA MUTUAL INSURANCE COMPANY OF DE WITT, IOWA, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. JANE MECKNA, APPELLEE AND CROSS-APPELLEE, DEAN ENGLISH, ADMINISTRATOR OF THE ESTATE OF ROBERT E. ENGLISH, DECEASED, APPELLEE AND CROSS-APPELLANT, JAMES KOLB, INTERVENER-APPELLEE AND CROSS-APPELLEE.

144 N. W. 2d 73

Filed July 8, 1966. No. 36199.

1. **Insurance.** Although an insurance policy obligates the insurer to defend all suits brought against the insured, even though groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy.
2. ———. The purpose of the omnibus clause of an insurance policy is to fix the liability of additional insureds and to eliminate ambiguities and defenses with reference thereto as a matter of public policy.
3. ———. The omnibus clause of an insurance policy imposes liability on the insurer for the negligence of any person using the insured's automobile with his permission.
4. **Automobiles: Insurance.** The death of a named insured caused by one operating his automobile with his consent is within the coverage of the omnibus clause of his liability insurance policy.
5. **Insurance.** Where an insurer has all the information the in-

sured can give it, and has ample notice to permit it to take any and all necessary steps to protect its interest, it cannot avoid liability by alleging a breach of the notice provision of the policy.

6. ———. An insurer cannot assert a breach of the cooperation clause as a policy defense in the absence of a showing of prejudice or detriment to the insurer.

7. ———. An insurer does not have a right to insist on a reservation of rights agreement with its insured as a condition precedent to undertaking the defense it is obligated to take by the terms of the policy.

8. ———. The burden of proving noncooperation is on the insurer who urges it as a policy defense.

9. **Insurance: Trial.** A misstatement by an insured promptly or seasonably corrected or withdrawn prior to trial of the action against the insured does not constitute a breach of the cooperation clause.

10. **Insurance.** The purpose of the cooperation clause is to prevent collusion between the injured and the insured, and to facilitate the handling of the claims by the insurer.

11. **Insurance: Judgments.** Where an insurer sees fit to gamble on its insistence on a reservation of rights agreement and to ignore the fact that an action against its insured is in default, it is in no position to complain about a default judgment entered against its insured.

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

Boland, Mullin, Walsh & Cooney and Webb, Kelley, Green & Byam, for appellant.

Norman Denenberg, for appellee English.

Keith Howard, for intervener-appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and COLWELL, District Judge.

SPENCER, J.

This is an action for a declaratory judgment brought by Iowa Mutual Insurance Company of De Witt, Iowa, hereinafter referred to as insurer, against Jane Meckna, hereinafter referred to as Meckna, and Dean English, administrator of the estate of Robert E. English, de-

ceased, who will hereinafter be referred to as administrator.

Insurer, previous to June 11, 1962, issued an automobile liability policy with limits on liability of $10,000 for each person for personal injuries and $10,000 for property damage to Robert E. English, the deceased. This policy included omnibus insurance coverage and was in full force and effect at all times material herein. This action is to determine the rights and liabilities of the parties under said policy.

The factual situation out of which the present action arises, so far as material to an understanding of the issues involved, is substantially as follows: On June 11, 1962, Meckna, while operating the insured automobile, with the express permission of the named insured, who was riding therein as a passenger, collided with a parked automobile owned by James Kolb. Robert E. English died as a result of this collision. Kolb, who had filed a claim in the Robert E. English estate, and an action against Meckna for damages sustained to his automobile in the collision, filed a petition in intervention herein.

On June 12, 1962, Meckna gave a statement at the police station to a deputy county attorney in the presence of a court reporter that the deceased was driving the car at the time of the collision. The information secured by the police from other witnesses indicated that Meckna was the driver, and the original report listed the driver as unknown. On June 14, 1962, an attorney, Phillip Abboud, hereinafter referred to as Abboud, wrote the insurer to advise that his client Meckna, whom he stated was a passenger in the car at the time of the collision and who was 4½ months pregnant, had a claim for personal injuries.

On June 16, 1962, Meckna went to the police station and in the presence of a deputy county attorney and a court reporter changed her version of the accident and gave a statement admitting that she was the driver

of the automobile at the time of the collision. She stated she had concealed this fact because of her five children. This new version was reported in a local newspaper and clippings of the story were placed in the insurer's file. After the newspaper story appeared, an agent of the insurer called Abboud and asked permission to talk to Meckna but Abboud refused to allow Meckna to be interviewed, and gave as the reason a pending motor vehicle homicide charge against Meckna.

On June 22, 1962, Abboud wrote to the insurer as follows: "I have been retained to represent Mrs. Jane Meckna who, as you know was injured in an auto accident June 11, 1962, and is still under doctor's care.

"Please be advised that we shall cooperate fully with you in all respects and on account of the pending Motor Vehicle Homicide Charges I, of course, desire to investigate the matter thoroughly which investigation has not as yet been concluded."

On August 6, and on September 17, 1962, the attorney for Kolb wrote insurer relative to the damage to the Kolb automobile. Insurer's resident vice president acknowledged receipt of the letters, but replied that insurer was not in a position to admit or deny liability, and stated that it was continuing its investigation. On August 29, 1962, the administrator filed suit in the district court against Meckna. Answer day for Meckna was October 1, 1962.

On September 19, 1962, the insurer wrote Abboud requesting information as to the exact status of the case. On September 20, 1962, Abboud wrote the insurer's resident vice president as follows: "In reply to yours of the 17th inst. we beg to advise that Miss (Mrs.) Jane Meckna has, on various occasions, unsuccessfully attempted to contact you. We were told, in our effort to reach you by 'phone, that you were out of town and conveyed to other employees what our intentions and purposes were, and we were informed to call at a later

time. In the interim we have received your letter already referred to.

"We want you to know and understand that Jane Meckna the defendant in the above captioned matter is available at any time, is willing and ready to work in conjunction with any efforts you may undertake in defending the lawsuit instituted against her and will wholeheartedly co-operate with you with every reasonable and legal way without jeopardizing her own rights or exposing herself in any manner in case of adverse judgment being rendered against her.

"We are enclosing herein copy of a summons and a petition involving the litigation in question, which is self-explanatory. This matter is being given our very early attention in the hope that you will have ample time and opportunity to consult with Jane Meckna and to protect both the rights of the insurance company and the rights of my client.

"Awaiting your further wishes and instructions relative to this subject matter, I am * * *."

On September 24, 1962, insurer's attorney telephoned Abboud and stated that he questioned whether or not the policy extended coverage to Meckna, and suggested that there was also a serious question as to whether the insurer would owe any obligation to Meckna because of her failure to give notice and make reports to the company as well as the fact that she gave conflicting versions of the accident. He suggested, however, that he would be willing to recommend a defense under a reservation of rights agreement.

It is the testimony of insurer's attorney that Abboud indicated he would be glad of an opportunity to unload the defense under such an arrangement, and asked him to find out if the insurer would defend under a reservation of rights. On October 1, 1962, insurer's attorney called Abboud to state that the company had accepted his recommendation, and suggested that the English case be continued to permit the preparation of the agree-

ment. Abboud authorized insurer's attorney to prepare a motion for a continuance in his name. Insurer's attorney then prepared and filed, under Abboud's name, a motion for extension of time to plead, until October 15, 1962.

On October 3, 1962, insurer's attorney wrote Abboud, enclosing a reservation of rights agreement and, among other things, stated: "This procedure will enable me to undertake the defense of the above suit under the terms of the agreement and will reserve all rights which Jane Meckna and/or Iowa Mutual Insurance Company may have at this time.

"As you know, I have filed a Motion to extend our Answer Day to October 15, 1962. It is, therefore, vital that you return the executed document to me prior to that time."

On November 6, 1962, insurer's attorney wrote Abboud that Kolb's attorney had sent him a copy of a petition filed by Kolb, and stated: "My people have instructed me to walk away from further involvement in these suits unless and until Jane Meckna executes and returns the Reservation of Rights Agreement which I forwarded on October 3, 1962, over one month ago."

On January 8, 1963, Norman Denenberg, the attorney for the administrator, served a motion for default judgment and a notice of hearing on Abboud. When Abboud did not appear at the time stated in the notice, no action was taken.

On January 28, 1963, the attorney for the administrator served another notice on Abboud, stating that the motion for a default judgment would be called up January 30. There is no question but that Abboud received both of these notices. When neither Abboud nor Meckna appeared on January 30, a hearing was set for February 13 to determine the amount of damages. At that time, evidence was adduced and a default judgment for $12,930 was entered against Meckna. The evidence is undisputed that Abboud did not notify the insurer or its attorney

that he had been notified of the default. In this respect, it is noted that Rule 7H of the Douglas County district court designates the Daily Record as the official court newspaper for the purpose of publishing new suits, pleadings, abstracts of court orders, and judgments. Abboud's testimony is evasive on any notice to Meckna, and it is more than likely that she was not notified.

Meckna testified that she signed the reservation of rights agreement during 1962, but could not give a more exact date. Abboud at the trial testified that the agreement was not signed until after the default. It is apparent that he either deliberately lied or was mistaken. His conduct and his statements to the attorney for the insurer, as well as his testimony in a deposition, indicate that Meckna signed the reservation of rights agreement in the fall of 1962, long before her default was entered.

On March 9, 1963, insurer's attorney received the executed reservation of rights agreement, which was not dated, from Abboud. On the same day, the attorney for the administrator telephoned the insurer, and advised it that he had taken a default judgment on February 13. On March 20, insurer's attorney wrote Abboud acknowledging receipt of the reservation of rights agreement and stating that he had been advised that a judgment had been entered against Meckna, advised him as to the procedure necessary to set aside the default, stated that it was impossible for the insurer to defend the action so long as the default judgment remained in effect, and suggested that immediate steps be taken to set aside the judgment.

On April 19, 1963, insurer's attorney wrote both Abboud and Meckna that inasmuch as he had not heard from them since his letter of March 20 to Abboud, he felt it best to do everything possible to have the default judgment set aside and that he had prepared and filed a motion for that purpose; advised them that the motion was set for hearing April 26, 1963; and suggested that

it was particularly important that Mrs. Meckna come to his office to execute the proposed answer. Jane Meckna appeared at his office soon thereafter, and advised him that the first information she had of the default was his letter. She signed the answer which he had prepared, and appeared at the hearing on the motion.

The motion to set aside the default was overruled, and insurer's attorney, in the name of Meckna, filed a motion for a new trial. This was overruled. On May 22, 1963, the attorney for the insurer wrote Meckna that if anything further was to be done, it would involve an appeal to the Supreme Court; that the insurer specifically denied that coverage under the policy extended to her; and, therefore, declined to prosecute such appeal. She was thereupon advised that she could take such an appeal herself through her own attorney, and at her own expense.

The trial court held against the insurer, directed the insurer to satisfy the judgment against Meckna to the extent of the policy limit, and determined that the policy extended coverage for the loss sustained by Kolb.

Insurer sets out 11 assignments of error, which for purposes of discussion we condense to five main points: (1) Meckna is not covered by the policy; (2) the English claim does not come within the coverage of the policy; (3) insurer is relieved of liability because of the breach of the notice clause of the policy; (4) insurer is relieved of liability because of the breach of the cooperation clause of the policy; and (5) the court erred in holding that the judgment obtained against Meckna bound the insurer.

There can be no question that coverage is extended by the policy to any person driving the automobile with the permission of the named insured. This is specifically provided in the policy and is also provided under what is commonly designated as the omnibus statute. § 60-534, R. R. S. 1943. Meckna was driving with the permission of the named insured, and is therefore an

additional insured within the terms of the policy. The policy provides: "The insurance afforded under Part 1 applies separately to each insured against whom claim is made or suit is brought, * * *."

This jurisdiction is committed to the rule that even though an insurance policy obligates the insurer to defend all suits brought against the insured, even though groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy. Gottula v. Standard Reliance Ins. Co., 165 Neb. 1, 84 N. W. 2d 179. It is, therefore, insurer's contention that the named insured does not belong to the class of persons whose injuries are covered by the policy, and consequently his personal representative has no claim thereunder.

Insurer argues that permitting the administrator to recover would change a liability policy into a personal accident policy for the benefit of the named insured, and would run counter to the principal purpose of an automobile liability policy of protecting the named insured against liability. While this point has not arisen heretofore in this state, it has been before the courts of many other jurisdictions. As insurer states: "* * * the courts are not agreed as to whether an automobile insurance policy covers injury or death of the named insured caused by another who is an additional insured under the omnibus clause." However, in the greater number of cases, the courts have sustained the right of the named insured, or, in case of his death, his representative, to recover. 7 Am. Jur. 2d, Automobile Insurance, § 128, p. 447. See, also, Annotation, 143 A. L. R. 1394, and cases supplementing that annotation.

In Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N. W. 2d 179, we stated: "The purpose of the omnibus clause is to fix the liability of additional insureds and to eliminate ambiguities and defenses with reference thereto as a matter of public policy. We conclude, therefore, that the omnibus clause imposes

liability on the insurer for the negligence of any person using the insured's automobile with his permission."

The following observation in 12 Couch on Insurance (2d ed.), § 45:483, p. 472, discussing recovery on behalf of a named insured, is pertinent herein: "This conclusion is stressed by the rule of construction against the insurer, and by the fact that if coverage in such case were not intended the insurer could have readily so declared by the addition of an express exclusion in the policy to that effect." We hold that the death of a named insured caused by one operating his automobile with his consent is within the coverage of the omnibus clause of his liability policy.

Having determined that Meckna is an additional insured, we now consider insurer's contention that Meckna breached the notice and cooperation provisions of the policy. Considering first the notice provision, we quote: "In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable." What is the purpose of this provision? Patently, it is to alert the insurer to a possible claim and to afford it an opportunity to make such investigation as it deems pertinent to enable it to process any future claim. Here, the insurer had actual notice of the collision involving the automobile covered by the policy, and of the death of the named insured within hours of the tragedy. Actually, the agent who sold the policy called insurer the morning after the collision. Its resident vice president visited with Meckna within less than 24 hours thereafter, and within a few days thereafter it had procured a copy of the police report. Its own file discloses that within 4 or 5 days thereafter, it knew that Meckna was the driver of the car, and that she had

corrected her first report to the police. Insurer also was fully cognizant of the possibility of motor vehicle homicide charges against Meckna, and understood her dilemma. The Kolb loss was taken up directly with the insurer by Kolb's attorney. The record would indicate that insurer also knew of the availability of other witnesses soon after the accident, and while the record does not indicate that they were interviewed by insurer, the original police report listed the driver as unknown because these witnesses had given the information that a woman and not the deceased was driving the automobile. Insurer had all the information Meckna could give it, and had ample notice to permit it to take any and all necessary steps to protect its interest. Under the facts in this case, there is no merit to this assignment.

The cooperation clause, so far as material herein, provides: "The insured shall cooperate with the company and, upon the company's request, attend hearings and trials and assist in making settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance."

At the outset, we call attention to MFA Mutual Ins. Co. v. Sailors, *ante* p. 201, 141 N. W. 2d 846, a case in principle not too different from the instant one. In that case, we held: "An insurer cannot assert a breach of the cooperation clause as a policy defense in the absence of a showing of prejudice or detriment to the insurer."

There certainly is nothing in this record to justify insurer, on September 20, 1962, after insurer was informed that Meckna was available at all times and was willing and ready to work in connection with any efforts to defend the administrator's claim, to assert the breach of the cooperation clause. Abboud on this occasion specifically withdrew any suggestion that dealings with Meckna should be through him, by telling insurer he was sending the summons and petition promptly to permit insurer ample time to *consult with Meckna.*

Thereafter, it is apparent that insurer's conduct was actuated by its desire to secure, and its insistence upon, a reservation of rights agreement. But even this would not explain its failure to consult with Meckna if there was further information it desired. We agree that insurer did no wrong in asking Meckna to sign a reservation of rights agreement. However, it had no right to insist on such an agreement as a condition precedent to undertaking the defense, which is the interpretation we put on the evidence herein. It was obligated to defend by the terms of the insurance policy, and must assume responsibility for the consequences of its action.

We held in Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623: "An insurer does not have the right without consent of the insured to retain control of the defense of an action indemnifiable under the apparent terms of an insurance policy and at the same time reserve the right to disclaim liability on the policy."

It is also pertinent to observe that the burden of proving noncooperation is on the insurer who urges it as a policy defense. Insurer throughout the case infers that the fact that Meckna gave an incorrect statement in the first instance violates the cooperation clause. We suggest this misstatement was corrected within 4 or 5 days, and the testimony of other witnesses indicated it was a misstatement. The general rule is that a misstatement by an insured promptly or seasonably corrected or withdrawn prior to trial of the action against the insured, does not constitute a breach of the cooperation clause. See cases at page 267, 34 A. L. R. 2d.

Under the facts of this case, we do not feel that the insurer is in a position to avoid liability under a claim of noncooperation. There is no question but that additional insureds are bound by the terms of the policy, but those terms are subject to a reasonable interpretation under the facts presented. It is evident from the record that Meckna at all times after September 20, 1962, was willing to cooperate and did cooperate fully

when she was eventually contacted by the insurer. It also should have been very apparent to insurer that Abboud was not protecting the interests of Meckna. It is hard to understand the motivation for his conduct. We can only suggest that the insurer was in a much better position than Meckna, who was its insured, to see that her rights were protected.

In MFA Mutual Ins. Co. v. Sailors, *ante* p. 201, 141 N. W. 2d 846, we said: "The purpose of the cooperation clause is to prevent collusion between the injured and the insured and to facilitate the handling of claims by the insurer." Insurer insinuates that collusion may be present herein. It is true that representatives of the administrator on two occasions urged Meckna not to sign the reservation of rights agreement. This conduct cannot be condoned. Certainly the administrator's attorney, regardless of his motives, should not have attempted to interfere with the relations between Meckna and the insurer. As the trial court well observed, "Justice is not served when counsel interviews opposing counsel's client, with or without permission, when litigation is pending." However, Meckna's evidence is conclusive that the reservation of rights agreement was signed and was in Abboud's hands before any contact was made by representatives of the administrator. There is no evidence of collusion in this record so far as Meckna is concerned. If collusion were being urged as a defense, the burden of proof would be on the insurer. Insurer has not met that burden.

With specific reference to the default judgment herein, we observe that the insurer could not help but know of the possibility of a default judgment unless some action were taken on the pending action. The record indicates that it relied on Abboud to see that no judgment was entered. In that respect, it is as much bound by what happened as Meckna. Insurer saw fit to secure additional time to answer, and must be held to understand the effect of not answering or otherwise pleading

in the action. It cannot be excused for permitting several months to pass without further pleadings after the time for answer had expired. If it permits this situation to exist, it must assume responsibility to see that Meckna was not defaulted. The entry of an appearance would have required notice to it. Insurer saw fit to gamble on its insistence on a reservation of rights agreement and to "walk away from further involvement" until the execution and return of the reservation of rights agreement. It is bound by the consequences of that action. Where an insurer sees fit to gamble on its insistence on a reservation of rights agreement and to ignore the fact that an action against its insured is in default, it is in no position to complain about a default judgment entered against its insured.

The administrator has filed a cross-appeal herein, directed to that portion of the trial court's judgment denying attorneys' fees, and directing that counsels' request should be addressed to the judge of the county court. A question has been raised as to whether this action is embraced within the provisions of section 44-359, R. R. S. 1943, under which the claim is made. We do not deem it necessary to determine this question. We have criticized certain conduct on the part of administrator's attorney. If a fee were allowable herein, we would hold its allowance not to be justified on the record before us.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. CARVILLE R. (BARNEY) BUTTNER, APPELLEE.

143 N. W. 2d 907

Filed July 8, 1966. No. 36209.

1. **Statutes. A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of**

the words of a statute in the connection in which they are used and in the light of the mischief to be remedied. While there is a rule requiring the strict construction of a penal statute that rule is not violated by giving to the words their full meaning in the connection in which they are employed.

2. **Officers.** A member of a planning board of the metropolitan city of Omaha is a ministerial officer within the meaning of section 28-706, R. R. S. 1943, and a conviction of a member thereof may be had for the violation of that statute.
3. **Criminal Law.** In this state all public offenses are statutory; no act is criminal unless the Legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law.
4. ———. In all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation.
5. **Constitutional Law: Criminal Law.** Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense.
6. **Indictments and Informations.** An information or indictment must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings in conformity with this opinion.

Donald L. Knowles, Arthur D. O'Leary, Thomas F. Ryder, and James M. Murphy, for appellant.

Alfred A. Fiedler, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BURKE, District Judge.

BROWER, J.

On December 16, 1964, a grand jury which had been convened in Douglas County, Nebraska, returned an indictment endorsed as "a true bill" containing four counts

against the defendant Carville R. (Barney) Buttner.

The defendant filed a demurrer to the several counts pursuant to section 29-1810, R. R. S. 1943. The trial court sustained the demurrer as to all counts of the indictment and dismissed them.

Thereafter the county attorney timely presented his exceptions by application first to the trial court and thereafter to this court. We thereupon granted leave to docket this proceeding to obtain a review of the case as provided by sections 29-2315.01 to 29-2316, R. R. S. 1943.

We here set out the several counts of the indictment, the first being copied in full, followed by the substance of the respective charges in the last three, omitting the allegations concerning the grand jury and the residence and presence of the defendant in Douglas County at the time of the alleged offenses. Count I: "The Grand Jurors, duly impaneled, sworn, and charged to inquire of offenses committed within the said County of Douglas, in the name and by the authority of the State of Nebraska, on their oaths do present and find that CARVILLE R. (BARNEY) BUTTNER late of the County of Douglas aforesaid, from the 3rd day of June in the year of our Lord one thousand nine hundred and sixty-four to the 25th day of September, 1964, in the County of Douglas aforesaid, then and there being in said County and State, did conspire with STEVE NOVAK, ERNEST A. ADAMS, and RONALD J. ABBOUD to commit a felony, to-wit: accepting a bribe by a city councilman, contrary to Section 28-706 of the Revised Statutes of Nebraska for 1943; that pursuant to said conspiracy and for the purpose of effecting the object of said conspiracy, the said CARVILLE R. (BARNEY) BUTTNER, in the City of Omaha, in said county and state, did meet with John B. Coleman, on August 13, 1964, and did on that date solicit bribes from the said John B. Coleman;

"COUNT II * * * that CARVILLE R. (BARNEY) BUTTNER, * * * on or about July 23, 24, 25, 26, 1964,

* * * being then and there a ministerial officer, to-wit: a member of the Planning Board of the City of Omaha, Nebraska, did receive a valuable consideration from John B. Coleman, to-wit: payment of expenses for a trip to Houston, Texas, and return to Omaha via Kansas City, Missouri, with the intent of him, the said CARVILLE R. (BARNEY) BUTTNER, to execute a power in him vested with partiality or favor in voting on legislative rezoning on an application of the said John B. Coleman;

"COUNT III * * * that CARVILLE R. (BARNEY) BUTTNER, * * * from on or about the 15th day of July, 1964, to the 28th day of September, 1964, * * * then and there being a member of the Planning Board of the City of Omaha, Nebraska, did unlawfully solicit, propose, or agree to receive a bribe, to-wit: expenses for a trip to Houston, Texas, and return to Omaha, Nebraska via Kansas City, Missouri.

"COUNT IV * * * that CARVILLE R. (BARNEY) BUTTNER, * * * from on or about August 3, 1964 to August 13, 1964, * * * then and there aiding and abetting city councilmen of the City of Omaha, Nebraska, did unlawfully solicit, propose, or agree to receive a bribe, to-wit: the sum of $15,000.00 from John B. Coleman, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Nebraska."

The grounds of the demurrer to counts I, II, and III of the indictment were: "1. That they fail to state facts sufficient to constitute an offense contrary to the Statutes of the State.

"2. That they fail to state facts sufficient to appraise the Defendant of the crime of which he is being accused.

"3. That the Defendant is not one of the persons defined by Section 28-706, R. R. S. Nebraska as set forth in Count I, II, and III of the indictment." The demurrer with respect to Count IV includes the same grounds as stated in 1 and 2 of the demurrer to the previous counts and adds number 3 as follows: "3. That this

Count fails to name the specific 'City Councilmen' to whom this Defendant allegedly aided and abetted."

With respect to counts I and II, the trial court held they did not allege facts showing a violation of section 28-706, R. R. S. 1943; with respect to count III it did not allege the identity of the person solicited, proposed to, or agreed with; and with respect to count IV it did not allege the identity of the councilmen aided or abetted.

The provisions of section 28-706, R. R. S. 1943, are here set out: "Whoever, directly or indirectly, gives any sum or sums of money or any other bribe, present or reward or any promise, contract, obligation or security for the payment of any money, present or reward or any other thing, *to any judge, justice of the peace, sheriff, coroner, clerk, constable, jailer, county attorney, member of the legislative assembly or other officer, ministerial or judicial,* except such fees as are allowed by law, *with intent to induce or influence such officer to appoint or vote for any person for office, or to execute any of the powers in him vested, or perform any duty of him required, with partiality or favor, or otherwise than is required by law, or in consideration* that such officer has appointed or voted for any person for any office, or exercised any power in him vested, *or performed any duty of him required, with partiality or favor, or otherwise, contrary to law, the person so giving,* and the officer so receiving, any money, bribe, present, reward, promise, contract, obligation or security, *with intent or for the purpose or consideration aforesaid,* shall be deemed guilty of bribery, and shall be punished by confinement in the Nebraska Penal and Correctional Complex not less than one year nor more than five years." (Italics supplied.)

In its journal sustaining the demurrer to counts I and II, the trial court makes clear that its reason for holding the counts did not allege facts showing a violation of this section was that the defendant was not one

of those officers mentioned in the section and prohibited by it from receiving the bribes, presents, or rewards therein mentioned and particularly that he was not a ministerial officer. The State assigns error to this ruling and contends a member of the planning board of the city of Omaha is a "ministerial" officer as set out in that section.

Inasmuch as this aspect of the case vitally affects the first two counts and the briefs of the parties consider this question at great length, we will discuss this matter first.

We are cited to the case of State v. Loechner, 65 Neb. 814, 91 N. W. 874, 59 L. R. A. 915, a case involving an indictment against a member of a board of education for malfeasance in office where this court had under consideration a statute providing: "'Any clerk, sheriff, coroner, constable, county commissioner, justice of the peace, recorder, county surveyor, prosecuting or district attorney, or any ministerial officer, who shall be guilty of any palpable omission of duty, or who shall willfully or corruptly be guilty of malfeasance or partiality in the discharge of his official duties, shall be fined,' etc." In the cited case this court held that a member of the board of education was a ministerial officer within the meaning of that statute. The question was discussed at considerable length in the opinion. Many authorities and cases there cited and evaluated are similar to those presented here. We deem it unnecessary to discuss them again but will quote certain conclusions of the court in that opinion. "Members of a board of education in cities and towns, like school district officers, are undoubtedly public officers, and must come within some of the recognized definitions of the different classes in which such officers are usually divided. In a general way it may be said that the affairs of state government and the method of administering its laws are divided into three distinct branches,—executive, judicial and legislative; and officers chosen to conduct the affairs of

government in either of the different branches mentioned are easily classified." In the opinion in the cited case the court, after consideration, decided that a member of the school board was neither a judicial nor a legislative officer, and resumed its discussion: "This brings us to those offices which are created for the purpose of conducting that branch of government which, in the general classification we have made, is classed as executive. * * *

"There is a marked distinction between a ministerial act or function when considered as an independent transaction, and the general nature of the office and the functions to be performed therein, which, when considered together, make the incumbent a ministerial officer. A sheriff is a ministerial officer, and so recognized by all. Yet in a sense he is the executive officer of the court, whose duty it is to obey and carry into execution its mandates, and all valid processes issued therefrom. He also, in the performance of his duties, in many instances, must and does exercise discretion and judgment of a quasi-judicial nature, but this fact alone can not transform him into a judicial officer. If ministerial officers can perform nothing but ministerial acts, then it is hard to conceive of such officer, for some of the acts of every ministerial officer must require the exercise of judgment and discretion, which is the very antithesis of a ministerial act. Whether the person is or is not a ministerial officer depends, not on the character of the particular act which he may be called upon to perform, or whether he exercises judgment and discretion with reference to such act, but whether the general nature and scope of the duties devolving upon him is of a ministerial character, as distinguished from other classes of which we have made mention. * * * A member of the board of education is required to act in obedience to the mandates of the law, which guides and directs his action in certain channels, and regarding which there is left to him no discretion. He must act

at the time and in the manner prescribed by statute, which defines and limits his authority. As to all such matters he is left no discretion. He administers the law as he finds it, and discharges the duties of the office in conformity with the law, and not according to his own judgment and discretion. It is true that in many of the acts he is called upon to perform he is given a certain latitude or discretion of a quasi-judicial character, but this, as we have seen, does not take him out of the class of ministerial officers, and place him in the class denominated judicial. * * *

"From a careful consideration of the subject in its different aspects, we are constrained to the view, as appears from what has been said, that the defendant belongs to the class of officers denominated 'ministerial,' and for that reason is included within the fair import of the language of the section of the Criminal Code under which the indictment was found."

In Sheely v. The People, 54 Colo. 136, 129 P. 201, the court had under consideration a statute forbidding bribery, much like that before us, where the officers described in the statute were set out as " 'any judge, justice of the peace, sheriff, coroner, clerk, constable, jailer, attorney general or prosecuting attorney, mayor, alderman or member of city council, member of the legislative assembly, or other officer, ministerial or judicial'." The officer prosecuted was a county commissioner. The court in that case also cited and discussed many authorities, among them State v. Loechner, *supra*, from which excerpts were quoted. The Colorado court, speaking of county commissioners, stated: "The general scope of their duties being the administration of the affairs of the county, they must be administrative officers, and though vested with a large amount of discretion, which this court has many times said cannot be controlled by the courts, yet it is administrative discretion rather than judicial. Nor are they legislative officers. They do not make law, but are themselves wholly

subject to the constitution and the statutes, and are concerned only in the administration of the business of the county as therein directed. If they are neither judicial nor legislative officers they must fall within the executive department, the administrative branch, and are to be classed as executive or administrative officers, as these terms are used interchangeably.—State v. Loechner, 65 Neb. 814.

"So we come to the real question in the case. Did the legislature intend to cover county commissioners by including them within the designation of other ministerial officers? A primary rule of construction is that the intention of the legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in the light of the mischief to be remedied. While there is a rule requiring the strict construction of a penal statute that rule is not violated by giving to the words their full meaning in connection in which they are employed.—Woodworth v. State, 26 O. St. 196."

Chapter 14, article 4, R. R. S. 1943, setting forth the powers and duties of a metropolitan city with respect to planning and zoning, and particularly section 14-404, R. R. S. 1943, provides that: "The city shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented or changed. The city shall not determine the boundaries of any district or impose any regulations or restrictions until after the appropriate planning board of the city has made recommendations thereon, * * *." Chapter 14, article 4, R. R. S. 1943, makes it obvious that much detailed ministerial work is involved in following the statutory directions for planning and zoning. All this would fall on the planning board. It is suggested the city planning board can make no final decision, but only recommend what it considers should be done. Although the board's

function is restricted to making a recommendation, its action in that respect is initially required. The fact that its decision is not final only emphasizes its ministerial character. We conclude that a member of a planning board of the metropolitan city of Omaha is a ministerial officer within the meaning of section 28-706, R. R. S. 1943, and a conviction of a member thereof may be had for the violation of that statute.

We turn now to the consideration of other facets of the case. Before doing so we think it necessary to state certain rules involving criminal procedure set forth in the decisions of this court. In State v. Coomes, 170 Neb. 298, 102 N. W. 2d 454, this court stated in its syllabi: "In all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation.

"Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense.

"In this state all public offenses are statutory; no act is criminal unless the Legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law.

"An information must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense." In the body of the opinion it is stated: " 'The information (or indictment) must expressly and directly state each fact that is an essential element of the crime intended to be charged so that the accused will not be required to go beyond the information to learn the nature of the charge against him or the issue he must meet. * * *.' Benedict v. State, 166 Neb. 295, 89 N. W. 2d 82. See,

also, Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868."

With these rules in mind we will consider each count in the indictment. Count I charges the defendant with conspiring with named persons to commit a felony, to wit, "accepting a bribe by a city councilman, contrary to Section 28-706," R. R. S. 1943. The conspiracy statute, section 28-301, R. R. S. 1943, make it a felony for "two or more persons (to) conspire to commit any felony." We think it obvious that the felony which is the object of the conspiracy must be set out with sufficient certainty to show it was a crime under the applicable statute. An attempt is made to set out the purpose of the conspiracy as a violation of section 28-706, R. R. S. 1943. Obviously it is necessary to state a crime under section 28-706, R. R. S. 1943, that it be alleged that the bribe was given or received with the intent or for the purpose or consideration of inducing or influencing the officer in some of the respects therein stated. It therefore was necessary in count I to allege as one of the objects of the conspiracy that the councilman referred to was to accept the bribe for some purpose or consideration or with the intent proscribed by the section. This was not done. Moreover, it is alleged that the purpose of the conspiracy was to bribe "a" councilman without naming any particular one. It is apparent that the accused would be required to go beyond the information to know the councilman involved and that a judgment rendered thereon would not bar a further prosecution as to the conspiracy with respect to another councilman. Count I did not state facts sufficient to show that the object of the conspiracy was to commit a felony, nor was it sufficient to inform the accused of the crime with which he was charged. The trial court committed no error in sustaining the demurrer thereto and dismissing this count of the indictment.

An examination of count II discloses allegations plainly and directly stating that the accused was a member of

the planning board, a ministerial officer. As such he received a valuable consideration to execute a power in him vested with partiality or favor. The valuable consideration received is fully set out and the person from whom it was received is named. The object of partiality or favor is stated to relate to voting on legislative rezoning. The board's recommendation was required before further legislative action could be had. The particular rezoning with respect to which the voting was to take place is set out. Having determined the accused was a ministerial officer within the meaning of that term in section 28-706, R. R. S. 1943, we conclude that count II alleges the crime of receiving a bribe thereunder. The trial court erred in sustaining the demurrer and dismissing count II.

Count III is brought under section 28-708, R. R. S. 1943, which reads as follows: "Whoever offers or attempts to bribe a public officer and every public officer who solicits a bribe or proposes or agrees to receive a bribe in any case shall be fined in a sum not exceeding five hundred dollars nor less than three hundred dollars, and shall be imprisoned in the Nebraska Penal and Correctional Complex for the period of one year." It alleges the accused unlawfully solicited, proposed, or agreed to receive a bribe. It fails completely to allege the identity of the person so solicited, proposed, or agreed with. In the discussion in State v. Coomes, *supra,* it is said: "As stated in 42 C. J. S., Indictments and Informations, § 139(d), p. 1040: 'Accused must be apprised of the crime charged with reasonable certainty, and if the language of the statute is insufficient for this purpose further averments of the facts and circumstances must be made.' And, as stated in § 139(e) thereof, p. 1042: 'Such averments as to time, place, person, and other circumstances as are necessary to identify the particular transaction are, of course, necessary.'" Manifestly the accused was not apprised of the crime charged. Neither are facts stated which would bar a later prose-

cution. The trial court committed no error in sustaining the demurrer and dismissing count III.

Count IV charges the accused with aiding and abetting city councilmen of the city of Omaha and that he "did unlawfully solicit, propose, or agree to receive a bribe." There may be some ambiguity in the language of the count as to who was to receive the bribe money from John B. Coleman. It is clear, however, that the count does not state a crime if the accused was to receive it for himself since he is not alleged to be an officer in count III. This is required to constitute a crime for receiving a bribe under section 28-706, R. R. S. 1943, or soliciting, proposing, or agreeing to receive one under section 28-708, R. R. S. 1943. Any crime charged, therefore, is restricted wholly to that of aiding or abetting councilmen who were the ones to be bribed if a crime is stated. But the count does not allege who the councilmen were that the accused was aiding or abetting. It seems clear that one charged with aiding or abetting another in accomplishing a felony should be informed directly and positively who that person was. Again there are seven councilmen in Omaha. There is no indication of how many the accused was aiding or abetting. Accused was not apprised of the crime charged, nor are facts stated which would bar a later prosecution. The trial court committed no error in sustaining the demurrer to and dismissing count IV.

It therefore follows that the judgment of the trial court should be and is affirmed in sustaining the demurrer and dismissing counts I, III, and IV, and its judgment is reversed in sustaining the demurrer to count II and dismissing the same.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS IN CONFORMITY WITH THIS OPINION.

BOSLAUGH, J., dissenting.

I respectfully dissent from that part of the majority opinion which holds that in alleging a conspiracy to

commit a felony it is necessary to allege in detail the felony which is the object of the conspiracy. I believe that the better rule is that it is sufficient to designate the crime which is the object of the conspiracy by its common law name. See, Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680; Williamson v. United States, 207 U. S. 425, 28 S. Ct. 163, 52 L. Ed. 278; State v. Madden, 170 Iowa 230, 148 N. W. 995; 16 Am. Jur. 2d, Conspiracy, § 23, p. 139; 15 C. J. S., Conspiracy, § 85, p. 1117; 12 C. J., Conspiracy, § 195, p. 618.

SPENCER, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. GARY L. ADAMS, APPELLANT.

143 N. W. 2d 920

Filed July 8, 1966. No. 36224.

1. **Constitutional Law: Criminal Law.** It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite.
2. ———: ———. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. The dividing line between what is lawful and unlawful cannot be left to conjecture.
3. ———: ———. The terms of a penal statute creating an offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. A statute which forbids 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.
4. ———: ———. Section 39-7,108.01, R. R. S. 1943, held unconstitutional.

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

Bertrand V. Tibbels, 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 COLWELL, District Judge.

BOSLAUGH, J.

The defendant, Gary L. Adams, was convicted of operating a motor vehicle upon a highway in such a manner as to endanger the safety of others or cause immoderate wear or damage to the highway in violation of section 39-7,108.01, R. R. S. 1943. The defendant's motion for new trial was overruled and he has appealed to this court.

The principal issue here is the validity of the statute. It was challenged by motions to quash and by demurrer in the lower court. The defendant contends that the statute is vague and indefinite; and that it fails to prohibit any specific act or prescribe an ascertainable standard of guilt.

Section 39-7,108.01, R. R. S. 1943, provides as follows: "Any person or persons who shall operate a vehicle upon any highway in such a manner as to (1) endanger the safety of others or (2) cause immoderate wear or damage to any highway, shall be deemd guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars or by imprisonment in the county jail for not more than thirty days, or by both such a fine and imprisonment. It shall be held prima facie evidence that a person has operated a vehicle over a state highway in a manner to endanger the safety of others or so as to cause immoderate use or damage to a state highway, if he has operated such vehicle in a manner contrary to the duly published rules and regulations of the Department of Roads governing the use of state highways."

The statute appears to have originated as a section of the Civil Administrative Code enacted in 1919. See

Laws 1919, c. 190, Tit. VII, Art. II, § 16, p. 814. By another section of the code (now § 39-7,134, R. R. S. 1943), the department was authorized to formulate rules and regulations in regard to the use of and travel upon the state highways in order to promote public safety, preserve and protect state highways, and prevent immoderate and destructive use of the same. See, Laws 1919, c. 190, Tit. VII, Art. II, § 15, p. 813; Trussell v. Ferguson, 122 Neb. 82, 239 N. W. 461.

Section 39-7,108.01, R. R. S. 1943, as originally conceived, was a penalty section to aid in the enforcement of the rules and regulations regarding the use of the state highways. In 1955, the statute was amended so as to provide for a penalty of imprisonment of "not more than thirty days." Laws 1955, c. 146, § 1, p. 409; c. 147, § 1, p. 410. In 1959, the statute was amended so as to apply to "any highway." Laws 1959, c. 172, § 1, p. 623.

It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. Markham v. Brainard, 178 Neb. 544, 134 N. W. 2d 34. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. State v. Nelson, 168 Neb. 394, 95 N. W. 2d 678. The dividing line between what is lawful and unlawful cannot be left to conjecture.

The terms of a penal statute creating an offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. A statute which forbids 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. Connally v. General Constr. Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322; State v. Nelson, *supra*. See, also, State v. Pocras, 166 Neb. 642,

90 N. W. 2d 263; State ex rel. English v. Ruback, 135 Neb. 335, 281 N. W. 607.

Section 39-7,108.01, R. R. S. 1943, as it now exists, is not limited to the operation of a vehicle upon a state highway or to the operation of a vehicle contrary to the rules and regulations of the Department of Roads. The statute in its present form prohibits the operation of any vehicle upon any highway in such a manner as to endanger the safety of others or cause immoderate wear or damage to the highway.

As pointed out by the defendant, in a broad sense the mere operation of a motor vehicle endangers the safety of others to some extent. Although it is unlikely that the Legislature intended such a broad application, there is no language in the statute which limits it to a more specific application.

State v. Joas, 34 N. J. 179, 168 A. 2d 27, a recent New Jersey case cited by the Attorney General, involved a statute which prohibited driving a vehicle upon a highway "carelessly, or without due caution and circumspection, in a manner so as to endanger, or be likely to endanger, a person or property * * *." The New Jersey statute included an element of careless or negligent operation which is absent from section 39-7,108.01, R. R. S. 1943. In the absence of a further requirement that the operation of the vehicle be "negligent" or "careless" or some similar specification, we think the statute fails to prescribe an ascertainable standard of guilt.

We conclude that section 39-7,108.01, R. R. S. 1943, fails to conform to those constitutional requirements which are applicable to criminal and penal statutes and that it is void and unenforceable.

The judgment of the district court is reversed and the cause remanded with directions to enter a judgment dismissing the complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. NORMAN R. OLESON, APPELLANT.

143 N. W. 2d 917

Filed July 8, 1966. No. 36227.

1. **Automobiles: Intoxicating Liquors. The failure of an arresting officer to inform a motorist, arrested for driving while intoxicated, of the provision of the implied consent law which permits him to take an additional test by a physician of his own choosing, does not constitute a lack of compliance with the mandatory terms of the statute and did not render the result of the test inadmissible.**
2. **———: ———. The taking of a sample of blood or urine for chemical analysis on the request of the arresting officer, as authorized by the implied consent law, is not required to be delayed by a request of the arrested motorist that he be permitted to contact legal counsel.**

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

Kerrigan, Line & Martin and Raymond A. Jensen, for appellant.

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

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and MURPHY, District Judge.

CARTER, J.

Defendant was convicted for driving a motor vehicle on the public highways in Dodge County, Nebraska, while under the influence of alcoholic liquor, contrary to section 39-727, R. S. Supp., 1963. Defendant was sentenced to pay a fine of $100 and costs, and ordered not to drive any motor vehicle on the public highways of the state for a period of 6 months. Defendant has appealed.

Defendant was arrested on February 6, 1965, while driving his automobile on U. S. Highway No. 77 about 3 miles north of Fremont. The testimony of the arresting patrolman is that he observed defendant's automo-

bile weaving from side to side across the centerline of the road. After the arrest defendant was given certain tests. He was unable to walk in a straight line, he was unable to balance himself in shifting his weight from one foot to the other, his breath gave off the odor of alcohol, his face was somewhat flushed, the pupils of his eyes were dilated, and his talk was slurred. A second patrolman came upon the scene during the giving of the tests, who corroborated the testimony of the first patrolman. On arrival at the county courthouse, similar tests were again made by the two patrolmen with the same results. A urine sample was taken and analyzed by a chemist having a permit from the State of Nebraska, qualifying him to make such tests. The test indicated an alcoholic content of .25 percent by weight. Defendant testified that he had been drinking, that he drank two Martinis, and that, in his opinion, he was not under the influence of intoxicating liquor at the time of his arrest. No contention is made that the evidence was insufficient to sustain the conviction.

It is the contention of the defendant that he was not properly advised of his rights when a urine sample was demanded for the purpose of making a chemical test thereof under the implied consent law. The test was administered at the direction of the arresting patrolman, as provided by section 39-727.03, R. S. Supp., 1963. The evidence shows that while taking the defendant into Fremont the patrolman inquired of the defendant if he was familiar with the implied consent law and, upon receiving a negative answer, advised him that by driving on a public highway he had given his implied consent to a blood, urine, or breath test. Defendant was also advised that he had a right to refuse but if he did refuse his driver's license could be suspended up to a year. He was also informed that the evidence could be used against him in court. He elected to give a urine sample and did so without objection. The objection made at the trial was that the failure of the patrolman to inform

the defendant he could have an additional test made by a physician or registered nurse of his own choosing has the effect of invalidating the test made. It is contended that the failure of the patrolman to inform the defendant as to this right invalidates the urine test and that it was therefore prejudicial error for the trial court to admit the result of the test in evidence.

It is not questioned that the patrolman correctly advised the defendant that he had impliedly consented to the giving of a blood or urine test. He also correctly advised the defendant of the consequences of his failure to comply. The arresting officer is not required to do more. The defendant was 64 years of age. He had been in the banking business for many years and was a man of more than average intelligence. The arresting patrolman testified that defendant asked for additional explanations of the implied consent law and the effect of a refusal twice after the first explanation to him. He indicated his understanding of the matter and voluntarily elected to comply by consenting to the urine test. He did not request a test by a physician of his own choice. While the statute does preserve his right to such additional test, it is declaratory of a right that has always been available. The patrolman was under no more obligation to advise the defendant that he could have an additional test by a physician of his own choosing than he was to inform him of his right to subpoena witnesses, to be confronted by his accusers, or not to testify without comment thereon by the prosecutor.

In Caldwell v. Commonwealth, 205 Va. 277, 136 S. E. 2d 798, the defendant complained that he was not informed he had the right to designate the physician who would take the blood sample, as the statute provided. In disposing of that question the court said: "There is no provision in the statute which expressly requires that the arresting officer advise the accused of his rights to request a test within a two-hour period; to have, if practicable, a physician of his own choice to extract his

blood, or to know the results of the test. These provisions are available to an accused but are merely directory, not mandatory, insofar as they apply to the arresting officer. We conclude that the failure of the trooper to inform defendant of the provisions of the statute complained of did not constitute a lack of compliance."

We conclude that where a police officer explains the statutory basis for his request for a blood or urine test, and the consequences of a refusal, the requirements of the statute imposed upon the arresting officer have been met. The defendant's tendered instruction, directing the jury to disregard the result of the chemical test if the arresting officer failed to advise defendant that he was entitled to an additional test by a physician of his own choosing, was properly refused.

Defendant contends that the trial court erred in refusing to give his requested instruction No. 1. The substance of the instruction is: If defendant requested an opportunity to consult with an attorney prior to the taking of a chemical test to determine the alcoholic content of the blood and such opportunity was not afforded him, the test was not to be considered for any purpose.

We point out that blood or urine tests can be effectively made only within a couple of hours after the consumption of liquor by the subject. Any delay could possibly defeat the purpose of the statute. The defendant in the case before us testified that on the way to the police station he said "that I would like to call my attorney" and received no answer, although he said the patrolman may have nodded his head. The patrolman does not remember that anything was said during the trip to police headquarters about calling an attorney. Upon arrival at police headquarters the tests were repeated and the sample of urine taken without a request for legal counsel. Later, as defendant was being lodged in jail, defendant requested permission to call his lawyer. Permission was granted and he talked by long distance telephone with his lawyer in a neighboring town.

The fundamental question here involved is whether or not want of legal counsel affects the validity of a urine or blood test, assuming that it was otherwise correctly made. We conclude that it does not.

A blood or urine test is not in a comparable class with confessions or incriminating statements. The voluntariness of such is the most important factor and, where they have been coerced after a prolonged period of detention, their validity becomes subject to serious question. But in the case of the blood or urine test, the consent to the test is implied when the defendant operates a motor vehicle on a public road. The giving of the sample pursuant to the statute does not involve a question of involuntariness, want of due process, or self-incrimination.

The arrest in the instant case was made at approximately 1:50 a.m. The defendant was permitted to call his attorney shortly after arriving at the police station, on defendant's first request then made. The request was not made until after the sample of urine had been furnished. But the taking of a sample need not be delayed until defendant contacts a lawyer or until his counsel appears. A contrary holding would in many cases defeat the purpose of the statute. Even if defendant's request for counsel was made while being taken to the police headquarters, opportunity to contact legal counsel at that time was not present. The first time thereafter that he requested counsel he was permitted to do so, a fact which he admits. In other words, he was permitted to telephone his attorney the first time he requested it, when it was possible to comply. But irrespective of the facts in the instant case, the validity of the test is not impaired. The privilege against self-incrimination is limited to the giving of oral testimony and does not extend to defendant's body, nor to secretions therefrom, nor to the introduction of the chemical analysis in evidence. Swingle v. United States, 151 F. 2d 512; United States v. Nesmith, 121 F. Supp. 758; Holt v. United States, 218 U. S. 245, 31 S. Ct. 2, 54 L. Ed. 1021;

Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N. W. 2d 75, 88 A. L. R. 2d 1055.

We conclude that the validity of a sample of blood or urine under the implied consent law is not impaired by a request for legal counsel, or the failure of defendant's counsel to appear before the sample is taken. We do not, by this opinion, intend to impair the right of a defendant to counsel for the purpose of protecting his rights. Our holding, simply stated, is that a defendant loses no rights subject to protection by legal counsel when he is requested to and furnishes a sample of blood or urine for chemical analysis to be used as evidence against him under the implied consent law. The trial court was not therefore in error in refusing to give defendant's requested instruction No. 1.

Other questions argued in the briefs are either without merit or not assigned as error if merit they have, matters which we do not here decide.

AFFIRMED.

MARILYN JANE STINEHAGEN, APPELLANT, V. GERALD LEE STINEHAGEN, APPELLEE.
143 N. W. 2d 914

Filed July 8, 1966. No. 36254.

1. **Divorce.** Where the circumstances of the parties have changed, the court may revise or alter a decree of divorce as it concerns the care, custody, and maintenance of the minor children. The modification of such a decree may not ordinarily be made on speculative evidence.
2. **Divorce: Appeal and Error.** In the absence of error, or a showing that the action of the trial court was unreasonable, such action will not ordinarily be disturbed on appeal.

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

Crosby, Pansing, Guenzel & Binning, Lawrence R. Reger, and Donn E. Davis, for appellant.

John McArthur, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and SCHEELE, District Judge.

CARTER, J.

This is a proceeding to modify the provisions of a divorce decree relating to the custody of a minor child of the parties.

The plaintiff, now Marilyn Jones, filed a petition for modification of the divorce decree on August 4, 1965, in which she alleged that the parties were divorced on August 6, 1955. The custody of the minor son, Joseph Scott Stinehagen, was divided between the parties. By the decree of divorce, plaintiff was awarded the custody of the child from April to November of each year and the defendant was awarded his custody from each December to the March following. By mutual agreement the parties permitted the son to remain with his mother during the school year and with his father during the summer months. The mother was awarded $60 per month for the support of the child, which has been paid regularly. Both parties have remarried since the divorce decree was entered.

The parties reside in Lincoln, their homes being about one mile apart. They have had the divided custody of the child in accordance with their mutual understanding. The child has visited his parents almost as he chose. The custody of the child has been harmoniously carried on by the parents and to the best interests of the child, who at the time of the hearing to modify the decree was 11½ years of age. The homes of the parties are very satisfactory and the conduct of both parties is exemplary. The existing situation has been for the best interests of the minor son from the standpoint of his physical, educational, and religious welfare, as well as his home environment.

The plaintiff has been employed as secretary to the base commander of the Lincoln Air Force Base at an

annual salary of $6,155. The government has ordered the closing of the base, which is expected to be completed the latter part of June 1966. A program has been set up by the federal government to provide employment at the same salary for certain civilian employees in civil service, of which plaintiff is one, whose positions are lost by base closings. Plaintiff alleges that it is possible she may be required to leave Lancaster County in order to protect her employment rights. Plaintiff, at the time of hearing, had not applied for the benefits of the program. Consequently, the location of her anticipated future employment was unknown at the time of hearing.

The trial court denied the application, and provided that the custody of the minor son should be with the defendant during the school year and with the plaintiff during the summer months if plaintiff should be required to accept employment outside of Lancaster County. The trial court increased the child support from $60 to $80 per month, to which no objection has been made.

The evidence shows that the divided custody of the minor child has worked out very well. Each of the parties has great affection for the child. The court in effect found that the best interests of the child require the continuance of the arrangement, and if the plaintiff is required to leave Lancaster County the decree should be modified to place the custody of the child with the father during the school year and with the mother during the summer months. Whether or not the mother would be required to leave Lancaster County, or where she would go if she did, was not known at the time of the hearing. The court evidently concluded that without this information the effect upon defendant's rights could not be determined and the right of the mother to take the child from the jurisdiction of the court under such uncertain circumstances is not justified. The question of whether or not a decree of child custody should be modified to permit the removal

of the child from the jurisdiction of the court is dependent upon all the attendant circumstances. Where the evidence does not show where the child is to be taken, nor the effect upon the defendant's right to partial custody and the right of visitation, the refusal of the court to make a general authorization to remove the child is not unreasonable. This court has in the past permitted the removal of minor children where the best interests of the child require it and when the place of removal and the reasons for the removal establish the necessity therefor. But where the evidence is uncertain as to the place of removal, or whether or not a removal will be made, the trial court may properly refuse such a modification until the necessity for the removal of the child becomes real and not speculative. The right of the defendant to partial custody and his rights of visitation appear superior to the right of plaintiff to remove the child to some unknown place at some unknown time. It is only when the necessity for a removal of a child from the jurisdiction of the court outweighs the rights of the opposing party that a modification of the decree to accomplish such purpose will be made. We think the speculative evidence of the plaintiff in this case and the evidence of the defendant are sufficient to support the modification order entered by the trial court.

Unless a valid reason exists at the time of the hearing for removal of a child from the jurisdiction of the court, the removal should not be permitted. Otherwise the general policy of keeping the minor child within the court's jurisdiction is not overcome. See Crandall v. Luhnow, 137 Neb. 13, 288 N. W. 29. We find nothing to indicate that the trial court abused its discretion or acted unreasonably in disposing of the issue as it did. Grothendick v. Grothendick, 175 Neb. 726, 123 N. W. 2d 646. No basis therefore exists for disturbing the action of the trial court under the evidence in the record.

AFFIRMED.

FARM BUREAU INSURANCE COMPANY OF NEBRASKA, A CORPORATION, APPELLANT, V. ALLIED MUTUAL INSURANCE COMPANY, A CORPORATION, ET AL., APPELLEES.

143 N. W. 2d 923

Filed July 8, 1966. No. 36266.

1. **Insurance.** This court is committed to a liberal construction of the omnibus statute to effectuate its purpose.
2. ———. This court is committed to a broad rather than a narrow construction of the word "permission" as it is used in the omnibus clause.
3. **Insurance: Automobiles.** Where the named insured grants his permittee broad and unfettered dominion over his insured automobile, he also impliedly authorizes his permittee to allow a third person to use it, thus rendering the latter an additional insured.
4. **Automobiles.** Where an owner is entrusted with a substitute automobile while his own is in the possession of the lender, in the absence of something to the contrary in the agreement, he should enjoy broad and unfettered dominion over the substitute automobile.

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

Jewell & Otte, for appellant.

Luebs, Tracy & Huebner, for appellees Allied Mut. Ins. Co. et al.

Tye, Worlock, Knapp & Tye and Jeffrey H. Jacobsen, for appellees Aetna Cas. & Sur. Co. et al.

Warren C. Schrempp, Richard J. Bruckner, and Carl E. Willard, for appellees Yount et al.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and COLWELL, District Judge.

SPENCER, J.

This is a declaratory judgment action brought by Farm Bureau Insurance Company of Nebraska, hereinafter referred to as Farm Bureau, to determine what coverage,

if any, was afforded defendant Howard L. Seager, hereinafter referred to as Seager, under insurance policies issued by Farm Bureau, Allied Mutual Insurance Company, hereinafter referred to as Allied, and Aetna Casualty and Surety Company, hereinafter referred to as Aetna.

The following outline of the facts will present the problems involved. Merle Palmberg, hereinafter referred to as Palmberg, while working on an Interstate Highway construction project approximately 10 miles from Lexington, Nebraska, was living with Seager and two other fellow employees at Lexington. About July 24, 1963, Palmberg purchased a 1962 Ford Thunderbird automobile, hereinafter referred to as Thunderbird, from a salesman for Albert E. Wells, doing business as Wells Motor Company, hereinafter designated as Wells, at Cozad, Nebraska. Palmberg traded in a 1956 Ford for which liability coverage was provided in a policy issued by Farm Bureau to Palmberg's parents. Three days subsequent to the accident from which this controversy arose, this policy was changed to provide coverage for the Thunderbird, and Palmberg, who had recently become 21 years of age, was included as a named insured with his parents.

As a part of the sales agreement in the purchase of the Thunderbird, Wells agreed to make certain repairs. Pursuant to previous arrangement, Palmberg delivered the car to Wells at Cozad about noon on Saturday, July 27, 1963. When he returned later in the afternoon, he was informed that the repairs could not be completed that day. Upon Palmberg's insistence that he needed an automobile to get back to Lexington, to go back and forth to work, and for a date, the salesman, with the permission of Wells, supplied him with a 1962 Ford Galaxie, hereinafter referred to as Galaxie, from the used car lot. The salesman affixed dealer's plates to the Galaxie and gave Palmberg a 48-hour dealer's permit made out in his name. Wells had coverage on this

automobile under a garage liability insurance policy with Allied. The salesman testified that when the Galaxie was delivered to Palmberg, no restriction was imposed as to his use, possession, control, or custody of it. No restrictions of any kind were even discussed. Palmberg testified in substance that he took it for granted he could treat the car as his own and could loan it to someone else if he wished.

About 5:30 a.m., July 28, 1963, when Palmberg returned from work, Seager, who was a foreman on the Interstate project and one of Palmberg's superiors, was just getting up. He appeared depressed and talked about his boy who had polio, and said that he wanted to go home for the day. Seager, whose home was at Lake Manawa, Iowa, had been furnished the exclusive use of a pick-up which he on occasions drove home. The pick-up furnished to Seager had been transferred by his previous employer to Missouri Valley Construction Company, the employer on the Interstate project, and was covered by the Aetna policy. Palmberg testified that Seager complained that the pick-up rode hard, and asked if his car was out in front. Palmberg told him it was being repaired, but that Wells had furnished him a car to use, he was welcome to use it if he liked, and Seager decided to take it. Seager's testimony is to the effect that he was going to use the pick-up but at Palmberg's insistence he took the Galaxie. Regardless of which version is accepted, Seager was using the Galaxie with the express permission of Palmberg.

Later that day, July 28, 1963, Seager, while operating the Galaxie owned by Wells and supplied to Palmberg, collided with an automobile owned and operated by Leonard C. Yount. Yount was injured in the collision and his wife was killed. He filed two actions against Seager, one individually and one as administrator of his wife's estate. Seager was subsequently convicted on a charge of motor vehicle homicide growing out of the collision.

The trial court specifically found that when the Galaxie was delivered to Palmberg it became a temporary substitute automobile; that Wells did not give express permission to Palmberg to loan or deliver possession of said automobile to anyone else, nor did he place any restrictions on its use by Palmberg; that Seager was using the Galaxie with Palmberg's express permission; and that Palmberg was not an occupant of the Galaxie when it was involved in the collision. The court then entered judgment that the Farm Bureau policy provided primary coverage to the Galaxie at the time of the collision, and that neither the Allied nor the Aetna policy provided any coverage. Farm Bureau perfected an appeal to this court.

Farm Bureau in its brief concedes that it is unable to make a case against Missouri Valley Construction Company, the employer of Seager and Palmberg, or its insurer, Aetna. No further reference will be made herein to either of those defendants.

Farm Bureau's assignments of error are directed to its contention that Allied should be held to have the primary coverage herein, and that the Farm Bureau coverage should be held to be excess coverage only.

The following pertinent comparable provisions from the two policies are of interest herein:

FARM BUREAU

"Persons Insured. The following are insureds under Part I: (a) * * * (2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured; * * *."

ALLIED

"Persons Insured. Each of the following is an insured under Part I, * * * (3) With respect to the Automobile Hazard: (a) any person while using, with the permission of the named insured, an automobile to which the insurance applies under paragraph 1 (a) or 2 of the Automobile Hazards, provided such person's actual operation

or (if he is not operating) his other actual use thereof is within the scope of such permission, * * *."

Paragraph 1 (a) is as follows: "The ownership, maintenance or use of any automobile for the purpose of garage operations, and the occasional use for other business purposes and the use for non-business purposes of any automobile owned by or in charge of the named insured and used principally in garage operations, * * *."

FARM BUREAU

"Other Insurance. If the insured has other insurance against a loss covered by Part I of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance."

ALLIED

"Other Insurance. If the insured, or with respect to Part II the claimant, has other insurance against a loss covered by this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

"The above provision shall not apply with respect to other insurance stated to be applicable to the loss only as excess insurance over any other valid and collectible insurance or on a contingent basis."

Additionally, there is attached to the Allied policy an endorsement covering customer rental, as follows: "In consideration of a premium charge of $21.51, it is agreed that such insurance as is afforded by the Policy for Bodily Injury Liability, for Property Damage Liability and for Automobile, Medical Payments applies with respect to any automobile while rented to a cus-

tomer of the named insured while such customer's automobile is temporarily left with the named insured for service or repair. The premium for this insurance shall not be subject to adjustment upon cancellation by the named insured."

It is apparent that the Galaxie was not an owned automobile under the terms of the Farm Bureau policy. The trial court determined that when the Galaxie was delivered to Palmberg, it became a " 'temporary substitute automobile.' " It is immaterial to a discussion herein as to whether the Galaxie is a nonowned automobile or a temporary substitute automobile, for the "Other Insurance" provision of the policy appears to apply as equally to one as to the other.

Before we have a problem as to who is the primary insurer, we must determine whether Seager is afforded coverage as an additional insured under the omnibus clause of both the Farm Bureau and the Allied policies. The policies provide coverage if he was using the Galaxie with the permission of the named insured. It is admitted that Seager was using the Galaxie with the express permission of Palmberg, who concededly would be covered under both policies. It is Farm Bureau's contention that if Palmberg had been driving the Galaxie, the Farm Bureau policy would not provide primary coverage upon the Galaxie if there were other collectible insurance. Its policy in that event would be secondary to the other collectible insurance, and therefore would provide only excess coverage.

In Turpin v. Standard Reliance Ins. Co., 169 Neb. 233, 99 N. W. 2d 26, we held: "Where two motor vehicle liability policies contained identical omnibus clauses relating to prorating of loss occurring under the provisions of such policies and a driver, not the owner of the motor vehicle, was driving it with the owner's permission and became involved in an accident resulting in injury and property damage for which a judgment was obtained against him, the insurance carried by such driver would

be excess over all other insurance, and the insurance carrier of the owner of the motor vehicle would be liable for the entire judgment sustained against the driver to the extent of the limit of such policy."

The trial court specifically held that Palmberg had not been given express permission to loan the Galaxie to any other person. There is no evidence in this record that Palmberg's parents, who were the named insureds in the Farm Bureau policy, gave him express permission to loan the 1956 Ford described in the policy, or any substitute automobile, to any person. Is express permission to loan essential to recovery under the two policies? We determine that it is not.

In Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N. W. 2d 179, this court, recognizing the salutary purpose of the omnibus statute, decided it should be given a liberal construction to effectuate its purpose, and adopted what is known as the "initial permission rule" in the construction of the omnibus clause. In that case, we said: "The statute is remedial in nature and has for its purpose the protection of the public against damages resulting from accidents arising because of the negligent use of automobiles by irresponsible and non-insured permittees. The statute should be construed to accomplish the purpose and policy of the legislation. We must therefore reject the contention that the language of the omnibus statute means that the permission to use the car in a specified manner or for a specified purpose only bears upon the liability where permission to use the car is in fact given. Under this rule as stated in 5A Am. Jur., Automobile Insurance, § 99, p. 99, a deviation from the permitted use is immaterial, the only essential being that permission be given for use in the first instance."

Protective Fire & Cas. Co. v. Cornelius, *supra,* commits us to a broad rather than a narrow construction of the word "permission" as it is used in the omnibus clause. With this in mind, the following statement from 7 Am.

Jur. 2d, Automobile Insurance, § 116, p. 431, is enlightening: "It has frequently been stated that, as a general rule, the permission given by the named insured to another to use the named insured's car does not authorize the permittee to allow a third party to use the car, and that if the permittee does allow a second permittee to use the car, such use is not 'with the permission of the named insured' as those words are used in the omnibus clause. However, the effect of this strict rule has been greatly diluted by reason of the fact that many of the courts recognizing the rule have substantially modified it by stating that in every case where the first permittee permits another to use the insured automobile, a factual determination must be made whether the initial grant of permission was broad enough to include an implied grant to the permittee of authority to give another use of the automobile and thus render the latter an additional insured under the omnibus clause. *Many courts have even gone one step further and hold that where the named insured grants his permittee broad and unfettered dominion over his insured automobile, he also impliedly authorizes his permittee to allow a third person to use it, thus rendering the latter an additional insured.*" (Italics supplied.)

The record affirmatively shows that no restrictions were placed by Wells on Palmberg's use, possession, custody, or control of the Galaxie. When Palmberg was notified of the collision, he drove to Cozad to see Wells, and Wells told him: "* * * you shouldn't have borrowed a car to this fellow, but we should have told you not to."

Allied assumes that because Palmberg gave certain reasons to show his need for a car, that the use of the car he received was restricted to the uses he enumerated. Without more appearing, we do not believe the evidence will warrant that assumption. It is more logical to believe that the car was delivered for any purpose for which he would need to use a car. Palmberg had just pur-

chased and taken title to the Thunderbird 3 days before. At that time, he surrendered the possession of his old automobile. When the Thunderbird could not be repaired, he was told they would keep it over and let him use another car. He told them he would like to have a pretty decent one, and they gave him the Galaxie. This is not the usual situation where one borrows an automobile for a specific purpose. This is a business transaction, and must be interpreted in that light. The Thunderbird was to be repaired by Wells. He could not do it at the time agreed, so made other arrangements for Palmberg's convenience during the interim. The Allied policy had an endorsement permitting Wells to rent automobiles to those who brought them in for repairs. Here, Wells was obligated to repair the Thunderbird, and, because of the nature of the transaction, he saw fit to furnish Palmberg an automobile without making a rental charge.

We determine that the evidence justifies the conclution that Palmberg had the unrestricted use of the Galaxie. In the absence of restrictions otherwise, he could treat the Galaxie as his own. An owner has an absolute right to loan his automobile to another. Where an owner is entrusted with a substitute automobile while his own is in the possession of the lender, in the absence of something to the contrary in the agreement, he should enjoy broad and unfettered dominion over the substitute automobile. From Palmberg's use, under the circumstances, must flow an implied consent to the loan of the Galaxie, which would place Seager in the same situation as Palmberg, who had initial permission to use the automobile. See, Hardware Cas. Co. v. Massachusetts Bonding & Ins. Co., 129 N. Y. S. 2d 304; Krebsbach v. Miller, 22 Wis. 2d 171, 125 N. W. 2d 408, 4 A. L. R. 3d 1; and cases cited at 4 A. L. R. 3d 80. We determine that Seager was an additional insured within the provisions of both policies.

This brings us to the question of the nature of the lia-

bility between Farm Bureau and Allied. We have determined that Seager is included as an additional insured in the Allied policy, which provides coverage for the Galaxie. The Farm Bureau policy specifically provides: "* * * provided, however, the insurance with respect to a temporary substitute automobile or nonowned automobile shall be excess insurance over any other valid and collectible insurance."

There can be no question but that as to Farm Bureau the Galaxie was a temporary substitute or nonowned automobile. By its express terms, the Farm Bureau policy only becomes effective on the exhaustion of other valid and collectible insurance. We determine, therefore, that Allied, which provided coverage for the Galaxie, has the primary coverage for Seager. Allied, therefore, is principally liable to the full extent of its policy limits, and Farm Bureau has excess coverage to the extent of its policy limits. This is in harmony with our holding in Turpin v. Standard Reliance Ins. Co., 169 Neb. 233, 99 N. W. 2d 26, where the two liability policies contained identical omnibus clauses, set out heretofore.

For the reasons given, the judgment of the district court is reversed and the cause is remanded for the entry of a judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V. ROBERT M. HAGEN, APPELLEE.

143 N. W. 2d 904

Filed July 8, 1966. No. 36330.

1. **Automobiles: Intoxicating Liquors.** Under the implied consent law a person, charged with driving a motor vehicle on the public highways of the state, consents to the giving of a sample of blood or urine for chemical analysis when he makes use of the highways.

2. ———: ———. **An arresting officer is not required to inform one charged with operating a motor vehicle while under the influence of alcoholic liquor of the consequences of his refusal to give a blood or urine sample as provided by the implied consent law.**
3. **Constitutional Law: Intoxicating Liquors. The privilege against self-incrimination is limited to the giving of oral testimony and does not extend to defendant's body, nor to secretions therefrom, nor to the introduction of the chemical analysis in evidence if it is otherwise properly obtained.**

Statutory proceeding for review by a Judge of the Supreme Court under section 29-824, Reissue Revised Statutes, 1943. Interlocutory order entered.

Thomas D. Brower and James D. Knapp, for appellant.

Van Steenberg, Myers & Burke, for appellee.

Heard before CARTER, J.

CARTER, J.

On November 9, 1965, the defendant was convicted in the county court of Kimball County for driving a motor vehicle on the public highways of the county while under the influence of intoxicating liquor, second offense. Defendant appealed to the district court. Defendant filed a motion to suppress the evidence pertaining to or leading up to the giving of a sample of urine for urinalysis, as provided by the implied consent law, in that it was in contravention of defendant's constitutional rights. The trial court sustained the motion and the county attorney has appealed pursuant to the provisions of section 29-826, R. R. S. 1943. The case has been briefed and orally argued to the writer of the opinion as the single judge assigned to hear and determine the issue in accordance with the procedure provided by sections 29-824 and 29-826, R. R. S. 1943.

The evidence is as follows: Defendant was operating his motor vehicle on a public highway when he was stopped by a state patrolman, given physical tests, and arrested for driving while under the influence of alco-

holic liquor. The patrolman testified that he advised the defendant that he was going to ask him some questions, told him that he did not have to answer, and that any answers given could be used against him as evidence in court. He testified he informed the defendant that when they got to the sheriff's office, he could call anyone he desired, including an attorney. The defendant made two telephone calls after arriving at the sheriff's office. The patrolman also requested and obtained a urine specimen from the defendant. The patrolman further testified that he advised defendant he could give either a blood or urine test and defendant elected to give a urine specimen. The patrolman said he told the defendant the following: "I stated that he was required by law to give a urine sample to show how much alcohol he had in his system either by a urine or blood test." He was then asked: "Did you tell him the state of the law in the event that he refused any such test?" His answer was: "Yes, sir, I stated it upon refusing to give a specimen to determine how much alcohol he had in his system that you could and you will go to court for what we called implied consent in refusing to give a test."

Defendant first contends that he was not adequately informed by the patrolman of his rights, in that he was not correctly informed of the consequences if he failed to give a blood or urine sample. The officer is not required to advise a defendant of the consequences of the failure to comply with the tests. As we said in State v. Oleson, *ante* p. 546, 143 N. W. 2d 917: "The patrolman was under no more obligation to advise the defendant that he could have an additional test by a physician of his own choosing than he was to inform him of his right to subpoena witnesses, to be confronted by his accusers, or not to testify without comment thereon by the prosecutor."

In a similar situation, the Supreme Court of Virginia said: "In Walton v. City of Roanoke, 204 Va. 678, 133

S. E. 2d 315, we said that 'the defendant was not compelled under § 18.1-55 to submit to the blood test. He had a choice of either allowing the test to be made or refusing it.' We adhere to that holding. However, the statute does not require an accused to submit to a blood test in order to avoid prosecution for refusing to take it, which may result in the suspension of his operator's license if such refusal is found to be unreasonable. He has the power to refuse to submit to the test but no right to refuse it. Since there exists no 'right to refuse' to submit to a blood test, the trooper was without authority to advise defendant that he had such a right. Furthermore, defendant orally consented to submit to the test so that it was not incumbent upon the trooper to advise him of the consequences if he refused. Had defendant refused to submit to the test, it then would have been the duty of the trooper to advise the accused that 'refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of this State.'" Caldwell v. Commonwealth, 205 Va. 277, 136 S. E. 2d 798. In State ex rel. Van Ermen v. Burke, 30 Wis. 2d 324, 140 N. W. 2d 737, dealing with a similar case, the court said: "Judge Schlichting's determination, that the evidence obtained from petitioner's person by the officers was obtained with petitioner's voluntary consent, is also supported by the weight of the evidence. * * * Furthermore, we are not aware of any holding by this court or the United States supreme court that a person accused of crime must be informed of any right to refuse to consent to a search being made of his person or premises."

It is contended that the failure to inform defendant correctly of the consequences of his refusal to give a test under the implied consent law vitiates the test taken. As we have heretofore shown, the arresting officer is not required to inform the defendant of such fact. But it is further urged that where the officer purports to inform a defendant of such consequences, he

must do so correctly. The complaint as to incorrectness is that the officer informed the defendant that if he refused to give a sample, he could and would have been taken to court instead of to the Director of Motor Vehicles as the law provides, for refusing the test under the implied consent law. It is asserted that the error resulted in coercing the defendant to give the test. The use of the word "court" instead of "Director of Motor Vehicles" is not an important element of information to the defendant. It is the fact that defendant subjects himself to a suspension of his driver's license that is important. Even if the patrolman were required to give correct information, the error was not material and does not constitute a threat, or duress, or coercion of the defendant. In Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N. W. 2d 75, 88 A. L. R. 2d 1055, we held that the privilege against self-incrimination is limited to the giving of oral testimony. It does not extend to the use of the defendant's body as physical or real evidence.

In State v. Oleson, *supra,* we said: "But irrespective of the facts in the instant case, the validity of the test is not impaired. The privilege against self-incrimination is limited to the giving of oral testimony and does not extend to defendant's body, nor to secretions therefrom, nor to the introduction of the chemical analysis in evidence. Swingle v. United States, 151 F. 2d 512; United States v. Nesmith, 121 F. Supp. 758; Holt v. United States, 218 U. S. 245, 31 S. Ct. 2, 54 L. Ed. 1021; Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N. W. 2d 75, 88 A. L. R. 2d 1055."

I necessarily conclude that the taking of the urine sample in the instant case was taken with the implied consent of defendant, as well as with his express consent; that the privilege of self-incrimination was not violated; and that the defendant was adequately advised of his constitutional rights in the obtaining of the sample of urine for the purpose of determining its alco-

holic content. It is my opinion that the trial court was in error in suppressing the evidence of alcoholic content in the urine specimen provided by the defendant.

INTERLOCUTORY ORDER ENTERED.

GEORGE WASSERBURGER ET AL., APPELLEES AND CROSS-APPELLANTS, V. BILL B. COFFEE ET AL., APPELLANTS AND CROSS-APPELLEES, GERTRUDE QUINTARD ET AL., INTERVENERS-APPELLEES AND CROSS-APPELLANTS.

144 N. W. 2d 209

Filed July 15, 1966. No. 36049.

Appeal from the district court for Sioux County: ALBERT W. CRITES, Judge. On rehearing. See *ante* p. 149, 141 N. W. 2d 738, for original opinion. Original opinion adhered to as modified.

Neighbors & Danielson, for appellants.

Atkins, Ferguson & Nichols, for appellees and interveners-appellees.

R. O. Canaday and Wilber S. Aten, for amicus curiae.

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

MCCOWN, J.

On rehearing, we adhere to our original opinion except for its application to the lands of S. C. Turnbull.

The judgment of the district court contained a specific finding and description of all lands as to which receiver's entry receipts were dated prior to March 27, 1889. It did not include any land of S. C. Turnbull. The memorandum opinion found that as to the remainder of the lands of plaintiffs not described, dates of entry are either missing or subsequent to March 27, 1889. The findings in the memorandum opinion, however, were specifically based on exhibit 13 and that exhibit shows

a receiver's receipt for the east half of the northwest quarter and the east half of the southwest quarter of Section 22, Township 35 North, Range 54 West, dated 2-7-89. This was one of the tracts owned by Turnbull, and obviously was prior to March 27, 1889.

The judgment does not state any reason for excluding this Turnbull land other than that it was not severed from the public domain prior to March 27, 1889. However, Turnbull did not testify. There was no specific evidence as to the number of his livestock, nor the extent of his particular right to an injunction, although there is nothing to indicate that his lands were different than the others. Our original opinion also determines the critical effective date for the severance from the public domain to be April 4, 1895, rather than March 27, 1889, and Turnbull, as well as other plaintiffs, is affected by this change in date. It is impossible to determine from the record whether or not the omission of this Turnbull land from the judgment was an oversight.

In view of the circumstances, the nature of the action, and the interrelationship of the rights of the several plaintiffs, that part of our original opinion holding that the district court correctly denied injunctive relief as to all lands owned by S. C. Turnbull is withdrawn. As to his lands, the cause is remanded with authority to amplify the findings of the original judgment if the omission of the description of the one Turnbull tract was correct and deliberate; or otherwise, for further proceedings consistent with our original opinion if the omission was an oversight.

ORIGINAL OPINION ADHERED TO AS MODIFIED.

GRAINGER BROTHERS COMPANY, A CORPORATION, APPELLANT, V. BOARD OF EQUALIZATION OF THE COUNTY OF LANCASTER, STATE OF NEBRASKA, ET AL., APPELLEES.

144 N. W. 2d 161

Filed July 15, 1966. Nos. 36111, 36112, 36113, 36114.

1. **Taxation.** Taxes on all tangible property and franchises are to be levied by valuation uniformly and proportionately.
2. ———. The rule of uniformity applies to both the rate of taxation and the valuation of property for tax-raising purposes.
3. ———. When a study of sales assessment ratios is shown to be statistically reliable, it is entitled to probative value.
4. **Constitutional Law: Taxation.** Under the Constitution of Nebraska, Article VIII, section 1, business inventories and real estate are in the same class for taxation purposes, and properties within the same class are required to be valued and assessed uniformly and proportionately in order that equalization obtain.
5. **Taxation: Appeal and Error.** An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court it is tried de novo.
6. **Taxation: Trial.** The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.
7. ———: ———. To secure a reduction in the assessed value of tangible property it must be demonstrated by evidence that its value has not been fairly and proportionately equalized, and is a result of arbitrary or unlawful action. The evidence must be such as to indicate the exercise of arbitrary action or the failure of plain legal duty, and not a mere error in judgment.
8. ———: ———. Where the county assessor does not act upon his own information, or does not make a personal inspection of the property, any presumption as to the validity of the official assessment does not obtain.
9. ———: ———. The presumption obtains that a board of equalization has faithfully performed its official duties, and in making an assessment it acted upon sufficient competent evidence to justify its action. However, the presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuations fixed by the

board becomes one of fact based upon evidence unaided by presumption.

Appeals from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Reversed and remanded with directions.

Mason, Knudsen, Berkheimer & Endacott, for appellant.

Paul L. Douglas, William D. Blue, Ronald D. Lahners, Floyd A. Sterns, Walter D. Weaver, and Janice L. Gradwohl, for appellees.

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

BROWER, J.

These cases involve the assessments on stocks of merchandise, being tangible personal property of the plaintiff and appellant, Grainger Brothers Company, for the years 1959, 1960, 1961, and 1962.

Protests were filed with the defendant and appellee board of equalization of the county of Lancaster for each of the years mentioned. The protests were each denied. On appeal the cases were consolidated for trial in district court as was done for briefing and argument here. The trial in district court resulted in a finding and judgment that the plaintiff's inventory was fairly and properly equalized by the county assessor and the board of equalization for each of the years involved and a dismissal of plaintiff's petitions. Plaintiff has appealed from an order overruling its motion for a new trial.

Plaintiff assigns error to the trial court in determining the assessed and actual value of its inventories and establishing them as set by its order; in failing and refusing to equalize assessed and actual values thereof with that of other properties in Lancaster County; and in failing to reduce the assessed values thereof.

Plaintiff's inventory for all of the years in question consisted of a full line of dry groceries and perishables

sufficient to supply the needs of its retail grocery customers in the Lincoln trade area. In its amended petitions for the several years plaintiff contended that the equalized assessed value of its inventory should be no greater than the following: 1959—$186,449; 1960—$180,-280; 1961—$211,878; and 1962—$205,369.

The assessor raised the actual value as originally reported by plaintiff and set the assessed value at 35 percent thereof, as follows:

Year	Actual	Assessed
1959	$821,360	$287,476
1960	794,185	277,965
1961	904,710	316,650
1962	933,385	326,685

The county assessor testified he determined actual value of plaintiff's property for each year involved by simply taking the same value as shown on form 2A of plaintiff's personal property tax return for each of said years. This value is the dollar amount of the inventory as set out in the taxpayer's latest federal income tax return which is required under section 77-1231.01, R. R. S. 1943, to be stated in the personal tax return. He did not in any way inspect the merchandise in the inventory. The assessor speaks of this as "book value."

The plaintiff here, however, does not contend the actual value of its inventory as determined by the assessor and board of equalization is in excess of its value. It is stipulated that if present, one S. A. Wilson, who was the executive vice president and general manager of plaintiff from 1950 to 1962 and president in 1962, would testify that the fair market value of plaintiff's inventory for the respective years was practically identical with that fixed by the assessor as actual value heretofore set out.

Plaintiff's objection is that the great proportion of the tangible property in Lancaster County is systematically assessed for less than its actual value, and that the failure to fairly and proportionately equalize plaintiff's in-

ventory in relation thereto results in a discrimination and an unjust and unfair assessment.

Plaintiff calls attention to Article VIII, section 1, of the Constitution of this state which, with certain exceptions not applicable to the case before us, requires that taxes on all tangible property and franchises are to be levied by valuation uniformly and proportionately. Homan v. Board of Education, 141 Neb. 400, 3 N. W. 2d 650. The rule of uniformity applies to both the rate of taxation and the valuation of property for tax-raising purposes. Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489; State ex rel. Morton v. Back, 72 Neb. 402, 100 N. W. 952, 69 L. R. A. 447; Chicago, R. I. & P. Ry. Co. v. State, 111 Neb. 362, 197 N. W. 114.

Plaintiff maintains that the actual value of real estate in Lancaster County, which constitutes by far the major portion of tangible property, is systematically undervalued, resulting in the discrepancy claimed.

To understand the valuation placed upon real estate in the county involved, it is here necessary to relate some of the history of its assessment which antedates the years involved in the present case.

In 1953 E. T. Wilkins & Associates, hereinafter called Wilkins, a professional appraisal company, reappraised all real estate and improvements in Lancaster County. The county assessor testified that Wilkins did a good and thorough job. In 1953 the State Board of Equalization and Assessment increased the value of all lots and improvements to a total valuation of $216,981,750. This figure represented 100 percent of value. For the taxable year 1954 the county board of equalization reduced the Wilkins appraisal figures on real estate and improvements in Lancaster County to correspond to the total valuation placed on real estate by the State Board of Equalization and Assessment the year before. The board of equalization in 1954 in the county assessor's presence reduced the value of real estate in the following amounts: Urban commercial property to 70 percent,

rural property to 65 percent, and urban residential property to 60 percent. Actual value then became the Wilkins appraisal adjusted to the 70, 65, and 60 percent values. The 50 percent assessment law then being in effect, the assessed value of each of these kinds of real estate was assessed at 50 percent. While still in 1954 the State Board of Equalization and Assessment reduced the actual value of urban residential property (60 percent) and urban commercial property (70 percent), by 10 percent without changing the value of rural property. In 1957 the law was changed, making the level of assessment 35 percent of actual value. Lancaster County, however, did not change the assessed value figures accordingly. What figure had been 50 percent assessed value then became 35 percent.

The actual value was not thereafter placed on the assessor's records, but the assessed value alone was shown. The assessed value was computed, however, by applying different percentages to the Wilkins appraisal, viz: 32½ percent to rural real estate, 31½ percent to urban commercial property, and 27 percent to urban residential property. The result, however, is the same as if the various changes made by the board of equalization and the State Board of Equalization and Assessment, and the shifting of the 50 percent assessed valuation to 35 percent had been spelled out in actual values. These changes are illustrated by exhibits 21, 22, and 23 with respect to the three types of real estate. Exhibit 23, which deals with urban real estate, is here set forth.

EXHIBIT 23
URBAN RESIDENTIAL PROPERTY

1954	Property valued by Wilkins	$10,000.00
	County Board placed this at 60%	6,000.00
1954	50% law in effect—assessed value of 30% of Wilkins	3,000.00

1957	50% changed to 35% but Lancaster County made no change.	
1954	State Board reduced 10%	$ 300.00
	making assessed value or 27%	$ 2,700.00
	Could have changed all Wilkins on basis of reducing each $10,000.00 to	$ 7,714.00
	Then applying 35% making same assessed value	$ 2,700.00

Exhibit 21 is similar for a rural property appraised for $10,000 by Wilkins. It shows the reductions heretofore mentioned applied to that type of property and the change from 50 percent to 35 percent in assessed value, and ends by showing that 32½ percent of the Wilkins appraised value is the same as 35 percent on a like computed actual value of $9,285.

Exhibit 22 covers a $10,000 urban commercial property as affected by the changes pertinent to such property, the result being that 31½ percent of the Wilkins appraisal is the same as 35 percent on a similarly computed actual value of $9,285.

The only occasion in which the county assessor computes actual value is when he makes a report to the State Board of Equalization and Assessment. He then multiplies the assessed value by 2.857 which transforms the 35 percent to 100 percent and writes the result on this report as the actual value.

The county assessor testified that if nothing was done to affect "their character or their construction, * * * or buildings, or something of that sort," these assessments remained the same after the adjustment made by the State Board of Equalization and Assessment in 1954. The level was set by the State Board of Equaliza-

tion and Assessment and the three levels between urban residential, urban commercial, and rural real estate were maintained from 1959 through 1962. This was done in order to keep the assessed valuations in line with those determined by the State Board of Equalization and Assessment in 1953. He stated this was done although real estate after 1958 was steadily rising in value. The defendants were served with requests to make admissions which includes the following: 3. "It was the policy and practice of the County Assessor of Lancaster County to maintain the evaluation for tax purposes of real property in Lancaster County at the same levels established by E. T. Wilkens & Associates as adjusted by the State Board of Equalization in 1954 for the years from 1954 through 1962." To this the defendants replied: "Admit Request No. 3 with the qualification that in the year 1954 the Board of Equalization of Lancaster County, Nebraska, upon the recommendation of the Lancaster County real estate classification and reappraisal committee also made an adjustment in real estate values."

The testimony of both the assessor and an employee engaged in the appraisal work in that office with respect to the assessment of newly constructed improvements on property is enlightening. Their two stories are in complete agreement. They show that new construction was appraised and assessed on cost levels prevailing in 1952 which Wilkins used in 1953. On obtaining information from the authorities of the city of Lincoln that new construction had been authorized, an appraiser went to the premises and examined the improvement as it was being constructed. He measured the building and noted the type of construction. He procured the cost thereof from a detailed cost data book, exhibit 24, left by Wilkins after the completion of its appraisal in 1954, referred to at times as the "cost guide." It is based on 1952 costs. The cost of the improvements at the 1952 value thus obtained was placed on the appraisal. In many instances new types of construction had become prevalent

since 1952 which were not specified in this cost data book. As to them the appraiser procured the costs either from the contractors, or from others engaged in construction or the furnishing of materials. These new costs were then discounted 15 percent to 20 percent to bring them down to the 1952 level of the costs as set out in the cost guide book. The new costs as discounted were then added to the appraisal procured through the cost guide. Then the sum was further reduced by 5 percent for depreciation. This discount for depreciation was made even before the building was completed. No other allowance for depreciation appears to have been ordinarily given. The sum so added as discounted was designated on the appraisal card as the appraised value. It was not, however, either the assessed value or actual value. The assessed value was obtained by multiplying this appraised value by the same percentages applied to the original appraised value of Wilkins, to wit: 32½ percent for rural property, 31½ percent for urban commercial property, and 27 percent for urban residential property. There is no dispute as to this manner of appraising new construction, nor its assessment thereafter. Neither is it disputed that its purpose was to keep the valuation of new construction on the level of the Wilkins appraisal and at 1952 prices. All this is conceded by other answers of defendants to requests for admissions.

An example of this method of appraisal applied to residential property was received in evidence as exhibit 25. The exhibit itself contains a diagram showing the dimensions of the house being constructed and figures used by the appraiser in his computation of the appraised value from the Wilkins cost data. An abbreviated abstract of this exhibit shows the ultimate compilation of the results of the appraisal as well as its application to actual and assessed value with the detailed figures omitted. It is here set forth:

	Appraised	-	1959
1 Cost guide	10,230		

	(1952 prices)		
2	Non-cost guide (minus 15-20%)		
	A. Split level	700	
	B. Carport	600	
	C. Storage	50	
3	Replacement value		11,580
4	Less: 5% dep'n	580	
5	"Appraised value"		11,000
6	Assessed value	2,970	
7	% of appraisal	27%	
8	Computed Actual (Value) (2.857 x 2,970)		8,485

Similar appraisals are in evidence. Not only the new buildings were adjusted to the Wilkins values, but in case of new additions, the land was also. This was done by consulting values as to lots in previously existing additions on the appraisal cards on file in the assessor's office and by consulting tables in the Wilkins guide with respect to standard depth in the measurement of lots and variations therefrom with values set out with respect to different depths.

Dr. James B. Hassler, a professor at the University of Nebraska with degrees from the University of California in agricultural economics and with a minor in statistics, testified with respect to an unbiased appraisal made between assessed value and sales value of real property in the city of Lincoln. He used as data exhibits 1, 2, and 3 which were transcripts prepared by the register of deeds of Lancaster County for the use of the State Board of Equalization and Assessment. These transcripts contained five percent of all real estate sales in the city of Lincoln for the years 1959 through 1962. The data was selected from every addition and subdivision. He also used exhibit 12 which is a compilation of all sales

in Lancaster County in 1960 where the consideration exceeded $40,000 and was less than $1,000,000.

Dr. Hassler testified the raw data for the years 1959 to 1962 was carefully screened by him. He rejected sales where the assessed value was very small compared to the sales price because these indicated a sale of residential property that had not been finally assessed. He excluded items where the names indicated relationship between grantor and grantee. Items having assessed valuations higher than 60 percent and less than 10 percent were excluded because he felt they might be questionable. There were very few above 60 percent and most of those under 10 percent were partial assessment situations. He took steps to prevent duplication between items on exhibit 12 and those on exhibits 1, 2, and 3.

The doctor used 100 items for the years 1959 and 1961 and all items for 1960 (431) and 1962 (693). He compared results in exhibit 12 with the other exhibits for the several years to determine whether there was bias in favor of low valued over high valued property. The doctor considered there was no significant variation between high and low valued properties. The sales price was computed from revenue stamps on the deeds. He tested each of the several exhibits by using two methods, one the aggregate ratio used by the Tax Commissioner (consisting of dividing the sum of the values of the actual sales into the sum of the actual assessed value), and the simple average assessment ratio (computing the ratio between sales and assessments on each sale, adding them together, and dividing the result by the number of cases considered). Dr. Hassler determined from the samples the ratio of assessed values to sales values for each of said years. Using an estimated standard of error for both types and for all years involved where annual random samples had been taken, Dr. Hassler testified he was able to state that the estimates, which are hereafter listed, would not deviate more than 1.5

to 2 percent plus or minus from the averages found. He stated that the sample sized was significantly large and the estimates were statistically sound. He prepared an analysis of the ratio of sales values with his estimated standard, which follows:

ANALYSIS OF THE RATIO OF
SALES VALUES TO ASSESSED VALUES
Lancaster County—1959-62

* * *

Year	Sample Size	Rw	Estimated Standard Error	Rs	Estimated Standard Error
1959	100	.2477	.0091	.2451	.0051
1960	431	.2466	.0049	.2434	.0023
1961	100	.2407	.0051	.2243	.0057
1962	693	.2397	.0054	.2319	.0024

In the above table Rw refers to the aggregate ratio system and Rs to the simple average ratio. The doctor concluded that to equalize the inventories of the plaintiffs for the 4 years they should be assessed at 24.03 percent of value.

The defendants contend the sales assessment ratio as presented by Dr. Hassler should not be considered. They call attention to the case of Carpenter v. State Board of Equalization & Assessment, 178 Neb. 611, 134 N. W. 2d 272, where, because of deficiencies in their preparation, sales assessment ratios were not accepted. Here, however, there is detailed testimony by an expert concerning their preparation and their dependability. They are related to four such separate ratio studies in four succeeding years and tested by applying a special one designed to test the 1960 ratio and inferentially the others. Moreover, the testimony of the county assessor and the appraiser from his office lends strength to the conclusions inferable from the sales assessment studies which in turn give weight to that of the assessor and his appraiser. When a study of sales assessment

ratios is shown to be statistically reliable, it is entitled to probative value. Sioux City Bridge Co. v. Dakota County, 110 Neb. 597, 194 N. W. 729; In re Appeals of Kents 2124 Atlantic Ave., Inc., 34 N. J. 21, 166 A. 2d 763; Baken Park, Inc. v. County of Pennington, 79 S. D. 156, 109 N. W. 2d 898; People ex rel. Hillison v. Chicago, B. & Q. R.R. Co., 22 Ill. 2d 88, 174 N. E. 2d 175.

Under the Constitution of Nebraska, Article VIII, section 1, business inventories and real estate are in the same class for taxation purposes, and properties within the same class are required to be valued and assessed uniformly and proportionately in order that equalization obtain. Homan v. Board of Equalization, 141 Neb. 400, 3 N. W. 2d 650; Chicago, R. I. & P. Ry. Co. v. State, 111 Neb. 362, 197 N. W. 114; H/K Company v. Board of Equalization, 175 Neb. 268, 121 N. W. 2d 382.

In Newman v. County of Dawson, 167 Neb. 666, 94 N. W. 2d 47, the following rules are set forth: "An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court it is tried de novo.

"The burden of proof is upon a taxpayer to establish his contention that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property resulting in a discriminatory, unjust, and unfair assessment.

"To secure a reduction in the assessed value of tangible property it must be demonstrated by evidence that the assessment is grossly excessive or that its value has not been fairly and proportionately equalized, and is a result of arbitrary or unlawful action. The evidence must be such as to indicate the exercise of arbitrary action or the failure of plain legal duty, and not a mere error in judgment."

Where the county assessor does not act upon his own information, or does not make a personal inspection of

the property, any presumption as to the validity of the official assessment does not obtain. H/K Company v. Board of Equalization, *supra.*

"The presumption obtains that a board of equalization has faithfully performed its official duties, and in making an assessment it acted upon sufficient competent evidence to justify its action. However, the presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuations fixed by the board becomes one of fact based upon evidence unaided by presumption." L. J. Messer Co. v. Board of Equalization, 171 Neb. 393, 106 N. W. 2d 478.

We now apply these rules to the evidence previously outlined. It clearly appears that the assessor and taxing authorities of Lancaster County have kept real estate values therein on a level with those fixed by the State Board of Equalization and Assessment in 1953. This is done designedly and systematically. It is done although the assessor testified there has been a steady rise in real estate values. The value of new construction is appraised in relation to replacement value from Wilkins cost guide where possible. The Wilkins cost guide lists prices of 1952. Where information concerning new materials or construction is not shown in the guide, it is discounted 15 to 20 percent. A depreciation of 5 percent is immediately given before construction is complete. If an improvement is only 50 percent completed on the date of assessment, the partial structure is listed at 50 percent of the appraised value with the discounts and depreciation already allowed. Then the rate on the new improvement is applied, not at 35 percent, but at 27 percent, 31½ percent, or 32½ percent by reason of a reduction made by the State Board of Equalization and Assessment in 1953. This is done for the purpose of equalizing real estate values. Indeed the systematic

plan seems to have resulted in establishing uniformity and equality in the valuation of real estate for taxation. We conclude, however, that as it affects valuation of the plaintiff's inventories of merchandise here valued for taxation at its true actual value, it perpetuates a systematic and unlawful discrimination. Plaintiff has established that the value of its property has not been fairly and proportionately equalized with other property, resulting in a discriminatory, unjust, and unfair assessment.

It is now necessary to determine the extent and nature of the relief to be granted. From the evidence the total actual value of real estate and of inventories assessed in Lancaster County for three of the four years in question appears. They are here set out for each year, the first figure being the real estate: 1959, $449,420,485 and $30,381,240; 1960, $461,924,270 and $39,384,435; and 1961, $476,922,060 and $40,615,225. Apparently the 1962 figures were not available. The breakdown between urban and rural lands and improvements is not shown except as set forth in the order of the State Board of Equalization and Assessment in 1953, which separates the different types of tangible property as follows: Lands and improvements, $57,600,900; lots and improvements, $216,981,750; business schedules, $29,482,880; and household goods and personal effects, $4,180,990. From the evidence it is clearly inferable the great portion of increase in total value of real estate arises from new construction and new additions in and to the city of Lincoln.

A separate valuation of rural lands upon which the percentage of variation from the Wilkins appraisal is somewhat higher is not shown for the years involved. The intent to hold such valuation to 1953 levels is clearly shown, however. Such value of urban commercial property is likewise not shown although maintained at the same level. Dr. Hassler did not attempt to segregate urban commercial from urban residential because, he testified, it was extremely difficult to do from the descriptions, and

because he assumed with the passage of time economic values would have altered on individual properties and the assessed value-sales value ratio would tend to mix for all types of property over the period.

In the case of Baken Park, Inc. v. County of Pennington, 79 S. D. 156, 109 N. W. 2d 898, the South Dakota court had under consideration the value for assessment purpose of a shopping center which the owner contended and the court found was assessed higher than downtown business property, resulting in discrimination. The court there considered sales assessment ratios with other evidence. Holding the plaintiff had established such discrimination, it stated: "If discrimination exists the remedy of the taxpayer is the reduction of his valuation to such amount as may be necessary to remove it. In re Appeals of Jepsen, 76 S. D. 421, 80 N. W. 2d 76. This court has recognized that perfect uniformity of taxation is a dream unrealized and exact uniformity or mathematical accuracy in valuations are impossible, yet quoted with approval a statement to assess the property of one person or class at 40%, another at 30% and still another at 25% without legislation under appropriate constitutional authority to so classify was the result of deliberation or intention. Sioux Falls Savings Bank v. Minnehaha County, 29 S. D. 146, 165, 135 N. W. 689, 693. Constitutional uniformity is then lacking. Chicago, R. I. & P. Ry. Co. v. Young, 60 S. D. 291, 244 N. W. 370. The record here shows more than mathematical inaccuracy. It was not necessary to prove the basis used in assessing every other piece in the city." The court then cited In re Appeals of Kents 2124 Atlantic Ave., Inc., 34 N. J. 21, 166 A. 2d 763, and further said: "In the Kents case, the court decided proof of a common level or ratio was not required, stating the remedy must be within the practical reach of a taxpayer, that he must not be required to prove more than sensibly can be expected of him and until a better technique appears an average ratio could be used as

evidence of a ratio at which an assessment above it should be reduced. Requiring proof of a common level or general percentage of true value would in many cases deprive a taxpayer of a remedy and cannot be sanctioned." In the Baken Park case it appears the appellate court was without jurisdiction to determine issues of fact or direct the decision of the trial court except where the facts were undisputed and were such that only one conclusion could be drawn. It did reduce the value, however, because of its finding of undisputed facts and the appellant's willingness to accept the undisputed reduction.

We are considering the present case de novo. From the ratio studies, Dr. Hassler concluded the assessed value of plaintiff's inventories should be 24.03 percent of actual value to be equalized with real estate. He admitted a possibility of very small error. From the testimony of the assessor and his appraiser new construction was discounted 15 to 20 percent to equate it with 1953 values. New construction was immediately given a 5 percent depreciation not accorded to other real estate or at other times. We conclude also that this is by way of equalizing. The 20 percent would reduce 35 percent to 28 percent, and 25 percent to 26¼ percent. The percentage cannot be exact. We conclude that the assessed value of the plaintiff's inventories should be determined by taking 26 percent of the actual value as determined by the county assessor for each of the years in question.

The judgment of the trial court is reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION NO. 25315 OF THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY AND UNION PACIFIC RAILROAD COMPANY.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.
IN RE APPLICATION NO. 25315, SUPPLEMENT NO. 1, OF THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY AND UNION PACIFIC RAILROAD COMPANY.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

144 N. W. 2d 432

Filed July 15, 1966. Nos. 36174, 36173.

1. **Public Service Commissions: Railroads. The Nebraska State Railway Commission is without authority to fix or change a schedule and classification of rates and charges in the absence of notice and hearing as required by section 75-119, R. S. Supp., 1965.**
2. **———: ———. Where the evidence is sufficient to support the finding, the Nebraska State Railway Commission may grant an application in whole or in part or may restrict or limit the grant, but it may not extend the effect of the application and thus engage in rate making without notice and hearing.**

Appeals from the Nebraska State Railway Commission. Reversed.

Mason, Knudsen, Berkheimer & Endacott and William P. Higgins, for appellants.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BURKE, District Judge.

CARTER, J.

This is an appeal from two orders of the Nebraska State Railway Commission on two applications by the Chicago, Burlington & Quincy Railroad Company and

the Union Pacific Railroad Company to establish graduated reduced single-line carload freight rates on feed grains from eastern and central Nebraska origins to western Nebraska destinations on the two railroads with the amount of rate reductions based on the weight of the carload shipments. The original application was for an order to establish such rates from eastern and central Nebraska to Henry and Lyman, Nebraska, and intermediate points, on the Burlington and Union Pacific, respectively. The second application was for the purpose of adding Sanborn and Venango, Nebraska, as destination points on the Burlington, and Barton, Nebraska, as a destination point on the Union Pacific. For the purpose of determining the common issue in the two appeals, we shall decide the cases in a single opinion.

The commission approved the reduced rates based on four weight classifications described in the commission's order as follows: "(1) 180,000 pound minimum, moving in shipper owned 'jumbo' covered hopper cars but mileage allowance is not observed; (2) 180,000 pound minimum, moving in carrier owned 'jumbo' covered hopper cars; (3) 145,000 pound minimum per car used; (4) 110,000 pound minimum per car used. These rates will not apply on shipments accorded transit and switching charges will not be absorbed at destination." The rates for the four classifications progressively increased from classification 1 to classification 4, all as applied for by the two applicants.

In entering its order in each of the two applications, the commission inserted on its own initiative the following exception: "Exception-minimum weights shall be as specified herein except that where because of limitations as to maximum gross weight permitted to move over certain portions of a rail branch line, the minimum carload weight shall not be greater than the weight of the grain in a car that can be safely transported over that portion of the rail line." It is the contention of the appealing railroads that this exception compels them to

transport feed grains over branch lines with car-weight limitations with a lesser rate than that applied for, that the exception was ordered without notice and hearing or stipulation of the parties, and that the effect is to establish an arbitrary and unlawful rate as to such branch line operations.

The evidence shows that the Interstate Commerce Commission had previously granted similar reduced rates on feed grains as those applied for between eastern and central Nebraska and eastern Colorado and Wyoming. One basis of the applications was to obtain competitive rates in the Nebraska areas affected with those granted to buyers in eastern Colorado and Wyoming. The evidence also shows that another basis for a reduction of rates in the affected areas in Nebraska was to attempt to recoup freight rates lost to unregulated motor carriers. We think the foregoing evidence sustains the order of the commission in granting the reduced rates in accordance with the applications.

The primary issue is the validity of the exception contained in the commission's orders. It must be conceded that the commission had authority to grant the rate reduction applied for under the evidence adduced, in whole or in part, or subject to restrictions and limitations. The railroads in making the application as here shown have invoked the jurisdiction of the court to this extent.

In the instant case the commission, by including the exception, decreased the freight rates on feed grains on branch lines with load limits beyond the scope of the applications. This had the effect of applying reduced rates on carload shipments below the minimum weight limits which the proposals in the applications requested. Since notice was not given of this proposed rate change by the commission and no hearing thereafter held on the propriety of such a freight rate, the order is prohibited by section 75-119, R. S. Supp., 1965, which provides in part: "Prior to the fixing or changing of any rate,

the commission shall give the common carriers to be affected thereby, ten days' notice of the time and place when and where the rates will be fixed. Such common carriers shall be entitled to be heard at such time and place to the end that justice may be done."

The Attorney General states that the contention of the two railroads is that the commission must either accept or reject proposed rate changes without alteration or limitation. We do not find this to be the contention of the railroads. We understand their contention to be that the applications may be granted in whole or in part, or restricted, or limited, but that they may not be extended beyond the power of the commission invoked by the applications without complying with section 75-119, R. S. Supp., 1965. In the instant case no objectors appeared to resist the grant of the applications. The evidence of possible discrimination in rates between the areas affected and branch lines with gross load limits was injected by the staff attorney of the commission, not by the appealing railroads. While it is true that there was a discrimination as to the charges to be made, this does not necessarily mean that there was an unlawful discrimination. Chicago, B. & Q. R.R. Co. v. Herman Bros. Inc., 164 Neb. 247, 82 N. W. 2d 395; Nebraska Limestone Producers Assn. v. All Nebraska Railroads, 168 Neb. 786, 97 N. W. 2d 331. One purpose in applying for the reduced rates in the instant case was to recoup lost freight charges. It could well be said that the appealing railroads could not compete with unregulated motor vehicles in the areas excluded from their applications because such rates would not be compensatory. Assuming the correctness of such position, the imposing of such rates could well result in loss to the railroads. To impose such a loss without notice, hearing, or a right of appeal, is not consonant with the statute or the rules of due process. Platte Sand & Gravel Co. v. Chicago, B. & Q. R.R. Co., 121 Neb. 855, 238 N. W. 766; United Mineral Products Co. v. Nebraska Railroads, 178 Neb. 640,

134 N. W. 2d 598. The effect of the exception inserted by the commission's own initiative is to reduce freight rates on branch lines having gross load limits under the minimums requested in the railroad companys' applications. This is rate fixing without notice and hearing.

We conclude that the inclusion of the exception by the commission, under the facts of this case, amounts to rate fixing by the commission without notice and hearing required by section 75-119, R. S. Supp., 1965, and is not binding on the appellant railroads. The parts of the orders of the commission designated "exception" are therefore reversed and held for naught.

REVERSED.

CHRIS A. WURTELE ET AL., APPELLANTS, V. CITY OF NEBRASKA CITY, APPELLEE.
144 N. W. 2d 153

Filed July 15, 1966. No. 36218.

Municipal Corporations: Appeal and Error. An appeal under the provisions of section 16-110, R. S. Supp., 1963, must be taken as in other civil actions (sections 24-544, 27-1302, and 27-1303, R. R. S. 1943), and in addition thereto, notice of appeal must be given and a copy of the petition on appeal must be served as required by the act.

Appeal from the district court for Otoe County: VICTOR H. SCHMIDT, Judge. Affirmed.

Dwight Griffiths, for appellants.

Moran & James and William F. Davis, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and DITTRICK, District Judge.

BROWER, J.

The appellants Chris A. Wurtele and others, legal owners of the territory affected, bring this appeal from an order of the district court for Otoe County dismiss-

ing on jurisdictional grounds an appeal to that court from an annexation ordinance of the city of Nebraska City.

The annexation ordinance, No. 1184, of the city was passed and approved with the emergency clause April 5, 1965, and published according to law April 7, 1965. The mayor issued his proclamation declaring the ordinance was in full force and effect on April 8, 1965.

Appellants filed an appeal bond in the office of the city clerk and treasurer on May 5, 1965, and filed a transcript of the proceedings procured from the office of the city clerk in the district court for Otoe County on May 10, 1965. The appellee filed a motion in the trial court to dismiss the appellants' petition for the reason that appellants failed to furnish a bond within the time required by section 16-110, R. S. Supp., 1963. The trial court found that section was not complete in itself and that additionally there must be compliance with sections 27-1302 and 27-1303, R. R. S. 1943.

Appellants contend the emergency clause in the ordinance was not valid, but it is not necessary for us to determine that question. It is conceded that the appellee is a city of the first class, operating under the commission form of government, and under section 19-431, R. R. S. 1943, an ordinance without the emergency clause would go into effect 15 days after its final passage. Therefore, the latest effective date would be 15 days after the mayor's proclamation on April 8, 1965, or April 23, 1965. The appeal bond was not filed until May 5, 1965.

This case is determined by our decision in Ulbrick v. City of Nebraska City, *ante* p. 229, 141 N. W. 2d 849. There we held: "An appeal under the provisions of section 16-110, R. S. Supp., 1963, must be taken as in other civil actions (sections 24-544, 27-1302, and 27-1303, R. R. S. 1943), and in addition thereto, notice of appeal must be given and a copy of the petition on appeal must be served as required by the act."

The appeal bond was not filed within 10 days of the

final passage of the ordinance as required by section 27-1302, R. R. S. 1943.

The judgment of the district court in dismissing the appeal was therefore without error and is affirmed.

AFFIRMED.

RAYMOND KAUFMAN, APPELLEE, V. GEORGE TRIPPLE, APPELLANT.

144 N. W. 2d 201

Filed July 15, 1966. No. 36256.

1. **Automobiles: Negligence.** The guest statute, section 39-740, R. R. S. 1943, provides two distinct grounds of recovery by a guest against his host for negligence, one where the host driver is under the influence of intoxicating liquor in which event he is liable for ordinary negligence, and the other where the host is guilty of gross negligence.
2. **Trial.** Where a party tenders an instruction to the court, he may not after an adverse verdict complain of its submission to the jury.
3. **Automobiles: Negligence.** Evidence as to a host's drinking of intoxicants a short time previous to an accident is a circumstance in determining whether or not the host was guilty of gross negligence.
4. ———: ———. The contributory negligence of a guest is ordinarily a question of fact for the jury.
5. **Negligence.** It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributing cause of the injury.
6. **Automobiles: Negligence.** A guest is not required to use the same degree of care as the driver of the automobile. If a guest perceives danger, or should have perceived it under the circumstances shown by the evidence, a duty to warn the driver arises. Ordinarily, however, a guest need not watch the road or advise the driver in the management of the automobile.
7. ———: ———. It is not contributory negligence for a guest to sleep while riding in an automobile when he has no knowledge of negligent driving on the part of his host, or of impending danger on the highway.
8. **Negligence.** Assumption of risk is available as a defense when one voluntarily exposes himself to the injury, even though it plays no part in causing the injury.

9. ———. The defenses of contributory negligence and assumption of risk are not inconsistent defenses, although the evidence as to one may tend to prove the other.
10. Damages. The general rule is that profits derived from a business are not to be considered as earnings and cannot be used as a measure of loss of earning power, but where profits are almost entirely the direct result of personal management and endeavor, they are admissible for the sole purpose of estimating loss of earning capacity.
11. Negligence: Damages. The fact that a person was not engaged in a gainful occupation when injured by the negligence of another does not bar recovery for impairment of his earning capacity.

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

Holtorf, Hansen & Kortum, for appellant.

W. H. Kirwin, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and COLWELL, District Judge.

CARTER, J.

This is an action by Raymond Kaufman to recover damages for personal injuries suffered by him while riding as a guest in an automobile owned and operated by George Tripple. The jury returned a verdict for Kaufman against Tripple in the amount of $21,974.75. Tripple has appealed.

On May 31, 1962, Tripple was engaged in the wholesale distribution of beer and had been so engaged for 10 years. At 10 a.m. on said day, Kaufman was in George's Tavern in Gering when Tripple came in. Tripple told Kaufman he had to call on beer customers in Bayard and Bridgeport and asked Kaufman to ride along with him. Kaufman accepted the invitation on condition that they would be back between 5 and 6 o'clock p.m.

They left in Tripple's automobile traveling east on Highway No. 92, to Melbeta, where they stopped and visited with a customer for a few minutes. They then

continued on east to Highway No. 26, where they turned north into Bayard, the intersection of Highways Nos. 92 and 26 being the place of the accident in this case. They went to Reifschneider's Tavern where they had a beer and Tripple discussed his business. They then went to Schwartz' Tavern where, according to Kaufman, they had another beer and Tripple's business was transacted. They then went to lunch with one Walt Bretzer, who later accompanied them to Bridgeport. They went south on Highway No. 26 to Highway No. 92 and turned east to Bridgeport, where they remained for a couple of hours. They returned to Bayard over the same route they traveled going to Bridgeport and went to Reifschneider's Tavern where they had a beer or two. They went from there to Schwartz' Tavern where they remained until 11:15 p.m. Kaufman played pool while Tripple bought beer for customers. Kaufman testified that Tripple drank 8 or 9 bottles of beer and Tripple testified he bought but one. As they left, Kaufman asked Tripple if he was in condition to drive and Tripple assured him that he was. They got into the automobile, Tripple driving, and headed south on Highway No. 26. Kaufman leaned back and relaxed and was aroused when the car hit one of the islands at the intersection of Highways Nos. 26 and 92, the intersection which they had negotiated three previous times that day. The car careened across Highway No. 92, went into the ditch, and hit its south bank head-on. Kaufman was very seriously injured and Tripple suffered a broken arm and cuts. The automobile was being driven 40 to 45 miles per hour when the accident occurred. There was a warning of a stop sign ahead a half block north of the intersection and stop signs to the east and west entrances to Highway No. 92. There were wheel marks on the pavement caused by the braking of the car beginning 9 feet north of the point where the automobile struck the curb of the island. Tripple testified that he fell asleep at the wheel and that he applied the brakes

when the island was struck. Kaufman testified that he asked Tripple after they left Bayard if he felt able to drive and was again assured that he was all right. Tripple denies that this conversation took place.

The intersection where the accident occurred is located about 3 miles south of Bayard. Highway No. 92 is substantially an east and west road. Highway No. 26 intersects Highway No. 92 from the north, forming a T-intersection. An island in Highway No. 26 extends north approximately 200 feet from the north side of Highway No. 92. The usual turning lanes for leaving and entering from one highway to the other are provided. Tripple struck the curb of the island and traveled approximately 94 feet before running into the south ditch of Highway No. 92.

Tripple contends that the evidence is insufficient to sustain a finding of gross negligence under the guest statute and that the trial court erred in overruling his motions for a directed verdict and in submitting the issue to the jury. Under the evidence in the record the jury could properly find that Tripple had been drinking beer intermittently most of the afternoon and evening, and drank 8 or 9 bottles of beer from 5 p.m. to 11:15 p.m. The evidence shows that Tripple approached the intersection at 40 to 45 miles per hour and failed to observe or comply with the warning and stop signs protecting Highway No. 92. Tripple admits that he fell asleep and was aroused only when his automobile struck the curb of the island.

The patrolman who investigated the accident testified that in his opinion Tripple was under the influence of liquor at the time of the accident. From the evidence herein summarized, the jury could properly find that Tripple was under the influence of liquor when the accident occurred.

Section 39-740, R. R. S. 1943, provides in part: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in

such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle."

The foregoing provision of the guest statute provides for two distinct grounds of recovery. One exists if the host driver is under the influence of intoxicating liquor in which event such driver is liable to a guest for ordinary negligence. The other exists only if the host is guilty of gross negligence. Tripple complains that the petition does not allege that Tripple was under the influence of intoxicating liquor within the meaning of the first ground of liability stated therein and that the trial court erred in submitting that issue to the jury. The issue was submitted by the court's instruction No. 5 in part as follows: "The burden of proof in this action is upon the plaintiff, and before plaintiff can recover, he must prove by a preponderance of the evidence all of the following propositions: (a) That the defendant was under the influence of alcoholic liquor or was guilty of gross negligence in one or more of the particulars set out in plaintiff's petition; (b) That the defendant being under the influence of alcoholic liquor or the gross negligence of the defendant was the sole, proximate cause of the accident; (c) That plaintiff was damaged by reason of defendant's gross negligence or his being under the influence of alcoholic liquor; (d) The amount of such damages."

The instruction was an exact copy of instruction No. 1 requested by Tripple. It is fundamental that a party may not tender an instruction to the court and then, after an adverse verdict, object to its submission to the jury by the court.

Tripple asserts, however, that motions for a directed verdict made at the close of plaintiff's evidence and at the close of all the evidence were erroneously denied. In Cunning v. Knott, 157 Neb. 170, 59 N. W. 2d 180, this

court said: "There is no contention here that defendant was driving under the influence of intoxicating liquor within the meaning of section 39-740, R. R. S. 1943. The evidence as to his drinking intoxicants, however, is a circumstance to be considered in determining whether defendant was guilty of gross negligence."

We think the evidence of Tripple's drinking throughout the day, the testimony of the patrolman that Tripple was intoxicated at the time of the accident, his admission that he fell asleep at the wheel, and his failure to comply with warning and stop signs is sufficient to warrant the submission of Tripple's gross negligence to the jury. Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041; Cole v. Wentworth, 175 Neb. 325, 121 N. W. 2d 567; Hess v. Holdsworth, 176 Neb. 774, 127 N. W. 2d 487. Under the facts here disclosed, the trial court did not err in overruling the motions for a directed verdict.

Tripple asserts that the trial court erred in not holding that the contributory negligence of Kaufman was more than slight as a matter of law and entitled Tripple to a directed verdict. As to the issue of contributory negligence the record shows that Kaufman was in the company of Tripple from 10 a.m. to the time of the accident at approximately 11:30 p.m. Kaufman testified that Tripple drank a lot of beer and that he drank 8 or 9 bottles from 5 p.m. to 11:15 p.m. He asked Tripple before and after entering the car if he was in condition to drive the automobile, indicating that he had some doubt as to the effect of his drinking. He accepted Tripple's assurances that he was in proper condition to operate the automobile. He leaned back in the car and dozed until the happening of the accident. The evidence is in conflict as to the quantity of beer which Tripple drank. Tripple also denies that Kaufman inquired as to his condition after entering the car.

The duty of a guest riding in an automobile is to use care in keeping a lookout commensurate with that of an

ordinarily prudent person under like circumstances. If the guest perceives danger, or if he should reasonably anticipate danger, the duty evolves upon the guest to warn the driver. Ordinarily, the guest is not required to watch the road or advise the driver in the management of the automobile. Sautter v. Poss, 155 Neb. 62, 50 N. W. 2d 547. See, also, O'Brien v. Anderson, 177 Neb. 635, 130 N. W. 2d 560; Bresley v. O'Connor Inc., 163 Neb. 565, 80 N. W. 2d 711. It is not contributory negligence for a guest to sleep while riding in an automobile when he has no knowledge of negligent driving on the part of his host, or of impending danger on the highway. Scott v. Service Pipe Line Co., 159 Neb. 36, 65 N. W. 2d 219. If a guest knows, or ought to have known, that the host driver was under the influence of intoxicating liquor to such an extent as to create danger in riding with him, his voluntary exposure to such danger constitutes contributory negligence. Wisnieski v. Moeller, 165 Neb. 476, 86 N. W. 2d 52. Under the evidence in this case, contributory negligence, if any, was a question of fact for the jury and not one of law for the court. The trial court did not err in overruling the motion for a directed verdict on this point and in submitting the question of Kaufman's contributory negligence to the jury.

Tripple also contends that the evidence shows as a matter of law that Kaufman assumed the risk of injury under the facts in this record and that his motion for a directed verdict should have been sustained on that ground. The defense of assumption of risk is not inconsistent with the defense of contributory negligence. It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributory cause of the injury while assumption of risk is a defense when one voluntarily exposes himself to injury, although it plays no part in causing the injury. It is here contended that, under the facts of this case, Kaufman knew or should have known that Tripple was not a safe driver when he en-

tered Tripple's automobile and that he therefore assumed the risk of injury as a matter of law. A fixed state of facts is not shown by the evidence and the conflicts appearing therein were for the jury. The trial court did not err in submitting the issue of assumption of risk to the jury. "The court further said that one who knows, appreciates, and deliberately exposes himself to a danger assumes the risks thereof. One cannot deliberately incur an obvious risk of personal injury, especially when preventive measures are at hand, and then hold the author of the danger for the ensuing injury." O'Brien v. Anderson, *supra*. Whether or not Kaufman assumed the risk of injury in the instant case is a question of fact for the jury. The motion for a directed verdict on the ground that Kaufman assumed the risk as a matter of law was properly overruled. Whether or not the knowledge of a guest, that the host driver of an automobile has been drinking, will operate to prevent a recovery of damages in a particular case depends upon all the facts and circumstances of the case, and is usually a question for the jury. Landrum v. Roddy, *supra*.

It is contended that the verdict in the amount of $21,974.75 is excessive and that the trial court permitted evidence of loss of earning power over objection, which was inadmissible and prejudicial.

The evidence shows that Kaufman had been engaged in operating a tavern in Scottsbluff, which he had sold about 30 days previously. At the time of the accident he had no business but was looking for another business of the same type. About a year later he purchased another tavern and took his son into the business as a partner.

Kaufman suffered serious injury to his back, the medical evidence showing that he suffered great pain and suffering which will continue to some extent for the remainder of his life. He had a comminution of the right shoulder blade and four fractured ribs. He also suffered serious injury to his right arm and hand, including

the severance of the tendons controlling the middle and ring fingers. Hospital, medical, and other charges for treating his injuries amounted to $2,112.25. His life expectancy was shown to be about 20 years. Without detailing all the evidence, we conclude that the verdict of the jury was within the scope of the evidence and is not therefore excessive.

Tripple argues that incompetent evidence was admitted over objection which tended to increase the size of the verdict. The complaint is directed to evidence of loss of earning capacity, which was submitted to the jury. Loss of earnings was not submitted because Kaufman was not employed nor engaged in a gainful business at the time of the accident, and therefore lost no earnings. Kaufman was permitted to testify that the net earnings in his former business in Scottsbluff amounted to $1,000 to $1,500 per month. He was also permitted to testify that he and his son netted $18,000 in earnings the first 10 months of operation in the business he purchased a year after the accident. Objection was made that this evidence was immaterial, that such damages were not pleaded, that it was not a proper measure of damages, and no proper foundation was laid for the testimony.

In Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891, this court quoted the following with approval from Germ v. City & County of San Francisco, 99 Cal. App. 2d 404, 222 P. 2d 122: "The earnings prior to the injury are admissible as evidence of the extent to which the earning capacity of the plaintiff has been impaired by the injury. * * * the best method of proof of pecuniary loss is testimony of the plaintiff as to his earnings for a number of years immediately prior to the accident. * * * There is no express limitation upon the time which this testimony may cover. The remoteness of the time affects the weight of the testimony and not its admissibility. The fact that the injured person was not employed at the time of the accident does not necessarily

deprive him of the right to compensation for the loss of his earning capacity."

The problem presented, however, relates itself more to a loss of profits rather than to a loss of earnings. A loss of earnings due to the negligence of another affords a proper basis of recovery. But a loss of profits from a business which may or may not be due to an impairment of earning capacity poses a different question. The law generally is unfavorable to the recovery of losses of profits in tort actions. But a recovery of profits does not rest on the fact that they are profits but because they are ordinarily speculative, contingent, or uncertain. Where it is shown that a loss of profits is the natural consequence of the tort, and their amount is shown with reasonable certainty, they are competent to show loss of earning power, although incompetent as a measure of damages. Each case in that respect must rest on its own facts.

Although Kaufman was not employed nor engaged in his trade as a tavern keeper, his trade was one that would suffer by his loss of earning capacity because of its personalized nature. Such loss cannot be measured by any known yardstick and it is usually a factual matter for the jury to determine. Kaufman suffered some loss of earning capacity due to his injury because of his impaired ability to lift heavy objects and his lack of dexterity in handling bottles, glasses, and the like. The profits he had previously made and what he made after the accident would support in a general way the extent of his loss of earning capacity. In his subsequently acquired business his profits were about $900 per month. But we cannot say as a matter of law under the facts of this case that the reduction of his profits was affected materially by his loss of earning capacity. It was for the jury to determine that question.

In Offensend v. Atlantic Refining Co., 322 Pa. 399, 185 A. 745, the court said: "The general rule is that profits derived from a business are not to be considered

as earnings and cannot be admitted as a measure of loss of earning power, but where they are almost entirely the direct result of personal management and endeavor, they are an accurate measure of earning capacity and admissible as such: * * *. Appellant's contention, that appellee was obliged to show by books, records, or accounts of some kind that the statement of net earnings was correct, cannot be sustained. Appellant was afforded a full opportunity to bring out on cross-examination the manner in which appellee arrived at his figures, and, failing to avail himself of this opportunity, he cannot now complain the estimate was not in fact accurate."

In Trujillo v. Wilson, 117 Colo. 430, 189 P. 2d 147, it is said: "Error is further urged in admission of evidence and instructing the jury as to damage through loss of income by R. J. Wilson who was permitted to testify as to cost of hired help and his operations and profit the preceding season in raising turkeys and the limit imposed on such operations as a result of the accident. Such evidence was admissible. Mountain States Co. v. Sanger, 87 Colo. 369, 287 Pac. 866, and cases annotated; 122 A. L. R. 307, et seq., and prior annotations there supplemented. While such evidence is not admitted as affording a measure of damages but only as an aid to the jury in estimating a fair and just compensation for being prevented by the injury from prosecuting such work, defendant cannot here complain for the reason that no objection was made to the instruction for failure to limit the purpose of the testimony and no proper instruction was tendered to that end."

In Osterode v. Almquist, 89 Cal. App. 2d 15, 200 P. 2d 169, the court said: "While a plaintiff in an action for personal injuries cannot ordinarily recover for loss of profits derived from a business * * *, however, under a plea of general damages and to prove loss of earning capacity, it is permissible to show what wages, salary, or emoluments would be open to the plaintiff in a busi-

ness, vocation, trade, or profession which he understands and in which he would have the right and ability to engage except for the injuries sustained, * * *, and the earning capacity of Ralph Osterode prior to the accident was a proper subject of inquiry."

"When it has been definitely proved that a loss of earnings or profits, or a decrease in earning capacity has resulted from an inability to exercise personal efforts or skill toward the production of income, and the amount of such loss has been established with reasonable certainty, the amount should be included in an award of damages in a motor vehicle case. But, when a claim for lost profits is interwoven with other factors, such as invested capital, industry, and skill of others, such lost profits may not be the subject of an award. Profits hoped to be derived in the future from a business are too remote and uncertain to be regarded as an element in estimating damages, but a decrease in income, arising from an inability to exercise personal efforts or special efficiency directly producing the income, is an element to be weighed. * * * The fact that an injured person was not engaged in a gainful occupation when injured does not bar recovery for impairment of his earning capacity, nor does fact he may not have been inclined to labor before sustaining injury. * * * Generally speaking, profits derived from a business are not to be considered as earnings and cannot be used as a measure of loss of earning power, but where profits are almost entirely the direct result of personal management and endeavor, they are an accurate measure of earning capacity." 10 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 6465, p. 63.

We find no error in the admission of the evidence as to the loss of earnings and profits under the facts in the instant case.

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

AFFIRMED.

RAMON CARDENAS, APPELLANT, V. PETERSON BEAN CO. ET AL., APPELLEES.

144 N. W. 2d 154

Filed July 15, 1966. No. 36257.

1. **Workmen's Compensation.** A workman is entitled to recover compensation for neurosis if it is a proximate result of his injury and results in disability.
2. ———. Except for scheduled member losses, workmen's compensation awards are not made for injury as such, but for inability to perform or obtain work produced by such injury.
3. **Appeal and Error.** Where evidence is irreconcilable and in direct conflict, this court will consider that the trial court had the opportunity of observing the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
4. **Trial.** Counsel who is not conducting the questioning has no standing to ask that a nonresponsive answer be stricken upon the sole ground of lack of responsiveness.
5. **Trial: Evidence.** A voluntary statement by a witness, not responsive to a question, should be stricken.
6. **Trial.** A reason for an objection not given will not be considered where it is not stated.
7. ———. Trial courts have broad discretion in the general conduct of a trial, including sanctions involving discovery procedures.
8. **Trial: Witnesses.** The trial court has discretionary power to exclude the testimony of a witness whose identity is deliberately withheld in discovery under proper circumstances. The trial court would also have discretion to impose an alternative sanction to effectively protect against harm due to lack of prior knowledge of the witness, such as continuing the hearing or deferring the questioning of such a witness.
9. ———: ———. Objection to the introduction of testimony of a witness whose name has not been properly disclosed in answer to an interrogatory must ordinarily be made as soon as the applicability of the objection is known or could reasonably have been known to the opponent.

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

Wright, Simmons & Hancock, for appellant.

Lovell & Raymond, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and COLWELL, District Judge.

MCCOWN, J.

This is a workmen's compensation case. The district court affirmed an award of the Workmen's Compensation Court sitting en banc granting the plaintiff compensation for an extended period of temporary total disability, medical expense, and for 5 percent permanent partial disability.

The plaintiff, Ramon Cardenas, an employee of Peterson Bean Co., hereinafter referred to as defendant, was injured January 17, 1964, when he fell from a plank walkway while pushing a wheelbarrow into a railroad boxcar. The wheelbarrow was loaded with 100-pound sacks of beans and he fell approximately 6 feet. Some of the sacks of beans also fell down and struck him. As a result of the fall, he received a 2-inch cut on his scalp and also complained of pain around his head, neck, shoulders, chest, and upper back. He was taken to the hospital and remained there under the doctor's care for approximately 5 days. He was released to return to his home, but remained intermittently under the care of Dr. Holmes until June 5, 1964. He had no fractures, but his complaints continued and he was treated with vitamins, liver injections, and decadron, a cortisone-like material useful in the treatment of neuralgia and neuritis, sprains, and strains. On May 14, 1964, Dr. Holmes returned him to the hospital for a revision of the scar on his head. Dr. Holmes last saw him on June 5, 1964. On August 21, 1964, plaintiff went to Dr. Ted E. Riddell for treatment. At that time plaintiff still complained of a pain in his right shoulder and the right side of his neck. Dr. Riddell treated him with steroid injections from time to time, and hospitalized him for traction from October 30 to November 10, 1964. Dr. Riddell also used diathermy and massage which was continued until January 1965, when he did not return to Dr. Riddell. Dr.

Riddell referred him to Dr. Schutzer, a psychiatrist who examined the plaintiff November 9 and 10, 1964, and also on July 8, 1965. Dr. John H. Floyd performed a cervical myelogram on the plaintiff on June 30, 1965, which disclosed no material abnormalities. The plaintiff was examined at one time or another by Dr. Schreiner, Dr. Lawrence M. Robertson, Jr., a neurosurgeon of Denver, Colorado, Dr. L. E. Daniels, a neurologist of Denver, Colorado, and Dr. Chester H. Farrell, a neuropsychiatrist of Omaha, Nebraska. Dr. Schreiner did not testify. A report from Dr. Robertson was introduced in evidence, and all the other doctors mentioned testified. Essentially, the doctors all agreed they could find no physical or organic reason to account for the extent of the complaints and symptoms evidenced by the plaintiff. Dr. Schutzer, however, was of the opinion that the plaintiff was temporarily totally disabled from a traumatic neurosis. He also testified in response to a question as to whether the plaintiff was able to earn wages in the same kind of work or work of a nature similar to that he had been doing by stating: "I would say that he's not able to perform as capably as he did before. I feel the symptom would prevent him from engaging in work in that same way." Dr. Farrell was of the opinion that the plaintiff had an "hysterical fixation upon a traumatical incident." Dr. Farrell felt that the plaintiff was partially incapacitated because of the fact he had a traumatic incident, but did not want to state any percentage that he was disabled. Dr. Robertson was the only physician who ever gave a specific opinion as to a percentage of permanent partial disability and his estimate was 5 percent.

Since the accident, the plaintiff has neither attempted to work nor applied for work. His complaints continue essentially the same except that there are no longer complaints as to his chest. Dr. Farrell probably expressed accurately the concensus of all the doctors on this issue when he stated: "I know this man has fear

that he has been hurt greater than he actually has."

At the initial hearing before a single judge of the Workmen's Compensation Court on January 25, 1965, it was found that the plaintiff was temporarily totally disabled and would remain totally disabled for an indefinite future period. At the hearing before the Workmen's Compensation Court sitting en banc on July 13 and 14, 1965, the plaintiff was awarded compensation of $37.50 per week for temporary total disability for a period of 69 2/7 weeks ending May 17, 1965, and, in addition, $1.88 per week for 230 5/7 weeks for a 5 percent permanent loss of earning power. The compensation court specifically found that the plaintiff failed to maintain the burden of proving that he sustained any traumatic neurosis or any disability beyond that awarded. On November 27, 1965, the district court affirmed the award of the compensation court in all respects.

The plaintiff's first group of assignments of error center around the court's finding as to disability and the specifically related problem of traumatic neurosis.

This court is committed to the rule that a workman is entitled to recover compensation for neurosis if it is a proximate result of his injury and results in disability. See Haskett v. National Biscuit Co., 177 Neb. 915, 131 N. W. 2d 597. In that case, however, it was pointed out that there was no serious contention of malingering. In this case, the expert testimony ranges all the way from an opinion that the plaintiff was entirely malingering to one that he was not malingering at all. Psychiatrists concede that conscious actions may be involved to one degree or another, even in admitted cases of traumatic neurosis. The distinction between hysteria, a neurotic illness, and malingering seems to be in whether the patient acts or reacts as he does consciously or unconsciously. Medically speaking, it is extremely difficult to classify an individual as acting wholly consciously or wholly unconsciously. Fortunately or unfortunately, however, the law must attempt the classification. Even

if it be conceded that an individual has a neurosis, however, this does not make the neurosis compensable nor prove his total disability. Except for scheduled member losses, workmen's compensation awards are not made for injury as such, but for inability to perform or obtain work produced by such injury. The degree of disability also depends upon the inability to perform or to obtain work. The extent of the disability is still subject to proof whether the injury is "physical" or "mental." In any event, both the issue of whether or not the plaintiff had a traumatic neurosis and the question of the extent of his disability were questions of fact and the medical evidence supports the award in this case. The rule is also applicable here that where evidence is irreconcilable and in direct conflict, this court will consider that the trial court had the opportunity of observing the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. See Runyons v. Mavis & Sons, Inc., 177 Neb. 179, 128 N. W. 2d 596.

The plaintiff also assigns error in several instances in which the court struck answers or responses made by the plaintiff to questions from his own counsel on direct examination, where an objection was made by the defendant's counsel on the ground that the answers were not responsive. It is the plaintiff's position that an objection for lack of responsiveness can be made only by the party examining the witness; and that if the answer is proper evidence, the party who is examining the witness has the right to retain it if he chooses to do so, and it cannot be excluded on this objection by the adverse party. We believe the proper rule to be that counsel who is not conducting the questioning has no standing to ask that a nonresponsive answer be stricken upon the sole ground of lack of responsiveness. See, III Wigmore on Evidence (3d Ed.), § 785, pp. 160, 161; United States v. Schneiderman, 106 F. Supp. 892. However, a voluntary statement by a witness, not respon-

sive to a question, should be stricken. 98 C. J. S., Witnesses, § 356, p. 79. Here it is difficult to determine in many instances whether the responses were voluntary statements or were merely irrelevant, unresponsive answers. The testimony of the plaintiff was being taken through an interpreter. In some instances, the plaintiff continued speaking in Spanish after the question had been answered and the interpreter was interpreting. In some instances, the plaintiff gave direct answers or additional comments in English. The plaintiff was unschooled as well as emotional and the entire circumstances created a difficult situation for both counsel and the court.

The objections of defendant's counsel, while in one or two instances they disclosed that they were based on the voluntary nature of the statements, in most instances were only on the grounds that the answer was not responsive. Ordinarily, of course, a reason for an objection not given will not be considered where it is not stated. In some instances the court did erroneously sustain objections on the ground of lack of responsiveness. The plaintiff, however, concedes that no single specific instance in which this error was made can be shown to be prejudicial, but argues that the cumulative effect was sufficient to deprive the plaintiff of a fair trial. Under all the circumstances, the errors were not prejudicial, nor did they prevent the plaintiff from having a fair hearing.

The plaintiff next asserts as error the court's failure to strike the testimony of three witnesses, Aurora Amaya, Francisco Amaya, and Raymond Varrza. On April 17, 1965, the plaintiff served an interrogatory upon the defendant asking the names and addresses of all persons who, to the knowledge of the defendant, had witnessed any fact as to the accident, and the preaccident and postaccident physical or mental condition of the plaintiff. No objections or motions were directed at the form or meaning of the interrogatories. On May 8, 1965, the defendant answered the interrogatory that it had no

information as to the names of any witnesses. The three witnesses named were called by the defendant at the trial and testified as to certain conversations had with the plaintiff, and also as to certain occasions after the accident when they saw the plaintiff perform certain physical acts or movements.

No objection whatever was made by the plaintiff at the time each of the three individuals testified. Plaintiff's counsel cross-examined Raymond Varrza and Aurora Amaya extensively but did not cross-examine Francisco Amaya. At the conclusion of the case, after the plaintiff's rebuttal evidence was in, one of plaintiff's counsel inquired of defendant's counsel as to the date that Mr. Varrza and Mrs. Amaya first came to his office, and he gave dates in early February. Counsel then, for the first time, moved to strike all the testimony of Mrs. Aurora Amaya and Mr. Varrza on the ground that their names had not been disclosed in the answer to the written interrogatories. It was also admitted that defendant's counsel had informed plaintiff's counsel by telephone after the date of the answer to the interrogatories that defendant might use Aurora Amaya as a witness, but it is denied that he mentioned Francisco Amaya or Raymond Varrza.

The plaintiff urges that the court's action in refusing to strike the testimony of these witnesses under the above factual circumstances was prejudicial error, and that the penalty for failure to answer the interrogatories properly and truthfully should be the exclusion of the testimony of any such witnesses. Our statute, section 25-1267.37, R. R. S. 1943, covering discovery procedures, does not cover this issue, nor has it been directly passed upon by this court.

Trial courts have broad discretion in the general conduct of a trial, including sanctions involving discovery procedures. See Caves v. Barnes, 178 Neb. 103, 132 N. W. 2d 310. The trial court has discretionary power to exclude the testimony of a witness whose identity is

deliberately withheld in discovery under proper circumstances. The trial court would also have discretion to impose an alternative sanction to effectively protect against harm due to lack of prior knowledge of the witness, such as continuing the hearing or deferring the questioning of such a witness. The object of the rule requiring the disclosure of the names of witnesses before trial is to enable the parties to discover the truth and eliminate surprise, and, dependent on the facts, the overall policy of discovering all the truth, in some circumstances, might be more adequately served by permitting testimony after postponement until the element of surprise has been eliminated. These matters, however, are primarily within the broad discretion of the trial court.

Ordinarily an objection must be made as soon as the applicability of it is known, or could reasonably have been known to the opponent. Objection to a witness' disqualification should ordinarily be made as soon as he is called to the stand, providing his disqualification is then known. See I Wigmore on Evidence (3d Ed.), § 18, p. 323. We see no reason why the same general rules should not apply to the introduction of testimony of a witness whose name has not been properly disclosed in answer to an interrogatory.

While we in no sense attempt to explain the failure of counsel to disclose the names of the witnesses, it is still incumbent upon opposing counsel to make objection promptly. We point out first that no objection was ever made as to Francisco Amaya. Counsel should not be permitted to withhold objection, proceed with full and extensive cross-examination, and then decide whether or not the testimony was prejudicial. Any other position would be contrary to our general rules of evidence and procedure.

In this case, it is contended that plaintiff did not know until inquiry was specifically made of defendant's counsel at the close of the trial that the names of these wit-

nesses were known to the defendant prior to the date of the interrogatories. However, the very first question asked of Aurora Amaya on cross-examination was to determine when she first went to the office of defendant's counsel with the information. If the interrogatories were as broad as the plaintiff seems to interpret them, the introduction at the trial of a witness whose name had not been disclosed might, in itself, reasonably put counsel to a duty of inquiring immediately as to whether actual grounds of objection existed. Under the circumstances here, no error was committed.

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

AFFIRMED.

CARTER, J., concurring in the result.

The opinion of the majority is deficient in not dealing with the contention that plaintiff is a malingerer. The evidence shows that plaintiff was first employed by the defendant on January 16, 1964, and suffered the injury for which compensation is sought the next day.

On the first day of the trial plaintiff was asked to raise his right arm and he was able to lift it to a horizontal position. The second day of the trial in response to a similar question he stated: "I have said always that I can not raise my right arm." Dr. L. E. Daniels testified that from his examination he found that plaintiff was malingering. Dr. Ted E. Riddell wrote to plaintiff's attorney on October 30, 1964, that plaintiff came to his office on that day and "put on quite an act." Plaintiff testified that Dr. Riddell told him at one time that he was "playing sick." Dr. Riddell denies making such a statement. Dr. Riddell also testified: "Well, he always seemed a little stiffer when he was in the office than when he was outside." Dr. Ulysses Schutzer testified: "* * * but I am reasonably certain that there must be an element of that particular feature which we have described as malingering or exploiting."

Aurora Amaya testified to taking plaintiff home from

the first hearing before the compensation court and plaintiff then said: "He said that he was not sick, he said he was just going to get money out of the company because the company had a lot of money and he wants to give money and everything to his family, you know, because that is the only way that he was—that he can give his family everything that they need." In 1963, plaintiff told his son-in-law in the course of a conversation: "Well, the subject came about me, that I worked everyday and this time of the year I put in 15, 16 hours a day, so he said that he wasn't figuring on working any more, if he could pull some kind of a stunt or trick where he could get enough so he wouldn't have to work for a while." There was evidence by persons who observed him driving his truck and that he was able to and did move his arms and head in a normal manner, which was inconsistent with his testimony.

Plaintiff, at the time of the accident, was pushing a wheelbarrow loaded with six 100-pound sacks of beans into a boxcar. He fell from the plank between the platform and the boxcar a distance of 6 feet. He struck his head, causing a 2-inch gash, and three sacks of beans fell on his neck and head. He suffered no broken bones and asserts only that he has pain in the back of his neck and some injury to his right arm.

This evidence when considered together indicates rather plainly that plaintiff was contemplating an injury for mercenary purposes; that he obtained employment with defendant and had his accident the very next day; and that he told Aurora Amaya that he was not ill but was only after money. This evidence, plus the evidence of the doctors herein recited, shows rather conclusively that plaintiff's claim was fraudulent.

This evidence is excused by the court's opinion on the ground of plaintiff's ignorance and inability to perpetrate such a scheme. That the plaintiff was ignorant cannot be doubted as no intelligent person would

brazenly announce the purpose of his scheme both before and after the accident. I submit that a physician in giving an expert opinion under such circumstances should not assume that his patient was honest and should confine his evidence to physical abnormalities of which there were none other than the 2-inch gash on the head. In my opinion the plaintiff was suffering from a mind bent on fraud and not from a traumatic neurosis.

I submit that fraud and evil intent are hidden in the recesses of the mind and are very difficult of ascertainment, but where, as here, the evidence shows such an intent before and after the accident, plus supporting findings by three physicians, the employer is entitled to protection against such unconscionable conduct.

The district court affirmed an award for a period of temporary total disability, medical expenses, and for 5 percent permanent partial disability. Plaintiff appealed. Defendant did not cross-appeal and in effect asks for an affirmance. Under the state of the record before us, the result is correct. It is my view that the affirmance should rest on a finding of fraud and the malingering of the plaintiff rather than the unsatisfactory and conflicting evidence of the medical experts. Whether or not the plaintiff was a malingerer or the victim of neurosis involves the determination of his mental state by fine line of demarcation. The evidence of disabling neurosis is very conflicting and the evidence that it was the result of the specific accident is even more so. As I view the record, the claim is fraudulent and the plaintiff a malingerer. The primary basis of the affirmance should rest on these grounds.

BROWER, J., joins in the concurring opinion.

STATE OF NEBRASKA, APPELLEE, V. ROBERT WILLIAM BREVET, REAL AND TRUE NAME ROBERT WILLIAM LOSIEAU, APPELLANT.

144 N. W. 2d 210

Filed July 15, 1966. No. 36270.

1. **Criminal Law. The statute awarding a preliminary hearing to one accused of crime is for the benefit of the accused. It is a right accorded, a personal privilege granted, which the accused may waive.**
2. **———. Since one accused of crime may waive his right to a preliminary hearing, he may likewise waive any procedure having for its purpose the granting of such right.**
3. **———. Where an accused demurs to an information, pleads in bar, or to the general issue, his right to a preliminary hearing is deemed to have been waived.**
4. **———. Whether or not a person accused of crime has waived his right to counsel, either at his own expense or at the expense of the state, is dependent upon the record before the court at the time the question was for determination. It is the substance and not the form that is controlling.**

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

Gerald B. Buechler, for appellant.

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

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and COLWELL, District Judge.

CARTER, J.

This is a proceeding under the Post Conviction Act, referred to as L. B. 836, enacted by the Legislature in 1965, now sections 29-3001 to 29-3004, R. S. Supp., 1965. The trial court denied the defendant any relief and he has appealed.

On September 1, 1939, defendant Robert William Losieau, under the name of Robert William Brevet, was convicted of armed robbery in the district court for Hall County and sentenced to serve 7 years in the

State Penitentiary. The sentence has been served. Subsequently the defendant was convicted for a felonious offense and was sentenced as a habitual criminal. The sentence of September 1, 1939, was one of the convictions used in securing the sentence imposed on the defendant as a habitual criminal. It is the contention of the defendant that the sentence of September 1, 1939, was a void sentence and improperly used to convict him as a habitual criminal. The defendant sought to have his conviction for armed robbery set aside in order to secure his release or a reduction of sentence for the term of imprisonment he is now serving.

The defendant was arrested on August 31, 1939, for committing an armed robbery. On September 1, 1939, he was taken before a justice of the peace and a preliminary hearing had. He was bound over to the district court for trial and an appearance bond was fixed at $5,000. In the afternoon of the same day an information was filed in the district court. Defendant indicated a desire to plead guilty and was taken into district court for arraignment. The following proceedings shown by the record were there held.

Defendant appeared in the trial court and announced to the court that he was ready to be arraigned. The information contained a written acknowledgment of the receipt of a copy of the information and a written waiver of the statutory time of service and time to plead signed by the defendant. The information was thereupon read to the defendant.

The court thereupon interrogated the defendant and adduced the following facts: Defendant gave his name as Robert William Brevet. He stated that he was ready to be arraigned on the information filed against him. He gave his age as 24. He stated he understood the charge against him and that the offense carried a penalty of 3 to 50 years in the penitentiary. He stated that he understood he was entitled to have an attorney represent him if he wished one. He was asked directly if he wished

an attorney and his response was "No, sir." He was then asked if he was ready to plead to the information and his answer was "Yes, sir." He was then asked: "And what do you plead to the information? * * *." He answered "Guilty."

The defendant then testified to the following facts: He gave his name and age the same as previously. He stated he had no home, that his parents were both dead, and that he had no brothers or sisters or other close relatives. He stated that he had finished the eighth grade in school and finished the tenth grade by studying evenings at home. He stated that he had worked some in a drugstore and that he had sold novelties and magazines on the road. He had no trade or profession. He stated that he was riding with a friend in an automobile through Kansas. They picked up a man and a woman. They were riding in a new Chevrolet automobile. He said the driver of the car gave it to him and parted company with them in St. Louis, Missouri. He and the woman came west in the car. He admitted robbing a restaurant in Clarks, Nebraska. He said they came into Grand Island and held up the Cummings Filling Station because they needed money. He said the gun he used was in the car. He stated they agreed he would hold the gun on the attendant and she would get the cash. They went in, he held the gun on the attendant, and locked him in the lavatory. The woman opened the cash register and they took the money. They drove west and were arrested in Kearney and returned to Grand Island.

The trial court examined the defendant further as to his previous home life and conduct. His statements showed that he had been roaming about the country, making little effort to obtain employment. He stated he had never been in trouble before. He had never been married. He had been hitchhiking about the country until he met the stranger with the Chevrolet. He did not know the automobile was a stolen car but

he suspected that it was. He denied stealing the car. He admitted that he and the woman planned the armed robbery and that it was carried out according to plan. He was then asked if he had anything further to say before sentence was pronounced and he answered "No." He was then sentenced to 7 years in the Nebraska State Penitentiary.

It is conceded by the parties that defendant had a preliminary hearing, meeting all requirements of the law. The defendant does contend that the district court lacked jurisdiction of the case in that the transcript from the justice of the peace court was not lodged in the district court until September 5, 1939.

A proper perspective of the role of a preliminary hearing appears necessary. Its functional purpose is stated in section 29-506, R. R. S. 1943. It is in no sense a trial of the person accused in regard to his guilt or innocence. Its purpose is to ascertain whether or not a crime has been committed and whether or not there is probable cause to believe the accused committed it. If it is found that the foregoing exists, then the accused should be held for trial in the district court which has jurisdiction to try the matter. Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240. The holding of an accused person for trial in the district court at the conclusion of a preliminary examination authorizes such court to proceed with the trial. It has long been the rule in this state that in a prosecution for a felony, in the absence of a waiver of the right to a preliminary hearing, the defendant cannot be put on trial over his objections until such preliminary hearing is accorded him. Jahnke v. State, 68 Neb. 154, 94 N. W. 158. The statute awarding one accused of crime the right to a preliminary hearing was enacted for the benefit of the accused. It is a right accorded, a personal privilege granted, which the accused may waive. Latimer v. State, 55 Neb. 609, 76 N. W. 207, 70 Am. S. R. 403; Reinoehl v. State, 62 Neb. 619, 87 N. W. 355. If a preliminary hearing may be

waived, it stands to reason that any part of the privilege granted, including the filing of a transcript of a preliminary hearing, may likewise be waived. It is the general rule in this state that an accused waives his right to, or the sufficiency of, a preliminary hearing by demurring to the information or pleading in bar, or to the general issue. Korth v. State, 46 Neb. 631, 65 N. W. 792. The proper method of objecting to trial in the district court for the insufficiency of a preliminary hearing, or the failure to provide one at all, is by motion to quash or a plea in abatement before an attack on the merits. In this case no question was raised concerning the sufficiency of the preliminary hearing and all objections thereto, including the delayed filing of the transcript from the justice court, are deemed to have been waived.

The defendant now asserts that he was denied legal counsel and that his rights were not therefore intelligently waived by him. The record, as previously indicated, shows that he was informed he was entitled to have an attorney represent him if he wished one. He stated he understood that. He was asked directly if he wished an attorney and he answered "No, sir." He was fully advised of his right to counsel and so stated. It is plainly evident from his evidence elicited before the court that defendant had committed the offense charged, that the evidence against him was insurmountable, and that he chose, with full knowledge of his right to counsel, to plead guilty to the charge. Now, more than 25 years later, he asserts it was necessary that he should have been told he was entitled to legal counsel at the expense of the state before his constitutional right to legal counsel could be waived. But we point out that he stated he did not want an attorney. From the record it is made clear that he did not want a lawyer at his own expense, at the expense of the state, nor at the expense of any one else. He had not only entered his plea of guilty, but he had testified to the details of the armed

robbery which he had perpetrated. No logical conclusion can be reached other than that defendant had no defense to the charge, that resistance was futile, and he desired to plead guilty to the charge.

Defendant appears to be of the opinion that the waiver of legal counsel must be by replies to ritualistic questions,—that the waiver is one of form rather than intent. With this we do not agree. The situation before the court was one which showed that the defendant knew the crime with which he was charged and the extent of the punishment that could follow his guilty plea. He made it clear that he desired to admit his guilt and accept his punishment. Having come to this conclusion the defendant did not want a lawyer of his own choice nor one provided at the expense of the state,—he desired no lawyer at all. Under these circumstances, for this court to say that the failure to advise defendant by a precise ritualistic statement that he could have counsel at the expense of the state reduces the law to form rather than substance. We submit that the defendant was meticulously advised of his rights and the consequences that could follow by their waiver. The defendant does not contend that he was not guilty of the crime charged and asserts only that the failure to follow a prescribed form relieves him of the adverse effect of his conviction, otherwise proper. We do not subscribe to this theory under the facts shown in this record.

Some complaint is made that the records of the case, including journal entries, improperly recited the nature of the charge against the defendant. The error was corrected nunc pro tunc after notice and hearing, and was without prejudice to the defendant. The information charged armed robbery and the defendant understood the charge to be armed robbery when he entered his plea of guilty. Subsequent mistakes, corrected as permitted by law, could not operate to the prejudice of the defendant.

A complete examination of the record shows that the

rights of the defendant were fully protected and that the trial court in denying relief under the Post Conviction Act was correct.

AFFIRMED.

INEZ MCBROOM, THROUGH AND BY HER FATHER AND NEXT FRIEND, LLOYD MCBROOM, APPELLANT, V. MELVIN J. WOLSLEGER, APPELLEE.

144 N. W. 2d 199

Filed July 15, 1966. No. 36287.

1. **Automobiles: Negligence. Where the head of the family maintains a motor vehicle for the general use, pleasure, and convenience of the family, the use of the vehicle for the pleasure** and convenience of the family is in the furtherance of his purpose in providing it. **Under such circumstances, it is treated as if it were being used in the conduct of the owner's business.**
2. **———: ———. A family purpose automobile is one which is furnished by the head of the family for the general use, pleasure, and convenience of the members of the family.**
3. **———: ———. An automobile which is furnished by some**one other than the head of the family is not a family purpose **automobile.**

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

Kerrigan, Line & Martin, for appellant.

Ray C. Simmons, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and COLWELL, District Judge.

BOSLAUGH, J.

This is an action for damages by Lloyd McBroom as father and next friend of Inez McBroom who was injured in an automobile accident on September 16, 1962. The accident occurred when the automobile in which Inez McBroom was riding collided with a 1956 Buick automobile operated by Thomas E. Wolsleger. The de-

fendant, Melvin J. Wolsleger, is the father of Thomas E. Wolsleger who was killed in the accident. The issue to be determined is whether the family purpose doctrine is applicable in this case.

The issue was determined in the lower court upon motions for summary judgment filed by both parties. The trial court overruled the plaintiff's motion for summary judgment, sustained the defendant's motion, and dismissed the action. The plaintiff's motion for new trial was overruled and he has appealed.

The 1956 Buick automobile which Thomas E. Wolsleger was operating at the time of the accident was owned by his brother, Stephen Wolsleger. Stephen was then 21 years old and serving in the Navy at a station in California. In June 1962, Stephen had returned to Nebraska on leave and had loaned the Buick automobile to another boy from Scribner to use in California while Stephen was on leave. The Scribner boy drove the Buick to Nebraska without Stephen's consent. Stephen picked up the Buick in Lincoln, Nebraska, and drove it to Scribner, Nebraska, where he left it with his father. Stephen told his father, the defendant, that he did not want to take the Buick back to California at that time; that he might want the Buick in California at a later time; that his father, mother, and brother Thomas could drive it; and that his father could use it as if it were the father's car. On July 4, 1962, Stephen returned to California.

The insurance on the Buick automobile was maintained and paid for by the defendant. After the Buick was left with the defendant, he paid for its maintenance, gas, and oil. At the time of the accident, Thomas was using the Buick automobile with the consent of the defendant and his wife.

Where the head of the family maintains a motor vehicle for the general use, pleasure, and convenience of the family, the use of the vehicle for the pleasure and convenience of the family is in the furtherance of his

purpose in providing it. Under such circumstances, it is treated as if it were being used in the conduct of the owner's business. Christensen v. Rogers, 172 Neb. 31, 108 N. W. 2d 389; Stevens v. Luther, 105 Neb. 184, 180 N. W. 87; Linch v. Dobson, 108 Neb. 632, 188 N. W. 227. This case turns on whether the Buick automobile which Thomas was operating at the time of the accident was a family purpose automobile.

The family purpose doctrine, as followed in this state, contemplates that a family purpose car is one which is furnished by the head of the family for the general use, pleasure, and convenience of the members of the family. A family purpose car has been described as one which the head of the family "purchases," "owns," "keeps," "maintains," or "provides" for the use of the family.

The 1956 Buick automobile involved in this case was owned by Stephen Wolsleger. Under the facts and circumstances in this case, the automobile was not one that was furnished by the head of the family but by one of his sons, a brother of the son who was driving it at the time of the accident. We think the evidence sustains the finding of the trial court that the family purpose doctrine is not applicable in this case.

The judgment of the trial court is affirmed.

AFFIRMED.

W. G. MCCUBBIN, APPELLANT, V. HAROLD H. BUSS ET AL., APPELLEES.

144 N. W. 2d 175

Filed July 22, 1966. No. 36124.

1. **Contracts: Business Coercion.** A wrongful threat to a means of livelihood of a person renders a transaction with him voidable if: (1) The threat is intended or reasonably should be expected to operate as an inducement; (2) the threat oppresses him in that he would not enter into the transaction except for the improper alternative; and (3) the threat induces him to enter into the transaction.

2. ———: ———. An unjust and inequitable threat is wrongful, although the threatened act would not be a violation of duty in the sense of an independent actionable wrong in the law of crimes, torts, or contracts.
3. ———: ———. The power of avoiding a transaction for business coercion is lost if the injured party unreasonably delays manifesting his intention to the other party.
4. ———: ———. A determination of unreasonableness of delay is influenced by the following circumstances: The speculative character of the contract; and the likelihood or the occurrence of a material change of position by the culpable party or of unjust prejudice to a third person.
5. ———: ———. A person who possesses a power to avoid a transaction for business coercion loses the power by electing to affirm the transaction.

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

Ellick, Spire & Ryan, for appellant.

Eisenstatt, Lay, Higgins & Miller and Daniel B. Kinnamon, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and KUNS, District Judge.

SMITH, J.

Plaintiff sued for rescission of an agreement which allegedly had been induced by business coercion. On this appeal from an adverse judgment he contends that the evidence establishes business coercion and that he effectively exercised his power to avoid the transaction.

The parties to the agreement, which discharged a prior stock-purchase contract, included defendant Goodrich Dairy, Inc., a close corporation, and its stockholders who were parties to the prior contract. Those stockholders may be conveniently limited to defendant Harold H. Buss and plaintiff, the evidence permitting us to arrange the holdings of the Buss family as a single interest. In the operation of Dairy, Buss was the president and plaintiff was the general manager. These relation-

ships are important in the evidence.

Dairy, which was a wholesaler and retailer of dairy products, employed plaintiff as general manager in 1948 under a written contract for a 10-year period. He served in that position until 1964 without any other express agreement concerning the duration of his employment. His annual salary rose from $9,365 in 1949 to $32,500 in 1960. There was no increase during the years 1961 to 1964 because of a ceiling set by the Internal Revenue Service.

Expansion of the business under the management of Buss and plaintiff is shown by the following data for the indicated fiscal years ending August 31:

Year	Total Capital	Gross Sales	Gross Profit on Sales	Profit before Taxes	Net Profit
1947-48	$ 149,215	$ 556,731	$189,603	$ 21,595	$ 16,561
1955-56	541,407	1,152,360	483,151	78,778	43,313
1962-63	959,347	2,013,183	969,824	221,913	107,835
1963-64	1,032,327	2,012,432	951,930	191,661	105,981

The controversy may have grown out of changes in the proportionate ownership of shares of stock in Dairy. In 1948 Buss gave up his majority interest when plaintiff purchased 500 shares from Dairy; of the other 700 shares issued and outstanding, Buss owned 600 and O. B. Wasson, 100. Those interests continued to January 1, 1963, without change.

The stock-purchase contract, dated January 20, 1959, contained provisions affecting transfers prior to death as well as after death. A transfer in the lifetime of a stockholder was subject to a first option in favor of Dairy and to a second option in favor of the other stockholders. The parties agreed that Dairy would purchase the shares of a deceased stockholder, and they fixed the price of the Buss shares at book value plus 5 percent and the price of the other shares at book value. Dairy possessed an option to pay 20 percent of the price shortly after death and the balance in equal annual installments over a 10-year period, the plan being unfunded. Upon

the death of Buss or plaintiff the survivor would possess a power to terminate the contract upon notification within 60 days after the death.

A change in the proportionate interests of the stockholders occurred January 1, 1963. Dairy retired the 100 shares owned by Wasson. At the same time Buss and plaintiff each sold five shares, which were removed from the operation of the stock-purchase contract. Buss became the majority stockholder.

On several occasions in 1964 the stock-purchase contract was a topic of conversation between Buss and plaintiff. In February Buss broached a desire to discharge the contract by agreement for the reason that performance would place Dairy in a dangerous financial position. Plaintiff was noncommittal. In March they disagreed mildly, but on April 6 they exchanged heated words. The following morning Buss threatened to terminate the employment of plaintiff because of the deadlock. Plaintiff expressed surprise and also said, " 'Since you do feel that strongly * * *, I will sign the cancellation.' " The testimony is clear that he yielded his rights in order to retain his employment; Buss admitted that plaintiff probably would not have assented without the threat. On April 8 the parties signed the agreement for discharge.

On May 28, 1964, Buss orally dismissed plaintiff, the dismissal was to be effective May 30, and plaintiff was to receive severance pay equal to his salary for one month. A formal dismissal appears in the corporate records.

The doctrine of business coercion is directed at some inequalities of bargaining power. A wrongful threat to the means of livelihood of a person renders a transaction with him voidable if: (1) The threat is intended or reasonably should be expected to operate as an inducement; (2) the threat oppresses him in that he would not enter into the transaction except for the improper alternative; and (3) the threat induces him to enter into the transaction. See, Fitzgerald v. Fitzgerald &

Mallory Constr. Co., 44 Neb. 463, 62 N. W. 899; First Nat. Bank of David City v. Sargeant, 65 Neb. 594, 91 N. W. 595, 59 L. R. A. 296; Restatement, Contracts, § 492, Comment b, p. 939, § 493, p. 942.

If a person threatens to do what he has a legal right to do, his threat ordinarily does not constitute business coercion. This rule has been stated in a form which arguably implies that no threat is wrongful unless there would be an independent liability for the threatened act. See, Carpenter Paper Co. v. Kearney Hub Pub. Co., 163 Neb. 145, 78 N. W. 2d 80; Malec v. ASCAP, 146 Neb. 358, 19 N. W. 2d 540; Kunkel Auto Supply Co. v. Leech, 139 Neb. 516, 298 N. W. 150. If the implication was made, the rule was overstated. An unjust and inequitable threat is wrongful, although the threatened act would not be a violation of duty in the sense of an independent actionable wrong in the law of crimes, torts, or contracts. See, Silsbee v. Webber, 171 Mass. 378, 50 N. E. 555; Restatement, Contracts, § 492, Comment g, p. 941.

Was the threat by Buss wrongful? Since the plaintiff contends only that it was unjust and inequitable, we do not reach possible issues concerning an employment agreement terminable at will or terminating on a definite date, the partnership status of a close corporation, or a tortious interference with business relations.

In April 1964, Buss bargained from strength, and the consideration for the discharge of the stock-purchase contract was inadequate. He had become the majority stockholder during the period of time between the dates of the two instruments. The value of the stock-purchase contract to plaintiff was greater in April 1964, than it had been when no one owned a majority of the shares, whereas the value to Buss was less.

The single motive for the threat is not disguised by the contention that Dairy would be heavily burdened in performing the stock-purchase contract. Dairy was financially stronger in 1964 than it had been in 1959. Its statement of financial condition on August 31, 1964,

contains the following data: Total assets, $1,237,419; total current assets, $405,960; cash and United States Treasury bills, $281,712; total liabilities, $205,092. There were conflicting opinions whether it would be practicable for Dairy to make the downpayment and installment payments, but we find it improbable that Dairy would meet difficulty in borrowing money for those purposes. The contract itself would probably protect Dairy. Should plaintiff die first, Buss would be able to terminate the contract. Should Buss die first, payment for his shares would be secured by the contract.

Cause for dismissal was a prominent issue in the trial, the parties apparently considering it a part of the issues concerning the wrongfulness of the threat as well as the existence of pressure. Buss criticized the performance by plaintiff on the grounds of absenteeism and other neglect of duty, but the evidence shows no material breach by plaintiff of his employment contract. Buss had kept those complaints to himself prior to dismissal, and he admitted that plaintiff had performed consistently over the years.

Buss held plaintiff responsible for the decline in sales and profits from 1962-63 to 1963-64. The cause was speculative and the remedy doubtful. Indeed Buss and his accountant projected the decline into the future for the purpose of showing a heavy financial burden on Dairy if performance were to be called for; yet plaintiff would not be a managerial agent during the projected period of time.

Buss denied that on April 8 he had intended to discharge plaintiff or to train Dwight Buss, a son 25 years of age, for the position of general manager. In July Dwight began working for Dairy on a daily basis.

We conclude that the evidence of business coercion is clear and convincing. The business relations among the parties, the impropriety of the sole motive for the threat, the wrongful pressure on the collateral interest of plaintiff in his employment, the causation between

threat and agreement, and the inadequacy of the consideration add up to a voidable transaction.

Defendants' argument that plaintiff's conduct constituted a waiver, estoppel, or affirmance which precludes rescission, stems from several events which occurred subsequent to May 28, 1964, the date when Buss had orally dismissed plaintiff. A few days after his dismissal plaintiff consulted his attorneys. On July 24, 1964, he commenced an action to recover from Dairy on his claim for salary to the end of the 1963-64 fiscal year, but he made no reference to the agreement for discharge of the stock-purchase contract. On September 22, 1964, he first demanded that defendants reinstate the contract.

"The power of avoidance * * * is lost if * * * the injured party unreasonably delays manifesting to the other party his intention to avoid the transaction.

"* * * the following circumstances are influential:

"(a) the speculative character of the contract whereby prolongation of the power to affirm or to avoid would give an advantage to the injured party or increase the loss * * * (to) the other party;

"(b) the likelihood that the (culpable) party * * * will materially change his position, or the welfare of a third person be unjustly prejudiced by delay;

"(c) the fact that change of position by the (culpable) party * * *, or prejudice to a third person, has in fact occurred during a period of delay in manifestation of intention." Restatement, Contracts, § 483, p. 921. See, also, Glatfelter v. Curtis, 130 Neb. 628, 266 N. W. 63; Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131; Restatement, Contracts, § 499, p. 957.

Although nothing hindered plaintiff from avoiding the agreement long before September 22, the delay was not unreasonable. His inaction offered slight prospect of gain or loss to either party, and no material change of position or prejudice occurred.

A party who possesses a power of avoidance for business coercion loses it by electing to affirm the trans-

action. See Restatement, Contracts, § 484, p. 924, § 499, p. 957. Commencement of plaintiff's action for salary was no such election. The duration of his employment agreement depended on facts remote from the agreed discharge of the stock-purchase contract. The threat by Buss did not imply an offer by Dairy to retain plaintiff as general manager for a reasonable length of time, and plaintiff followed a consistent course in his action for salary.

The agreement for discharge of the stock-purchase contract was voidable for business coercion, and plaintiff exercised his power of avoidance with reasonable promptness. The judgment is reversed and the cause remanded with directions to rescind the agreement for discharge and to reinstate the stock-purchase contract.

REVERSED AND REMANDED WITH DIRECTIONS.

KUNS, District Judge, dissenting.

STATE OF NEBRASKA, APPELLEE, V. DAVID KING, APPELLANT.
144 N. W. 2d 438

Filed July 22, 1966. No. 36138.

1. **Criminal Law.** If a judgment of conviction is reversed or held void at a time when the defendant is serving the void sentence and, following a new trial and a second conviction, a new sentence is imposed, the defendant is not entitled to credit as a matter of law against the second sentence for time served under the void sentence.
2. ———. The crediting of time served on a void sentence on a subsequent conviction and valid sentence is a matter of sound judicial discretion on the part of the trial court.
3. ———. In the absence of a showing of an abuse of judicial discretion by the trial court in imposing a sentence within the limits provided by statute, this court will not ordinarily interfere with the sentence imposed by the trial court.

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

William L. Walker, for appellant.

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

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and COLWELL, District Judge.

CARTER, J.

On April 2, 1959, defendant was charged in the district court for Douglas County with the crime of robbery. On September 25, 1959, defendant entered his plea of guilty and was sentenced to an 8-year term in the Nebraska State Penitentiary. On December 30, 1964, the United States District Court held in a habeas corpus proceeding that the conviction and sentence was void but stayed defendant's release on the writ until the proper authorities could institute a new criminal proceeding against the defendant. Defendant was again tried in the district court for Douglas County on March 16 to 18, 1965, and a verdict of guilty was returned by the jury. Defendant was sentenced on April 13, 1965, to serve 4 years confinement at hard labor in the Nebraska Penal and Correctional Complex in Lancaster County, Nebraska. The defendant appealed to this court.

Defendant was represented by legal counsel in the district court in the person of Michael Levy. After assisting in the trial, Mr. Levy disassociated himself from the case. Before the final submission of the case on appeal, this court directed the appointment of an attorney at state expense by its opinion in State v. King, 179 Neb. 511, 138 N. W. 2d 805. Pursuant thereto William L. Walker was appointed as legal counsel to handle defendant's appeal in this court.

The defendant has asserted 10 assignments of error, and those that are discussed in the brief are directed at the failure of the trial court to credit the time served under the void sentence on the sentence imposed on April 13, 1965. The void sentence was 8 years on which defendant had served 5 years and 3 months and with the 4-year sentence of September 13, 1965, the defendant

could, as defendant alleges, be required to actually serve more than 9 years.

Defendant relies on what he terms the modern rule set out in Freeman v. State, 87 Idaho 170, 392 P. 2d 542. The rule cited in that case is: "In cases dealing with resentencing necessitated by the invalidity of the original sentence, but not involving a new trial between the first and second sentence, the courts are not in agreement on the question whether time served under the first sentence is to be credited against time served under the second. In some jurisdictions, allowance of such credit is provided for by statute. In jurisdictions lacking such a statute, what appears to be the modern (and, it is submitted, the better) view is that such an allowance is proper." Cases from many jurisdictions are cited in support of this rule. The foregoing rule relates to situations where the conviction was valid and the sentence itself was erroneous. It does not involve the precise question we have before us. We have before us the situation where the conviction and sentence were void and the new sentence resulted from a new trial of the case which intervened between the two sentences.

Defendant does cite cases from other jurisdictions which hold that time served on a void sentence should be credited on a subsequent sentence on a valid conviction for the same offense. See, Stonebreaker v. Smyth, 187 Va. 250, 46 S. E. 2d 406; Lewis v. Commonwealth, 329 Mass. 445, 108 N. E. 2d 922, 35 A. L. R. 2d 1277; Short v. United States, 344 F. 2d 550.

The general rule is that in the absence of statute to the contrary, if a judgment of conviction is reversed at a time when the defendant is serving the sentence imposed, and, following a new trial and a second conviction, a new sentence is imposed, the defendant is not entitled to credit as a matter of right against the second sentence for the time served under the original sentence. See cases collected in 35 A. L. R. 2d 1283, section 3 of the annotation there beginning. See, also, Robinson v.

United States, 144 F. 2d 392; Palumbo v. State of New Jersey, 334 F. 2d 524; Shupe v. Sigler, 230 F. Supp. 601; McCleary v. Hudspeth, 124 F. 2d 445.

The foregoing rule appears to have been the law of this jurisdiction for many years. McCormick v. State, 71 Neb. 505, 99 N. W. 237; Knothe v. State, 115 Neb. 119, 211 N. W. 619; Crommett v. State, 115 Neb. 399, 213 N. W. 743; In re Application of Cole, 103 Neb. 802, 174 N. W. 509.

We adhere to the rule that where a conviction and sentence are held void and on a subsequent trial a new sentence is imposed, defendant is not entitled to credit as a matter of law on the second sentence for the time served under the original void conviction and sentence. The only question before the court in such a situation is whether or not the trial court abused its discretion in imposing the sentence that it did. The trial court may take into consideration the fact that the defendant has been confined under a void sentence just as it may take into consideration the length of time that a defendant has been confined while awaiting trial. It is evident that the trial court in the instant case did give consideration to the fact of defendant's confinement under the void sentence in that it first imposed a sentence of 8 years under the void conviction and a sentence of but 4 years under the subsequent valid conviction. The crediting of time in such a situation is a matter of sound judicial discretion on the part of the sentencing court with which this court will not interfere in the absence of a showing that such discretion was abused by the sentencing court.

A material distinction exists when time has been served under a valid conviction but under an erroneous or void sentence than in the case where the conviction is void and a subsequent conviction obtained. In the latter case the trial court, within the limits provided by statute, may exercise its sound judicial discretion in imposing sentence, including the consideration of all miti-

gating circumstances. But in such a case the defendant has no assurance, and is entitled to none as a matter of law, that he has everything to gain and nothing to lose. In Shupe v. Sigler, *supra,* this was pointed out in the court's opinion as follows: "In conclusion, it should be pointed out to Mr. Shupe and the many others who are filing petitions for a writ of habeas corpus in this court, that it is possible that some may be doing themselves more harm than good. They may not have 'nothing to lose and everything to gain' in filing for the 'great writ.' * * * For many the bright rainbow and the hopes engendered by Fay v. Noia, and the other habeas corpus cases recently decided by the United States Supreme Court, may turn out to be an illusory rainbow with only a 'pot of fool's gold' for its seeker."

The sentence is within the limits of the statute fixing the penalty for the crime of robbery. We find nothing indicating an abuse of discretion by the trial court in imposing the sentence of 4 years. There is no error in the record and the judgment of the district court is affirmed.

AFFIRMED.

LOUIS MOSER ET AL., APPELLEES, V. GLENN E. TURNER, COUNTY SUPERINTENDENT OF SCHOOLS OF LANCASTER COUNTY, NEBRASKA, ET AL., APPELLANTS, IMPLEADED WITH BERNARD J. KLASEK, COUNTY SUPERINTENDENT OF SCHOOLS OF SALINE COUNTY, NEBRASKA, ET AL., APPELLEES.

HAROLD BECK ET AL., APPELLEES, V. GLENN E. TURNER, COUNTY SUPERINTENDENT OF SCHOOLS OF LANCASTER COUNTY, NEBRASKA, ET AL., APPELLANTS, IMPLEADED WITH BERNARD J. KLASEK, COUNTY SUPERINTENDENT OF SCHOOLS OF SALINE COUNTY, NEBRASKA, ET AL., APPELLEES.

144 N. W. 2d 192

Filed July 22, 1966. Nos. 36171, 36172.

1. **Schools and School Districts.** **Any person adversely affected by**

the changes made by a county superintendent pursuant to section 79-402, R. S. Supp., 1965, may proceed by appeal or by error pursuant to section 25-1901, R. R. S. 1943.

2. ———. The county superintendents of the counties involved have the authority and jurisdiction when acting jointly and multilaterally to create new districts or change the boundaries of existing districts where territory lies in one or more counties under section 79-402, R. S. Supp., 1965.

3. ———. Where a school district contains land in more than one county, section 79-426.05, R. S. Supp., 1965, provides that the county committee of the county in which the schoolhouse of the district lies is the only county committee that represents such district in a proceeding to change the boundaries thereof.

4. **Appeal and Error.** From the very nature of an error proceeding, the rights of the parties are determined by the appellate court solely on the record made by the tribunal whose action is being reviewed. No new facts or evidence can enter into the consideration of the court.

5. **Fraud.** Fraud is never presumed but must be clearly proved by the party who pleads and relies on it.

Appeals from the district court for Saline County: H. EMERSON KOKJER, Judge. Affirmed.

Paul L. Douglas, William D. Blue, Ronald D. Lahners, Floyd A. Sterns, Walter D. Weaver, and Janice L. Gradwohl, for appellant Turner.

William L. Walker and Earl Ludlam, for appellants Vlasak et al.

Jerry L. Snyder, for appellees.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and SCHEELE, District Judge.

BROWER, J.

These two cases arise from multilateral hearings had before Bernard J. Klasek, county superintendent of schools of Saline County, Nebraska, referred to as Klasek, and Glenn E. Turner, county superintendent of schools of Lancaster County, designated hereafter as Turner.

Case No. 36171 involved action on a petition of the electors of School District No. 11 of Lancaster County

and a petition of the school board of the city of Crete in Saline County, herein called the Crete district, which petitions sought to dissolve School District No. 11 and annex and attach its territory to the Crete district.

Case No. 36172 involved similar petitions seeking the dissolution of School District No. 72, Lancaster County, and to annex and attach its territory to the same city school.

After several continuances, final hearings were held by the two county superintendents at Wilber, Nebraska, that concerning the annexation of School District No. 11 on February 18, 1964, and of School District No. 72 on February 20, 1964.

On February 25, 1964, Klasek signed orders granting the petitions and ordering the dissolution, annexation, and attaching of the two districts to the Crete district. On the same day Turner made his order denying the petitions in both cases.

Thereafter in case No. 36171, Louis Moser, a legal voter of School District No. 11, for himself and as a class action for all other legal voters similarly situated and who signed the petition for the dissolution and annexation of that district, filed a petition in error in the district court for Saline County, making the two county superintendents, the Crete district, certain named objectors, and all other objectors to the petition for the change of boundaries, parties.

In case No. 36172, Harold Beck, Adeline I. Jans, and Orval H. Jans, legal voters of School District No. 72, for themselves and as a class action, filed in the same court a similar petition in error against both superintendents, the Crete district, certain objectors named, and all other objectors to the change of boundaries in School District No. 72.

Each petition alleged the order of Klasek was correct and not in error and the order of Turner was in error, and sought a reversal of the latter and the judgment of

the court changing the boundaries and annexing the respective districts to the Crete district.

Each petition in error had attached thereto a transcript of the entire proceedings, including the final order in the respective cases, and filed with each was a bill of exceptions containing all the evidence produced at the hearing before the county superintendents which was thereafter admitted in evidence in each case in district court.

In each action the defendants, named as objectors, appeared for themselves and all other objectors similarly situated, and the other parties filed voluntary appearances or were served with summonses. Special demurrers were filed by the named objectors, and on being overruled, answers and cross-petitions were filed. The demurrers and answers properly raised the questions hereinafter discussed.

The parties will be designated here as plaintiffs and defendants.

Separate trials in district court each resulted in a judgment finding the trial court had jurisdiction of the subject matter; that Klasek's order of February 25, 1964, should be affirmed; that Turner's order of the same date should be reversed; that the school petitions in each instance were sufficient and valid; and that the territories of School Districts No. 11 and No. 72 of Lancaster County should be attached to the Crete district.

Defendants' motions for a new trial being overruled, the two cases have been brought by appeal to this court where they have been consolidated for briefing and argument.

The defendants have assigned 17 errors to the trial court, but many of them are not argued in their brief, and others are repetitious and are separately related successively to the various orders and rulings as well as the final judgment of the trial court. The questions necessary for our decision will be set out as discussed.

The defendants first contend that the trial court

had no jurisdiction because proceedings in error cannot be taken from the decision of the county superintendent and that the sole method of review was by an appeal. The proceedings are based on section 79-402, R. S. Supp., 1965, which was last amended by Laws 1963, c. 472, § 1, p. 1514, which became effective July 12, 1963, a short time before the petitions referred to in each action were circulated and completed. The amendment of 1963 provided, among other things, "that any person adversely affected by the changes made by the county superintendent may *appeal* to the district court of any county in which the real estate, or any part thereof, involved in the dispute is located." (Italics supplied.) The method of appeal was not provided in section 79-402, R. S. Supp., 1965, but the Legislature had previously enacted L. B. 277, Laws 1963, c. 138, § 1, p. 515, now section 25-1937, R. R. S. 1943, providing that where a statute provides for an appeal without setting forth the procedure therefor, the appeal shall be the same as appeals from county court to district court in civil actions. This provision was not followed and the defendants assert it is now the exclusive remedy of those seeking a review of proceedings before a county superintendent. It is competent for the Legislature to prescribe whatever mode of procedure it may see fit for bringing judicial questions before the courts for determination or a multiplication of cumulative remedies. Tyson v. Washington County, 78 Neb. 211, 110 N. W. 634, 12 L. R. A. N. S. 350; C. R. T. Corp. v. Board of Equalization, 172 Neb. 540, 110 N. W. 2d 194. This court has repeatedly held that where the county superintendents of schools act in a quasi-judicial capacity, their decisions may be reviewed under section 25-1901, R. R. S. 1943, by petition in error, some of the more recent cases being School Dist. No. 49 v. Kreidler, 165 Neb. 761, 87 N. W. 2d 429; Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 102 N. W. 2d 599. There is nothing in section 79-402, R. S. Supp., 1965, or in

section 25-1937, R. R. S. 1943, which purports to take away the right to proceed in error under section 25-1901, R. R. S. 1943. Any person adversely affected by the changes made by a county superintendent pursuant to section 79-402, R. S. Supp., 1965, may proceed by appeal or by error pursuant to section 25-1901, R. R. S. 1943. Defendants' contention has no merit.

Defendants next maintain that the county superintendents had no authority to hold hearings with respect to petitions to change the boundaries of school districts or the annexation of one district to another where the territory involved lies in more than one county. The first part of section 79-402, R. S. Supp., 1965, provides in part that: "The county superintendent shall create a new district as hereinafter provided from other districts, or change the boundaries of any district upon petitions signed by sixty per cent of the legal voters of each district affected; * * *." Defendants point out that the word "superintendent" is in the singular. However, section 79-402, R. S. Supp., 1965, clearly indicates the Legislature intended to allow the legal voters the right to reorganize their school districts or change the boundaries thereof even though the proposed change involved territory in more than one county. This appears from the following portions of the section: "Provided, that any person adversely affected by the changes made by the county superintendent may appeal to the district court of any county in which the real estate, or any part thereof, involved in the dispute is located. * * * If the real estate is located in more than one county, the court in which an appeal is first perfected shall obtain jurisdiction to the exclusion of any subsequent appeal. * * * Territory may be annexed to a district from an adjoining county upon joint action by special committees as provided in section 79-426.09 with such special committee performing those responsibilities as herein provided for the county committee." Neither is it of import that the word "superintendent"

occurs in the singular throughout the section. Section 49-802, R. R. S. 1943, provides: "Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter enacted shall be as follows: * * *

"(6) Singular words may extend and be applied to several persons or things as well as to one person or thing." Section 79-402, R. S. Supp., 1965, as changed by amendments from time to time, has been the law of this state for many years. As it formerly existed, the word "superintendent" was construed to mean "superintendents" to make it agree with other then existing provisions. Olsen v. Grosshans, 160 Neb. 543, 71 N. W. 2d 90. Under the section as it has existed, from time to time this court has held that the county superintendents of the counties involved acting jointly had the duty under petitions to make changes in boundaries of school districts, portions of which are in more than one county. Halstead v. Rozmiarek, 167 Neb. 652, 94 N. W. 2d 37; Lindgren v. School Dist. of Bridgeport, *supra;* Olsen v. Grosshans, *supra.*

Defendants call attention to the following provision in section 79-402, R. S. Supp., 1965: "When any such territory not in any organized district is located in more than one county, notice of such fact shall be given to the joint committee provided for in section 79-426.09, whose duty it shall be to give the prescribed notice of and hold the hearing on the question of to which organized district or districts such territory shall be attached." They contend that section 79-426.09, R. S. Supp., 1965, referred to in the quoted provision, provides a method for the county committee operating under sections 79-426.08 and 79-426.09, R. S. Supp., 1965, to reorganize school districts and submit the same to the electors at an election provided for in section 79-426.15, R. S. Supp., 1965. They maintain this is now the exclusive method for annexing or changing boundaries of school districts where the territory lies in more than one county, and the county superin-

tendents have been divested of all authority to make such changes in those cases.

In the year 1949 a comprehensive plan for the readjustment and realignment of all school districts was adopted by the Legislature. A state committee for this purpose was established; also a similar committee for every county in the state. The state committee was directed to set up and recommend to the county committee plans and procedures for reorganization of school districts. When the county committee should determine that some reorganization was desirable, it was to hold one or more public hearings with respect to the merits of the proposed plans, provide for the equitable adjustment of all property, debts, and liabilities among the districts, and thereafter formulate and complete a plan for the reorganization of any or all school districts. This plan was to be submitted to the state committee for its recommendations. If no recommendations were made by the state committee, the proposed plan was to be submitted to a vote of the electors. If the state committee made recommendations, the county committees were to consider them and could hold additional public hearings, after which it would announce its plan as adopted and submit it to a vote at a special election.

In setting up this comprehensive reorganization procedure, the Legislature did not take away the right of the voters to proceed to make such changes as they desired by petition under the provisions of section 79-402, R. S. Supp., 1965. It did, however, provide that the petitions be submitted to the county committee and the state committee for their review and recommendations. The petitions and recommendations were also to be presented to the legal voters at a public hearing. Legal voters could either withdraw their names from the petition or add them to it while being considered by the committee. At the end of the 10 days the committee was to return the petitions to the county superintendent who then had the duty to hold a public hearing to determine

the validity and sufficiency of the petitions. If, after this hearing, the county superintendent determined that 60 percent of the voters had signed the petitions, he should then proceed to effect the changes in the boundaries as set forth in the petitions.

Apparently the provisions for review of the action of the county superintendent by the county and state committees stemmed in part from the desire to keep them informed of the changes being made by the electors by the petition method. Certainly under section 79-402, R. S. Supp., 1965, it was not intended thereby to divest the authority of the county superintendent under the petition method. The office of the reorganization committees in proceedings to change the school districts before the county superintendents is shown in Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 102 N. W. 2d 599, where this court said: "It is contended that the proceedings are void in that the state committee on reorganization did not have its report before the county committee on reorganization at the time it held its hearing on the proposal to transfer the lands in question. Such report was filed with the county superintendent when the hearing was held to determine the sufficiency of the petitions. We point out that the consideration of the proposal to transfer lands by the state and county committees is advisory only. Such committees have no part in determining whether or not the transfer shall be made other than to make recommendations thereon. The failure of the state committee to make its recommendations prior to the time the county committee met is an irregularity only where it is shown that such report was on file with the county superintendent at the hearing at which the transfer was approved. This is an irregularity that could have been raised by an error proceeding, and which affords no basis for a collateral attack." There is no indication in section 79-402, R. S. Supp., 1965, that petitioners whose districts cross county lines are to be denied the benefits of that section, nor

that they are required to follow the plan set up for comprehensive reorganization. The two methods are distinguished from one another in Longe v. County of Wayne, 175 Neb. 245, 121 N. W. 2d 196. We conclude that the county superintendents of the counties involved have the authority and jurisdiction when acting jointly and multilaterally to create new districts or change the boundaries of existing districts where territory lies in one or more counties under section 79-402, R. S. Supp., 1965.

Defendants contend that the county superintendents were without jurisidiction to consider the petitions for annexation because the district reorganization committees of all the counties in which lies the area of any school district affected had not been notified of the proceedings to dissolve, annex, and attach the area to another district. They argue that certain lands in Seward County were a part of the Crete district and that the Seward County special committee was not notified and took no part in the consideration of the petitions prior to their being filed with the county superintendents. No land in Seward County is being transferred in the proceedings. The Seward County land is a part of the Crete district. It is represented by the officials of that district who alone signed that district's petition. Section 79-426.05, R. S. Supp., 1965, provides for the county committees under the comprehensive redistricting plan. These are the committees referred to in section 79-402, R. S. Supp., 1965. Section 79-426,05, R. S. Supp., 1965, has this provision: "The county committee of the county in which the schoolhouse or the administrative office of a joint district lying in two or more counties is located shall be designated to have within its jurisdiction the territory of said joint district for the purposes of organizing school districts." We think it clear that where a school district contains land in more than one county, section 79-426.05, R. S. Supp., 1965, provides that the county committee of the county in which the school-

house of the district lies is the only county committee that represents such district in a proceeding to change the boundaries thereof. This assignment of error cannot be sustained.

Defendants maintain the trial court erred in overruling their motion to call witnesses in support of certain allegations of fraud practiced by those circulating the petitions. The case of Dovel v. School Dist. No. 23, 166 Neb. 548, 90 N. W. 2d 58, was an error proceeding. This court, in its consideration of the case, stated: "We think the taking of new evidence dehors the record before the county superintendent of schools was not consistent with the nature of the proceeding before the court and that such evidence may not be considered. To hold otherwise would have the effect of permitting an appeal where an appeal is not authorized. The question presently for determination is whether or not the record of the proceedings before the county superintendent of schools discloses error as a matter of law." It seems clear that from the very nature of an error proceeding, the rights of the parties are determined by the appellate court solely on the record made by the tribunal whose action is being reviewed. No new facts or evidence can enter into the consideration of the court. The defendants cite no authority showing an exception to this rule permitting evidence of fraud to be received on appeal in an error proceeding, and we have found none. We do not think additional evidence should have been permitted here.

Defendants assert that there was sufficient evidence of fraud presented at the hearing before the county superintendents to vitiate the petitions in any event. We have examined this evidence. A witness and voter of School District No. 72 testified that the circulator of the petition in School District No. 72 told her that she already had sufficient signers but would like to have her sign also. This was denied by the circulator, and the witness does not appear to have been influenced by the remarks as her name does not appear among the signers

on the petition. Another testified that an attorney for the Crete district, in a conversation on the street in Crete, told her that her daughter would not be permitted to attend school in Crete unless School District No. 72 was joined to that district and this might be the last opportunity for School District No. 72 to be joined to the Crete district. Although she and her husband signed the petition, she stated these remarks did not influence them in so doing. She likewise testified the circulator of the petition told the witness and her husband, who signed the same, that she already had enough signers. Perhaps the circulator really thought a sufficient number of voters had already signed as apparently she was then circulating a separate petition to be attached to another one. If the two were considered together, it appears only two or three signatures were then needed. The testimony concerning fraud lacks substance and is clearly insufficient. If such testimony could vitiate such a petition, there would be few indeed that could be accepted if contested. "Fraud is never presumed but must be clearly proved by the party who pleads and relies on it." Sterner v. Lehmanowsky, 173 Neb. 401, 113 N. W. 2d 588. The evidence of fraud is insufficient.

Klasek found that 67.3 percent of the legal voters had signed the petition for annexation in School District No. 11 after making adjustments caused by timely withdrawals and additions timely filed by the voters and in the sworn list of voters attached from the evidence adduced. He found 63.2 percent of the voters in School District No. 72 had signed the petition after making similar adjustments. The approval of the proposed change by the county reorganization committee and the state committee on school district reorganization was in the record. In such a case only 60 percent of the voters of a school district is required on a petition to reorganize the districts. Defendants point to no adjustments improperly made or to others that should be made that could affect the result. The trial court found that the

petitions were sufficient, that Turner was in error, that the Klasek order should be affirmed, and that the territories of School Districts No. 11 and No. 72 in Lancaster County should be attached to School District No. 2, Saline County. After reviewing the record and the defendants' contentions, we agree with its decision.

It follows that the judgment of the trial court was right and should be and is affirmed.

AFFIRMED.

ANNETTE M. TRIMBLE, APPELLANT, V. FRANKIE CLEVELAND TRIMBLE, JR., APPELLEE.

144 N. W. 2d 171

Filed July 22, 1966. No. 36194.

1. **Divorce.** In deciding the question of alimony or division of property between the parties to a divorce suit the court, in exercising its sound discretion, will consider the respective ages of the parties, their earning abilities, the duration of the marriage, the conduct of each during the marriage, their station in life, the circumstances and necessities of each, their health and physical conditions, whether the property was accumulated before or after the marriage, or by inheritance or gift, and any and all other circumstances bearing upon the question, and from all of such elements determine the rights of the respective parties.
2. ———. In a proper case the allowance of permanent alimony may exceed the value of the husband's estate at the time the marriage is dissolved.
3. ———. The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into the determination such as the husband's age, health, earning capacity, future prospects, and social standing.

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

Bosley & Bosley, for appellant.

Daniel E. Owens, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and MURPHY, District Judge.

CARTER, J.

Plaintiff, Annette M. Trimble, brought this suit for a divorce against the defendant, Frankie Cleveland Trimble, Jr., on the ground of extreme cruelty. The trial court granted a divorce to the plaintiff and made a division of property between the parties. Plaintiff has appealed.

The only question involved in this case is the correctness of that part of the trial court's decree in making an award of property to the plaintiff. The parties were married on May 23, 1936, and have resided in McCook for many years. Two children were born to the marriage, a son 25 years of age and a daughter who became 21 years of age less than a month after the entry of the divorce decree. At the time of trial plaintiff was 50 and the defendant 49 years of age.

The evidence shows that plaintiff has been employed as a secretary since 1954 and is presently earning $85 per week in such employment. Plaintiff was the beneficiary of an inheritance of $10,000. She used $1,200 of it to pay bills and gave defendant amounts of $2,000, $750, and $600 for his personal needs. She spent $2,100 for an automobile. She now has $5,000 invested in corporation stock and a savings account of $2,050. Her bank account was $350. She owes $464 on the automobile. Plaintiff has supplemented a bequest of $4,000 to each of the two children to complete their education. She paid $500 on the purchase of an automobile for the son, the defendant making the subsequent payments of $70 per month thereon.

Defendant at the time the suit for divorce was filed was the warehouse branch manager of the Fleming Company, a wholesale grocery concern. His salary was $550 per month and a bonus of 7 percent of earnings. The bonus in 1964 was $1,740. Defendant has since

been employed by the Fleming Company in Lincoln at a salary of $550 per month without a bonus arrangement. He owns an automobile valued at $1,500. Prior to his transfer to Lincoln defendant owned and operated the Midwest Credit Service in McCook, which he abandoned when transferred to Lincoln. In 1963, 1962, and 1961, the profits of this business were $5,000, $4,000, and $3,000, respectively. Plaintiff attempted to continue the business without financial success. Defendant testified that he owed a $1,300 note at a McCook bank, $1,600 to a building contractor, and a note of $6,105 to his mother. He has a bank account of $190 and a current pay check of $200. He owns no other property except the family home, some golf clubs, and hunting and fishing equipment worth $200. The family home was valued at from $12,000 to $12,500 which was subject to a mortgage of $5,295.40. The income of both parties appears to have been used up for living expenses.

On the foregoing evidence the trial court made the following division of property: The plaintiff was awarded the family home subject to the encumbrance thereon, all the household furniture owned by the parties, plaintiff's bank account and savings account, her automobile, her personal effects, and the Midwest Credit Service business. Defendant was awarded his automobile, his checking account, his current paycheck, and his golf, hunting and fishing equipment. Defendant was required to pay all existing debts of the parties except the encumbrances on the family home and plaintiff's automobile. The costs of the action and an attorney's fee of $150 were taxed to the defendant.

The plaintiff asserts that the division of property was inequitable to the extent of $5,000 which she asks this court to grant her.

At the time of the trial of the divorce proceeding the parties had been married 29 years. Plaintiff had been employed since 1954 and had earned from $60 to $85 a week during that period. Defendant was

earning $550 per month and substantial bonuses for at least 2 years prior to the divorce proceeding. Defendant's total income for 1964 from salary, bonus, and profits from Midwest Credit Service amounted to $10,036.98 and the annual salary of plaintiff amounted to $4,335. Plaintiff had inherited $10,000 and had remaining the sum of $7,000. Most of the reduction of her inheritance was due to the giving of money to defendant to pay his personal obligations. The testimony is that the earnings of the parties went for living expenses. Defendant still owed $1,300 at the bank and the $1,600 downpayment to the seller of the home they purchased. It is true that the parties assisted in the education of the two children over and above the $4,000 that each of the children inherited for their education.

The precipitating cause of the divorce was the excessive drinking of intoxicating liquors by the defendant and his abuse of the plaintiff directly caused thereby. There is no indication of fault on the part of the plaintiff. The income of the parties was substantial. The parties were apparently in good health. They apparently suffered no financial losses, nor suffered any emergent situations that absorbed their earnings. Still the defendant was in debt to the extent noted, the earnings of plaintiff were expended, and her inheritance was reduced from $10,000 to $7,000. The defendant was a law school graduate and was admitted to the bar, although he had never engaged in the practice of law. Plaintiff had worked continuously for 11 years and contributed all her earnings to the marriage. She still works, although the life of the nonprofit association by whom she is employed is uncertain. Defendant is earning $550 per month with reasonable certainty that his employment will continue. The plaintiff is given the equity in the home, the remainder of her inheritance amounting to $7,000, the equity in the automobile which she purchased, and the furniture in the home, the value of which is not shown. Under the circumstances here

shown it would appear that plaintiff is entitled to the restoration of her inheritance in addition to the joint property of the marriage that was awarded to her. We think the decree should be modified by allowing plaintiff an additional $3,000 to be paid by the defendant on such terms and conditions as the trial court shall prescribe.

In Malone v. Malone, 163 Neb. 517, 80 N. W. 2d 294, we said: "We have often said the fixing of the amount of the alimony rests, in each case, upon the sound discretion of the court." In Prosser v. Prosser, 156 Neb. 629, 57 N. W. 2d 173, we also said: "Alimony is awarded for the maintenance of the wife when the conditions exist that the statute requires. It is not an assignment of a portion of the husband's estate and it may, in fact, exceed the value of the husband's personal and real property. * * * It should not be allowed as a matter of sympathy to the wife or as penalty imposed for the misconduct of the husband."

We point out that defendant has an earning capacity of approximately $6,600 per year. It is true that the parties have accumulated very little in the way of assets. Defendant urges that he is heavily in debt. That he owes the bank $1,300 and $1,600 as the down-payment on the family home is unquestioned. His assertion that he owes his mother a note for $6,105 can be discounted by the fact that it is made out in his own handwriting, was in the possession of the defendant, and its existence was unknown to the plaintiff until the time of trial.

In determining how the property of the parties should be divided and in fixing an award of alimony, the relative fault of the parties is a material element. The age and health of the parties and the duration of the marriage are evidentiary facts to be considered. The social standing, comforts, and luxuries of life which the wife probably would have enjoyed are to be considered. The earnings of the husband and his earning potential

are very important when viewed in the light of the contributions made by the wife to the marriage. The principal asset awarded the wife is the family home. The substantial encumbrance upon it which the wife must pay creates a financial burden on the part of the wife with a limited earning capacity. Her only alternative is to sell the property and thereby defeat the purpose of awarding her the family home. In a consideration of all the factors, we think justice and equity require the additional allowance of $3,000, heretofore discussed. Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771; Haussener v. Haussener, 147 Neb. 489, 23 N. W. 2d 700; Prosser v. Prosser, *supra*.

For the reasons given, the decree of the district court is affirmed as modified herein. Costs of the appeal are taxed to the defendant, including an attorney's fee of $250.

AFFIRMED AS MODIFIED.

MURPHY, District Judge, dissenting.

I respectfully dissent from the majority opinion herein, and in that connection I submit the following observations.

The question of the constitutionality of the applicable statutes, particularly sections 42-318 and 42-321, R. R. S. 1943, to the extent they may function as limitations upon the broad chancery powers of the district courts (Article V, section 9, Constitution of Nebraska) is a question which suggests itself, but was neither presented nor determined in the trial court, and which has not been presented here. In her brief, plaintiff relies upon those statutes. It is a question, therefore, which we should not now consider. Madison County v. Crippen, 143 Neb. 474, 10 N. W. 2d 260; De Lair v. De Lair, 146 Neb. 771, 21 N. W. 2d 498; Ebberson v. School Dist. No. 64, *ante* p. 119, 141 N. W. 2d 452; Read v. City of Scottsbluff, 179 Neb. 410, 138 N. W. 2d 471. Rather, we must accept the statutes as we find them.

The effect of the majority opinion is to award the

plaintiff a property settlement in excess of the net worth of the parties, and thus to require an invasion of defendant's future income. It goes far beyond any mathematical limitation previously expressed by this court, and beyond the limits of the statute.

The statute, section 42-318, R. R. S. 1943, provides: "Upon every divorce * * *, if the estate and effects restored or awarded to the wife shall be insufficient for the suitable support and maintenance of herself * * * the court may further decree to her such part of the personal estate of the husband and such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case." While the terms "property settlement" and "alimony" are sometimes used interchangeably, here it is obvious that the word "alimony" is used in the proper sense of an allowance for future support. It seems to me that the statute allows an award of alimony only upon a finding that the property settlement made will be insufficient for the suitable support and maintenance of the wife, and permits consideration of the husband's "ability" only in that particular instance.

This is the effect of the statement quoted in the majority opinion from Prosser v. Prosser, 156 Neb. 629, 57 N. W. 2d 173, and with which I wholeheartedly agree as a statement of the controlling law of the case. While the majority opinion here treats of the added sum of $3,000 in the name of alimony, it is a restoration to plaintiff of an inheritance and not a provision for plaintiff's future support and maintenance. It appears to be a penalty assessed against the defendant for his fault in having caused the divorce, and because the parties lived beyond his means. Both the opinion and plaintiff's brief in this regard place their reliance not on the future, but on the basis of compensation for the past. I cannot agree that the statute either requires or permits this.

In any event, the decree of the trial court, from which the defendant does not appeal, grants to the plaintiff practically 100 percent of the current net assets of the parties. It grants defendant assets worth $2,090 and requires him to pay liabilities in the amount of $2,900, disregarding the note of $6,105 to his mother. It sufficiently provides for the suitable support and maintenance of plaintiff. It goes far beyond any past-stated mathematical limitation. I would deem it to be neither unjust nor unreasonable.

IN RE ESTATE OF WILLIAM M. THOMPSON, DECEASED. NELLE B. THOMPSON, APPELLEE, V. HAROLD M. DEVOE, AS EXECUTOR OF THE ESTATE OF WILLIAM M. THOMPSON, DECEASED, APPELLANT.

144 N. W. 2d 188

Filed July 22, 1966. No. 36215.

1. **Bills and Notes: Executors and Administrators.** Where a claimant against an estate has possession of a note shown to have been signed by the deceased, and produces it at the trial, it is admissible in evidence and makes a prima facie case of due delivery of the note.
2. **Bills and Notes.** Under former section 62-116, R. R. S. 1943, where a negotiable instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed, until the contrary is proved.
3. ———. The burden of proving the nondelivery of a negotiable instrument in an action between the original parties is upon the party who asserts such nondelivery.
4. **Bills and Notes: Witnesses.** A person having a direct legal interest in the result of a civil action or proceeding, where the adverse party is a representative of a deceased person, is incompetent, under the provisions of section 25-1202, R. R. S. 1943, to testify to facts from which inferences of delivery and possession of a note may be drawn, such note being the basis of claim against the estate of the deceased person.

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

Hastings & Wanek, for appellant.

Baskins, Baskins & Schneider, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BURKE, District Judge.

CARTER, J.

This is an appeal from a judgment of the district court for Keith County allowing the amounts due on two promissory notes payable to Nelle B. Thompson as valid claims against the estate of William M. Thompson, deceased.

Nelle B. Thompson, the claimant, is the widow of William M. Thompson. The latter died on July 24, 1962. The will of William M. Thompson was admitted to probate on September 13, 1962, and Harold M. DeVoe was appointed executor of the estate. Claimant filed two notes as claims against the estate of William M. Thompson, the first dated July 29, 1957, payable to claimant 1 year after date in the amount of $8,320 with interest at 4 percent per annum; and the second dated October 21, 1958, payable to claimant 1 year after date in the amount of $8,000 without interest. No payments were shown on the notes. The two notes were signed by the deceased, the signatures being admitted by the parties as those of William M. Thompson. The executor filed objections to both claims. The claims were disallowed in the county court and claimant appealed to the district court.

On the trial in the district court the only witness who testified was Nelle B. Thompson, the widow of William M. Thompson and the payee in the notes. All of her evidence was objected to as being incompetent under the dead man's statute, section 25-1202, R. R. S. 1943.

Nelle B. Thompson was permitted to testify substantially as follows: She is the widow of William M. Thompson, deceased. She saw the notes when they were made out in her home. She thinks she placed them in a joint lock box which she and her husband had in a bank in Brule, Nebraska. She found the notes in the joint lock

box in going through her papers after her husband's death. She took the notes from the lock box and delivered them to her attorney, who filed claims thereon in the county court. At the completion of claimant's testimony the notes were received in evidence. The notes have since been in the custody of the courts and appear in the bill of exceptions filed in this court.

It is the contention of the executor that the evidence of the widow of William M. Thompson is incompetent under section 25-1202, R. R. S. 1943. This statute provides in part: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness," subject to certain exceptions not pertinent to the instant case. The widow clearly had a direct legal interest in the result of the suit and is a person excluded by the statute as incompetent to testify to any transaction or conversation between the widow and her deceased husband. Kroh v. Heins, 48 Neb. 691, 67 N. W. 771; In re Estate of House, 145 Neb. 866, 18 N. W. 2d 500, 159 A. L. R. 401; Fincham v. Mueller, 166 Neb. 376, 89 N. W. 2d 137.

The evidence of the widow in the instant case was for the purpose of showing her possession of the notes at the time of the death of William M. Thompson, or that the notes were delivered to her in her lifetime. Such evidence on the part of a person having a direct legal interest in the result of a civil action is incompetent. Russell v. Estate of Close, 79 Neb. 318, 112 N. W. 559; In re Estate of Hoagland, 126 Neb. 377, 253 N. W. 416; In re Estate of Tynan, 142 Neb. 671, 7 N. W. 2d 628. The evidence of the widow at least infers a delivery of the notes to her and that she has lawful possession of the same. Any evidence by the widow which infers delivery or lawful possession of the notes is incompetent, it being a transaction with the deceased. The evidence is incom-

petent and the trial court was in error in admitting the same. Consequently, we have a record without direct evidence of the delivery of the notes to the widow in her lifetime, admittedly an essential element of the execution of a valid note. The issue then resolves itself into a question as to where the burden of proof lies.

In Gandy v. Estate of Bissell, 72 Neb. 356, 100 N. W. 803, this court said: "The plaintiff had possession of the note, produced it upon the trial and it was received in evidence. This made a prima facie case of due delivery of the note." In Dodd v. Kemnitz, 74 Neb. 634, 104 N. W. 1069, we said: "It is the claim of plaintiffs that their possession of the contract in suit, the defendant having voluntarily placed it in their possession, conclusively shows a delivery for all purposes. With that contention we do not agree. In Gandy v. Estate of Bissell, 72 Neb. 356, Mr. Justice Sedgwick, who delivered the opinion of the court, clearly demonstrates that the possession of a written agreement is prima facie evidence only of a delivery. This is in accord with the general rule. The delivery of a written instrument is one of intention, and to constitute a complete delivery thereof it must be made in a manner evincing an intention to part presently and unconditionally with all control over it, and thereby give it effect." In Gandy v. Estate of Bissell, 81 Neb. 102, 115 N. W. 571, the court reasserted the rule as shown by the syllabus as follows: "In a suit upon a promissory note, where the plaintiff has possession of the note, produces it upon the trial, and it is received in evidence, such facts make a prima facie case of due delivery of the note." In Bothell v. Miller, 87 Neb. 835, 128 N. W. 628, this court said: "But, even if plaintiff had interposed the objection that the testimony offered was not within the issues, the objection would not have been good, as this court is committed to the doctrine that in a suit of this character a general denial puts in issue every material averment of the petition, and the affirmative is upon the plaintiff to prove the making and delivery of

the identical instrument mentioned in the petition, and so continues to the close of the case." In Teske v. Baumgart, 99 Neb. 479, 156 N. W. 1044, it was said: "During the examination defendant made the following admission in the record: 'The defendant admits that the signature attached to exhibit 1 is his genuine signature, but does not admit the remainder of the instrument.' Plaintiff had possession of the note and produced it at the trial. This was prima facie evidence of delivery and ownership. Gandy v. Estate of Bissell, 72 Neb. 356. This, together with the admission of the execution of the note, made a complete case for plaintiff in chief, and he rested. It is now contended that the general denial in the answer cast upon plaintiff the burden of proving that the note in suit is the identical note, in form, date and amount, that was signed by the defendant. If this contention is sound, defendant was entitled to a directed verdict when plaintiff rested. * * * The fact that such a defense may be shown under the general issue does not, however, change the rule that in making such defense, where the note is regular upon its face, the burden is upon the defendant. * * * This rule has never been departed from in this state, except in Ohio Nat. Bank v. Gill Bros., 85 Neb. 718, which is strongly relied upon by defendant upon this appeal. In that case the action was upon a promissory note, and the answer a general denial. We there forsook the beaten path, and held that the burden was upon the plaintiff to show the execution and delivery of the instrument sued on, and that evidence in defense tending to show a material alteration of the note after its execution and delivery does not shift the burden of proof to the defendant. It is evident that we in that case had more in mind the doctrine of the shifting of the burden in a civil action; the rule in this state being settled that in a civil action the burden never shifts. That rule is not in conflict with the rule that, in an action upon a promissory note, which is regular upon its face, plaintiff's case is complete when

he proves the execution of the note, has it in his possession, and produces it at the trial. * * * In an able opinion in Anderson v. Chicago & N. W. R. Co., supra, written by the same member of the court who wrote the opinion in Ohio Nat. Bank v. Gill Bros. supra, we returned to 'the beaten path.' "

The foregoing appears to have been the rule in this state until the adoption of the Uniform Negotiable Instruments Law in 1905. In Gasper v. Security State Bank, 109 Neb. 495, 191 N. W. 654, this court said: "Facts which would show that Mr. Conaway's relation was such that a delivery of possession to him would not constitute a legal delivery to McGrew should have been disclosed by the petition if the plaintiff desired to show affirmatively that there was not a complete execution of the check for want of legal delivery. The negotiable instruments law (Comp. St. 1922, sec. 4627) provides that, 'where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed, until the contrary is proved.' As against the demurrer, therefore, the legal delivery of the check, on the facts set forth in the petition, will be presumed." In Caldwell v. Wells, 174 Neb. 288, 117 N. W. 2d 486, this court in an action involving a suit on a note said: "The lack of delivery of a promissory note is an affirmative defense." The burden of proving nondelivery of the notes in the instant case is on the executor.

It appears to be the contention of the executor that claimant's case must fail because of failure of proof of delivery of the notes. Under the rules discussed in this opinion, the production of the notes in court and the admission of deceased's signature thereon was sufficient foundation for their admission in evidence, and a holding that a prima facie case was made. The notes being negotiable instruments, delivery is presumed as to one not a signer of the notes. And finally, the lack of de-

livery is an affirmative defense not supported by evidence.

The executor contends that the evidence of Nelle B. Thompson shows that there was not a legal delivery of the notes and that such evidence supports his pleaded defense of no delivery of the notes. Even if the evidence was properly admitted, it is not subject to such a construction. The evidence as we view it indicates delivery and lawful possession rather than the contrary.

We necessarily conclude that the evidence was sufficient to sustain the judgment and that the trial court was correct in directing a verdict for the claimant.

AFFIRMED.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE, V. MERRITT BROTHERS SAND AND GRAVEL COMPANY, A CORPORATION, ET AL., APPELLANTS.

144 N. W. 2d 180

Filed July 22, 1966. No. 36216.

1. **Equity: Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo without reference to the findings of the trial court, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. **States.** The State may hold property in a dual capacity, proprietary and governmental; and to the extent it functions with regard thereto in its proprietary capacity, it is subject to the same laws as its citizens.
3. **Highways.** The rights-of-way acquired by the Department of Roads shall be held inviolate for state highway and departmental purposes and no physical or functional encroachments, structures, or uses shall be permitted within such right-of-way limits, except by written consent of the department. § 39-1359, R. R. S. 1943.
4. **Statutes.** All statutes in pari materia must be considered

together and construed as if they were one law, and, if possible, effect given to each provision.

5. **Highways.** A landowner whose property abuts upon a highway right-of-way may have rights in such right-of-way different in kind from, and greater than, the rights of the public generally, and at least has the same rights.
6. **Fences.** A fence is an enclosing structure, composed of any material which will present a sufficient obstruction, about a field or other space, intended to prevent intrusion from without or straying from within.
7. **Easements.** Unless a contrary intent appears, an easement granted by one landowner to a second adjoining landowner to construct and maintain a fence upon the land of the first landowner carries with it the incidental right of free and unobstructed passage onto and over the grounds thereby enclosed.
8. **Appeal and Error.** Questions not presented to or passed on by the trial court will not be considered on appeal.
9. **Highways: Limitations of Actions.** That a highway right-of-way has not been used to its full width, and that some portion of it has been enclosed or occupied by a private individual for a period in excess of the statute of limitations, does not vest that individual with any title thereto, as title by prescription cannot obtain to all or any part thereof.
10. **Injunctions.** An injunction will not lie if the right thereto is unclear, or the damage complained of nonexistent.
11. **Equity.** That the relief sought would serve no useful purpose to promote the convenience or welfare of the party seeking the relief is a factor to be considered by a court of equity whose assistance is asked.

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

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, and Warren D. Lichty, Jr., for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and MURPHY, District Judge.

MURPHY, District Judge.

This is an action in which plaintiff seeks to enjoin

defendants from using a certain tract of land described in the pleadings by metes and bounds (hereinafter referred to as the tract of land) for any purposes inconsistent with or in excess of their easement rights therein, to enjoin the defendants from interfering with plaintiff in taking a survey of the tract of land, and for a determination that plaintiff has a right to construct a fence upon the boundary so found but in such a manner as not to interfere with defendants' easement. Defendants, in their answer and cross-petition, seek not only to have plaintiff's petition dismissed, but also affirmative relief in the nature of an injunction prohibiting plaintiff from constructing a fence, entering on defendants' property, or molesting defendants in the use or enjoyment of their property.

The trial court, by its judgment, found that plaintiff was the owner of the fee simple title to the tract of land, and that defendants, or some of them, held certain easement rights therein; and generally granted the relief prayed for by plaintiff. Defendants having appealed, the matter is now here for review. Actions in equity, on appeal to this court, are triable de novo without reference to the findings of the trial court, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Foos v. Reuter, *ante* p. 301, 142 N. W. 2d 552; Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467.

There is but little dispute between the parties upon the physical facts or historical background; their primary areas of disagreement concern the current use being made of the tract and the proper application of the law to the situation in which they now find themselves. While in the course of this litigation other issues have been determined, we here concern ourselves only

with those issues discussed in the parties' briefs and essential to this decision. Particularly, we make no determination as to the nature of plaintiff's title. We do, however, notice applicable statutes, although they may not have been referred to in the briefs.

U. S. Highway Nos. 73-75 in Cass County, Nebraska, is a part of the state highway system. The corporate defendants own certain lands just south of the Platte River in Cass County adjacent to that highway right-of-way, the common boundary being on the west of defendants' lands. On January 20, 1934, in the course of certain condemnation proceedings between the parties to the contract, a contract was entered into with relation to the tract of land wherein, among other things, it was agreed that: "The party of the second part (Department of Roads and Irrigation of the State of Nebraska) also grants an easement to the party of the first part (the D. H. Merritt Estate) to build and maintain a fence at the expense of the party of the first part within a distance of 30 to 46 feet East of the centerline of the new highway and to permit party of the first part to plant and maintain shrub and tree screen at the expense of the party of the first part East of the above described fence, limiting the height of said trees sufficiently to retain 1,000 foot sight distance on the highway."

Plaintiff and the corporate defendants here are the successors in interest to the respective parties to that contract. The easement granted in that contract is the subject matter of this litigation. The individual defendants here are the principal stockholders and active managers of defendant corporations. The existence and validity of the easement are not disputed.

An action was brought in the district court for Cass County, Nebraska, by the corporate defendants here against the plaintiff here, concerning the easement granted in the above referred to 1934 contract. By judgment rendered therein March 5, 1964, which judgment has been permitted to become final, it was determined, in

substance: That the corporate defendants here were the owners of the easement and the benefits to be derived therefrom, which easement was in full force and effect; that plaintiff here should be permanently enjoined from interfering with or disturbing said easement and the rights arising therefrom, or from removing or interfering with the then existing fence and tree and shrub screen, except by a proper exercise of the power of eminent domain; and that the judgment should not be deemed to authorize any use of said easement inconsistent with, or in excess of, the rights established and granted by the terms of said easement and such rights as may be reasonably incidental or necessary to the reasonable and proper enjoyment of said easement, as established by the contract. The judgment contains a special finding that the grant of the easement did not carry with it any "right to use said property for any uses or purposes other than as set forth in said contract of January 20, 1934, and such rights as are reasonably incidental or necessary for the reasonable and proper enjoyment thereof."

Plaintiff, in its brief, acknowledges that it is not here endeavoring to exercise its police power, but is only exercising its general rights of ownership of the right-of-way. We take it, then, that plaintiff appears here in its proprietary (as distinguished from governmental) capacity. The activities of which plaintiff complains in no manner interfere with the use of the right-of-way for highway purposes. The State may hold property in a dual capacity, proprietary and governmental. To the extent it functions in its proprietary capacity, it is subject to the same laws as its citizens. Stoller v. State, 171 Neb. 93, 105 N. W. 2d 852; 81 C. J. S., States, § 104, p. 1075.

The total area of the tract is 8.16 acres. A fence and shrub and tree screen have been placed thereon by defendants in accordance with the contract above referred to. The area of ground occupied by defendants is not

clearly shown, but is greatly in excess of the tract of land, and includes three lakes or sand pits. Defendants' principal business presently conducted upon the tract is the operation of what is known as Merritt Beach, a recreation facility to which the public is invited and admitted upon the payment of an admission fee. This business has existed since 1932. The principal facilities provided are for picnicking and swimming. Concession stands are maintained. Fishing is permitted. This business is conducted from around the first of May each year until the following Labor Day. The only entry to defendants' grounds for vehicular traffic is by way of a gate where the admission fees are collected. Entry can be gained by individuals by climbing the fence.

The foregoing facts are either admitted by the parties, or appear from the record without dispute. The following facts are disputed, but we find that they do exist, based upon our own examination of the record.

Some time shortly after the entry of the 1964 judgment, defendants, in order to prevent their customers from going upon the tract, installed what is referred to as a barrier curb generally along the boundary between defendants' property and the highway right-of-way. This is a series of precast concrete forms, shaped somewhat similar to logs, commonly used to enclose parking lots. While these forms are not permanent fixtures, they are difficult to move. The south end of the curb is upon defendants' property. It runs to the vicinity of the boundary and north generally along the boundary to the vicinity of a lake, where it extends onto the tract. The curb, at its north and south ends, is so positioned with relation to natural terrain features that the entire curb functions to effectively prohibit the passage of vehicular traffic, except only for a passageway left open toward the north. This pasage is used to a sufficient extent that there is a visible trail in the area. It is used daily by defendants' agents and employees who mow and maintain the tract, and remove refuse

principally from the tract but also from defendants' adjacent grounds. It is occasionally used by defendants' customers who from time to time, neither with defendants' consent, nor contrary to defendants' prohibition, park their cars upon the tract. The barrier curb does not prevent the passage of persons afoot. Occasionally defendants' customers carry picnic tables, provided by defendants in the course of their business, across the barrier curb to the west onto the tract of land. Defendants return these tables, to the east of the barrier curb, usually the same day. Likewise, but less often, an occasional fisherman will wander upon the tract, and while there will cast his line into one of the lakes which appear to be principally within defendants' boundaries, but also appear to extend into the highway right-of-way. No fish were observed to have been caught by any such fisherman. Within the tract defendants maintain several trash receptacles. These activities, parking, picnicking, fishing, trash removal, and weed mowing, occurred prior to the 1964 judgment as well as after. The record is unclear, but a reasonable inference is that the installation of the barrier curb reduced the extent thereof. The volume of such activities within the tract are greatly exceeded by those without.

In 1952 defendants permanently installed two rows of ornamental, cast iron light poles, of about four poles each. The western most of these poles is within the tract. One other may be.

Plaintiff, on May 27, 1964, attempted to survey the boundary, but was effectively prevented from doing so by one of the defendants, Gerald Merritt. There now remains in existence at least one boundary marker permanently installed at the time of an earlier survey.

It is the contention of plaintiff that these activities—picnicking and fishing by defendants' customers, vehicular traffic, mowing of weeds, daily removal of trash, and maintenance of one or two light poles—constitute encroachments or wrongful uses by defendants which

ought to be prohibited. It is plaintiff's further contention that, as an owner, it is entitled to survey, and erect a fence upon, the boundary line provided that it installs gates to permit defendants to pass through and maintain their fence and shrub and tree screen.

"The rights-of-way acquired by the (Department of Roads) shall be held inviolate for state highway and departmental purposes and no physical or functional encroachments, structures, or uses shall be permitted within such right-of-way limits, except by written consent of the department." § 39-1359, R. R. S. 1943.

"All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision." City of Grand Island v. Ehlers, *ante* p. 331, 142 N. W. 2d 770. See, also, Mary Lanning Memorial Hospital v. Clay County, 170 Neb. 61, 101 N. W. 2d 510.

It becomes necessary to examine defendants' rights not only under the easement, but also as abutting landowners and as members of the general public, with a view toward statutory law.

A landowner whose property abuts upon a highway right-of-way may have rights in such right-of-way different in kind from, and greater than, the rights of the public generally, and at least has the same rights. Wells v. Miller, 173 Neb. 780, 115 N. W. 2d 137 (cited in the briefs as 172 Neb. 70); Painter v. State, 177 Neb. 905, 131 N. W. 2d 587; Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N. W. 2d 76.

The defendants have an easement to maintain the fence. "A fence is an enclosing structure, composed of any material which will present a sufficient obstruction, about a field or other space, intended to prevent intrusion from without or straying from within." 36A C. J. S., Fences, § 1, p. 258. See, also, Shamberg v. City of Lincoln, 174 Neb. 146, 116 N. W. 2d 18. The parties refer us to no cases upon the subject, and we find none. We are of the opinion, however, unless a contrary intent

appears, that an easement granted by one landowner to a second adjoining landowner to construct and maintain a fence upon the land of the first landowner carries with it the incidental right of free and unobstructed passage onto and over the grounds thereby enclosed; for the principal effect, at least, of such an easement is to permit the erection of an obstruction to such passage at a location other than where it could otherwise have been erected. Here there is no evidence that defendants have disturbed the soil other than with relation to planting or maintaining the shrub and tree screen.

While the parties here argue the issue of free ingress and egress from a public highway by an abutting property owner, we feel the matter is not properly before this court. The issue was not raised in the pleadings or by the evidence, and was not determined by the district court. Questions not presented to or passed on by the trial court will not be considered on appeal. Dunbier v. Rafert, 170 Neb. 570, 103 N. W. 2d 814.

Defendants are occupants of that part of the tract enclosed within the fence, and as such have a statutory right to continue to use, in the presently existing condition, the one or two ornamental light poles thereon. § 39-1332, R. R. S. 1943. There is no evidence that plaintiff has determined that the safety and general welfare of the public would be better served by defendants applying for a written permit therefor. Although the issue is not here presented, it may well be said that such a determination, in light of this evidence, would appear to be arbitrary. Defendants have a further statutory right to designate locations, and provide receptacles, within that part of the tract, for the deposit of rubbish, trash, refuse, and debris, to promote safety, cleanliness, or highway beautification, at least so long as they do not thereby interfere with the use of the right-of-way for highway purposes. § 39-713, R. R. S. 1943. Highway beautification is a highway purpose. § 39-1320 (2)(f), R. S. Supp., 1965.

Subject to certain restrictions not here material, it is lawful to camp upon a highway right-of-way, at least if by doing so the use of the right-of-way for road purposes is not disturbed. In this regard, to camp includes to build a fire and prepare or partake of a meal, or to maintain a rendezvous or meeting place. §§ 39-708 to 39-712, R. R. S. 1943. We fail to see how it can be said that the granting of the easement by the plaintiff should be construed to confer upon the plaintiff the right to enjoin or prohibit such activities. Whether or not the easement confers upon the corporate defendants the right to prohibit picnicking, we need not decide. We do determine, however, that the occasional picnicking, and less occasional fishing, that have occurred are an incidental result of defendants' commercial enterprise and do not constitute an encroachment or wrongful use by defendants upon or of plaintiff's right-of-way. Defendants have not commercially exploited their easement; on the contrary, they have taken reasonable steps to discourage the activities complained of by plaintiff. When plaintiff first had notice of such activities does not appear. We do observe, however, that it was sometime prior to the litigation resulting in the above-mentioned judgment of 1964. When the easement was granted in 1934 the commercial enterprise then conducted on the dominant tenement was the same as now. Plaintiff made no complaint until just before the filing of this action. Parking a motor vehicle upon a highway right-of-way, but not on the main-traveled portion thereof, is not unlawful. § 39-757, R. R. S. 1943.

The statute of limitations does not run against the public. That a highway right-of-way has not been used to its full width, and that some portion of it has been enclosed or occupied by a private individual for a period in excess of the statute of limitations, does not vest that individual with any title thereto, as title by prescription cannot be obtained to all or any part thereof. Taylor v. Austin, 83 Neb. 581, 119 N. W. 1123; Donovan v. Union

P. R.R. Co., 104 Neb. 364, 177 N. W. 159; Barrett v. Hand, 158 Neb. 273, 63 N. W. 2d 185; § 39-1404, R. R. S. 1943.

Nevertheless, the conduct of these parties is material in determination of their mutual rights and obligations. Plaintiff could have obtained an adjudication in the prior action, but did not seek it. We are not now willing to determine that any or all of the activities or cases of which plaintiff now complains, to the extent and in the manner shown, constitute encroachments or wrongful uses which ought to be prohibited. An injunction will not lie if the right thereto is unclear, or the damage complained of nonexistent. Aro Inv. Co. v. City of Omaha, 179 Neb. 569, 139 N. W. 2d 349; Armbruster v. Stanton-Pilger Drainage District, 169 Neb. 594, 100 N. W. 2d 781.

Plaintiff also seeks assistance in making a survey of the boundary. The Department of Roads has statutory authority to enter upon any property to make surveys in contemplation of locating roads, acquiring land or property, or performing other operations incident to highway construction, reconstruction, or maintenance. § 39-1324, R. R. S. 1943. The right of entry is not absolute. Plaintiff has neither alleged nor proved any of the required purposes.

In an action to have established or determined the corners or boundaries of land which are lost, destroyed, or in dispute, if any public road is likely to be affected thereby, it is required that the appropriate county be made a party. The County of Cass is not a party here. The assistance ought not have been granted.

Finally, plaintiff asks that it be found to have a right to construct a fence upon the boundary. What has already been said concerning defendants' right to free and unobstructed passage should be conclusive of this issue. It may further be said, however, that the fact that a proposed fence would serve no useful purpose to promote the convenience or welfare of the party proposing to erect it is a factor to be considered by a court of equity whose

assistance is sought in the erection thereof. Bush v. Mockett, 95 Neb. 552, 145 N. W. 1001, 52 L. R. A. N. S. 736. In this instance, no useful purpose for the proposed fence exists. The relief ought not have been granted.

Much ado is made in the briefs of defendants' "right" to mow the grass and weeds enclosed by the existing fence. We fail to see how plaintiff, in either its proprietary or governmental capacity, is damaged by defendants, or anyone else, mowing upon a highway right-of-way; nor is it made clear why a court of equity should become involved in such an issue.

We fail to see how plaintiff is entitled to any relief under these circumstances. The relief sought by defendants, to the extent it may be granted, has already been granted in the March 1964, judgment. We reverse the judgment of the district court and remand the cause with directions to dismiss both the petition and cross-petition, all at plaintiff's costs.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ROBERT WILLIAM LOSIEAU, APPELLANT.

144 N. W. 2d 406

Filed July 22, 1966. No. 36240.

1. **Criminal Law.** When a motion is made to vacate, set aside, or correct a sentence, the movant must set forth facts and not merely conclusions.
2. ———. Alleged extraction of involuntary extrajudicial confession does not entitle the defendant to a vacation of sentence where the record affirmatively discloses that the alleged confession has played no part in the guilty plea or sentence imposed.
3. ———. Defendant is not entitled to a vacation of sentence on the ground that following his arrest he made a confession to enforcement officers which might be inadmissible, where in a proceeding in which sentence was imposed, no statement or confession was received in evidence against the defendant and

the sentence was imposed on the defendant's voluntary plea of guilty.

4. ———. A strong inference of invalidity of claims made by a prisoner arises as a result of the prisoner's failure to assert such claims earlier although he had an opportunity to do so.

5. **Attorney and Client: Criminal Law.** The competency and qualifications of a long-time member of the district court bar as a lawyer before such court are matters of which the trial court has judicial knowledge and can take judicial notice on a motion to vacate judgment and sentence imposed thereby on a plea of guilty to a criminal offense by one represented by such attorney.

6. **Criminal Law: Evidence.** This court may take judicial notice of inconsistent claims and statements of a defendant in successive post conviction proceedings appealed to it in order to prevent an imposition on the court.

7. **Criminal Law.** In the present case where the record shows the defendant was represented by counsel at the time of his conviction he cannot on motion to vacate the sentence offer testimony to contradict the record.

8. ———. Even though one of the grounds of a motion to vacate a sentence raises a factual issue, where the issue is one that is readily determinable by reference to files and records of the district court, the prisoner is not entitled to hearing on the motion.

9. ———. The question of a defendant's guilt or innocence is not an issue on a motion to vacate a sentence based upon a plea of guilty.

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

Joseph H. Badami, for appellant.

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

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and COLWELL, District Judge.

BROWER, J.

This is a proceeding under the Post Conviction Act, L.B. 836, Laws 1965, c. 145, p. 486, now sections 29-3001 to 29-3004, R. S. Supp., 1965, enacted by the Legislature

with the emergency clause and approved by the Governor on April 12, 1965.

On August 3, 1945, the defendant, Robert William Losieau, was convicted in the district court for Douglas County of the crime of stealing an automobile and on the following day sentenced to be imprisoned in the State Penitentiary to serve a term of 3 years. The sentence has been served. The conviction thereafter was used as one furnishing a basis for his conviction as a habitual criminal. Defendant seeks to have his conviction for stealing the automobile set aside as a step in effecting a release, or a reduction of his sentence as a habitual criminal which he is presently serving.

On April 6, 1965, the defendant filed a verified motion in the district court for Douglas County to vacate and annul his conviction for stealing the automobile. It alleged defendant was denied counsel when first arrested and during his detention in both the city and county jail, and throughout constant interrogation by police officers and the county attorney during his arraignment, trial, and conviction. It stated the defendant had requested an opportunity to obtain counsel at all such times, but such requests were denied in violation of the Sixth Amendment to the Constitution of the United States. Because of the interrogation he was induced under abuse, threats, and false promises to make incriminating statements. Assistance of counsel was particularly required because defendant had but 5 years of schooling. It stated two codefendants admitted orally and in a written letter to the court that defendant had no knowledge or any part in stealing the automobile which he was charged with stealing. "When petitioner asked to withdraw his plea of guilty, the court refused and sentenced him to a term of three years in the Nebraska State Penitentiary, while petitioner's two co-defendants in this matter, who also had previous criminal records, received a term and sentence of one year. Had an attorney been present, there

is at least a possibility that the court would have been informed of mitigating circumstances."

On the same day he filed a separate application as an indigent for the appointment of an attorney to represent him in this proceeding. The trial court then made an order setting the matter for hearing on April 12, 1965, and appointed counsel to represent him. On April 9, 1965, the defendant filed a motion for an order permitting him to attend in person and testify, and to confer with his counsel.

On July 19, 1965, on application by defendant's counsel, pending motions were withdrawn. On August 23, 1965, defendant filed a motion for advancement which is missing from the files. On that day the trial court ordered that this motion be treated as a renewal of all previous motions which should in their entirety be considered as a proceeding under L.B. 836, Laws 1965. The public defender of Douglas County was again appointed as defendant's counsel. It directed notice be given the county attorney to appear on September 7, 1965, to show cause, if any there be, why a hearing should not be had on defendant's previous motions and applications, and directed a copy of the order be mailed to the defendant.

On September 1, 1965, a petition for a writ of "habeas corpus ad testificandum" to be directed to the warden of the Nebraska Penal and Correctional Complex to enable the petitioner to attend the hearing was filed. This petition contained these allegations: "* * * that under a threat and promise of Douglas County Officials, including a beating by Douglas County Police Officers, he entered a plea of guilty at the City Jail in order to be transferred to the County Jail in order to escape further physical abuse, threats and starvation, and although he requested to withdraw his plea of guilty in * * * court, said request was denied." It alleged the evidence was within the knowledge of the petitioner who was the sole person who could testify thereto. A separate request was then made for compulsory process for the

attendance of two named witnesses to appear at the hearing.

On September 7, 1965, the county attorney and defendant's counsel appeared. It was shown the defendant had completed service of the sentence previously imposed, and on consideration of all the motions and applications the matter was taken under advisement. On September 17, 1965, the court found that all the defendant's motions and applications should be denied, that L.B. 836, Laws 1965, had application only to sentences under which prisoners are in custody at the time of hearing, and that the motion to vacate and annul the conviction failed to state a cause of action. It overruled and denied all the various motions and applications.

From the order denying defendant's several motions and orders, refusing to vacate and set it aside, the defendant has appealed to this court. The defendant assigns error to the trial court in refusing to grant him relief under L.B. 836, Laws 1965, or a hearing thereunder and refusing to vacate and set aside his sentence.

Although the defendant particularly objects to the trial court's ruling that relief could not be granted under L.B. 836, Laws 1965, where the defendant is not presently in custody under sentence thereunder, we do not consider it necessary to decide that question.

The defendant's allegations in his motion to vacate and set aside his conviction, filed April 6, 1965, only allege he was induced by abuse, threats, and false promises to make incriminating statements. No amplification or statement of fact as to what the abuse, threats, or false promises were is set forth. When a motion is made to vacate, set aside, or correct a sentence, the movant must set forth facts and not merely conclusions. State v. Clingerman, *ante* p. 344, 142 N. W. 2d 765; United States v. Trumblay, 256 F. 2d 615, certiorari denied, 358 U. S. 947, 79 S. Ct. 355, 3 L. Ed. 2d 353.

Almost 5 months thereafter in his petition for a writ of habeas corpus ad testificandum to the warden he en-

larged the allegations of abuse suffered by him, stating that because of a threat and promise of Douglas County officials, "including a beating by Douglas County Police Officers, he entered a plea of guilty at the City Jail in order to be transferred to the County Jail in order to escape further physical abuse, threats and starvation." This was not made by way of amendment to his motion, but inasmuch as the journal of the trial court indicates all the motions and applications were considered by it, we will consider it also.

All this is refuted by the record of conviction and sentence which was before the trial court. The journal of the court on August 2, 1945, shows: "Now, on this day, comes the County Attorney on behalf of the State of Nebraska, and the defendant, Robert William Losieau, is brought into Court in the custody of the Sheriff, deputy public defender Ed Hayes representing defendant. Thereupon the said defendant waives the filing of a complaint, preliminary examination, service of a copy of the information heretofore filed herein and the time provided by law before being required to answer thereto, and is, with his assent, arraigned for plea. The information being read to him for plea thereto, the defendant says he is guilty of Stealing Automobile as charged therein.

"Whereupon sentence is deferred and said defendant is remanded to custody of the Sheriff."

The sentence entered on August 3, 1945, recites: "Thereupon said defendant is arraigned for sentence upon his plea of guilty to the charge of Stealing Automobile as heretofore entered herein, and is informed by the Court of the nature of his said plea, of the consequences thereof, and of the penalty attached by law thereto; and, after being thus advised and instructed, the said defendant still adheres to his said plea of guilty and says he desires to stand thereon." The record shows he had counsel who appeared with him in open court when he entered his plea, and that when sentenced, he

was advised of the effect thereof, and being cautioned, he elected to stand on it.

The provisions of L.B. 836, Laws 1965, in its application to the review of convictions for crimes in the state court, resembles in many respects Title 28 U. S. C. A., section 2255, page 563, which applies to such review in courts of the United States. We think some of the decisions of the federal courts with respect to section 2255 are applicable to our own statute. We here set forth those which we deem pertinent to the case before us.

"Alleged extraction of involuntary extrajudicial confession did not entitle defendant to vacating of sentence, where record affirmatively disclosed that alleged confession had played no part in guilty plea or sentence imposed." United States v. Langston, 194 F. Supp. 891.

"Defendant was not entitled to vacation of sentence on the ground that following his arrest he made a confession to enforcement officers which might be inadmissible, where in a proceeding in which sentence was imposed, no statement or confession was received in evidence against the defendant and the sentence was imposed on defendant's voluntary plea of guilty." United States v. Dailey, 171 F. Supp. 744.

A strong inference of invalidity of claims made by a prisoner arises as a result of the prisoner's failure to assert such claims earlier although he had an opportunity to do so. Malone v. United States, 299 F. 2d 254, certiorari denied, 371 U. S. 863, 83 S. Ct. 122, 9 L. Ed. 2d 100.

The competency and qualifications of a long-time member of the district court bar as a lawyer before such court are matters of which the trial court has judicial knowledge and can take judicial notice on a motion to vacate judgment and sentence imposed thereby on a plea of guilty to a criminal offense by one represented by such attorney. Wheatley v. United States, 198 F. 2d 325. This court, having such knowledge, can take judicial notice thereof also.

This court, on appeal, where cases were interwoven and interdependent and where certain aspects of the controversy involved were considered and determined by this court in former proceedings involving a party before it, has examined its own records and taken judicial notice of its own proceedings and judgments in the former action. Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551. In habeas corpus actions, which are akin to post conviction remedies, a court may take judicial notice of its own records in connection with the allegations of the petition or in connection with a previous habeas corpus proceeding. 31 C. J. S., Evidence, § 50(5), p. 1043; State ex rel. Campbell v. Tahash, 261 Minn. 252, 112 N. W. 2d 37. The petition for post conviction relief in the case of State v. Brevet, *ante* p. 616, 144 N. W. 2d 210, recently decided by this court, involved another conviction under which this same defendant had likewise served his sentence and desired to have that conviction set aside also. Although they involved different convictions and sentences, the defendant's object in the two cases was the same, to wit, to secure his release from the sentence as a habitual criminal which he is now serving. In the present case the prisoner alleges he only had 5 years of schooling. We think this court can take notice of our previous opinion setting forth the interrogation by the trial court in the other conviction where he stated he had finished the eighth grade in school and the tenth by studying evenings at home. This court may take judicial notice of inconsistent claims and statements of a defendant in successive post conviction proceedings appealed to it in order to prevent an imposition on the court.

Defendant contends that where, as here, he had alleged absence of counsel at the time of his conviction, he is entitled to a trial on that issue even though the allegation is in direct conflict with the record of the conviction. This is asserted in the present case where the record shows he appeared in court with counsel

known to be of good ability and repute. There are no allegations that connect any misconduct of the officers to whom he attributes the abuse, threats, and violence with the plea of guilty in open court. His claims were delayed and with exception of conclusionary statements were not made for months after filing his original motion to vacate. This complaint as a whole was first asserted years after he had served the sentence resulting in the conviction. His allegation that he pleaded guilty in the city jail is incredible and in any event did not enter into his plea of guilty. In Wallace v. United States, 174 F. 2d 112, certiorari denied, 337 U. S. 947, 69 S. Ct. 1505, 93 L. Ed. 1749, rehearing denied, 338 U. S. 842, 70 S. Ct. 30, 94 L. Ed. 515, the court held that where the record showed the defendant was represented by counsel at the time of his conviction he could not on motion to vacate the sentence offer testimony to contradict the record. Certainly he should not be permitted to do so in the present case. Even though one of the grounds of a motion to vacate a sentence raises a factual issue, where the issue is one that was readily determinable by reference to files and records of the district court, the prisoner was not entitled to hearing on the motion. Yancy v. United States, 252 F. 2d 554, affirmed, 362 U. S. 389, 80 S. Ct. 811, 4 L. Ed. 2d 864; State v. Clingerman, *ante* p. 344, 142 N. W. 2d 765.

Certain allegations of the defendant indicate he seeks to introduce anew evidence with respect to his participation in the crime. The question of the defendant's guilt or innocence is not an issue on a motion to vacate a sentence based upon a plea of guilty. Woodring v. United States, 248 F. 2d 166.

Having examined the records of the trial court, we find no error in its judgment and the same is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY ERVING, SR., APPELLANT.

144 N. W. 2d 424

Filed July 29, 1966. No. 36214.

1. **Constitutional Law: Criminal Law.** The purpose of the Post Conviction Act, Chapter 29, Article 30, R. S. Supp., 1965, is to provide a remedy to a convicted defendant in a criminal action whose rights under the state or federal Constitutions have been denied or infringed so as to render the judgment void or voidable.
2. ———: ———. In such a proceeding the applicant is required to allege facts which, if proved, constitute a violation or infringement of constitutional rights. Mere conclusions of fact do not suffice.
3. **Criminal Law.** Error may not ordinarily be predicated on the admission of evidence as permitted by existing rules of law even though such evidence may be inadmissible under subsequent rules having a prospective application only.
4. **Constitutional Law: Criminal Law.** Where the allegations in an application for relief under the Post Conviction Act contain only questions specifically decided in the criminal case on appeal which did not involve a denial of a constitutional right, questions not properly asserted under subsequent prospective rules in the decisions of the Supreme Court of the United States, and questions of law on the facts alleged in the motion to vacate the conviction and sentence, afford no basis for a hearing, and the trial court under such circumstances may properly deny a hearing for the taking of evidence.
5. **Criminal Law: Appeal and Error.** An application for a hearing under the Post Conviction Act is not a substitute for an appeal and, unless the facts alleged indicate a violation or infringement of constitutional rights sufficient to void the conviction and sentence, the application fails to state grounds for relief under Chapter 29, article 30, R. S. Supp., 1965.

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

Fred J. Montag, for appellant.

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

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and SCHEELE, District Judge.

CARTER, J.

This is an appeal from an order of the district court for Douglas County denying a motion to vacate a conviction and sentence for first degree murder under the provisions of the Post Conviction Act, sections 29-3001 to 29-3004, R. S. Supp., 1965.

Defendant was convicted of first degree murder on June 3, 1960, and sentenced to life imprisonment. His conviction was affirmed by this court on June 29, 1962. Erving v. State, 174 Neb. 90, 116 N. W. 2d 7. On September 27, 1965, defendant filed a motion to vacate the judgment and sentence under the Post Conviction Act. The trial court issued an order to the county attorney of Douglas County to show cause why a hearing should not be held on the motion. The motion was argued and the application to vacate the conviction and sentence was denied. The defendant has appealed, asserting that the court erred in not granting him a hearing on the merits of the allegations of his application.

The defendant asserts many alleged violations of his constitutional rights. Defendant alleges that he was held in custody from December 27, 1959, to December 30, 1959, on which latter date he was released from custody. He states he was interrogated during this period by the county attorney, that he made answer to some questions but was not advised of his right to remain silent or to consult with legal counsel, and that the statements were used for impeachment purposes against him at his trial. Defendant was released on December 30, 1959, and he was not again taken into custody until January 6, 1960. No claim is made that he was forced or coerced into making a confession or incriminatory statement, his release on December 30, 1959, being corroborative of that fact. The opinion in Erving v. State, *supra*, deals with the problem and determines this issue. It is clear that no objection was made at the trial to the effect that the statements used were involuntary. Defendant does not contend that they were. He does not allege that

he confessed or incriminated himself involuntarily. The facts pleaded indicate that he requested a lawyer and that the request was refused. Defendant was not prejudiced for the reason that he refused to answer any material questions. The statement was used only on cross-examination for the sole purpose of showing that defendant refused to answer questions as to his whereabouts on the day before the murder was committed. Whether or not this evidence should have been admitted, it does not show the denial of a constitutional right. We think the record before us, including our opinion in Erving v. State, *supra,* shows the want of merit in this contention.

Other portions of his motion allege that the police searched his residence and his automobile without a search warrant, that such unlawful searches and seizures were unreasonable, and that the admission into evidence of the items there found was in violation of his constitutional rights. No objection was made to the admission of the evidence at the trial on the ground here being advanced. Defendant is in no position, under the circumstances here existing, to complain about the admission of this evidence. In Plummer v. United States, 260 F. 2d 729, the court said: "The motion, which was prepared by appellant without assistance of counsel, alleged four grounds for vacating sentence: (1) illegal arrest, (2) illegal detention, (3) illegal search and seizure, and (4) ineffective assistance of counsel. The first three points are not grounds for vacating a sentence under § 2255 and do not entitle appellant to a hearing. See White v. United States, 1956, 98 U. S. App. D. C. 274, 235 F. 2d 221; Newman v. United States, 1950, 87 U. S. App. D. C. 419, 184 F. 2d 275." See, also, United States v. Langston (1961), 194 F. Supp. 891. The foregoing rule was the controlling law when defendant was tried. The assertions here made appear to be an attempt to get within the rule of Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977. Since the holding

in Johnson v. State of New Jersey, No. 762, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882, released June 20, 1966, Escobedo v. Illinois, *supra,* has no relevancy to the instant case since we are dealing with a case commenced prior to June 22, 1964. It seems clear that the present rule barring the admission of illegally seized evidence, it having no retroactive effect, could have no application to the present case. Linkletter v. Walker, 381 U. S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601.

Defendant alleges that upon his arrest on January 6, 1960, he was unlawfully detained until an information was filed on February 2, 1960. He was given a preliminary hearing on the day of his arrest. He was represented by legal counsel. The remedy for testing the efficacy of a preliminary hearing is by plea in bar or habeas corpus. When he entered his plea without invoking these available remedies, he effectively waived any objections to the sufficiency of the preliminary hearing. State v. Brevet, *ante* p. 616, 144 N. W. 2d 210.

Defendant asserts that two witnesses who testified for the State at the trial were deprived of their constitutional rights and that this had the effect of violating his constitutional rights. The credibility of these witnesses and the weight to be given to their testimony were for the jury. Defendant's allegations go to the reliability of the evidence which was an issue in the trial and considered on appeal. Credibility of witnesses and weight of testimony are not issues which can be reexamined in a post conviction proceeding. In any event, the claimed constitutional rights are personal rights which may be claimed only by the person whose rights have been abridged.

Defendant asserts that he was prejudiced in his trial because of undue publicity in the various news media. No claim is made that a change of venue was requested or that the matter was otherwise brought to the attention of the court. If there was merit in his contention, remedies were available. The record does not disclose

that any apparent right was denied him. The nature and extent of the publicity are not alleged. Defendant will not be permitted to foresake available remedies upon his trial in such matters and then assert them for the first time in a post conviction proceeding. Such proceeding is not a substitute for appeal. As to this point the motion to vacate does not show that any constitutional right was denied the defendant. This contention is without merit.

Defendant alleges that his constitutional rights were violated by the manner in which the bill of exceptions was prepared after the intervening death of the official court reporter who reported the evidence at the trial. The application shows on its face that the bill of exceptions was prepared in accordance with the rules of the court. The allegations do not show the violation of any constitutional right on this point.

Defendant alleges that his constitutional rights were violated when the trial court refused to require the county attorney to furnish statements given to him. The statements, as shown by our opinion in Erving v. State, *supra,* were statements allegedly given by two State witnesses. The correctness of the ruling was sustained on appeal, and, we think, correctly so, for the reasons stated in this court's opinion in that case. The attempt to raise this issue in post conviction procedure is nothing more than an attempt to relitigate a matter already finally decided. This is not the purpose of the post conviction proceeding. We fail to see where any constitutional right to due process has been violated as to this allegation. Every adverse ruling in the course of a criminal trial does not involve a constitutional right within the meaning of the Post Conviction Act.

We point out that the allegations of the motion to vacate are in many respects conclusions only. For instance, the statements made to the county attorney are not alleged to be confessions or incriminating statements. Too often the allegations are mere conclusions evidently

designed to bring the defendant within the scope of Escobedo v. Illinois, *supra,* or other decisions of similar import, without alleging the specific facts which are alleged as violative of the constitutional rights of the defendant. The pleading of conclusions is no more acceptable in a post conviction proceeding than in any other civil proceeding.

We have examined the lengthy motion to vacate the conviction and sentence in this case. As we have hereinbefore indicated, the allegations involve questions specifically decided in Erving v. State, *supra;* late decisions of the Supreme Court of the United States which are not applicable because of their prospective effect only; questions which have been waived and are not available to the defendant in a post conviction proceeding; and questions involving matters of law only which have been correctly decided. No facts are alleged showing that defendant was prejudiced in any way by the denial of legal counsel. No question of fact was required to be determined which was raised by the motion to vacate the conviction and sentence. The trial court was, therefore, correct in refusing a hearing and denying the motion to vacate defendant's conviction and sentence.

AFFIRMED.

EARL R. MCKINNEY, APPELLANT, V. COUNTY OF CASS, NEBRASKA, ET AL., APPELLEES.

144 N. W. 2d 416

Filed July 29, 1966. No. 36230.

1. **Counties: Highways.** A county is obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence.
2. ———: ———. The duty of the county in this respect will not be extended beyond the words and fair implications of the statutory liability.

3. **Trial.** Instructions should be read and construed together, and, if as a whole they state the law correctly, they will be held sufficient, although one or more of them considered separately may be subject to just criticism.
4. **Trial: Appeal and Error.** Where an instruction, although erroneous, is not prejudicially so and cannot, by any course of logical reasoning, be deemed to have resulted in disadvantage to the complaining party, it is not legal cause or reason for granting a new trial.
5. ———: ———. It is reversible error for the trial court to include in its instructions to the jury allegations of fact found in the pleadings, but which have not been supported by any evidence.
6. **Juries: Trial.** It is within the sound discretion of the trial court to permit a party in a civil case to withdraw his waiver of a right to jury trial if the application to do so is timely made and the waiver has not been acted upon to the prejudice of any party.
7. **Trial: Appeal and Error.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.

Appeal from the district court for Cass County: VICTOR H. SCHMIDT, Judge. Affirmed.

Leonard Dunker and Kier, Cobb & Luedtke, for appellant.

James F. Begley, Cassem, Tierney, Adams & Henatsch, and John B. Henley, for appellee County of Cass.

Baylor, Evnen, Baylor & Urbom and Robert T. Grimit, for appellee Howard.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

This is an auto accident case that occurred on Sunday, September 16, 1962, about 3:55 p.m., at an intersection of two rural graveled roads in Cass County, Nebraska, about 1 mile east of Greenwood, Nebraska. For convenience appellant Earl R. McKinney will be referred to as plain-

tiff, appellee County of Cass, Nebraska, as defendant Cass County, and appellee Wayne Howard as defendant Howard.

The plaintiff, aged 21 years, was riding as a passenger in the left rear seat of a 1957 green Chevrolet automobile owned and operated by Riley Mardin, aged 19 years. The Mardin vehicle was being driven in a northerly direction on a north-south county graveled road. Besides the plaintiff and Mardin there were four other male companions in the Mardin vehicle. Defendant Howard was alone driving his 1962 blue Ford automobile easterly on an east-west county graveled road. Both county roads were maintained by Cass County, Nebraska; and the east-west road was an arterial road. The stop signs at the accident intersection in question had been removed about 1 week prior to the date of the accident by employees of defendant Cass County, and no temporary stop signs or warning signs had been substituted. Defendant Howard was a rural mail carrier with 16 years experience on a route in that area; his mail route did not cross the accident intersection. Defendant Howard was familiar with the roads, the accident intersection, and also with the fact that some stop signs in the area had been removed for repainting and repair. None of the occupants of the Mardin automobile were familiar with the intersection.

The impact between the Howard automobile and the Mardin automobile occurred at about the center of the intersection. Mardin testified that just prior to entering the intersection the speed of his vehicle was about 45 miles per hour, and that he decreased the speed of his automobile to about 35 miles per hour as he entered the intersection; he looked to the east and to the west two or more times, beginning when he was about 100 feet south of the intersection; and he didn't see the Howard vehicle until just at time of impact, "Just directly before the impact I just looked out the window and I saw a big blue fender." None of the other occupants of

the Mardin automobile ever saw the Howard automobile prior to the impact. Defendant Howard testified that when he was about 120 feet west of the intersection he saw "a tunnel of dust" on the road to his right, and that through the weeds along the roadway he saw "a green flash" at the end of the dust tunnel. At that time his speed was about 50 miles per hour; and he applied his brakes and reduced his speed to about 10 miles per hour at the time of the impact at the center of the intersection. The front of the Howard vehicle struck the middle and left rear side of the Mardin vehicle. Plaintiff received severe personal injuries as a result of the accident.

Plaintiff's amended petition alleges that defendant Cass County was negligent in causing the insufficiency and want of repair of the county roads, and that defendant Howard was negligent in that: "A. He failed to maintain proper observation. B. He drove said vehicle at an excessive rate of speed for the then existing conditions. C. He failed to decrease the speed of his automobile as he approached an intersection and a place where special hazards existed * * *. D. That although he knew or should have known that the stop signs had been removed on the north-south intersecting county road, he proceeded in utter disregard of that knowledge thus required and did run into and against the vehicle in which the plaintiff was riding where by the exercise of reasonable care he could have avoided the same." Defendant Cass County answered by a general denial and alleged contributory negligence on the part of plaintiff. Defendant Howard answered admitting the alleged negligence of defendant Cass County, denied any negligence on the part of the defendant Howard, and alleged contributory negligence of plaintiff. The cause was tried to a jury. At the conclusion of plaintiff's case a motion was made by defendant Cass County for a dismissal as to that defendant, which was sustained. The jury returned a verdict for defendant Howard, from which plaintiff appeals to this court.

Plaintiff claims error by the trial court in the dismissal of defendant Cass County at the close of plaintiff's evidence. Plaintiff's amended petition alleges that defendant Cass County was responsible for the insufficiency and want of repair of the roads at the accident intersection in the following particulars: "A. That * * * County of Cass, Nebraska, did create a dangerous trap at the intersection of said county roads by removing the traffic controls * * *. B. * * * County of Cass, Nebraska, by and through its employees * * * did remove the stop signs and traffic controls from said intersection. C. * * * County of Cass, Nebraska, failed to place any temporary barriers or warning signs on either county road described to advise or warn motorists of the removal of the traffic control signs. D. * * * County of Cass, Nebraska, failed to use reasonable care in the removal of said signs for prevention of creating a traffic hazard." The basis for liability on the part of defendant Cass County is found in section 39-834, R. R. S. 1943, which provides in part: "If special damage happens to any person, his team, carriage or other property by means of insufficiency or want of repair of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in an action against the county, * * *." In Olson v. County of Wayne, 157 Neb. 213, 59 N. W. 2d 400, we held: "There was not at common law a right of action against a county for the recovery of damages resulting from a defective highway or bridge. The source and extent of liability of a county in this state for damages of this character are statutory. * * * A county is obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while he is in the exercise of reasonable and ordinary caution and prudence. The duty of the county will not be extended by construction beyond the words and fair implication of the statutory liability. A county is not an insurer

of the safety of a person who uses its roads and bridges or the safety of the highways and bridges maintained by it for the use of the public. * * * the burden is upon the plaintiff to establish negligence of the county and that its negligent act or omission was the proximate cause of the injury to the plaintiff or that it was a cause that proximately contributed to it." See, also, Dickenson v. County of Cheyenne, 146 Neb. 36, 18 N. W. 2d 559; Wittwer v. County of Richardson, 153 Neb. 200, 43 N. W. 2d 505; Brooks v. Thayer County, 126 Neb. 610, 254 N. W. 413.

The record shows that the traveled surface of both intersecting county roads was free of any defects. Plaintiff failed to sustain the burden of proof required of him, and the trial court properly dismissed defendant Cass County as a party defendant at the conclusion of plaintiff's case.

Plaintiff states that since defendant Cass County was dismissed as a party defendant at the close of plaintiff's evidence it was confusing and misleading to the jury; and that it was error to give instruction No. 3 in part as follows: "The Court has ruled as a matter of law that no verdict may be brought in by you as against the County of Cass, Nebraska, and such County is no longer a party defendant in this case. However, if you find that the County of Cass, Nebraska, was negligent in one or more of the particulars charged against it, and if you find that the defendant was negligent in one or more of the particulars charged against him, all by a preponderance of the evidence, and that the combined or concurring negligence of these two was a proximate cause of the accident, and of plaintiff's injuries, then your verdict should be for the plaintiff."

The record reflects that one of the instructions requested by the plaintiff, which was refused, provides: "You are instructed that the laws of Nebraska provide that where separate independent acts of negligence by different persons combine to produce a single injury,

each one is separately liable for the injury even though one of them alone might not have produced the injury."

The trial court properly submitted the issue of concurrent negligence. There was no prejudice to the plaintiff. Barry v. Moore, 172 Neb. 57, 108 N. W. 2d 401; Wright v. Lincoln City Lines, Inc., 160 Neb. 714, 71 N. W. 2d 182.

On September 30, 1964, all parties, by their respective attorneys, stipulated in writing that a jury trial of the issues would be waived. Trial was set for January 18, 1965. The trial judge died December 4, 1964. On January 11, 1965, defendant Howard by motion, supported by affidavit, asked leave to withdraw his waiver of jury trial. Plaintiff filed an affidavit in opposition to the motion stating, in part, that the purpose of the motion was to delay the trial of the issues, and that the parties and the witnesses to be called would be inconvenienced because it was untimely filed. Plaintiff made no claims of prejudice to him. On January 15, 1965, the court sustained the motion of defendant Howard and ordered the cause tried to a jury at the term beginning April 12, 1965.

Article I, section 6, of the Constitution of the State of Nebraska, provides: "The right of trial by jury shall remain inviolate * * *." Section 25-1126, R. R. S. 1943, provides: "The trial by jury may be waived by the parties in actions arising on contract, and with assent of the court in other actions * * * (2) by written consent, in person or by attorney, filed with the clerk; * * *." In a civil action the right of trial by jury is a personal privilege which may be waived. Berg v. Griffiths, 126 Neb. 235, 252 N. W. 918. Agreements of parties in regard to the trial of a suit are not absolute, even though in writing, and they are not to be treated as contracts to be enforced in all circumstances. They may be set aside by the court in the exercise of a sound discretion in the promotion of justice. See, In re Estate of Statz, 144 Neb. 154, 12 N. W. 2d 829; Rose v. Kahler, 151 Neb. 532, 38 N. W. 2d 391.

This question has not been presented to this court before. We hold the rule to be that it is within the sound discretion of the trial court to permit a party in a civil case to withdraw his waiver of a right to jury trial, if the application to do so is timely made and the waiver has not been acted upon to the prejudice of any party.

Plaintiff alleges in his amended petition that one of the negligent acts of defendant Howard was that he failed to decrease the speed of his automobile as he approached an intersection and a place where special hazards existed, contrary to section 39-7,108, R. R. S. 1943. The court refused to include this allegation in its instruction No. 1 as a specific allegation of defendant Howard's negligence. Our court has uniformly held that it is mandatory for the trial court to correctly instruct the jury as to all issues in the case which are presented by the pleadings and supported by the evidence. See Carlson v. Chambers, 173 Neb. 166, 112 N. W. 2d 729. "It is reversible error for the court to include, in its instructions to the jury, allegations of fact found in the pleadings but which have not been supported by any evidence." Fuss v. Williamson, 159 Neb. 525, 68 N. W. 2d 139. See, also, Colton v. Benes, 176 Neb. 483, 126 N. W. 2d 652. There was no evidence adduced to the effect that defendant Howard did not decrease the speed of his automobile. The only direct testimony as to this allegation was the testimony of the defendant Howard that he did decrease the speed of his automobile; that he was traveling about 50 miles per hour when he was about two-tenths of a mile west of the intersection; and that he then applied his brakes and decreased his speed to about 10 miles per hour at the time of the impact. Plaintiff offered the testimony of Safety Patrolman Raymond Syslo, who investigated the accident, to the effect that the defendant Howard said that his speed was 50 miles per hour. This speed is not related to any particular place or time. We conclude that there was no evidence presented by the plaintiff in support of his allegation of

negligence, and that the trial court properly refused to submit to the jury the failure of defendant Howard to decrease the speed of his automobile as he approached the intersection.

Plaintiff complains that the court failed to submit to the jury his fourth specification of negligence: "That although he knew or should have known that the stop signs had been removed on the north-south intersecting county road, he proceeded in utter disregard of the knowledge thus required and did run into and against the vehicle in which the plaintiff was riding where by the exercise of reasonable care he could have avoided the same." This specification of negligence was a general allegation of negligence and the trial court properly refused to submit it to the jury. Ripp v. Riesland, 176 Neb. 233, 125 N. W. 2d 699.

In instruction No. 1 the court submitted for the jury's consideration as an alleged specific act of negligence of defendant Howard: "That he failed to yield the right-of-way." Plaintiff claims that this was error and prejudicial to him for the reason that he did not plead this as an act of negligence on the part of that defendant. It was error for the trial court to submit this item of negligence for the consideration of the jury; however, a review of the record shows that the submitted item of negligence was in harmony with plaintiff's other allegations of negligence, his theory of recovery, and the evidence adduced by plaintiff at the trial of the issues. The result was that plaintiff had the benefit of the submission to the jury of an item of negligence that he was not entitled to have submitted.

"Where an instruction, although erroneous, is not prejudicially so and cannot by any course of logical reasoning be deemed to have resulted in disadvantage to the complaining party, it is not legal cause or reason for granting a new trial." In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526. See, also, Wright v. Lincoln City Lines, Inc., 163 Neb. 679, 81 N. W. 2d 170; Kline v. Met-

calfe Constr. Co., 148 Neb. 357, 27 N. W. 2d 383. The giving of the instruction was not prejudicial to the plaintiff.

Error is urged by the plaintiff that instructions Nos. 4 and 7, as given by the court, placed too great a burden of proof upon the plaintiff. Instruction No. 4 was: "If you find that the plaintiff has proved by a preponderance of the evidence that the defendant, Wayne Howard, knew that the stop sign in question was not in place at the time of the accident then you are referred to Instructions Nos. 5 and 6 which cover the rules of the road at an open intersection." Instruction No. 7 was: "If you find that the plaintiff has failed to prove by a preponderance of the evidence that the defendant, Wayne Howard, knew that the stop sign in question was not in place at the time of the accident, then the highway on which the defendant, Wayne Howard, was traveling was as to him a favored highway and you should apply the rules of the road set out in Instructions Nos. 8 and 9."

The instructions as given were proper guides for the jury to determine whether the accident intersection was either an open intersection or one involving a favored road. Plaintiff does not object to the purpose of the instruction. He complains that the jury should not have been limited to a finding of what defendant Howard "knew," but the instruction should have permitted the jury to make a finding of what defendant Howard "should have known."

Restatement, Torts, § 839, p. 306, on the subject of "should know," provides: " 'Should know' indicates that the possessor is under a duty to the other to use reasonable diligence to ascertain the existence or nonexistence of the facts in question, and that he would ascertain the existence thereof in the proper performance of that duty."

The record shows that defendant Howard did know that the east-west road was a favored road. He had knowledge that Cass County was in the process of re-

pairing and repainting some of its stop signs throughout the county, and that the stop signs at three intersections within 5 miles of the accident intersection had been removed for that purpose shortly before the accident. Defendant Howard testified that he did not know that the stop sign at the accident intersection had been removed. Immediately following the accident witnesses at the scene testified that defendant Howard stated in substance: "That he knew the county had taken the stop signs down to have them painted." There was conflict in the evidence as to defendant Howard's knowledge of the removal of the stop sign. It was a question for the jury and it was properly submitted by the court under the instructions given. Defendant Howard had no duty, under the record, to inform himself of the condition and location of the stop sign.

"Instructions must be considered and construed together, and 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." Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612.

Plaintiff complains that the issue of unavoidable accident was not pleaded and that the court erred in submitting that issue to the jury by giving instruction No. 15 as follows: "The fact that an accident occurred, or the fact that the plaintiff sustained damages, if such you find, either or both, taken alone without other evidence, facts and circumstances, is no evidence of negligence. When accidents happen as incidents to reasonable use and reasonable care the law affords no redress." In Wright v. Lincoln City Lines, Inc., 163 Neb. 679, 81 N. W. 2d 170, we held that an instruction having similar language did not submit the issue of unavoidable accident when considered along with all of the other instructions. See, also, Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333. Although the giving of instruction

No. 15 was unnecessary, there was no prejudicial error since the jury was properly instructed upon the burden of proving the negligence charged as a proximate cause of the injury.

Plaintiff complains that instruction No. 8 was incomplete because it did not give the duty of all persons to use care in approaching an intersection. Instruction No. 8 was: "A motorist traveling on a favored highway may properly assume that on-coming traffic will yield the right-of-way to him." There is no merit to plaintiff's claim of error. "Instructions should be read and construed together, and, if as a whole they state the law correctly, they will be held sufficient, although one or more of them, considered separately, may be subject to just criticism." Wright v. Lincoln City Lines, Inc., 163 Neb. 679, 81 N. W. 2d 170.

"Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured." Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772. See, also, Wright v. Lincoln City Lines, Inc., 163 Neb. 679, 81 N. W. 2d 170.

This case was submitted to a jury with instructions that were not prejudicial to the plaintiff. The judgment entered by the district court upon the jury verdict should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT WILLIAM LOSIEAU, APPELLANT.

144 N. W. 2d 435

Filed July 29, 1966. No. 36242.

Criminal Law. Under the particular circumstances, defendant was "in custody under sentence" and the remedies of the Post Con-

viction Act may be sought against the validity of a final judgment of conviction, even though the petitioner has not yet begun to serve the sentence imposed.

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

Ray C. Simmons, for appellant.

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

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

MCCOWN, J.

This case involves the application of the Post Conviction Act to a prisoner in custody under one sentence, but seeking to challenge a second conviction and sentence which he has not yet started to serve. See L. B. 836, 1965 Legislature, now sections 29-3001 to 29-3004, R. S. Supp., 1965.

On October 9, 1952, the district court for Douglas County sentenced Robert William Losieau to 20 years on a burglary and habitual criminal conviction. He was paroled on June 22, 1961, and violated his parole November 8, 1961. On January 12, 1962, he was sentenced in the district court for Dodge County to 20 years on a breaking and entering and habitual criminal conviction and returned to the penitentiary. He is presently serving the original burglary sentence from Douglas County, and is tentatively scheduled for release from that sentence March 18, 1967, at which time he will begin serving the Dodge County breaking and entering sentence.

In July 1965 the defendant commenced proceedings in the Dodge County district court to challenge the Dodge County breaking and entering conviction in that court under the Post Conviction Act. On July 20, 1965, counsel was appointed for him. The State moved to dismiss the application for post conviction relief on

the ground that the defendant was not "a prisoner in custody under sentence" of the Dodge County district court but instead was presently serving a sentence from the Douglas County district court and therefore was not entitled to relief on the Dodge County sentence under the Post Conviction Act. On October 28, 1965, the district court sustained the motion, dismissed the post conviction proceeding, and discharged his counsel. Motion to vacate the order of dismissal was overruled on November 8, 1965. Counsel to represent defendant on the appeal was appointed and this appeal followed.

The sole issue is whether or not this proceeding is premature under the provisions of the Post Conviction Act. It is the State's position that the act is not available to attack a sentence not presently being served; that the defendant is not in custody under the sentence being attacked; and that even if the Dodge County conviction were held invalid, it would not entitle him to immediate release from custody. The State contends that the Post Conviction Act was taken "almost verbatim" from Title 28 U. S. C. A., section 2255, page 563; that the federal act is a part of federal habeas corpus remedies; and that federal decisions, holding that habeas corpus and section 2255 remedies are available only to attack a sentence presently being served, are applicable and should be controlling.

It is appropriate here to note that the Post Conviction Act, while closely interrelated, does not affect our habeas corpus proceedings. The act is a comprehensive post conviction measure embracing both federal and state constitutional claims. Its procedures were intended to be swift, simple, and easily invoked. It is cumulative and not concurrent with any other remedy. The language of section 1 of the Nebraska act that "there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable" is not in the federal act. The Nebraska act is broader than the federal act as to the basis for

relief. The relief to be prayed for under our act is "to vacate or set aside the sentence." The court is authorized under our act, depending on the findings, to vacate and set aside the judgment and "discharge the prisoner or resentence him or grant a new trial as may appear appropriate." It is our conclusion that it was not the intent of the Nebraska Legislature to equate our Post Conviction Act literally with section 2255 of the federal act, but rather that it was designed to meet modern judicial requirements, and afford an adequate corrective process for hearing and determining alleged violations of federal and state constitutional guarantees in the developing areas of their emergence.

Even if the State's position on the doctrine of prematurity were accepted, it ignores such recent cases as Martin v. Commonwealth, 349 F. 2d 781 (Fourth Circuit, 1965). There the lower court had ruled that habeas corpus was available only to attack a sentence presently being served. The circuit court reviewed the development of cases relaxing the strictness of the interpretation of "custody" in habeas corpus cases in the federal courts. Judge Sobeloff concluded, and we think rightly, that the United States Supreme Court, if faced with the issue today, might well reconsider McNally v. Hill, 293 U. S. 131, 55 S. Ct. 24, 79 L. Ed. 238. That case, of course, is the historical foundation upon which virtually all the cases cited by the State rest. The Fourth Circuit Court of Appeals held in the Martin case that since the defendant's escape and larceny convictions barred his eligibility for parole on the prior second degree murder charge he was presently serving, he was "in custody" within the meaning of Title 28 U. S. C. A., section 2241, page 4. The court determined that the subsequent convictions, which caused the vast difference between continued confinement without eligibility for parole and conditional release were in the truest sense a present restraint upon Martin's liberty. In one of the latest United States Supreme Court cases

cited by the State, Heflin v. United States (1959), 358 U. S. 415, 79 S. Ct. 451, 3 L. Ed. 2d 407, the court was even then divided on the issue of whether section 2255 could be used to question a sentence which the prisoner had not begun to serve. Even in that case, however, the entire court then proceeded to grant appropriate relief under Rule 35 of the Federal Rules of Criminal Procedure as to the sentence not yet being served. The essential authority to correct sentences granted by Rule 35 of the Federal Rules of Criminal Procedure is incorporated in our Post Conviction Act. Long prior to the Heflin case, *supra*, the United States Supreme Court had specifically held that where the revocation of parole was due to the second conviction, habeas corpus was not premature even though the second sentence had not begun to be served. See Ex Parte Cleio Hull (1941), 312 U. S. 546, 61 S. Ct. 840, 85 L. Ed., 1034. In the case at bar, defendant's motion specifically alleges "although petitioner is not now serving" the Dodge County sentence, "it was due to said sentence and illegal conviction that petitioner was returned to the Nebraska State Penitentiary as a parole violator."

Some states have already adopted the view that the modern concept of habeas corpus should permit a prisoner to litigate his right to liberty at a future date. A comprehensive review of the doctrine of prematurity and the developing concept of habeas corpus and post conviction remedies are set out in Commonwealth v. Myers, 419 Pa. 1, 213 A. 2d 613.

A slavish adherence to the historical employment of the writ of habeas corpus necessitates a disregard of the present practical consequences to the effective administration of justice as well as a distortion of the legislative intent in adopting a post conviction act. The most obvious and critical problem is the effect of the resulting delay. The ability to reach the truth in virtually any hearing progressively deteriorates with the passage of time. Were a retrial to be required, a serious,

and in many instances fatal, load might be placed on the State itself in its ability to present its case on the retrial. Witnesses may have disappeared or died, memories will suffer the attrition of time, and other evidence may have become inaccessible. The same factors may affect the defendant's ability to establish his own allegations at any hearing. In our changing concepts of criminal procedure and constitutional rights, unnecessary delay becomes abhorrent.

Logic, necessity, and the practical considerations of modern jurisprudence make it imperative that historical doctrine not outweigh effective criminal procedure. A refusal to recognize the jurisdiction of the court here would necessitate placing preeminent emphasis on the history of the writ of habeas corpus rather than on the practical and effective employment of the Post Conviction Act. We, therefore, hold that under the circumstances here, the defendant was "in custody under sentence" and the remedies of the Post Conviction Act may be sought against the validity of a final judgment of conviction, even though the petitioner has not yet begun to serve the sentence imposed.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. CARIL ANN FUGATE, APPELLANT.

144 N. W. 2d 412

Filed July 29, 1966. No. 36259.

1. **Criminal Law. The district court may adopt reasonable procedures for determining what the motion and the files and records in a case show before granting a full evidentiary hearing** under the Post Conviction Act.
2. ———. **Where an issue of fact is readily determinable by ref-**

erence to the files and records of the case, an evidentiary hearing upon a motion under the Post Conviction Act may be denied.

3. **Criminal Law: Appeal and Error.** In an appeal from an order denying an evidentiary hearing upon a motion under the Post Conviction Act, the files and records of the district court which were considered by the district judge in ruling upon the motion shall accompany the transcript filed in this court. The transcript in such a case shall contain a certificate of the district judge identifying the files and records as those which were considered in ruling upon the motion.
4. **Criminal Law.** Where the allegations in a motion under the Post Conviction Act are vague and conclusory in nature, relate to matters which have been fully litigated previously, or are effectively disproved by the record, the motion should be denied.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and remanded.

John McArthur and Merril R. Reller, for appellant.

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

Heard before CARTER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and MURPHY, District Judge.

BOSLAUGH, J.

The defendant, Caril Ann Fugate, was convicted of first degree murder in 1958 and sentenced to life imprisonment. The judgment was affirmed by this court in Fugate v. State, 169 Neb. 420, 99 N. W. 2d 868. A petition for a writ of certiorari was denied by the Supreme Court of the United States in Fugate v. Nebraska, 363 U. S. 851, 80 S. Ct. 1631, 4 L. Ed. 2d 1733.

While the first proceeding in error was pending in this court, the defendant filed a motion for new trial upon the ground of newly discovered evidence. The motion was overruled by the trial court and its order was affirmed by this court in Fugate v. State, 169 Neb. 434, 99 N. W. 2d 874.

In 1964, a proceeding was commenced in the United States District Court to obtain a writ of habeas corpus to release the defendant from imprisonment. See Fugate

v. Ellenson, 237 F. Supp. 44. While that proceeding was pending, the 1965 Legislature enacted L.B. 836, the Post Conviction Act, Chapter 29, article 30, R. S. Supp., 1965. As a result of this legislation, the proceeding in the United States District Court was dismissed without prejudice to the right of the defendant to seek relief under the new statute. See Ellenson v. Fugate, 346 F. 2d 151. The defendant then commenced this proceeding by motion filed in the district court.

The trial court granted the county attorney 5 days in which to show cause why a hearing should not be granted upon the defendant's motion. A return was filed which alleged, in substance, that the defendant's motion and the files and records in the case showed that the defendant was not entitled to any relief. Upon consideration of the motion, and the files and records in the case, the trial court found that the relief requested should be denied and the motion overruled. The defendant's motion for new trial was overruled and she has appealed.

The case is here for review upon the motion and the files and records of the case. In order for this court to review the order of the district court, it is necessary that the files and records of the case, which were considered by the district judge, be available to this court.

The praecipe filed by the defendant in the lower court requested that the transcript include the files and records of the case. However, the transcript filed in this court on this appeal contains only the motion of the defendant filed on June 23, 1965, and pleadings and orders filed after that date. Such a transcript alone is inadequate for the purpose of appellate review of the order entered in this case.

Although it is essential that the files and records of the case be available to this court in cases of this nature, it is not necessary that all of the files and records be copied and certified to this court as a part of the transcript. It is sufficient if the files and records of the case accompany the transcript and the transcript con-

tain a certificate by the district judge identifying the files and records as those which were considered by the court in ruling upon the motion.

In this case, at the request of this court, the files and records of the district court were transmitted to this court by the clerk of the district court. We believe this procedure should be followed in each case where an appeal is taken from an order denying an evidentiary hearing under the Post Conviction Act. Accordingly, we direct that in an appeal from an order denying an evidentiary hearing upon a motion filed under the Post Conviction Act, the files and records of the district court which were considered by the district judge in ruling upon the motion shall accompany the transcript filed in this court. The transcript in such a case shall contain a certificate of the district judge identifying the files and records as those which were considered in ruling upon the motion.

Section 29-3001, R. S. Supp., 1965, provides that a hearing shall be granted "Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief * * *." The defendant contends that where a prisoner alleges facts which, if true, would entitle him to relief, a hearing must be granted upon the motion.

The federal statute (Title 28 U. S. C. A., § 2255, p. 563) contains a provision that a hearing shall be granted "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief * * *." Under this provision, the federal courts have held that a hearing is not required where the motion and the files and records of the case show that the prisoner is not entitled to relief. See, Hodges v. United States, 368 U. S. 139, 82 S. Ct. 235, 7 L. Ed. 2d 184; Butler v. United States, 340 F. 2d 63, certiorari denied, 382 U. S. 847, 86 S. Ct. 92, 15 L. Ed. 2d 87.

In State v. Woods, *ante* p. 282, 142 N. W. 2d 339, we held that the district court may adopt reasonable pro-

cedures for determining what the motion and the files and records show before granting a full evidentiary hearing. Where an issue of fact is readily determinable by reference to the files and records of the case, a hearing may be denied. State v. Losieau, *ante* p. 671, 144 N. W. 2d 406.

The defendant's motion alleges that she was taken into custody in Wyoming on January 30, 1958; that a complaint charging her with first degree murder had been filed on January 29, 1958, but that knowledge thereof was kept from her and she was not aware of the complaint; that she was induced by promises and threats to make statements and to waive her rights without assistance of legal counsel, although she had requested legal counsel and her requests were ignored; that at other times and occasions the defendant requested the assistance of legal counsel, but that her request was ignored and denied; that she was urged to make statements and did make statements; and that the statements elicited from her were used against her over objection and resulted in her conviction.

The motion further alleges that on February 3, 1958, the defendant was taken before the county judge and required to plead to a complaint without the assistance of counsel; that she was held at the Lincoln State Hospital for the purpose of frightening her; that as a result, her ability to resist the urging of the county attorney, deputy county attorney, and law enforcement officers was seriously impaired; that she was induced by trickery and deceit to write a letter which was used to induce a witness to testify aaginst her; that she was 14 years of age at the time of her trial and incapable of preserving or exercising her legal rights without the assistance of counsel; that she was denied effective aid of counsel because the court refused to permit legal counsel of her choice to participate in the trial; that false and inflammatory information concerning her was circulated during her trial; that false testimony was knowingly used

by the State against her; that one of the jurors at her trial had placed a wager to the effect that she would be sentenced to the electric chair; that his participation in the trial deprived her of a trial by an impartial jury; and that the cumulative effect of all of the circumstances alleged was to deprive the defendant of her constitutional rights.

The defendant's principal complaint centers around the use by the State of the statements which were obtained from her before she was represented by counsel. It has recently been determined that the rule of Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, is not retroactive and does not apply to cases in which the trial began before June 22, 1964. Johnson v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882. This does not prevent a review by post conviction procedure of the question of whether statements obtained from a defendant were made voluntarily. In such a review, all of the facts and circumstances involved may be considered. Davis v. North Carolina, 384 U. S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895.

The defendant in this case was 14 years of age at the time that she was taken into custody January 30, 1958. She then had been charged with first degree murder. Counsel was not appointed for her until February 15, 1958. While the defendant was in custody, and before counsel had been appointed for her, she was questioned on a number of occasions and made statements which were introduced in evidence by the the State at her trial. There is nothing in the record which shows that these statements were other than voluntarily made. But this does not prevent the defendant at this time from obtaining a review as to the voluntariness of the statements through post conviction procedure upon evidence other than that which appears in the record.

The trial court determined in the first instance that the statements made by the defendant were voluntary.

See State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66. By proper instruction, the issue of voluntariness was again submitted to the jury for its determination.

The issue was again raised in the motion for new trial, but abandoned in the error proceeding in this court. Under these circumstances, we do not believe that the defendant should be deprived of a post conviction review at this time upon the ground that the matter has been fully litigated.

The record fully sustains the action of the trial court in denying the defendant an evidentiary hearing upon the other allegations in the motion. These allegations are either vague and conclusory in nature, relate to matters which have been fully litigated previously, or are effectively disproved by the record.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, v. DARREL F. PARKER, APPELLANT.

144 N. W. 2d 525

Filed July 29, 1966. No. 36262.

1. **Constitutional Law: Criminal Law.** The case of Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, affects only those cases in which the trial began after June 22, 1964.
2. ———: ———. In the absence of a showing of real miscarriage of justice, the question of whether a confession was obtained unlawfully cannot be raised under sections 29-3001 to 29-3004, R. S. Supp., 1965, where the facts relied on by the petitioner have been the subject of and decided in a former appeal to this court from conviction.

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

Schrempp, Lathrop, Rosenthal & Bruckner, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

Heard before CARTER, BOSLAUGH, BROWER, SMITH, and McCOWN, JJ., and MURPHY, District Judge.

BROWER, J.

The appellant, Darrel F. Parker, was convicted of the first degree murder of his wife, Nancy Parker, and sentenced to life imprisonment by the district court for Lancaster County on June 2, 1956.

From his conviction and sentence appellant timely brought error to this court, which affirmed the judgment of the trial court in Parker v. State, 164 Neb. 614, 83 N. W. 2d 347. His motion for rehearing was overruled. A petition for certiorari to the Supreme Court of the United States was denied April 14, 1958. Parker v. Nebraska, 356 U. S. 933, 78 S. Ct. 775, 2 L. Ed. 2d 763.

Appellant, in 1962, filed his petition for a writ of error coram nobis in the district court for Lancaster County, which was dismissed by that court. On appeal to this court, the judgment of the trial court was affirmed. Parker v. State, 178 Neb. 1, 131 N. W. 2d 678.

A petition for a writ of habeas corpus was filed by appellant in the United States District Court for the District of Nebraska. This petition was dismissed after the passage of the law relating to post conviction procedure, sections 29-3001 to 29-3004, R. S. Supp., 1965, because the petitioner had not exhausted his state remedies.

On June 10, 1965, the appellant filed his verified motion for relief under sections 29-3001 to 29-3004, R. S. Supp., 1965, in the district court for Lancaster County. A hearing was there held at which the transcript of the evidence and exhibits at appellant's preliminary hearing and the transcripts, bills of exceptions and exhibits, both at the original trial at which appellant was convicted and sentenced and the hearing on his petition for a writ of error coram nobis, were received in evi-

dence. No further evidence was offered. At the conclusion of this trial the district court denied his motion and the appellant appeals to this court from an order overruling a motion for a new trial.

The facts surrounding the murder of Nancy Parker on December 14, 1955, and the actions of the appellant following her death are set forth in the opinion of this court in Parker v. State, 164 Neb. 614, 83 N. W. 2d 347. The interrogation of appellant by John E. Reid alone, leading to his confession, and the preparation and reduction thereof to writing by the court reporter and its signature by the appellant before witnesses is there related. The oral confessions to law enforcement officers immediately following the interrogation is also discussed.

The appellant's assignment of errors is repetitious, but the questions which they pose will be considered in this opinion.

Several of the errors urged by appellant relate to the appellant's interrogation leading to his confession without the presence of his attorney. It affirmatively appears from the record that appellant was not represented by counsel during several hours of questioning. Neither was he advised of any right to the presence of an attorney, nor that any statement he made might be used against him. The contentions of the appellant here asserted were raised in the trial court at the hearing on the present motion and there related by his counsel to the rules laid down by the Supreme Court of the United States in the case of Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977. It was asserted that the doctrine of Escobedo must be considered retroactively and governed the interrogation of the appellant which preceded his confessions in December 1955. Subsequently the Supreme Court of the United States, in Johnson v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882, held that the case of Escobedo v. Illinois, *supra,* affects only those cases in which the trial began after June 22, 1964. It has no

application to appellant's confession and his contention based upon that case cannot be sustained.

Appellant contends his written and oral confessions were involuntary and were procured in violation of the due process clause of the Constitutions of the United States and the State of Nebraska. At all of the trials and hearings, from this preliminary to and including the consideration of the present motion, appellant was represented by able counsel. All questions now raised concerning whether his confession and oral statements made immediately thereafter were voluntary or involuntary were hotly contested at length in the trial when he was convicted and sentenced, which continued over 17 days. He then had four attorneys of his own choice. The evidence then given and received is very voluminous, particularly on the issue of the voluntariness of his confessions. The evidence with respect to the written confession was presented to the court in the absence of the jury. The trial court thereafter held that the written confession was voluntary before it was permitted to be heard by the jury. Even more extended testimony presented both by the State and the appellant was thereafter heard before the jury on the written and oral confessions. After the issue was presented to the jury under the trial court's instructions, the jury by its verdict found the confessions voluntary as a matter of fact. It was again reviewed by the trial court on considering a motion for a new trial. It was considered by this court and reviewed in its opinion in Parker v. State, 164 Neb. 614, 83 N. W. 2d 347. Certiorari to the Supreme Court of the United States was denied in Parker v. Nebraska, *supra*. It was reviewed by another judge of the trial court at the hearing of the motion now before us on appeal.

Objection at one time was made to the oral confessions because separate and independent evidence as to their being voluntary was not first produced before the court in the absence of the jury. This objection,

however, was thereafter in effect withdrawn, as stated in our opinion in Parker v. State, 164 Neb. 614, 83 N. W. 2d 347. The oral confessions followed immediately after the written one and much of the evidence with respect to the voluntariness of the written confession applied to the oral ones also.

The law relating to post conviction procedure, sections 29-3001 to 29-3004, R. S. Supp., 1965, is quite new. In many of its aspects it is similar to the federal statute, Title 28 U. S. C. A., § 2255, p. 563. The case of Hodges v. United States, 282 F. 2d 858, certiorari denied, 368 U. S. 139, 82 S. Ct. 235, 7 L. Ed. 2d 184, was one where the accused made a confession of guilt. Like questions as to the confession being voluntary were heard in the cited case first by the trial court alone and by it held to be voluntary and thereafter submitted to the jury. The jury found the confession voluntary and the defendant in that case was convicted. The accused, without appealing, attempted by motion filed under 28 U. S. C. A., § 2255, to have the issue redetermined. The United States Court of Appeals, District of Columbia Circuit, in its opinion stated: "It may be that less than 4% of such petitions ultimately prove meritorious. Yet we must scrutinize all of them with care, not only because it is our duty under the statute but because we are traditionally obligated to give relief in habeas corpus—for which the statute provides at least a partial substitute—in cases where a clear miscarriage of justice has occurred. But, absent a showing of a real miscarriage of justice, I think we must hold to the general rule that the admission of a confession at a plenary trial is not subject to attack under Section 2255 on the ground that the confession was coerced, or was given during a period of illegal detention. Allowing such collateral attacks to be made would permit the reopening of many of the most lengthy and hotly contested criminal trials—at a time when recollections may have dimmed and witnesses may have disappeared."

To the same effect, see State v. Howard (Mo.), 383 S. W. 2d 701, interpreting the post conviction procedure of Missouri.

In Butler v. United States, 340 F. 2d 63, certiorari denied, 382 U. S. 847, 86 S. Ct. 92, 15 L. Ed. 2d 87, the court held that although strict doctrine of res judicata does not apply to a motion to vacate a judgment, under 28 U. S. C. A., § 2255, it cannot serve office of an appeal, and issues disposed of on prior appeal will not be reviewed again on motion to vacate the judgment. See, also, Evans v. United States, 346 F. 2d 512. We hold that in the absence of a showing of real miscarriage of justice, the question of whether a confession was obtained unlawfully cannot be raised under sections 29-3001 to 29-3004, R. S. Supp., 1965, where the facts relied on by the petitioner have been the subject of and decided in a former appeal to this court from conviction.

Out of abundant caution we have carefully reviewed the evidence in this extended record now before us. After the death of his wife, appellant accompanied her body to Des Moines, Iowa, for burial. While in that city he was requested by a phone call from the county attorney to return to Lincoln to assist in the investigation of his wife's murder. He was told to go directly to the highway patrol headquarters to avoid publicity. Following these instructions, on arrival at the headquarters he was introduced to John E. Reid, an eminent criminologist from Chicago. Reid interrogated him alone in a small room with a lie detector. The questioning continued for several hours, though in two periods with a considerable interval between. In the interval he was alone in another room. Appellant maintains he was lured into a trap and his testimony was that the confession was obtained by constant grilling while he was still emotionally disturbed by the tragic death of his wife. He testified this continued until he lost all sense of what was going on or what he was doing, and he had no knowledge of what he signed or said. He says

that during the period which he did remember, his hair was pulled and he was bumped under the chin by Reid repeatedly. Reid denies this but admits gently stroking appellant's hair and lifting his chin when asking him to look into his eyes.

On the other hand, the evidence shows the appellant was 24 years old. He had been graduated from high school as the valedictorian of his class. Thereafter he attended Iowa State College where he received above-average grades. There he was graduated, receiving a degree of Bachelor of Science, majoring in forestry. He was steward of his fraternity and took part in college activities. He had traveled somewhat. After confessing to Reid, he repeated the substance of his written confession to two law enforcement officers in Reid's absence. The oral confessions tend to strengthen the written one. He then made no complaint of his treatment by Reid. The written confession was taken in shorthand by the court reporter and thereafter transcribed by her. It was read to him in the presence of the reporter and four enforcement officers. It was signed after corrections made and initialed by him and witnessed by the reporter and two of the enforcement officers present. They testified he made no objections when it was read although asked if he had been threatened or had been promised anything. Again he made no complaint of his treatment and appeared normal and unemotional at that time. He had not been arrested and the complaint for first degree murder was first filed in county court the next day. The only evidence indicating detention was his testimony that while he was alone in a room before the second interrogation at which he confessed, he got up to get a chair to stretch his legs out on, when Captain Smith came running in and said, "Oh, I thought you were going to—oh, oh, that's all right." He says he then realized he could not go.

This conflicting evidence was submitted to the trial court which held the confession voluntary. The jury

found it voluntary. It has now been considered by two trial judges, each of whom reviewed it again on motions for new trial. It was previously reviewed by this court on appeal.

Appellant complains of the misconduct of the prosecuting attorney in his opening statement to the jury. This was considered by this court in its opinion in Parker v. State, 164 Neb. 614, 83 N. W. 2d 347, and because of the admonition of the court and the failure of counsel to move for a mistrial, this court there held appellant had no ground for complaint.

Appellant also assigns as error the admission of testimony concerning acts and condition of Nancy Parker prior to her death. The question was considered by this court in Parker v. State, 164 Neb. 614, 83 N. W. 2d 347, where it was held that its admission did not prejudice the appellant.

We find no evidence of a real miscarriage of justice. We think the same issues should not now be relitigated.

It follows that the judgment of the trial court should be and is affirmed.

AFFIRMED.

ROY A. SANKEY, APPELLANT AND CROSS-APPELLEE, V. WALTER WILLIAMSEN, APPELLEE AND CROSS-APPELLANT.
144 N. W. 2d 429

Filed July 29, 1966. No. 36268.

1. **Bailments.** The burden is upon the party who seeks recovery to establish upon the whole case facts and circumstances showing a breach by the opposite party of some duty under the bailment upon which a liability may be predicated.
2. ———. When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee and makes him responsible for ordinary negligence.
3. **Negligence.** In an action for negligence based on specified acts of negligence, the plaintiff, in order to recover, must establish the specific negligence alleged and the doctrine of res ipsa loquitur cannot be applied.

4. ———. **In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.**
5. **Appeal and Error. The remedy for the failure on the part of a plaintiff appellee to comply with the provisions of section 26-1,109, R. R. S. 1943, is the entry of an order nonsuiting the plaintiff unless a petition on appeal is filed within the time specified.**

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and dismissed.

T. R. P. Stocker, for appellant.

Hal W. Bauer, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

This is a suit to recover damages to a farm tractor owned by Roy A. Sankey, appellant, hereinafter referred to as plaintiff, which he loaned to his tenant, Walter Williamsen, appellee, hereinafter referred to as defendant, to use and perform farm work incident to their oral crop-share lease.

On February 18, 1964, plaintiff recovered judgment for $610.24 in the municipal court of Lincoln, Nebraska; on March 9, 1964, defendant perfected an appeal to the district court for Lancaster County, Nebraska; and on June 19, 1964, defendant moved for judgment for plaintiff's failure to file petition on appeal within 50 days after rendition of judgment in the municipal court, citing section 26-1,109, R. R. S. 1943. By leave of court, plaintiff filed his petition, later amended, alleging defendant's specific acts of negligence with respect to the tractor summarized as failure to supply oil and water, permitting revolving discs to cut tires, driving at high speed, chasing cattle, driving across rough ground, and bending frame; and praying for $900 in damages. Defendant answered by general denial and alleging failure

of plaintiff to file a petition within 50 days. Jury trial was waived and trial had to the court. At conclusion of all the evidence, defendant moved for a directed verdict which was denied and judgment for $106.83 was entered for plaintiff. Plaintiff's motion to correct or modify the judgment for the full amount of damages proved, or, in the alternative, for a new trial, was overruled; and defendant's motion for new trial and his renewed objection to the jurisdiction of the court were denied. Plaintiff has appealed to this court, and the defendant has filed his cross-appeal.

In the summer of 1961, plaintiff orally leased some farm ground in Lancaster County, Nebraska, to defendant, a plumber by occupation, who possessed no farming equipment. Plaintiff owned a 1958 model tractor and other farming equipment which he loaned to defendant to use in their farming operation. Defendant had continuous but not exclusive possession of the tractor from September 30, 1961, to the first Monday in July 1962, when plaintiff reclaimed possession of the tractor and equipment while defendant was absent from the farm. During this same period, there was some disagreement between plaintiff and defendant concerning the terms of their lease not related to the issues of this case. The record fails to show that any special instructions as to either the care or use of the tractor were given by plaintiff to defendant at any time. During the period of defendant's possession, plaintiff and his employees used the tractor on the farm upon several occasions for seeding, pulling fence posts, and pulling other machinery.

Plaintiff's testimony is that when he regained possession of the tractor from the defendant in July 1962, he observed then that the engine did not function properly and it had no power; that the tires had been cut; that the steering arm, grill, and fenders were bent; and that the front carriage mount bearing was out. The only direct evidence offered on behalf of the plaintiff as to defendant's negligence was that on one occasion the

plaintiff saw the tractor being driven on the highway "above the customary manner" in reference to speed, that he saw defendant's sons, ages 13 to 16 years, driving the tractor in the fields over narrow ditches 2 to 3 feet in height, and that he saw defendant's sons chasing cattle with the tractor. Defendant testified that the tractor worked well at all times with the exception of one ignition failure which was repaired; that on the day before plaintiff repossessed it, defendant was cultivating milo; that he changed oil regularly; that water and anti-freeze were kept in the radiator as needed; that the tires were 3 years old when he got the tractor; that when plaintiff regained possession of the tractor there were some cuts and bruises on the tires and one lug was cut off, all as a result of normal use and wear; that he had driven the tractor on the county road between 15 and 18 miles per hour which was the maximum speed permitted by the governor on the motor; that his sons used the tractor to go down to the pasture to get the cattle, but did not chase the cattle; and that the tractor was used in the normal manner to perform the farming operation on that farm.

In support of claimed damages, plaintiff shows that one tractor tire was repaired on August 24, 1964, 2 years after the alleged acts of negligence, in the sum of $24.75; that a motor tune-up was made on August 9, 1962, in the sum of $81.88, which included several parts and services not related to the suit, but the exact amount not appearing in the record; and that it was determined in 1962, that the tractor engine had a cracked block, which was repaired on December 11, 1962, at a cost of $610.24.

The relationship of bailor and bailee existed between the parties; they intended that the tractor and other equipment were to be used by the defendant for the mutual benefit of both the plaintiff and defendant on the plaintiff's farm. The tractor was used only for farming purposes. "The burden is upon the party who seeks

recovery to establish upon the whole case facts and circumstances showing a breach by the opposite party of some duty under the bailment upon which a liability may be predicated. * * * When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee and makes him responsible for ordinary negligence." Fuelberth v. Splittgerber, 150 Neb. 309, 34 N. W. 2d 380. "* * *ordinary care means such care as ordinarily prudent men, as a class, would exercise in caring for their own property under like circumstances, * * *." 8 Am. Jur. 2d, Bailments, § 207, p. 1094.

Plaintiff claims error in that the trial court failed to apply the doctrine of res ipsa loquitur. Plaintiff's petition alleges specific acts of negligence. This court has consistently adhered to the rule: "In an action for negligence based on specified acts of negligence the plaintiff, in order to recover, must establish the specific negligence alleged and the doctrine of res ipsa loquitur cannot be applied." Roos v. Consumers Public Power Dist., 171 Neb. 563, 106 N. W. 2d 871.

"It is a fundamental rule of negligence that to be actionable the negligence charged must be the proximate cause of the injury. * * * In other words, the negligence must be such that the accident would not have occurred but for the existence of the negligence charged. * * * The burden of proof is on the plaintiff, in order to recover in an action for negligence, to prove that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it." Odom v. Willms, 177 Neb. 699, 131 N. W. 2d 140. See, also, Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531, 82 A. L. R. 2d 714.

The record fails to show any competent evidence to support any of the specific acts of negligence alleged by the plaintiff that were the proximate cause of any of the damage claimed by him. At the conclusion of all

the evidence the defendant's motion for judgment should have been sustained.

The defendant urges that the trial court erred in denying his motion for judgment for the reason that plaintiff failed to file his petition on appeal within 50 days from the date of judgment for the plaintiff in the municipal court as provided in section 26-1,109, R. R. S. 1943. Recently this court in Anoka-Butte Lumber Co. v. Malerbi, *ante* p. 256, 142 N. W. 2d 314, considered section 27-1306, R. R. S. 1943, which statute refers to appeals from the county court and justice of peace courts having substantially the same language as section 26-1,109, R. R. S. 1943. In that case we held: "There is no question that section 27-1306, R. R. S. 1943, is intended to prevent unnecessary delay in the administration of justice. * * * The proper procedure in such situation would appear to be for the appellant to direct the court's attention to the fact that the appellee has not filed a petition on appeal within the time required. The court should then order that the plaintiff be nonsuited unless a petition on appeal is filed within a time specified." We hold that the procedure outlined in the Anoka-Butte Lumber Co. case shall also apply to appeals under section 26-1,109, R. R. S. 1943.

Other errors are argued by both plaintiff and defendant; however, for reasons heretofore given it is unnecessary to discuss them.

The judgment of the trial court is reversed, and the cause is dismissed at plaintiff's costs.

REVERSED AND DISMISSED.

CLARA HUMANN. APPELLEE, V. FREDERICK O. HUMANN, APPELLANT.

144 N. W. 2d 723

Filed September 2, 1966. No. 36154.

1. **Divorce. There is no general rule as to the degree of corrobo-**

ration required in a divorce action. The determination as to the sufficiency of the corroboration in each case is made upon the facts and circumstances in that case.

2. ———. Ordinarily acts of personal violence by a husband toward his wife are not justified by conduct on the part of the wife that does not threaten bodily harm.

3. **Trial.** Where the evidence is irreconcilable and in direct conflict, this court will consider that the trial court had the opportunity of observing the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other.

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

Johnston & Grossman and Miles W. Johnston, Jr., for appellant.

Rollin R. Bailey, Davis, Thone, Bailey, Polsky & Hansen, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and KUNS, District Judge.

MCCOWN, J.

Clara Humann, plaintiff and appellee, instituted this divorce action in the district court for Lancaster County, Nebraska. The case was transferred to the separate juvenile court of Lancaster County where Frederick O. Humann, defendant and appellant, filed his answer and cross-petition. After trial, the court found for the plaintiff upon the ground of extreme cruelty. Plaintiff was granted an absolute divorce. General custody of all the children was placed in the chief juvenile probation officer of the court. Physical custody of and support allowances for the three youngest children were granted to plaintiff. Physical custody of the two oldest children was granted to defendant. Defendant has appealed.

The record shows that the parties were married in October 1949, and had lived in Lincoln, Nebraska, continuously since that time. Five children were born to them between 1950 and 1958. Defendant held a perma-

nent job as a painter and also did outside work at various times. Plaintiff also had worked during most of their married life. The family had always been hard pressed financially, with consequent arguments and other disputes directly or indirectly related to finances. Plaintiff testified to conduct and various actions which she contended were cruel. However, the record reflects only two specific incidents which should be considered as the basis for the general finding of extreme cruelty. The first incident occurred in September 1964, while defendant was being treated in a hospital. The finding of extreme cruelty is not supported by sufficient evidence, however, as to this incident.

The second incident occurred in the home on February 7, 1965, and as to this incident, the critical question is the sufficiency of the corroborative testimony. The testimony of the plaintiff and defendant was in direct conflict. The plaintiff testified that the defendant grabbed her arms, struggled with her, and shoved her against the furniture and down to the floor; and that he tore her blouse, knocked a cup of coffee out of her hand and spilled it over her blouse, and tried to shove her down the back step. The defendant's version was that the plaintiff had a cup of coffee in her hand; that he placed his hands on her shoulders trying to talk with her; that she turned around and whirled; that his finger got caught in her blouse, which tore it; and that when she whirled, she kicked at him and spilled the coffee. He accounts for the bruises on her arms by suggesting that she must have hit her arm on the doorcasing when she was swinging at him. He denies that he grabbed her or did anything to cause any bruises.

Mrs. Marianne Rush testified that on February 8, 1965, she saw the plaintiff in the store and noticed her arm was black and blue and skinned. She was told by the plaintiff that the defendant had done it. Dr. E. T. Hobbs testified that the plaintiff consulted him on February 9, 1965, at his office; that she had bruises on her shoulders,

upper arms, and both knees; that there were four spots on her upper arm that were darker than the remainder of the bruised area; that these were on both arms; and that they would correspond to a finger or thumb pretty well. The history given to the doctor was that her husband had manhandled her and given her these bruises. Plaintiff and defendant each denied the other's version of the occurrence. No other persons were present and there was no testimony from others concerning the sounds of an altercation or the events at or immediately after the time of the occurrence.

The defendant asserts that the evidence is insufficient independent corroborative evidence under the provisions of section 42-335, R. R. S. 1943. That section provides: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose."

There is no general rule as to the degree of corroboration required in a divorce action. The determination as to the sufficiency of the corroboration in each case is made upon the facts and circumstances in that case. Ordinarily acts of personal violence by a husband toward his wife are not justified by conduct on the part of the wife that does not threaten bodily harm. Clark v. Clark, 178 Neb. 796, 135 N. W. 2d 481.

The case of Kidder v. Kidder, 159 Neb. 666, 68 N. W. 2d 279, appears determinative on the issue of corroboration. In that case, the plaintiff had testified that the defendant had struck her and raised a large lump on the side of her face, and that it became discolored. The defendant's version was that the plaintiff had threatened to strike him with a hammer, whereupon he fell against her, and she fell out of a jeep and in some manner received the injury. There were no witnesses to the incident, but three witnesses saw the lump on the day the blow was inflicted and were told by the plaintiff that

the lump resulted from striking by the defendant. This court held that this evidence was sufficient corroboration under the facts in that case.

In the case before us, the evidence of two witnesses tends to corroborate the plaintiff's version of the incident rather than the defendant's version. In some aspects of the facts, the determination of the issue of sufficiency of the evidence might well be said to be close. Under these circumstances, where the evidence is irreconcilable and in direct conflict, this court will consider that the trial court had the opportunity of observing the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other. See Ivins v. Ivins, 171 Neb. 838, 108 N. W. 2d 99. Under the facts in this case, the corroboration was sufficient and the finding and determination of the separate juvenile court was correct.

The defendant contends that his evidence was sufficient to entitle him to a finding of extreme cruelty on the part of the plaintiff. In view of his testimony that he did not wish a divorce, but rather to be reconciled, it is not surprising that his evidence was weak. As to a complaint about the association of the plaintiff with another man, there was no evidence of misconduct upon her part. As to a complaint that plaintiff had threatened defendant with a knife, the evidence and corroboration was insufficient to show the making of such a threat, or if made, that it amounted to extreme cruelty. The trial court found correctly that there was insufficient evidence to support defendant's allegations in his cross-petition.

The defendant also assigns error in the division of custody of the children between the plaintiff and the defendant. At the trial, the two oldest children indicated that they wished to live with their father. The three youngest children did not testify, presumably because they had not attained the age and ability to express an intelligent preference as to custody. General custody of

all the children was placed with the chief juvenile probation officer of the court, with directions to place the physical custody of the three youngest children with the plaintiff and of the two oldest with the defendant.

Section 42-311, R. R. S. 1943, provides in part: "Upon * * * decreeing a divorce, * * * the court * * * may determine with which of the parents the children or any of them shall remain." The defendant contends that it is contrary to public policy to divide custody of children between parents and thus separate the children. This is not the law. Waldbaum v. Waldbaum, 171 Neb. 625, 107 N. W. 2d 407. The record does not show any abuse of discretion by the trial court in making provision for the custody of the children and for the future maintenance of the children in plaintiff's custody.

For the reasons stated, the judgment of the separate juvenile court is affirmed. The plaintiff is allowed $250 for the services of her attorney in this court.

AFFIRMED.

KUNS, District Judge, dissenting.

I concur entirely with the portion of the decision by the majority which affirms the denial of the divorce to the defendant, the provisions for the custody of the children, and the support allowed to the plaintiff. I respectfully dissent, however, from the affirmance of the action of the trial court in granting a decree of absolute divorce to the plaintiff for the reasons hereinafter set forth.

The statement of facts in the majority opinion conforms to the record in all respects and there is no reason to question any finding with respect to the credibility of any of the witnesses, including the parties. The record, however, does not contain sufficient evidence to constitute corroboration, as required by section 42-335, R. R. S. 1943.

It should be recognized at the outset, that jurisdiction over the matter relating to divorce arises entirely from statute and has never been considered to be within the

equity jurisdiction of the court, even though divorce actions are tried as in equity. In Detter v. Erpelding, 176 Neb. 600, 126 N. W. 2d 827, it was said: "Divorce and its incidents are matters of public concern over which the Legislature has authority. What policies to adopt concerning its regulation are for it to decide and are not for the courts. * * * Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist." Similar statements are contained in Harrington v. Grieser, 154 Neb. 685, 48 N. W. 2d 753, and Cizek v. Cizek, on rehearing, 69 Neb. 800, 99 N. W. 28. A further statement of this principle is contained in Robinson v. Robinson, 164 Neb. 413, 82 N. W. 2d 550: "A marriage contract is one having a great public interest and it cannot be dissolved except when all conditions of controlling statutes are met. The parties to a marriage assume duties and obligations of a most solemn character. They may not be put aside at the will of the parties as in an ordinary partnership. A divorce or legal separation must be grounded on a legal fault within the grounds enumerated in the statute and *proved in the manner therein provided. One party may not create the grounds that will sustain him or her in maintaining such a suit.* It is not the province of the courts to grant such decrees for sociological reasons. The policy of the state relative to marriage is fixed by the Legislature. It is not for this court to do what it deems best for the parties. The only relief that may be granted is that provided by statute when the evidence is sufficient to bring the case within its purview." (Emphasis supplied.) This statement was reiterated in Birth v. Birth, 165 Neb. 11, 84 N. W. 2d 204. The requirement of corroboration is a matter of legislative policy and has remained unchanged in this state for a century, originally enacted in R. S. 1866, page 135, as a part of the original statutes of Nebraska. As stated in the majority opinion, this court

has logically declined to impose strict requirements concerning the degree or the sufficiency of proof of corroboration. Whenever this court, however, has considered the nature of corroboration, it has held that corroboration should amount to competent evidence and independent proof of the facts and grounds alleged in the petition. Goodman v. Goodman, 168 Neb. 841, 97 N. W. 2d 336; Laughrey v. Laughrey, 171 Neb. 132, 105 N. W. 2d 576; Conry v. Conry, 176 Neb. 396, 126 N. W. 2d 188. Corroboration, in this sense, is entirely different from the corroboration of the complainant in a rape or paternity case where the evidence is required only to support the complainant as a witness and need not amount to independent proof; in these cases, the fact that the witness complained soon after the offense is considered corroborative although the contents of such extrajudicial statements are not admissible in evidence nor considered proof of the facts alleged. State v. Meyers, 46 Neb. 152, 64 N. W. 697, 37 L. R. A. 423; Krug v. State, 116 Neb. 185, 216 N. W. 664; Peery v. State, 163 Neb. 628, 80 N. W. 2d 699.

In the majority opinion the holding of this court in Kidder v. Kidder, 159 Neb. 666, 68 N. W. 2d 279, is cited as a controlling precedent. This case, however, should be considered in the light of Green v. Green, 148 Neb. 19, 26 N. W. 2d 299; the syllabus is substantially the same as syllabus 1 of the majority opinion here; in the summary of the evidence, the court referred to the plaintiff's testimony that defendant had whipped their child severely and said: "The condition of the child after the whipping, showing marks on her body, was testified to by plaintiff's mother." There was no specific analysis of the reasons why such evidence was or was not adequate corroboration, and it is quite possible that the evidence in the record showed other details which might have made the corroboration entirely sufficient. In Kidder v. Kidder, *supra,* the evidence was quoted as showing that plaintiff received a lump and bruise on

her face, which she claimed resulted from a blow by defendant; other witnesses saw the lump and heard her statement that defendant had struck her. In disposing of the argument that the corroboration was not sufficient, the opinion said: "Unless this court is prepared to depart from its general holdings and the particular holding in Green v. Green, supra, it must be said that the testimony as to the incident of February 13, 1953, has been corroborated agreeable to the statute." Again, it is quite possible that additional circumstances might have been shown by the record entirely justifying this finding. It should be noted that this court has said repeatedly that the sufficiency of the corroborative evidence is determined upon the facts and circumstances of the particular case.

The use of plaintiff's extrajudicial statements to amplify corroborative evidence violates both the letter and the spirit of section 42-335, R. R. S. 1943. In this case the purported corroboration does not connect the defendant with the incident, even to the extent of having been present, nor does it indicate even slightly his actions or any intention of being cruel; plaintiff's injuries were not such that they must have been inflicted by defendant; and there are many available hypotheses to the effect that such bruises could have been caused without any cruelty whatever. If defendant had suddenly pulled his wife back to save her from being struck by an automobile, he might have created the exact situation considered by the court. The point is that when corroboration is based upon a circumstantial showing, such showing must be sufficient to prove the ground for the divorce against defendant, and not merely the effects of acts which, if done by defendant, might be grounds for divorce. Unless such a principle is recognized and carried into effect, a plaintiff might succeed in securing a decree of divorce by exhibiting and complainng of marks or scars claimed to have been inflicted by cruelty months or even years previously. If the court refrains from re-

ferring to the plaintiff's testimony or extrajudicial statements for the purpose of determining the sufficiency of corroboration, the legislative purpose will be accomplished; when such reference is made, it is almost inevitable that the decree will be made solely upon the declarations and statements of the plaintiff.

It has also long been a rule of evidence that the prior consistent statements of a witness may be utilized only to support the credibility of that witness after an attack upon his credibility; and such statements are not admissible unless they were made before the witness had any reason to expect that his testimony would be given. Plaintiff's extrajudicial statements should not have been received in evidence nor should they be given the slightest evidentiary weight. The purported corroboration does not support plaintiff's claim of cruelty unless her own evidence and statements are first believed and then used to build the corroboration to the extent deemed sufficient by the majority.

If the subject of divorce were confided to the discretion of the court in the exercise of its equitable jurisdiction, the holding by the majority might be justified. Until the Legislature relinquishes its authority over the subject, the court should not erode or change the clear requirements of the statute.

For these reasons, the decree of the trial court granting a decree of absolute divorce to the plaintiff ought to be reversed for want of sufficient corroboration.

CARTER and BROWER, JJ., join in this dissent.

EDGAR F. RUSSELL, APPELLEE, V. WESTERN NEBRASKA REST HOME, INC., A CORPORATION, ET AL., APPELLANTS, ALLAN TARR ET AL., APPELLEES.

144 N. W. 2d 728

Filed September 2, 1966. No. 36220.

1. **Vendor and Purchaser: Specific Performance.** When land, or

any interest therein, is the subject matter of an agreement, the power of a court of equity to enforce specific performance is beyond question.

2. **Specific Performance.** A party who seeks specific performance must show not only that he has a valid legally enforceable contract, but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the defendant, or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for nonperformance of the covenants incumbent upon him.

3. ———. The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute right, but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust and may be denied when the party seeking it has failed to perform.

4. **Equity: Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

5. **Contracts.** While as a general rule a contract will be treated as abandoned or rescinded where the acts and conduct of one party inconsistent with its existence are acquiesced in by the other party, to be sufficient the acts and conduct must be positive and unequivocal.

6. **Vendor and Purchaser: Specific Performance.** The general rule is that from the time when a contract of sale of land should be performed the land is in equity the property of the vendee held by the vendor in trust for him, and the purchase price is the property of the vendor held in trust for him by the vendee, and that upon specific performance the vendor is liable to account for the rents and profits and the vendee for the interest on the purchase price.

7. ———: ———. A vendor, sued for specific performance, who has retained possession and received the rents and profits of the land, is liable for taxes accruing between the time of the contract and the trial.

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

Robert L. Gilbert, for appellants.

Atkins, Ferguson & Nichols, for appellee Russell.

W. H. Kirwin, for appellees Tarr et al.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and BURKE, District Judge.

BURKE, District Judge.

This is a suit in equity for specific performance of a contract for the sale of 160 acres of land in Scotts Bluff County.

Appellant Western Nebraska Rest Home, Inc., is a corporation and appellants Clara Reisig and Reuben Reisig are president and secretary, respectively, of said corporation. Appellee Edgar F. Russell farms northeast of Minatare. George E. Lemley is a real estate salesman for Asmus and Rychecky, a real estate brokerage firm in Scottsbluff.

Lemley, acting on behalf of the corporation under a listing agreement, contacted Russell about purchasing a tract of land described as the northeast quarter of Section 14, Township 22 North, Range 53 West of the 6th P.M., Scotts Bluff County, Nebraska.

On November 1, 1963, Russell signed an "Offer to Purchase" wherein he offered to purchase the real estate for a stated sum. Clara Reisig, as president of the corporation, signed an acceptance of the offer and Lemley returned a signed copy to Russell. Sometime later Lemley submitted a document entitled "Addendum" to Russell for his signature. Russell refused to sign the document.

The contract of purchase provided for a downpayment of $1,000 with the balance to be paid "on final settlement date on or before March 1, 1964." Under the contract the vendor was to convey marketable title by warranty

deed. The contract was subject to the purchaser "being able to secure a loan in the amount of $5000 on the * * * premises" to be conveyed. Possession of the premises was to be given on or before March 1, 1964, "on payment in full of purchase price."

Russell made the downpayment of $1,000 and it was placed in the realtor's escrow account. In January 1964, Russell made application to the Prudential Insurance Company for a loan. On February 13, 1964, Russell received a title opinion from his attorney showing a defect in the chain of title. On February 18, 1964, Prudential advised its broker, Asmus and Rychecky, that Russell's application for a loan had been approved subject to acceptable title.

On February 17, 1964, attorney for the corporation wrote to its vendor requesting that the defects in title be cured or that he would undertake to do so at the vendor's expense.

During the month of March 1964, Reuben Reisig bought a building in Morrill and wanted to use Russell's downpayment being held in escrow as part downpayment on the building. On March 16, 1964, Asmus and Rychecky credited Reisig's account with Russell's downpayment. Reisig stated, "* * * if this thing don't go through I will bring a thousand dollars back."

On April 22, 1964, attorney for the corporation wrote Russell's attorney and suggested that a settlement be made with part of the purchase price being held in escrow pending perfection of the title or, in the alternative, that Russell take possession under an ordinary farm lease.

On May 26, 1964, Russell's attorney wrote to the attorney for the corporation and stated that Russell had concluded that there had been considerable damage to the property since November and that his client would be willing to proceed under the contract with the understanding that the purchase price would be reduced by $500 and that payment of the balance due would be made

when the title defects were corrected. Russell's lawyer concluded his letter by stating: "I have not seen the place and wouldn't know what it was like before this deal was made so I have to assume that my client's request is reasonable. If the Reisigs feel that it is not, our only recourse will be to ask that the contract be rescinded for the failure by Western Nebraska Rest Home, Inc. to comply with the contract by making the title merchantable."

On May 27, 1964, the attorney for the corporation answered this letter by stating, "* * * the Western Nebr. Rest Home Inc. is treating the contract, if there was a contract, as being rescinded."

On June 1, 1964, the corporation deposited $1,000 to the real estate firm's escrow account as a refund of the downpayment. Russell refused to accept the refund from the real estate firm. On June 1, 1964, the corporation entered into an agreement wherein it agreed to sell the real estate to Allan and Donna Tarr for a stated sum and accepted the sum of $1,500 as a downpayment.

The trial court found that Reuben Reisig, Clara Reisig, and Western Nebraska Rest Home, Inc., should specifically perform the agreement upon receipt of the balance of the purchase price and, in addition, awarded Russell damages in the sum of $980.28.

The trial court ordered that Allan and Donna Tarr have judgment on their cross-petition against the corporation for damages in the amount of $1, and judgment for money had and received in the sum of $1,500 together with interest at the rate of 6 percent per annum from June 1, 1964.

The appellants assign as errors (1) the finding of the trial court that there was a binding agreement between Russell and the corporation and the Reisigs, (2) the order requiring the appellants to specifically perform the agreement, and (3) the awarding of damages.

The applicable rules are:

When land, or any interest therein, is the subject mat-

ter of an agreement, the power of a court of equity to enforce specific performance is beyond question. Bennett v. Moon, 110 Neb. 692, 194 N. W. 802, 31 A. L. R. 495; Mainelli v. Neuhaus, 157 Neb. 392, 59 N. W. 2d 607.

A party who seeks specific performance must show not only that he has a valid legally enforceable contract, but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of defendant, or that he is ready, able, and willing to perform his obligations under the contract and do whatever has been made a condition precedent on his part, or show a valid excuse for nonperformance of the covenants incumbent upon him. Sofio v. Glissmann, 156 Neb. 610, 57 N. W. 2d 176; O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403.

The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute legal right, but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust and may be denied when the party seeking it has failed to perform. Kobza v. Spath, 166 Neb. 623, 90 N. W. 2d 246.

Appellants contend that there was not a valid, binding contract inasmuch as the acceptance by the corporation was conditioned upon the execution of the "Addendum" by Russell. The evidence on this point is in irreconcilable conflict. However, there is evidence to support a finding that the "Addendum" was prepared subsequent to the acceptance of the offer. Russell testified that he executed the offer on November 1, 1963, and Lemley later gave him a signed copy of the contract; that nothing was said about the "Addendum" at that time; and that about a week or two later, Lemley submitted the "Addendum" to him for his signature. The evidence is undisputed that the "Addendum" was executed by

Clara Reisig as president of the corporation on November 27, 1963, and shortly thereafter delivered to the real estate office.

Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Wilkie v. Banse, 166 Neb. 138, 88 N. W. 2d 181.

We conclude that there was a valid, legally enforceable agreement between Russell and the corporation. We conclude, also, that Russell substantially complied with the terms of the agreement by performing or offering to perform the acts which formed the consideration of the undertaking on the part of the purchaser.

Next, the appellants urge that if there was a legally enforceable agreement, it was rescinded or abandoned by the letter of May 26, 1964, written by Russell's attorney which is quoted in part hereinabove.

While as a general rule a contract will be treated as abandoned or rescinded when the acts and conduct of one party inconsistent with its existence are acquiesced in by the other party, to be sufficient, the acts and conduct must be positive and unequivocal. 17 Am. Jur. 2d, Contracts, § 494, p. 967.

The language relied upon to support the alleged rescission of the contract is neither positive nor unequivocal and, at most, amounts to nothing more than a threat to rescind in the future.

Finally, the appellants contend that the trial court erred in awarding Russell damages in the sum of $980.28 which included delinquent real estate taxes in the amount of $480.28.

In McCleneghan v. Powell, 105 Neb. 306, 180 N. W. 576, we approved the rule announced in Beckwith v.

Clark, 188 F. 171, where the court held: "The general rule is that from the time when a contract of sale of land should be performed the land is in equity the property of the vendee held by the vendor in trust for him, and the purchase price is the property of the vendor held in trust for him by the vendee, and that upon specific performance the vendor is liable to account for the rents and profits and the vendee for the interest on the purchase price."

It is conceded that the delinquent taxes were not paid by Russell and inasmuch as the corporation under its contract was obligated to convey free and clear of liens and encumbrances, the court erred in taking this factor into consideration in its accounting. Further, a vendor, sued for specific performance, which has retained possession and received the rents and profits of the land, is liable for taxes accruing between the time of the contract and the trial. Mitchell v. Mutch, 189 Iowa 1150, 179 N. W. 440.

Russell's evidence concerning rents and profits is at best speculative, and, in any event, does not equal the interest on the unpaid balance of the purchase price.

Since the failure to execute the contract of sale at the time set for its execution was due to the fault of the corporation, it would be inequitable to allow it to gain any advantage from its own fault. Accordingly, the remission of interest on the unpaid balance of the purchase price is the measure of the purchaser's damages.

After a consideration of the rules herein announced, we conclude that the judgment of the trial court is correct in ordering Western Nebraska Rest Home, Inc., Reuben Reisig, and Clara Reisig to specifically perform the agreement set forth in Russell's petition upon receipt from Russell of the balance of the purchase price on said agreement. It is further ordered that Allan Tarr and Donna Tarr have judgment against Western Nebraska Rest Home, Inc., for $1,501 with interest at 6 percent per annum from June 1, 1964, as provided by the judgment

of the district court. We hold that the judgment for damages against appellants in the sum of $980.28 is in error and that portion of the trial court's judgment is vacated. The judgment of the district court as modified by this opinion is affirmed.

AFFIRMED AS MODIFIED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1966

MAURICE G. BROCKHAUS, APPELLEE, V. L. E. BALL CONSTRUCTION CO., APPELLANT.

145 N. W. 2d 341

Filed October 7, 1966. No. 36166.

1. **Workmen's Compensation.** For workmen's compensation purposes, "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.
2. ———. An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless he is able to obtain, hold, or do any substantial amount of remunerative work, either in his previous or any other established field of employment for which he is fitted.

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

Haney, Walsh & Wall and Theodore J. Clements, for appellant.

Cassem, Tierney, Adams & Henatsch, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and DITTRICK, District Judge.

DITTRICK, District Judge.

This is a claim for compensation under the provisions of the Workmen's Compensation Act. The case was tried initially before a single judge of the Workmen's Compensation Court, where the claimant Maurice G. Brockhaus was awarded compensation for 25 percent permanent partial disability. On rehearing before the Workmen's Compensation Court sitting en banc, claimant was awarded compensation for total disability for an indefinite future period of time, which award was affirmed by the district court.

Claimant was employed by L. E. Ball Construction Company, which we shall designate as the employer. The accident which resulted in claimant's injuries occurred on August 23, 1962, at Norfolk, Nebraska. The claimant while working for the employer on a construction project slipped on a clod of dirt in a ditch while a length of pipe was being lowered into the ditch. He fell to his knees with the weight of the pipe against him. He felt immediate pain and was taken to a doctor for X-rays. On September 28, 1962, claimant was admitted to the Veterans Hospital at Omaha, Nebraska, when on October 3, 1962, Dr. Burklund performed a partial hemilaminectomy with removal of a herniated disc at the L-5, S-1 level. He was given therapy at the Veterans Hospital and was discharged on October 12, 1962, with instructions to do exercises at home. Claimant consulted Dr. Werner P. Jensen at Omaha, Nebraska, on November 10, 1962. On November 17, 1962, claimant was admitted to St. Joseph's Hospital of Omaha, where on November 28, 1962, Dr. Jensen put on a plaster flexion cast from the hips to the ribs. Claimant was dismissed from the hospital December 1, 1962. Dr. Jensen split the cast and prescribed a brace. Dr. Jensen again examined him on January 4, 1963, on which date claimant was readmitted to St. Joseph's Hospital, where on January 16, 1963, Dr. Jensen performed a laminectomy for a herniated disc at the L-4, 5 level. Dr. Jensen estimated that claim-

ant has a 35 percent permanent partial impairment of his back. Claimant was dismissed from the hospital on February 6, 1963, and since that date has worn a brace.

On August 25, 1964, Dr. Frank J. Iwerson examined claimant and his findings were that claimant had a marked list to the right and was unable to stand erect; that there was a marked lumbar muscle spasm present; that with the patient lying on his back there was a positive Lesegue's sign on the left side; that there was a marked limitation of the straight leg raising on the left side as compared to the right; that there was marked tenderness over the low back and the patient was unable to rise to a sitting position from a lying position without help; that there was weakness of the dorsiflexion of the toes and the patient was unable to walk on his toes or heels; and that the patient was unable to work, was completely disabled, and in need of further treatment.

Dr. Harold A. Ladwig was in consultation with Dr. Jensen while claimant was confined at Bergan-Mercy Hospital of Omaha, Nebraska, during September 1964. Dr. Ladwig found a noticeable weakness of the left ankle and toes; that the patient was unable to stand on his left heel and toes; that he had a list to the right of variable degree; and that there was diffuse tenderness of the low back.

A report of Dr. Jensen bearing the date of September 19, 1964, states that the claimant stands with a marked limp; that there was muscle spasm in the lumbar area and weakness of dorsiflexion of the great toe; and that there were residuals from a herniated disc. Dr. Jensen recommended intermittent pelvic traction and conservative therapy, consisting of daily physiotherapy and physical therapy. When claimant left Bergan-Mercy Hospital in October 1964, he was advised by Dr. Jensen that the doctor did not feel there was any indication for further surgery and that he had undergone two surgical procedures without a great deal of help.

That claimant's injury arose out of and in the course

of his employment by the employer is not questioned. The issue is whether the claimant is totally disabled within the meaning of the provisions of the Workmen's Compensation Act.

Claimant was 39 years of age, married, and the father of two children at the time of hearing before the Workmen's Compensation Court sitting en banc. He is a high school graduate. He was sent to Doane College by the Navy and received training as a diesel mechanic for approximately 3 months. Prior to his employment by the employer he was in the well-digging business and had done plumbing, carpentry, and electrical work. He had also worked as a derrick man in the oil fields, and as a truck driver. After his dismissal from St. Joseph's Hospital on February 6, 1963, claimant obtained employment as a truck driver from April to July 31, 1963, under an arrangement with his employer that he would not be required to do heavy lifting. He lost this employment because of his physical disabilities. Thereafter in 1963 he worked briefly painting a church steeple while sitting in a chair and pulling himself up and down by ropes. He assisted his father at odd carpentry jobs when no extensive lifting was required. He worked as a farm laborer approximately 2 days until back pains from operating a tractor required him to quit such employment.

Claimant continues to have pain across the lower part of his back and his left leg which at times becomes numb. His left leg develops muscle spasms and on occasions it gives way while he is walking, causing him to fall.

Prior to his injury on August 23, 1962, claimant's average earnings were approximately $4,000. During 1963 his earnings were approximately $1,100, and during 1964 between $350 and $400.

The record in this case substantiates that plaintiff is a common laborer; that all of the types of employment for which he is fitted and has been engaged in involve heavy lifting as well as extensive physical effort; and

that prior to his injury he was in good health and able to work.

This court has stated the following rule: "For workmen's compensation purposes, 'total disability' does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do." Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262. See, also, Haler v. Gering Bean Co., 163 Neb. 748, 81 N. W. 2d 152; Tilghman v. Mills, 169 Neb. 665, 100 N. W. 2d 739.

We held in Crable v. Great Western Sugar Co., 166 Neb. 795, 90 N. W. 2d 805, that an employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration, and that the status of the employee in such respect remains unaffected thereby unless claimant is able to get, hold, or do any substantial amount of remunerative work, either in his previous occupation or any other established field of employment for which he is fitted.

The foregoing rule was reaffirmed by our court in the case of Nordahl v. Erickson, 174 Neb. 204, 116 N. W. 2d 275.

The evidence of both expert and lay witnesses in the instant case as reflected by the testimony shows that the claimant is totally disabled.

The employer contends that this court should adopt the following rule: "Permanent total disability does not exist where a claimant can, by reasonable effort, prepare himself to secure and retain a remunerative occupation." The employer cites in support of such rule 99 C. J. S., Workmen's Compensation, section 299 (e), page 1070, and Utah Fuel Co. v. Industrial Commission of Utah, 76 Utah 141, 287 P. 931. The record in the instant case does not reflect that the claimant can by reason-

able effort prepare himself to secure and retain remunerative employment. Furthermore, to so rule in this case would compel the claimant to look to his own resources, which at best are very meager.

For the reasons stated, we conclude that the award entered by the Workmen's Compensation Court sitting en banc, and the affirmance thereof by the district court, should be affirmed.

AFFIRMED.

JONAS LILEIKIS, APPELLANT, V. VALANTINAS KUDIRKA, APPELLEE.

145 N. W. 2d 441

Filed October 7, 1966. No. 36243.

Automobiles: Negligence. When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery.

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

Sodoro & Meares, for appellant.

Matthews, Kelley & Cannon, for appellee.

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

BROWER, J.

This is an action for personal injuries sustained by the plaintiff and appellant, Jonas Lileikis, a pedestrian who was injured in a collision with a four-door hardtop 1961 Mercury Monterey driven by the defendant and appellee, Valantinas Kudirka. At a trial before a jury, at the conclusion of the plaintiff's evidence, the court

sustained defendant's motion for a directed verdict or in the alternative a dismissal of plaintiff's case. A motion for a new trial being overruled, the plaintiff brings the case to this court by appeal.

The accident happened on Sunday, June 24, 1962, at 5:30 p.m., on U. S. Highway No. 73-75 in a rural area south of Omaha, Nebraska, at what is commonly called the LaPlatte Crossing. It was a bright, clear, dry summer day.

At the place of the collision, U. S. Highway No. 73-75 extends in a north and south direction. It is a paved four-lane divided highway with two lanes for traveling to the north and two to the south. A short distance north of where the accident occurred the highway is intersected by another road which has a graveled surface to the west of the highway and a crushed rock surface on its east. The graveled road also extends north and south parallel to the highway on its west. A grassy median is to the west of the southbound portion of the highway, separating it from the graveled road. A similar grassy median lies between the northbound and southbound lanes of U. S. Highway No. 73-75. Both medians are cut by two concrete "crossovers" which are in turn separated by a similar median in line with that separating the southbound and northbound lanes of the highway. From an aerial photograph, exhibit 1, the median separating the two crossovers appears to be somewhat longer from north to south than the width of the highway from curb to curb. The north crossover is immediately to the west of the intersecting crushed rock road to its east. There is no intersecting road to the immediate east of the south crossover. Although the south crossover is paved, it is not a part of the main-traveled north or south route of the highway, but is a place where cars or pedestrians may cross over the median strip into and out of the side roads pictured in the area.

About 1:30 or 2 p.m., on June 24, 1962, the plaintiff

and his wife had accompanied his daughter, Ruth Baesler, her husband, and their child at an outing at Holman's Beach south of the city of Omaha. The daughter and husband went swimming, but plaintiff and his wife did not go into the water. Later in the afternoon the plaintiff went to the car where his wife sat and asked her when they were going home. On her replying she did not know, he stated he was going to walk back, although it was a distance of 15 miles.

When the rest of the family arrived back at their home in Omaha, the plaintiff was not there. A neighbor, Jonas Starkevicius, on request drove Mrs. Baesler back over the road to Holman's Beach, looking for the plaintiff. About a block away from the scene of the accident Mrs. Baesler saw her father walking northward toward Omaha on the grassy median on the west side of U. S. Highway No. 73-75 which separates it from the graveled road. He was then approximately west of the south end of the south crossover. The car in which Mrs. Baesler traveled was then proceeding southward on the outside southbound lane of the highway.

Mrs. Baesler testified she saw her father, the plaintiff, turn eastward and walk across both of the southbound lanes of traffic into the south crossover. On the plaintiff walking eastward, Mr. Starkevicius turned his vehicle into his left lane preparatory to picking up the plaintiff. As Starkevicius and Mrs. Baesler approached in the car from the north, plaintiff continued walking eastward on the south crossover to its east edge. There he moved out of the crossover area, still walking normally, into the inside northbound lane in which defendant's Mercury was approaching from the south. On taking three or four steps plaintiff came in collision with the left door handle of the defendant's Mercury when plaintiff was halfway into the lane closest to the crossover or island. Plaintiff was thrown in the air but the witness did not know in what direction. She did not know where her father was looking or how he was

faced. She did not see the defendant's car or other cars until immediately before the accident. While with her disabled father, the defendant stated in the Lithuanian language, which they both spoke, that when "he saw him it was too late to stop."

A witness, who was a state patrolman at the time, came to the scene after the accident in answer to a call. He described the highways and roads as previously related. He stated the impact was between the left front door handle of the car and plaintiff's person at a point where the automobile swerved to the right. Photographs of defendant's automobile seem to clearly show this. There was a long sweeping curve across the two northbound lanes of traffic extended to the ditch on the east side of U. S. Highway No. 73-75 where defendant's car came to rest. It was marked by "abrasions" which are laid down by tires when a car travels sideways. The patrolman distinguished such abrasions from skid marks resulting from an application of the brakes. The abrasions began in the west northbound lane approximately east of the center of the south crossover. A red dot was placed on the aerial photograph, exhibit 1, by the officer, apparently in the center of the inside northbound lane. He testified this was the point of impact, which he determined in part however from conversation with the defendant.

Jonas Starkevicius testified. His evidence substantially agrees with that of Mrs. Baesler with respect to the movements of her father seen by him. He was driving 50 or 60 miles per hour when he first saw plaintiff. He pulled into the east southbound lane, intending to pick up the plaintiff in the south crossover. He saw defendant's automobile approaching when it was 200 feet away from the place of accident. Defendant's vehicle was going north on the west northbound lane immediately prior to the accident. There were no other vehicles between this car and the plaintiff and no cars to its right, but there were a few cars farther south be-

hind the defendant's car. He did not give any testimony concerning the speed of the defendant's vehicle. When defendant's car was 200 feet away, plaintiff was right at the edge of the west northbound lane. After stepping over a line marking the joint between the crossover and the highway, he took two or three steps when he immediately came in contact with the car.

Defendant produced no evidence on his own behalf, but plaintiff introduced certain of defendant's testimony taken by deposition by way of admissions and other portions of the deposition were admitted on cross-examination by way of explanation. In the excerpts received, defendant stated he saw the plaintiff walking eastward when his car was approximately a block away, maybe a block and a half. His car was traveling in the left-hand lane northbound. It was then going 50, or perhaps 55 miles per hour. When within ½ block of the plaintiff the defendant slowed his car to between 40 and 45 miles per hour. Plaintiff was then near the edge of the crossover. Defendant looked in his mirror and cars were four or five car-lengths back of him. He then spoke to his nephew riding beside him. Defendant asked, " 'Do you see that guy walking?' and he said, 'Yes', and I said, 'Is he drunk or something?' and he said, 'I don't know.' " Plaintiff was still on the concrete between the two highways when defendant's car was 50 feet away, but farther "up here by the edge." The car was then still going 40 or 45 miles per hour. As plaintiff got close it appeared he sort of stopped and seemed to look down but his head was down and defendant was not sure whether plaintiff looked at him. Defendant did not blow the horn on approaching, nor apply his brakes. Defendant was keeping his eyes on the road and going straight ahead. When within 15 feet of him the plaintiff "took off." Defendant cut right and plaintiff "jumped" or "bumped" into his door, hitting the left front door.

The plaintiff was unconscious after the accident and remembers nothing after walking across the southbound

lanes of the highway and into the crossover. The evidence clearly shows the plaintiff was not intoxicated and, although 67 years of age at the time of the accident, was in good health and in no way disabled.

Plaintiff contends the defendant was negligent in failing to keep a proper lookout or having his car under reasonable control; in failing to give warning of his approach; in traveling at an excessive rate of speed under the existing circumstances; and in failing to apply the brakes or change the course of his vehicle to avoid striking the plaintiff.

The trial court did not consider the plaintiff's contentions with respect to the defendant's negligence. It held the plaintiff was guilty of contributory negligence more than slight in degree as a matter of law and for that reason sustained the motion for a directed verdict for the defendant. The plaintiff assigns error to this ruling and contends it is contrary to the law and the evidence.

We cannot sustain the assignments. We conclude, as did the trial court, that it is not necessary to consider the defendant's negligence.

The south crossover in which the plaintiff walked not only was intended as a means for vehicles to change their course and enter another roadway, but was a place of safety in which vehicles could wait while traffic on the highway itself cleared. We think, with respect to the highway, it offered the same facility to a pedestrian. The plaintiff was in this place of safety. He left it and on taking at the most three or four steps collided with the left side of a car at the front door handle. There is no evidence to the contrary. The car was approaching at 40 to 45 miles per hour until it swerved close to him. This, too, is uncontradicted. The highway was in a rural area. The plaintiff stepped from a place of safety into the side of an oncoming car being driven at a lawful but rapid speed. The evidence is not entirely in harmony as to whether the plaintiff looked or whether he stepped out without looking. It was his duty to look and

if he did not he was negligent. If he proceeded without looking he was equally negligent.

This court has hitherto held: "When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery." Cuevas v. Yellow Cab & Baggage Co., 141 Neb. 662, 4 N. W. 2d 790. See, also, Farag v. Weldon, 163 Neb. 544, 80 N. W. 2d 568; Thomas v. Owens, 169 Neb. 369, 99 N. W. 2d 605.

Plaintiff cites cases where pedestrians were walking on the main portion of a highway or where there was evidence that they were upon the highway itself for some purpose. He abstracts rules from these decisions which he contends are contrary to that which we have stated and deem controlling in the present situation. The cases cited and the rules taken therefrom have no application to the facts disclosed by the evidence before us. The extension of this opinion to discuss them would serve no purpose.

It follows that the judgment of the trial court should be and is affirmed.

AFFIRMED.

IN RE GUARDIANSHIP OF ANNA MALNICK, INCOMPETENT. SAMUEL J. MALNICK, APPELLEE AND CROSS-APPELLANT, V. ANNA MALNICK, APPELLANT AND CROSS-APPELLEE.

145 N. W. 2d 339

Filed October 7, 1966. No. 36284.

1. **Guardian and Ward. Where one is, by reason of old age, disease, weakness of mind, or from any cause, unable or incapable, unassisted, to properly manage his property, he is incompetent, and a guardian should be appointed.**
2. ———. The incapacity of a person, which will authorize the

appointment of a guardian, is a question of fact in each case and the finding of the trial court thereon will not ordinarily be disturbed.

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

McCormack, McCormack & Brown, for appellant.

John J. Lawler, for appellee.

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

BOSLAUGH, J.

This is a proceeding upon a petition for the appointment of a guardian for the estate of Anna Malnick. The trial court found that joint guardians should be appointed. Anna Malnick has appealed from that judgment.

The appellant is the widow of Paul Malnick who died in December 1964. Paul Malnick was also survived by a son, Samuel J. Malnick, the petitioner; Freda Shields, a daughter; and two grandchildren, the children of a deceased son.

The appellant is now 80 years of age and lives alone. She is in good health for a person of her age and cares for a garden at her home. There is evidence that she has developed arteriosclerosis of the heart and her blood pressure is somewhat higher than normal. She is not afflicted with any mental illness.

The appellant was born in Poland and came to the United States in 1928. She understands and is able to speak the Ukranian language, but understands and can speak only a few words in English. She is unable to read or write.

While her husband was living, the appellant and her husband did not have a checking account. It was their custom to keep money in their home, pay their bills in cash, and purchase savings bonds with their excess funds or deposit them in savings accounts.

At the time of the death of Paul Malnick, the appellant had approximately $800 in cash in her home. She received approximately $400 in cash in February 1965 when approximately $28,000 in savings bonds were cashed and part of the proceeds reinvested. During the administration of the estate the appellant received over $3,300 in cash from the administrator and $900 which was refunded by the mortuary. The appellant testified in November 1965 that she had "a couple hundred" in cash at her home at that time. There is no satisfactory explanation in the record as to what has happened to the cash which the appellant received between December 1964 and November 1965.

Section 38-201, R. R. S. 1943, provides for the appointment of a guardian for any person who, by reason of extreme old age or other cause, is mentally incompetent to have the charge and management of his property. Section 38-202, R. R. S. 1943, provides that if it shall appear to the court, after hearing, that the person in question is incapable of managing his property, it shall appoint a guardian of his estate.

Where one is, by reason of old age, disease, weakness of mind, or from any cause, unable or incapable, unassisted, to properly manage his property, he is incompetent, and a guardian should be appointed. In re Guardianship of Blochowitz, 135 Neb. 163, 280 N. W. 438. The incapacity of a person, which will authorize the appointment of a guardian, is a question of fact in each case, and the finding of the trial court thereon will not ordinarily be disturbed. Keiser v. Keiser, 113 Neb. 645, 204 N. W. 394.

The record in this case sustains the finding of the trial court that the appellant is unable to manage her property without assistance and, for that reason, is incompetent within the meaning of the statute. The appointment of a guardian for the estate of the appellant was proper.

The trial court appointed Freda Shields and the Omaha

National Bank of Omaha, Nebraska, as joint guardians. The record shows that Freda Shields has been assisting the appellant in the handling of her affairs. The appellant has conveyed her residence property to herself and Freda as joint tenants. The bonds which were purchased in February 1965 were registered in the name of the appellant and Freda as joint tenants. The checking accounts which have been opened by the appellant are joint accounts with Freda. The safe deposit box in which appellant keeps her securities is joint with Freda and her husband.

It will be the duty of the guardian in this case to investigate the transactions which have taken place since the death of Paul Malnick and take whatever action may be appropriate to protect the interests of the appellant. In view of the circumstances in this case and the interest which Freda Shields has in the transactions which have occurred, she is not a suitable person to be appointed as a guardian for the estate of the appellant. The judgment should be modified accordingly.

The trial court directed that a deed from Freda Shields and her husband conveying their interest in the appellant's residence property to the appellant be recorded, and that the judgment should serve as a conveyance if the deed was not recorded. This matter was not properly before the court in this proceeding and should be deleted from the judgment.

The judgment of the district court, as modified, appointing the Omaha National Bank of Omaha, Nebraska, as guardian for the estate of Anna Malnick is affirmed.

AFFIRMED AS MODIFIED.

LEE L. BARTON ET AL., APPELLEES, V. CITY OF OMAHA, A MUNICIPAL CORPORATION OF THE METROPOLITAN CLASS, ET AL., APPELLANTS.

145 N. W. 2d 444

Filed October 12, 1966. No. 36202.

1. **Municipal Corporations.** Section 14-117, R. R. S. 1943, does not confer upon a city of the metropolitan class the power to annex territory located in a foreign county.
2. **Statutes: Officers.** Inaction by administrative officials, who would be alert to exercise a power granted by the Legislature, sometimes bespeaks lack of statutory power.
3. **Municipal Corporations.** A power of annexation is strictly construed.

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

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 appellants.

Swenson, Erickson & Nelson and Dixon G. Adams, for appellees.

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

SMITH, J.

The issue is whether the City of Omaha is empowered by statute to annex territory located in a foreign county. The district court found against the power. It permanently enjoined the city from enforcing an ordinance that in form annexed land in an adjoining county. The city has appealed.

In 1915 the city, which is located entirely in Douglas County, established its southernmost limit at the north boundary of Sarpy County. One hundred six annexations subsequently occurred. The city is now attempting to annex a contiguous tract of 152.55 acres in Sarpy County. The tract, which is unincorporated, contains

multiple-family houses, 502 single-family houses, a small shopping center, and an estimated population of 1,960. Housing developments in Sarpy County adjacent to the city existed as early as 1925; yet until now the city asserted no jurisdiction respecting platting, zoning, or annexation.

The annexation statute provides in part as follows: "* * * any metropolitan city may at any time extend the corporate limits * * * over any lands, * * * such distance as may be deemed proper in any direction, and may include, * * * with such metropolitan city, by such extension * * *, any adjoining city of the first class having less than 10,000 population or any adjoining city of the second class or village; Provided, that any other laws and limitations defining the boundaries of cities or villages or the increase of area or extension of limits thereof, shall not apply to * * * lands, cities or villages annexed, * * * under this section. This grant of power shall not be construed as conferring power upon the council to extend the limits of a metropolitan city over any agricultural lands which are rural in character." § 14-117, R. R. S. 1943.

From 1887 to 1905 the Legislature empowered the City of Omaha upon a population increase of 20,000 to extend the corporate limits "such distance as may be deemed proper in any direction not exceeding one mile." Laws 1887, c. 10, § 3, p. 106; Laws 1905, c. 14, § 2, p. 69. The present statute was enacted in 1917 and reenacted in 1921.

County lines are not always barriers. A village situated in more than one county may be incorporated, and it may annex territory in still another county. §§ 17-220 and 17-406, R. R. S. 1943. A metropolitan city may extend its limits to include villages. The power over land in a foreign county is clear enough, unless other statutes create ambiguity.

We find no authority for the City of Omaha holding an election in Sarpy County. The election commissioner

of Douglas County is the chief election officer of the city, but he is not in charge of municipal elections in Sarpy County. See, §§ 32-201, 32-210, 32-226, and 32-492, R. R. S. 1943.

The situation of the city contrasts with that of the Metropolitan Utilities District under statutes that were also enacted in 1921. The district may extend its service beyond the city "so as to include adjacent territory * * *, even though the same be in an adjoining county or counties, * * *." § 18-410, R. R. S. 1943. At district elections the election commissioner of Douglas County receives abstracts of votes from the clerks of adjoining counties. He issues certificates of election. § 14-1004, R. R. S. 1943. To read such a procedure into the statutes governing metropolitan cities is possible but injudicious.

Power over platting as well as annexation appeared in the 1921 act. It was restricted by this clause: "* * * when such real estate is located in the same county as such metropolitan city * * *." Laws 1921, c. 116, Art. I, § 15, p. 411. The clause was amended in 1961 to read as follows: "* * * when such real estate is located in any county in which a city of the metropolitan class is located, * * *." § 14-116, R. R. S. 1943. The amendment probably made no change in substance. The title limited the subject to municipal authority over real estate "within the same county as such city." Laws 1961, c. 29, p. 144.

Control over platting is intended to promote orderly development of lands that may be annexed subsequently. County of Norfolk v. City of Portsmouth, 186 Va. 1032, 45 S. E. 2d 136; cf. Schlientz v. City of North Platte, 172 Neb. 477, 110 N. W. 2d 58. Villages, which may annex territory in adjoining counties, possess no wide power over platting. Municipal approval is required only if the land lies within ½ mile in the same county. §§ 17-1002 and 17-1003, R. R. S. 1943. Public policy not being clear-cut, the analogy has slight value.

The asserted power of annexation would create diffi-

culties. For example the 1921 act specifies "the county" in reference to certain appeals, duties of the mayor, jurisdiction of the chief of police, certification of the levy, and compensation for services of the county treasurer, who is ex officio city treasurer. §§ 14-548, 14-221, 14-603, 14-514, 14-554, and 14-551, R. R. S. 1943.

The past failure of the city to assert its powers of planning is significant under the circumstances. "Authority actually granted * * * of course cannot evaporate through lack of * * * exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power of those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." Federal Trade Commission v. Bunte Bros., Inc., 312 U. S. 349, 61 S. Ct. 580, 85 L. Ed. 881. See, also, In re West New York, 25 N. J. 377, 136 A. 2d 654.

The degree of ambiguity in the annexation statute draws the past position of the city into the process of statutory construction. Arguments directed to desirable legislative policy must yield, for the power of annexation is construed strictly. Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490. The district court interpreted the statute correctly.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICCARDO SILVACARVALHO, APPELLANT.

145 N. W. 2d 447

Filed October 12, 1966. No. 36245.

1. **Criminal Law.** The otherwise valid conviction of a defendant properly represented by counsel at a criminal trial is not rendered void or voidable solely because at a pretrial police interrogation, the defendant was denied counsel, and was not

warned of his absolute right to remain silent.

2. **Constitutional Law: Criminal Law.** Pretrial interrogation of a criminal suspect by police, without warning him of his constitutional right to remain silent, and without granting his request for counsel, does not constitute prejudicial error, in the absence of proof that a confession, admission, or statement obtained from the defendant as a result of such interrogation was used in evidence at the trial.
3. **Criminal Law.** Under the Post Conviction Act, the sentencing court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised before granting a full evidentiary hearing.
4. ———. Post conviction remedies are intended to provide relief in those cases where a miscarriage of justice may have occurred, and are not to be a procedure to secure a routine review for any defendant dissatisfied with his sentence.

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

Paul E. Galter, for appellant.

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

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

MCCOWN, J.

This is a proceeding under the Post Conviction Act, sections 29-3001 to 29-3004, R. S. Supp., 1965.

June 2, 1964, an information and complaint was filed in Lancaster County charging Riccardo Silvacarvalho with a robbery on May 30, 1964, and with being a habitual criminal. He was bound over to the district court after waiving his right to a preliminary hearing. Counsel was appointed, and the defendant pleaded not guilty. Jury trial was had, and the defendant was found guilty by the jury and convicted of robbery. He was subsequently adjudged to be a habitual criminal and sentenced to 10 years imprisonment.

Substantially all of the issues presented in this post

conviction proceeding were raised by the defendant by pretrial motions and motions for a new trial following conviction.

The district court in the current post conviction proceedings found from the defendant's motion and the records and files that there was no denial or infringement of the rights of the defendant as to render the judgment void or voidable, under the Constitution of the State of Nebraska or the Constitution of the United States, and that the defendant was entitled to no relief. This appeal followed.

The defendant alleges that he was questioned by the Omaha police in connection with robberies in the City of Omaha. He alleges that he requested the opportunity to consult with counsel and was refused; that he was never at any time advised of his right to remain silent, and that he answered all questions asked of him. His motion then states that members of the Lincoln city police department came to Omaha and returned him to Lincoln, and that the Lincoln police then carried on an intensive interrogation of the defendant without advising him of his constitutional right to remain silent, and without allowing him to contact or consult an attorney despite his requests that he be allowed to do so. This interrogation concerned the crime with which the defendant was charged. He does not assert that he answered any of the questions of the Lincoln police. There is no allegation or contention in the motion nor in the defendant's brief that he made any admissions, confessions, or statements which were used against him.

The contention of the defendant is that he was denied the assistance of counsel during police interrogation conducted without warning of his right to remain silent, and that the denial of counsel was prejudicial error sufficient to void the conviction. He relies on Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977. It is the defendant's position that police interrogation within the area circumscribed by the Escobedo deci-

sion gives rise to a constitutional right to counsel at the time of interrogation, even though no confessions, admissions, or statements were made or, if made, were not used in evidence at the trial.

The defendant's theory is that any police interrogation after the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, constitutes a violation of his constitutional right to counsel sufficient to void an otherwise valid conviction. We cannot agree.

While the nature and extent of involvement of the constitutional right to counsel are not presently clear, the thrust of Escobedo and later cases, including Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, is directed at confessions, admissions, or statements obtained as a result of police interrogation aimed at securing a confession. Whether these redefined constitutional rights be grounded on the Fifth, Sixth, or Fourteenth Amendments to the Constitution of the United States, they relate to interrogation while in custody, and are enforced by rendering evidence obtained from the defendant in violation of the standards prescribed, inadmissible at the trial. They do not require the appointment of counsel as a prerequisite to police interrogation, nor make the denial of counsel at the time of interrogation prejudicial error sufficient to void any subsequent conviction.

The otherwise valid conviction of a defendant properly represented by counsel at a criminal trial is not rendered void or voidable solely because at a pretrial police interrogation, the defendant was denied counsel, and was not warned of his absolute right to remain silent.

Pretrial interrogation of a criminal suspect by police, without warning him of his constitutional right to remain silent, and without granting his request for counsel, does not constitute prejudicial error, in the absence of

proof that a confession, admission, or statement obtained from the defendant as a result of such interrogation was used in evidence at the trial.

The records and files in this case establish that the defendant is entitled to no relief. The sentencing court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised before granting a full evidentiary hearing. State v. Woods, *ante* p. 282, 142 N. W. 2d 339.

Post conviction remedies are intended to provide relief in those cases where a miscarriage of justice may have occurred, and are not to be a procedure to secure a routine review for any defendant dissatisfied with his sentence. State v. Clingerman, *ante* p. 344, 142 N. W. 2d 765.

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

AFFIRMED.

CECILE A. BENTON, APPELLEE, v. JOHN M. BENTON, APPELLANT.

145 N. W. 2d 576

Filed October 21, 1966. No. 36261.

1. **Divorce.** A divorce case is for trial de novo on the record in the Supreme Court which is required to reach independent conclusions of fact without reference to findings made by the trial court.
2. ———. The mere use of intoxicants is not a ground for divorce in this jurisdiction.
3. ———. Corroborative evidence is required of the acts or conduct asserted as a ground for divorce.
4. ———. A general rule by which to measure the exact amount of the degree of corroboration required in a divorce case cannot be formulated, and each case must be determined on its own facts and circumstances.
5. ———. To constitute extreme cruelty, the unjustifiable con-

duct must be such as to destroy the legitimate aims and objects of matrimony.

6. ———. Mere incompatibility does not constitute extreme cruelty.

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

Jack E. Lyman, for appellant.

Robert M. Harris, for appellee.

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

SPENCER, J.

Plaintiff, Cecile A. Benton, brought suit for divorce against defendant, John M. Benton, on the ground of extreme cruelty. Defendant denied the allegations of the petition and cross-petitioned for a divorce. The trial court dismissed the cross-petition, and granted a divorce to the plaintiff. The defendant has perfected an appeal, attacking the sufficiency of the evidence to support the decree.

Plaintiff, who had a son by a prior marriage, and defendant were married February 26, 1950. There are two living daughters the issue of this marriage, one born March 4, 1951, and the other born June 7, 1958. Plaintiff's son by the previous marriage, who was 18 at the time of the hearing in October 1965, had been raised by the parties.

Plaintiff's petition alleges in substance that the defendant is addicted to excessive drinking, is quarrelsome, mean, and abusive, has falsely accused the plaintiff of misconduct, and has failed to properly support his family. Plaintiff's testimony would tend to support some of her allegations. There is no doubt, however, but that plaintiff's son, who at the time of the trial was no longer in the home, has been at the root of most of their difficulty. The plaintiff accused the defendant of being

unnecessarily hostile to her son, and resented his attempts to discipline the boy. During the 3½ years preceding the trial, there is no question but that the boy was in serious need of discipline, and the record would support an inference that the mother was too indulgent.

The defendant in recent years and during most of their marriage has been on the road, away from home approximately half of the time. He has been steadily employed throughout the marriage, and on the record amply provided for his family within his means until the separation of the parties in April 1964. At that time the parties agreed to separate for a period to see if they could readjust their situation. The petition for divorce was filed November 24, 1964.

"A divorce case is for trial de novo on the record in the Supreme Court which is required to reach independent conclusions of fact without reference to findings made by the trial court." Kuta v. Kuta, *ante* p. 443, 143 N. W. 2d 751.

Plaintiff's corroborating witnesses were her son, her mother, and the 14-year-old daughter of the parties. The son's testimony is limited to answering allegations made by the defendant relative to his difficulties with the plaintiff's son, and is not in any way corroborative of the plaintiff's testimony except as it clearly indicates that the boy was the prime cause of the difficulty between the parties.

Plaintiff's mother, who was a resident of Iowa, in recent years has visited the home only for brief periods not more than twice a year, and had not been in the home for 11 months prior to the separation of the parties. She does corroborate the fact that the defendant drank, but her testimony is wholly insufficient to show excessive drinking on even one occasion. She testified that on the last occasion she was in the home the parties quarreled, but when required to be specific, she testified as follows: "A He just fussed about the bills that had to be paid, that was paid out, that she was just spending

the money, wasting it. Q Were there more conversations that week between the parties that you were present at? A I can't remember everything that was said. Q Were there other subjects discussed that you recall? A Well, he always complained about David, his doings and everything, too."

The corroboration of the 14-year-old daughter on the quarreling is essentially the following: "Q Karla, have you ever been present in the home when there has been an argument between your mother and father? A Yes, I have. Q Has this been on more than one occasion? A Yes, I have—yes. Q When are you first aware—how far back can you remember that they argued? A Oh, about a year ago—well, I'm not for sure. Q Karla, when your mother and father quarrel, do you know what they quarrel about? A Well, all sorts of things, but mostly my brother. Q I see, and this is your brother, David, you are talking about? A Yes. Q was there any quarreling about liquor? * * * A I'm not for sure."

The daughter was questioned on defendant's use of liquor as follows: "Q Do you know, Karla, when your father was still living in the home whether or not he used alcoholic liquor?" She answered: "A *He used it mostly when he was gone,* but he did drink when he was home." (Italics supplied.) She further testified: "Q Did you see him drink any liquor? A Yes, I did. Q Could you tell when he had been drinking liquor? A Yes, I could. Q How could you tell? A Well, sometimes he staggered and, well, by his voice mostly. Q Was his voice different when he had been drinking liquor? A Yes, kind of slurred together. Q Did you see him drink liquor more than once? A Yes, sir. Q Do you have any idea how often you saw him drink liquor? A No, sir." There is no other testimony which could be considered corroborative of plaintiff's testimony.

It is undisputed that the defendant was a user of intoxicants, but this record does not support a finding that he habitually used intoxicants to excess. The mere

use of intoxicants is not a ground for divorce in this jurisdiction. Nor can we say defendant's use of intoxicants was of such a character as to constitute extreme cruelty. It is undisputed that plaintiff also drank intoxicants. She described herself as a social drinker. The defendant worked steadily, was a territory manager for his company, and received periodic raises. There is no corroborative evidence that his drinking proclivities interfered with either his employment or their marriage relationship.

Corroborative evidence is required of the acts or conduct asserted as a ground for divorce. Laughrey v. Laughrey, 171 Neb. 132, 105 N. W. 2d 576.

A general rule by which to measure the exact amount of the degree of corroboration required in a divorce case cannot be formulated, and each case must be determined on its own facts and circumstances. Read v. Read, 179 Neb. 637, 139 N. W. 2d 829.

On the record herein, we cannot say that the plaintiff has proved her allegations of extreme cruelty. To constitute extreme cruelty, the unjustifiable conduct must be such as to destroy the legitimate aims and objects of matrimony. Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368.

Mere incompatibility does not constitute extreme cruelty. Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321.

The trial court allowed plaintiff an attorney's fee of $500, which we affirm as adequate herein. We make no further allowance herein, but do tax the costs to the defendant.

For the reasons given, the judgment herein is reversed, and the cause remanded with directions to dismiss the plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF ANDREWS VAN LINES, INC. ANDREWS VAN LINES, INC., APPELLEE, V. NIELSEN & PETERSEN, INC., ET AL., APPELLANTS, IMPLEADED WITH MERCHANTS TRANSFER & STORAGE CO., INC., ET AL., APPELLEES.

145 N. W. 2d 584

Filed October 21, 1966. No. 36265.

1. **Public Service Commissions: Appeal and Error.** On appeal from an order of the Nebraska State Railway Commission which requires the exercise of legislative authority, the only questions to be determined are whether or not the commission acted within the scope of its powers and whether or not the order complained of is reasonable and not arbitrarily made.
2. **Public Service Commissions: Motor Carriers.** Evidence of operations under color of authority may be considered by the Nebraska State Railway Commission in determining whether or not the proposed service is or will be required by the present or future public convenience and necessity.
3. ———: ———. The issue of public convenience and necessity is ordinarily one of fact and where there is evidence in the record to sustain the Nebraska State Railway Commission's order, this court cannot say that it is unreasonable and arbitrary.

Appeal from the Nebraska State Railway Commission. Affirmed.

James E. Ryan, for appellants.

Nelson, Harding, Acklie, Leonard & Tate, for appellee Andrews Van Lines, Inc.

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

MCCOWN, J.

The Nebraska State Railway Commission granted appellee's application for a certificate of public convenience and necessity authorizing the statewide transportation of household goods over nonradial irregular routes. Competing carriers have appealed.

The basic issue here centers around the appellee's grandfather certificate issued March 31, 1938, covering

appellee's operations as of the grandfather date of April 1, 1936. Upon the issuance of the grandfather certificate in 1938, the appellee raised a specific question with the commission as to whether the language of the certificate authorized statewide nonradial operations in accordance with those conducted prior to the grandfather date. He was advised by the commission that it did. Thereafter the appellee continued to provide nonradial statewide transportation of household goods as well as radial operations not involved in this proceeding. This nonradial statewide transportation of household goods has been continued openly ever since.

By the late 1940's and early 1950's, it was judicially determined in other cases that the words "and occasionally to and from various points within the State of Nebraska at large" in a certificate did not authorize nonradial irregular route statewide operation. In late 1953, the motor transportation department, by letter, advised the appellee that it was its opinion that under the grandfather certificate any shipment which did not either originate or terminate in Madison County would be outside the scope of the territorial authority. Shortly thereafter, under advice of counsel, the appellee commenced proceedings for an order nunc pro tunc to correct the commission's order of March 31, 1938. In 1965 those proceedings culminated in Andrews v. Nebraska State Railway Commission, 178 Neb. 799, 135 N. W. 2d 712. A more complete résumé of the factual situation will be found in that case. That case held that the proper function of a nunc pro tunc order was not to correct some affirmative action which ought to have been taken, but was to correct the record which had been made and that the evidence was insufficient to establish that the actual order entered had been entered by error or mistake. The action of the commission in denying the nunc pro tunc amendment of its own record was affirmed. The present application was filed shortly after that decision. During all the time involved, the appellee openly con-

tinued to transport household goods over nonradial irregular routes statewide.

On appeal from an order of the Nebraska State Railway Commission which requires the exercise of legislative authority, the only questions to be determined are whether or not the commission acted within the scope of its powers and whether or not the order complained of is reasonable and not arbitrarily made. City of Scottsbluff v. United Tel. Co. of the West, 171 Neb. 229, 106 N. W. 2d 12.

The railway commission originally advised appellee that the grandfather certificate authorized the nonradial operations which were being conducted. Judicial decisions many years later interpreted the same language in other certificates as not authorizing such operations. With the advice of counsel, legal proceedings were then commenced to correct or confirm the authority appellee claimed to have been legally and continually entitled to since the grandfather date. Those proceedings were blocked by procedural difficulties, as well as by partially missing records both of the commission and of the appellee.

For many years neither the commission nor any competing carriers took action to challenge the appellee's right or authority to conduct the operations involved here, except to resist appellee's efforts to correct what appellee claimed to have been an ancient error. No court has yet held that in 1938 the appellee should not have been entitled to a grandfather certificate authorizing the operations involved here. This court has refused to redetermine those issues, on the record of the proceedings involving them, on procedural or technical grounds. The appellee is not a new carrier entering the household goods field, and the granting of the application will not change the competitive situation in any respect. Under such circumstances, it can hardly be said that the appellee's operations were in bad faith, with no legal justification, and therefore require a finding of appellee's

unfitness and an absence of color of authority. We believe the facts establish that the appellee's nonradial household goods operations were conducted under sufficient color of authority to support the action of the commission here.

Evidence of operations under color of authority may be considered by the commission in determining whether or not the proposed service is or will be required by the present or future public convenience and necessity. Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

The issue of public convenience and necessity is ordinarily one of fact and where there is evidence in the record to sustain the commission's order, this court cannot say that it is unreasonable and arbitrary. Basin Truck Co. v. R. B. "Dick" Wilson, Inc., 166 Neb. 665, 90 N. W. 2d 268.

For the reasons stated, the order of the railway commission was proper and is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

EDWARD MCGERR ET AL., APPELLEES, V. ALFRED BEALS ET AL., APPELLANTS.

145 N. W. 2d 579

Filed October 21, 1966. No. 36271.

1. **Appeal and Error.** In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party.
2. **Trial: Appeal and Error.** The verdict by a jury based upon conflicting evidence will not be set aside unless it is clearly wrong.
3. **Fraud.** Evidence that the defendants knowingly made a false representation of a material fact, with the intention that it be acted upon, and that the plaintiffs relied thereon to their damage will sustain a judgment for damages for false representation.

4. **Set-Off and Counterclaim.** **Ordinarily, a debt due at a future time cannot be set off against a debt presently due.**

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

William L. Walker, Earl Ludlam, John McArthur, and A. James McArthur, for appellants.

Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellees.

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

BOSLAUGH, J.

This is an action for damages for false representations arising out of the sale of a residence property to the plaintiffs, Edward McGerr and Barbara J. McGerr. The defendant, Alfred Beals, was the owner of the property. The sale was negotiated by the defendant, Action Realty Company, Inc., a real estate broker.

The jury returned a verdict against both defendants. Their motions for new trial were overruled and they have appealed. Although the defendants have filed separate briefs, the principal assignments of error of each defendant relate to the sufficiency of the evidence to sustain the judgment and the instructions of the trial court.

The property in question is located at 6000 Holdrege Street in Lincoln, Nebraska. It is a brick veneer house with a full basement. When the house was constructed, tile was laid under the basement floor which led to a pit located approximately 14 feet south of the southeast corner of the house. An automatic electric sump pump installed in the pit is connected to a discharge tube leading to the street in front of the property. Water which collects in the pit is automatically pumped out into the street.

Beals listed the property for sale with Action Realty

Company in August 1963. It was shown to the plaintiffs in September 1963 by Richard Svoboda, a salesman employed by the Action Realty Company. Mrs. McGerr testified that she told Svoboda that they needed a house with a dry basement because they wanted to have a bedroom in the basement. When they first looked at the house at 6000 Holdrege Street, the basement was dry and there was no sign of any water. Nothing was said about there being a water problem with the house.

The plaintiffs inspected the property again about a week later. On that occasion Svoboda told the plaintiffs that a sump pump had been installed in the yard as a precautionary measure because of the fact that water might drain onto the property from the east. Svoboda said that the water would not run in and over the basement floor but would go into the "pocket" and be pumped out to the street. Mrs. McGerr further testified that Svoboda said that they would have nothing to worry about as far as water coming into the basement was concerned.

The plaintiffs inspected the property a third time on a Sunday afternoon during an open house. The basement was dry on this occasion and there was no sign of any water. The plaintiffs were in the basement of the house when Beals and Svoboda arrived. While Beals was in the northeast corner of the basement he asked Mrs. McGerr to look at the basement and note how perfectly dry it was. The plaintiffs agreed to purchase the house on the following Tuesday. The contract is dated October 2, 1963.

The plaintiffs commenced moving into the house about a week later. Water was then coming through the basement wall and onto the floor. Water flows in where the wall meets the floor and at times covers the entire basement floor. The water interferes with the use of the basement area, causes the furnace and laundry equipment to rust, and creates a musty odor in the rest of the house.

In June 1964, the plaintiffs wrote to Action Realty Company requesting that all of their payments and other costs to date plus the expense of moving to another house be refunded within 10 days. The plaintiffs were unable to reach a settlement with the defendants, and this action followed.

The defendants produced evidence which contradicted that of the plaintiffs. The effect of this evidence was to present a question for the jury. In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party. Boardman v. McNeff, 177 Neb. 534, 129 N. W. 2d 457. The verdict by a jury based upon conflicting evidence will not be set aside unless it is clearly wrong. Bauerle v. Frosh, *ante* p. 170, 141 N. W. 2d 748.

The evidence is sufficient to sustain a finding that the defendants represented that the house had a dry basement and that there was no water problem, which was untrue. The jury could find that the defendants knowingly made a false representation of a material fact, with the intention that it be acted upon, and that the plaintiffs relied thereon to their damage. The evidence in this case is sufficient to sustain the judgment against both defendants.

The defendants contend that the plaintiffs' letter requesting that all of their payments and other costs be refunded was a rescission and a bar to a later action for damages. The plaintiffs' letter was, at least, an offer to rescind which was not accepted by the defendants. The defendants did not change their position in any way and the plaintiffs were not barred from proceeding with an action for damages for the misrepresentation.

By instruction No. 6 the jury was advised that a mere expression of opinion honestly made under circumstances that do not give another the right to rely thereon is not actionable; and that a statement understood to be an expression of opinion, or which could not reasonably be

understood to be otherwise, should be disregarded. The instruction was not erroneous or prejudicial to the defendants.

Instruction No. 7 related to the right of a purchaser to rely upon representations where the facts are unknown to him, the effect of an investigation by the purchaser, and the duty to use ordinary prudence to prevent deception. The defendants claim that the instruction was not proper in this case because there was no evidence of a latent defect. Although the defendants claimed that the plaintiffs had been fully advised concerning the water problem in the house, the plaintiff's evidence was to the contrary. The instruction was properly given.

Instruction No. 8 related to the duty of the seller to disclose a material fact where its suppression is the equivalent to a false representation. The instruction was proper in view of the plaintiffs' evidence concerning the statements in regard to the sump pump, its purpose, and its effect.

Instruction No. 9 advised the jury concerning notification to a principal of the unauthorized act of an agent, and the effect of the failure of the principal to return benefits received by him. The instruction was proper and appropriate in view of the evidence and the issues relating to agency.

By cross-petitions the defendants alleged that the plaintiffs were in default, that the defendants had declared a forfeiture of the contract, and that the court should decree its cancellation. The contract provides for forfeiture at the option of seller in the event of a default of 60 days in any payment due under the contract. The evidence established that there had been no default of 60 days' duration or any attempt by the defendants to declare a forfeiture. The cross-petitions were properly dismissed.

By motions, the defendants requested that the judg-

ment of the plaintiffs be set off against the balance remaining due on the contract. The contract contains no escalation clause other than the option to declare a forfeiture in the event of a 60-day default on the part of the buyer. Ordinarily, a debt due at a future time cannot be set off against a debt presently due. Lyhane v. Durtschi, 144 Neb. 256, 13 N. W. 2d 130. The defendants' motions were properly overruled.

The defendants claim that the trial court should have instructed the jury concerning the plaintiffs' duty to mitigate the damages. Under the pleadings in this case there was no issue concerning mitigation of damages and no instruction was required. The plaintiffs sought to recover only the difference between the value of the property at the time of the sale and what its value would have been if the representations of the seller had been true. The defendants introduced evidence concerning the value of the property, and the issue was properly submitted to the jury by the instructions of the trial court.

It is unnecessary to consider the other assignments of error. The judgment of the district court is affirmed.

AFFIRMED.

NEBRASKA STATE BANK, SOUTH SIOUX CITY, NEBRASKA, A CORPORATION, APPELLEE, V. FRANCIS L. SHERLOCK, APPELLANT.

145 N. W. 2d 573

Filed October 21, 1966. No. 36285.

1. **Assumpsit, Action of.** Wherever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter and the obligation may be enforced by assumpsit.
2. **Banks and Banking.** A bank which pays an overdraft is generally entitled to recover the amount thereof from the owner of the account.

Appeal from the district court for Dakota County: JOHN E. NEWTON, Judge. Affirmed.

McCarthy & Kneifl, for appellant.

Leamer & Graham, for appellee.

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

BROWER, J.

Plaintiff Nebraska State Bank filed its petition in the district court for Dakota County to recover $4,238.82, which was transferred from the account of Glass Land Company to the account of the defendant, Francis L. Sherlock. The sum so transferred was thereupon paid out by plaintiff on two checks drawn by the defendant in the exact amount of the sum transferred. The sum so transferred was ordered repaid and was repaid to the Glass Land Company as a result of our decision in Glass v. Nebraska State Bank, 175 Neb. 673, 122 N. W. 2d 882, resulting in an overdraft in defendant's account.

Hereafter the plaintiff will be designated as such or as the Bank, and Francis L. Sherlock as the defendant.

Plaintiff in the trial court brought its action for money had and received as an unjust enrichment. Defendant's answer denied that he was unjustly enriched at the expense of the plaintiff.

The case was tried to a jury and after both parties rested the plaintiff moved for a directed verdict which the trial court sustained, and judgment was entered for the amount of the sum so transferred and interest.

Defendant Sherlock has appealed and assigns error to the trial court in sustaining plaintiff's motion, claiming its action was contrary to the law and the evidence.

On August 17, 1960, defendant had borrowed $4,500 from one Eugene Russell for the express purpose of covering two checks which were then outstanding against his account. This sum was secured by a mortgage to

Russell on a half section of land. Russell's check was payable to "Glass Land Co. & Francis L. Sherlock," the defendant. It bore a notation on its face, "Escrow account on Sherlock Farm & Bar." The check was properly endorsed, "Francis L. Sherlock, Glass Land Co. By Oris Glass." It was deposited in the account of Glass Land Company on August 18, 1960. On August 19, two checks drawn by defendant were presented to the plaintiff Bank for payment. The funds in defendant's account were insufficient to pay them. A teller of plaintiff testified he was verbally authorized by Mr. Glass to transfer the exact amount, $4,238.82, required to pay the two checks to the defendant's account, which was done and the checks were paid. This court, in Glass v. Nebraska State Bank, *supra,* found the teller was not authorized to make the transfer and judgment was entered against the Bank therefor. The Bank thereupon paid the Glass Land Company the amount of the judgment with interest and thereafter brought this action. The two checks of the defendant which were honored from the funds so transferred were checks for liquor purchased by defendant, a liquor licensee. Thereafter, on July 14, 1962, the defendant repaid Russell the sum he had borrowed from him. Defendant testified he later knew of the deposit to his account and that the checks were paid thereby, that the Bank had to repay the amount transferred to Glass Land Company, and that the defendant has never repaid the plaintiff although it has made demand therefor. The Glass Land Company will hereafter be referred to as Glass and Eugene Russell as Russell.

Plaintiff cites Barker v. Wardens & Vestrymen of St. Barnabus Church, 171 Neb. 574, 106 N. W. 2d 858, holding: "Wherever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter and the obligation may be enforced by assumpsit." See, also, Estate of Devries v. Hawkins, 70 Neb. 656, 97 N. W.

792; McCormick Harvesting Mach. Co. v. Stires, 68 Neb. 432, 94 N. W. 629; 58 C. J. S., Money Received, § 1, p. 906. Plaintiff Bank contends the present action is one to recover an overdraft arising in defendant's account and that a bank which pays an overdraft is generally entitled to recover the amount thereof from the owner of the account. Bank of Benson v. Swanson, 107 Neb. 687, 187 N. W. 88; 9 C. J. S., Banks and Banking, § 353b, p. 703.

Defendant, while not disputing the general rules stated, contends in the present case the payment cannot be recovered. He cites certain authorities dealing with the subject of the recovery of payments erroneously made which he claims should govern in the present case to the exclusion of the rules urged by plaintiff and hitherto stated. He cites 40 Am. Jur., Payment, § 205, p. 856, where it is stated: "The question whether money paid under a mistake of law may be recovered is an ancient one and has provoked much dispute, but the trend of modern authority is strongly in favor of the rule that, as between individuals, money voluntarily paid *on a claim of right,* with full knowledge of all the facts, in the absence of fraud, duress, or compulsion, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability. The illegality *of the demand* paid constitutes, of itself, no ground for relief." (Italics supplied.) Essentially the same rule is stated in 70 C. J. S., Payment, § 156, p. 362. There the essence of the rule stated is that where one, under like misapprehension of the law but with the similar knowledge of the facts, pays money on a *demand* not legally enforceable against him, he cannot recover. The rules mentioned and the multitude of cases cited by the texts encompass a situation where the payor because of a mistake as to the law makes payment on the "demand" or "claim of right" of the payee. This the payor does under the erroneous impression it is a legal obligation owed the payee. Such a situation existed in Malec v. ASCAP, 146 Neb. 358, 19 N. W. 2d

540, where this court, in discussing the basis of the rule, stated: "In Weber v. Kirkendall, supra, this court said: 'But one threatened with civil process, unaccompanied by any act of hardship or oppression, is required to make his defense in the first instance to the merits of the claim, and cannot postpone litigation by paying the demand and afterward maintain an action therefor.'

" 'The reason of the rule that money voluntarily paid with full knowledge of the facts can never be recovered and its propriety are quite obvious when applied to a case of payment on a mere demand of money unaccompanied with any power or authority to enforce such demand, except by suit at law. In such case, if the party would resist an unjust demand, he must do so at the threshhold. The parties treat with each other on equal terms, and if litigation is intended by the one of whom the money is demanded, it should precede payment. When the person making the payment can only be reached by a proceeding at law, he is bound to make his defense in the first instance, and he cannot postpone the litigation by paying the demand in silence and afterward suing to recover the amount paid.' 21 R. C. L., sec. 166, p. 143." In the case before us, the defendant made no demand and asserted no claim of right to the payment. Any error of the Bank as to the law arose from a misconception of the legal sufficiency of the instructions obtained from Glass as to the transfer of the credit. There is no suggestion that the plaintiff considered any obligation of it to the defendant motivated the transfer. Any mistake of law made by the Bank did not relate to rights between the defendant and the Bank, but between it and Glass. The rules cited with respect to the denial of recovery of a payment made under a mistake of law has no application to the case before us.

The defendant next takes the position that the transfer was due to a mistake of fact and that it cannot be recovered from him because he has changed his position to his prejudice in reliance thereon. Although many

authorities are quoted by defendant, his claims with respect to their applicability to the present case are obscure. He cites rules of law stating that where one makes payment to a lienholder under a mistaken belief that the payor has an interest in the property and the lien is discharged or impaired, the person making the payment cannot recover. The plaintiff here made no payment under such circumstances and these authorities are not in point. Defendant apparently claims he subsequently paid off the Russell mortgage and finds himself without the proceeds of the loan which was given to Glass. This is apparently claimed to be the change of position which constitutes the prejudice. There is nothing to show that the Bank knew anything about the defendant's mortgage to Russell, nor the payment of the proceeds to Glass. The Bank placed the money in the defendant's account. When defendant endorsed Russell's check and it was deposited to the Glass account, the proceeds in the account, as far as the Bank was concerned, became the property of Glass. The mistake of the Bank, whether of law or fact, arose between it and Glass. The defendant received the deposit from the plaintiff by reason of the mistake. The questioned transfer was specifically intended to pay the checks for liquor previously given by the defendant and presented to the Bank to be honored. The proceeds of the loan procured by the defendant was for the same purpose. Defendant desired the checks to be honored and they were immediately paid. The defendant received the inventory of liquor that was the consideration for his checks. If there is something due the defendant from Glass, it was not caused by the action of the Bank but by the endorsement of Russell's check by the defendant. That is a matter between the defendant and Glass. We conclude that the defendant's citations of authority are not applicable. The mistake of the Bank resulted in the defendant's enrichment at the Bank's expense. His rights against Glass were not impaired thereby and he

has not changed his position because of the transfer to his prejudice in a manner that would defeat the plaintiff's right to recover the overdraft.

The trial court committed no error in directing a verdict for the plaintiff on the undisputed evidence disclosed. Its judgment entered was in all respects proper and the same is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GENE STEINHAUSEN, APPELLANT.

145 N. W. 2d 584

Filed October 21, 1966. No. 36300.

Criminal Law. The action of the district court in imposing sentence and denying probation in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion.

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

Merril R. Reller and Donald R. Hays, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

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

SMITH, J.

Defendant, having been convicted of assault with intent to commit rape, was sentenced to 2 years in the penal complex. He has appealed, contending that the district court erred in denying probation.

The evidence establishes that the contention of defendant is without merit. The action of the district court in imposing sentence and denying probation will not be disturbed on appeal unless the record shows an

abuse of discretion. See, § 29-2218, R. R. S. 1943; State v. Hylton, 175 Neb. 828, 124 N. W. 2d 230. There was no abuse in the present case.

The judgment is affirmed.

AFFIRMED.

GEORGE W. FARMER, SPECIAL ADMINISTRATOR OF THE ESTATE OF JEFFREY FARMER, DECEASED, APPELLANT, V. S.M.S. TRUCKING COMPANY, A CORPORATION, ET AL., APPELLEES.

145 N. W. 2d 922

Filed October 28, 1966. No. 36197.

1. **Negligence.** Negligence is defined as a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or the doing what reasonable and prudent persons under the existing circumstances would not have done.
2. ———. Knowledge is fundamental to liability for negligence. The very concept of negligence presupposes that the party charged therewith either fails to foresee an unreasonable risk of injury to another, or could have foreseen it had he conducted himself as a reasonably prudent person.
3. **Trial: Appeal and Error.** When a verdict, had it been obtained, could only have been based upon speculation or conjecture, it can not be sustained.
4. ———: ———. When plaintiff as a matter of law would not have been entitled to a verdict had the cause been submitted upon his theory of the case, failure to submit such theory is without prejudice.

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

Schrempp, Lathrop, Rosenthal & Bruckner, for appellant.

Cassem, Tierney, Adams & Henatsch and Charles F. Gotsch, for appellees.

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

NEWTON, District Judge.

This is an action brought by George W. Farmer, Special Administrator of the Estate of Jeffrey Farmer, deceased, as plaintiff, against S.M.S. Trucking Company, a corporation, and Arthur B. Custer as defendants.

The allegations of plaintiff's petition material to this appeal are that on June 12, 1963, plaintiff's decedent was operating a bicycle in an easterly direction on West Dodge Road in Omaha, Douglas County, Nebraska; that at such time defendant, Arthur B. Custer, was operating a tractor and semitrailer loaded with sand and gravel in an easterly direction on West Dodge Road; and that on approaching the intersection of One Hundred Sixty-eighth Street plaintiff's decedent made a left turn and was struck by the truck operated by the defendant, Arthur B. Custer, and belonging to the defendant, S.M.S. Trucking Company, a corporation. The petition charges the defendants with negligence in failing to keep a proper lookout, in failing to keep the truck under proper control, and in operating the truck at an excessive rate of speed under the existing circumstances. It further charges the defendant, S.M.S. Trucking Company, only, with negligence in furnishing its employee a vehicle which it knew or should have known had defective brakes in that it exerted an unequal retarding power.

Defendants' answer denied the allegations of plaintiff's petition above set forth; and charged plaintiff's decedent with contributory negligence, and with confronting the defendant Custer with a sudden emergency not of his making. For reply plaintiff denied the new matter in defendants' answer contained.

The court instructed the jury on all the material allegations of negligence contained in plaintiff's petition, but did not instruct the jury that it might bring in a verdict against the employer, S.M.S. Trucking Company, a corporation, notwithstanding it might find that the defendant Custer was free from negligence. This

is plaintiff's principal contention of error and is based upon the allegation that a truck with defective brakes was furnished the driver thereof.

The evidence, which is uncontroverted, is in substance as follows: Plaintiff's decedent was a 9-year-old boy who lived on One Hundred Sixty-eighth Street to the north of Dodge Road. He was riding his bicycle in an easterly direction along the right-hand or southernmost edge of Dodge Road. The defendant Custer, also traveling in an easterly direction, overtook plaintiff's decedent and on doing so turned into the left-hand or passing lane for eastbound traffic. When 40 or 50 feet behind the bicycle he "beeped" his horn. Plaintiff's decedent looked over his shoulder at him and then proceeded to make a left-hand turn across the highway in front of the truck. The truck veered further to the left and the boy was struck at a point about on the centerline of the highway by the left front fender and headlight of the truck which continued across the centerline for a distance of approximately 100 feet as subsequently shown by skid marks of the left rear dual tires on the tractor or trailer. Skid marks were not left by any of the other wheels or tires on the vehicle. The driver of the truck testified that as plaintiff's decedent turned to the left, he applied the brakes on the truck and went straight ahead, but that the truck pulled somewhat to the left across the centerline as mentioned. After the accident the truck was unloaded and then driven, it being an International truck, to the International Harvester Company in Omaha where the brakes were thoroughly checked by the service manager, an experienced mechanic, who found it to be in all respects in good working order. This individual further testified that skidding by the one set of dual tires could result from several causes other than defective brakes, such as turning or swerving, shifting the weight of the load from one set of duals, shifting of the load, the condition of the tires whether smooth or with rib tread, the amount of per square inch of tire on

the road surface, or condition of the road surface; and that turning from the right to the left would remove some of the weight from the left wheels, cause them to skid, and that once they started to skid they would become hot and continue to skid.

On these facts the jury found generally for both defendants, and upon these facts the plaintiff contends that the instruction as to separate verdicts should have been given.

Negligence is defined as "a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under the existing circumstances would not have done." Eaton v. Merritt, 135 Neb. 363, 281 N. W. 620. It necessarily follows that in this case before negligence can be imputed to defendants due to defective brakes, it must appear that defendants either knew or in the exercise of ordinary care should have known of the alleged defective condition. There is no evidence whatsoever in this record charging the defendants with such knowledge or of the existence of any condition which would charge defendants with such knowledge.

Knowledge is fundamental to liability for negligence. The very concept of negligence presupposes that the party charged therewith either fails to foresee an unreasonable risk of injury to another, or could have foreseen it had he conducted himself as a reasonably prudent person. American Air Lines, Inc. v. Shell Oil Co., Inc., 355 Mich. 151, 94 N. W. 2d 214; Minder v. Peterson, 254 Minn. 82, 93 N. W. 2d 699; Amelsburg v. Lunning, 234 Iowa 852, 14 N. W. 2d 680; Wadzinski v. Cities Service Oil Co., 275 Wis. 84, 80 N. W. 2d 816; Scarborough v. Aeroservice, Inc., 155 Neb. 749, 53 N. W. 2d 902, 30 A. L. R. 2d 1159.

The sole evidence in this record that indicates in any manner whatsoever a possibility of defective brakes or that the brakes did not exert an equal retarding

force on all wheels is that of the defendant Custer, who said that the truck pulled slightly to the left when the brakes were applied and the fact that only one set of duals left skid marks. The undisputed evidence indicates that this situation could have been caused by numerous other possibilities and that on subsequent examination the brakes were in excellent working order and exerted an equal retarding force on each wheel. Under such circumstances a jury could only arrive at the conclusion that the brakes were defective by means of speculation or conjecture, and a verdict based upon speculation or conjecture can not be sustained. Securities Investment Corp. v. Krejic, 132 Neb. 146, 271 N. W. 287; Springer v. Henthorn, 169 Neb. 578, 100 N. W. 2d 521; Odom v. Willms, 177 Neb. 699, 131 N. W. 2d 140.

The jury in this case rendered a verdict for the defendant Custer, the driver of the truck, although he was charged with a failure to maintain adequate control of his vehicle. Certainly defective brakes would under the circumstances presented here be a matter of interest in determining whether or not the defendant did exercise reasonable control of his vehicle. The question of control was submitted to the jury and resolved in favor of the defendant Custer. This would perhaps be sufficient answer to plaintiff's contention, but in any event since the plaintiff as a matter of law would not have been entitled to a verdict against the defendant, S.M.S. Trucking Company, a corporation, on the charge that it had furnished a truck with defective brakes to its driver, there can be no prejudice to plaintiff. Odom v. Willms, *supra.*

For the reasons stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

FRANK L. LEE, APPELLEE, V. RALSTON SCHOOL DISTRICT, DOUGLAS COUNTY, NEBRASKA, APPELLANT.

145 N. W. 2d 919

Filed October 28, 1966. No. 36274.

1. **Master and Servant.** The refusal of an employer to allow an employee to perform the duties required of him by his employment amounts to his dismissal from such employment.
2. ———. The proper remedy for the wrongful discharge of an employee is an action for damages for the breach of the contract of employment.
3. ———. The measure of damages in a suit for breach of contract for personal services is the amount of the salary agreed upon for the period involved less the amount which the servant earned or, with reasonable diligence, might have earned from other employment during that period.
4. ———. Where an employee who has been wrongfully discharged obtains other employment during the unexpired term of the contract, which is not consistent with the performance of all of the duties required under the original contract, the employer is entitled to a reduction in damages by reason of the employee's earnings in the subsequent employment.

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

Shrout, Hanley, Nestle & Corrigan, for appellant.

Story, Carl & Parker, for appellee.

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

BOSLAUGH, J.

The plaintiff, Frank L. Lee, was employed by the defendant, Ralston School District, as superintendent of its schools for a term of 3 years commencing July 1, 1961. On January 21, 1963, the defendant relieved the plaintiff of his duties but continued to pay his salary until November 1963. The plaintiff then commenced this action to recover the salary and expense allowances alleged to be due the plaintiff under the contract from November 1963 through June 1964.

The defendant's answer alleged that the plaintiff had obtained other employment and denied that there was any amount due the plaintiff under the contract. By counterclaim the defendant sought to recover the payments made to the plaintiff for June through October 1963.

A jury was waived and the action tried to the court. The trial court found that the plaintiff was entitled to recover an amount equal to the salary alleged to be due under the contract, with interest, and dismissed the counterclaim. The defendant's motion for new trial was overruled and it has appealed.

The action of defendant in relieving the plaintiff of his duties under the contract was the equivalent of a dismissal or discharge. Schlueter v. School Dist. No. 42, 168 Neb. 443, 96 N. W. 2d 203. Although the defendant alleged that the plaintiff had been discharged for cause, there was a complete failure of proof in that regard. The plaintiff's rights as against the defendant are those of an employee who has been wrongfully discharged from his employment.

From the allegations of the petition, it would appear that the action was brought to recover wages due under a contract for personal services. In some states an employee who has been wrongfully discharged may sue for his wages under the doctrine of constructive service. See, 35 Am. Jur., Master and Servant, § 53, p. 484; 56 C. J. S., Master and Servant, § 50, p. 444. The doctrine of constructive service has never been adopted in this state, and the proper remedy for the wrongful discharge of an employee is an action for damages for the breach of the contract of employment.

The judgment in this case was for the entire amount remaining due the plaintiff under the contract. The question that must be determined is whether the evidence will sustain a judgment for that amount.

The measure of damages in a suit for breach of contract for personal services is the amount of the salary

agreed upon for the period involved less the amount which the servant earned or, with reasonable diligence, might have earned from other employment during that period. Schlueter v. School Dist. No. 42, *supra*.

In this case the plaintiff testified that he was placed on temporary duty as a naval officer on July 15, 1963; that his rank was that of commander; that his duty was that of recruiting officer for the Naval Reserve in the Omaha area; that he was stationed at Fort Omaha and had offices there; and that his total pay and allowances per month as a naval officer were greater than his salary per month under the contract with the defendant.

The plaintiff further testified that he did not keep regular office hours while on naval duty; that sometimes he would be in his office at 9 o'clock in the morning, at other times at 1 o'clock in the afternoon, and at other times not until 5:30 or 6 o'clock in the evening. The work consisted of preparing material to be mailed to prospective recruits, arranging for interviews, and arranging for teams to go out and talk to the parents of prospective recruits. The plaintiff also testified that most of the work was done in the evenings, some on Saturday, and occasionally on a Sunday. The work involved travel in Omaha and occasionally out of town. His first tour of duty terminated in December 1963, and was followed by a second tour of duty that ended in May 1964.

The record in this case will not sustain a finding that the plaintiff's employment as a naval officer after his discharge by the defendant was part-time work or consistent with the performance of all the duties of a superintendent of schools under the contract of employment with the defendant. The defendant is entitled to a reduction in damages by reason of the plaintiff's earnings while on duty as a naval officer during 1963 and 1964 to the extent that his duty as a naval officer was not consistent with the performance of his contract with the defendant. The evidence will not sustain a judgment

for the entire amount remaining due under the contract.

The plaintiff argues that the judgment must be affirmed because the defendant is estopped from denying that the plaintiff's contract was "purchased" by it. The argument appears to be based upon a statement made by the president of the defendant's board.

At the meeting of the board on January 21, 1963, the president requested the plaintiff's resignation. When this was refused, the president stated: " 'In that case we have no option other than to buy your contract.' "

The petition in this case sought recovery under the original contract. The plaintiff alleged that he was "ready and willing to assume and perform all acts required of him by the contract." In a letter to the defendant's board on November 15, 1963, the plaintiff's attorney stated that the plaintiff was ready and willing to assume the duties of superintendent and do everything required of him by the contract.

There is no pleading or proof of any agreement between the plaintiff and the defendant whereby the defendant "purchased" or "bought up" the contract. The resolution of the defendant's board merely stated that the plaintiff's salary would be paid on a monthly basis until the expiration date. The plaintiff's contention is without merit.

The judgment of the district court is reversed and the cause remanded for a determination of the damages due the plaintiff for the defendant's breach of the contract of employment.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD D. SNYDER, APPELLANT.

146 N. W. 2d 67

Filed October 28, 1966. No. 36305.

1. **Constitutional Law: Criminal Law. Once a defendant, under**

the advice of counsel, requests or submits to an examination by court-appointed psychiatrists, he is not constitutionally entitled to the presence of his counsel at the examination.

2. **Criminal Law.** The otherwise valid conviction of a defendant properly represented by counsel in a criminal case is not rendered void or voidable solely because at a pretrial police interrogation the defendant was denied counsel, and was not warned of his absolute right to remain silent.
3. **Constitutional Law: Criminal Law.** Under the Post Conviction Act, the sentencing court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised before granting a full evidentiary hearing.
4. ———: ———. Post conviction remedies are intended for those cases where a miscarriage of justice may have occurred, and not to secure a routine review for any defendant dissatisfied with his sentence.

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

Richard D. Snyder, pro se.

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

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

WHITE, C. J.

This is a proceeding by motion under the Post Conviction Act, sections 29-3001 to 29-3004, R. S. Supp., 1965.

On June 22, 1965, a complaint was filed charging the defendant with rape and assault with intent to commit rape on June 19, 1965. A hearing was held before the county judge on June 22, 1965, in which the defendant was represented by counsel, and he entered a plea of not guilty to both counts of the information. On July 19, 1965, defendant, with counsel, appeared in county court and waived preliminary hearing, and defendant was bound over for trial to the district court. On July 30, 1965, defendant appeared in district court with counsel and moved that the court order the defendant be

given a psychiatric examination, and the court so ordered. Defendant was examined at the Hastings State Hospital and a copy of the report was sent to the court, the county attorney, and the defense counsel. On August 20, 1965, defendant appeared in court with his counsel, waived the reading of the information, and pleaded guilty to Count I (rape) of the information. After a presentence investigation, defendant appeared with counsel before the court on August 27, 1965, and was sentenced to 12 years in the Nebraska Penal and Correctional Complex.

The district court held that the motion and the files and records in the case showed that the petitioner was entitled to no relief. See § 29-3001, R. S. Supp., 1965. This appeal followed.

Defendant alleges that upon his arrest and interrogation he was never advised of his right to remain silent and to consult with an attorney, and contends he was questioned in the psychiatric examination without the assistance of counsel. The record shows that at every stage of these proceedings defendant was represented by counsel. Although he asserts he was interrogated at some time subsequent to his arrest without being advised as to his right to remain silent and have the assistance of counsel, there is nothing in the record whatsoever to indicate that the result of any interrogation was ever used against the defendant at any stage of the proceeding. He voluntarily pleaded guilty with the assistance of counsel and he had counsel represent him throughout the proceedings from some time prior to his arraignment in county court. The otherwise valid conviction of a defendant properly represented by counsel in a criminal case is not rendered void or voidable solely because at a pretrial police interrogation, the defendant was denied counsel, and was not warned of his obsolute right to remain silent. State v. Silvacarvalho, *ante* p. 755, 145 N. W. 2d 447.

The defendant argues that he was denied counsel at

a "critical stage in the proceedings," during the taking of a psychiatric examination. The record shows that this examination was ordered by the court on the request of the defendant in open court with his counsel present. The proper rule is that, once a defendant, under the advice of counsel, requests or submits to an examination by court-appointed psychiatrists, he is not constitutionally entitled to the presence of his counsel at the examination. In re Spencer, 63 Cal. 2d 400, 46 Cal. Rptr. 753, 406 P. 2d 33 (1965). See, also, Durst v. Superior Court of Los Angeles County, 222 Cal. App. 2d 447, 35 Cal. Rptr. 143, 7 A. L. R. 3d 874 (1963). There is no merit to this contention.

The records and files in this case establish that the defendant is entitled to no relief. The sentencing court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised before granting a full evidentiary hearing. State v. Woods, *ante* p. 282, 142 N. W. 2d 339; State v. Silvacarvalho, *supra*.

Post conviction remedies are intended for those cases where a miscarriage of justice may have occurred, and not to secure routine review for any defendant dissatisfied with his sentence. State v. Clingerman, *ante* p. 344, 142 N. W. 2d 765; State v. Silvacarvalho, *supra*.

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

AFFIRMED.

VYTAUTAS J. ARLAUSKAS, APPELLEE, V. WESTERN ELECTRIC COMPANY, APPELLANT.

145 N. W. 2d 925

Filed October 28, 1966. No. 36342.

Workmen's Compensation. Held, that under the Workmen's Com-

pensation Act plaintiff sustained a permanent partial disability from organic heart disease and a cardiac arrest.

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

Fraser, Stryker, Marshall & Veach, for appellant.

Sodoro & Meares, for appellee.

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

SMITH, J.

The issue in this workmen's compensation case is whether plaintiff was permanently disabled because of a cardiac arrest and organic heart disease. The right to compensation is unquestioned otherwise. A single judge of the compensation court denied the claim, but on direct appeal the district court found a permanent partial disability. The employer company has appealed.

Plaintiff, who was 30 years of age, had no history of heart disease. He sustained the cardiac arrest April 9, 1963, minutes after he had ingested a penicillin tablet under supervision of a company nurse. A short time passed before Dr. Tranisi, a company physician, arrived. Plaintiff looked like a man in severe shock with profuse diaphoresis. Pulse and blood pressure were imperceptible. Responding to emergency treatment, plaintiff described the onset. After a sensation of itching and swelling all over, he had suffered from shortness of breath, vomiting, and severe epigastric cramps.

Abnormalities were present subsequent to the emergency treatment. Plaintiff could distinguish only gross objects and light, and his right eye appeared to be deviated externally. Pulse was perceptible but quite rapid. Blood pressure of 60/40 was first ascertained in 10 or 15 minutes. Plaintiff felt cold inside, and he soon developed intermittent muscular contractions typical of a severe chill.

Plaintiff was hospitalized April 9 to 12, 1963, under the care of Dr. Tranisi in consultation with Dr. Fangman, an internist. At the time of admission plaintiff had a blood pressure of 112/74 and a pulse of good quality. Dr. Tranisi recorded this impression: "Anaphylactic type reaction, etiology indefinite, possibly secondary to ingestion penicillin tablet." Plaintiff resumed handling storeroom materials for the company on April 22, 1963, but he was restricted by the doctors to light manual labor until June 11, 1963.

Plaintiff quit his job November 1, 1963, for unrelated reasons. He was employed by Swift and Company from November 1963, to February 1965, at manual labor which was not quite so hard as his former work. An employment questionnaire shows that he denied having heart disease. Yet in testimony and statements to doctors he complained of suffering weekly from shortness of breath and chest pain. He also testified to a misunderstanding of the question.

The medical opinions, together with supporting data, are contained in written reports. Dr. Fangman in June 1964, referred to plaintiff's complaints, and then said: "I would not eliminate the possibility of a cardiac neurosis with anxiety state. Any absolute statement regarding the absence of organic disease at this moment is going to require more intensive diagnostic evaluation * * *." He concluded in July 1964, that plaintiff was not disabled permanently. The doctor noted minor electrocardiographic changes April 10, 11, and 12, 1963, and in May 1964, but he found the cardiogram within normal limits.

Dr. Hartigan, an internist, made an examination in June 1964, at the request of plaintiff's attorney. Plaintiff, besides reiterating his complaints, mentioned a hospitalization of several weeks and a doctor's disclosure of damage to the heart muscle. The heart on examination had regular rhythm, strong tones, and no murmur. An electrocardiogram demonstrated some inversion of the

T waves in the 4th, 5th, and 6th precordial leads, but it otherwise was not remarkable. A double two step test showed an increase in rate, no other abnormal change, and no coronary insufficiency at the time. Dr. Hartigan found a permanent disability of 10 per cent, but he also said:

"It is my impression that this man suffered an acute allergic reaction. From his history apparently there was some myocardial injury at that time. There were only minimal residual findings of this present on his cardiogram at this time. * * * I would assume from his story that he had suffered myocardial damage from which he has recovered well. He states that his exercise tolerance is not up to what it was before. This could be the result of his myocardial injury plus the enforced inactivity. I think he has made a good recovery. I would suspect that his long-term prognosis is good."

Counsel says that we should disregard the opinion of Dr. Hartigan because plaintiff misrepresented damage to the heart muscle and the length of hospitalization. Accuracy was not essential. The representation of damage was not misleading, for the Chief, Benefit and Employee Service Section, had written in May 1963: "1. Is there permanent damage to his heart? 2. If so, is it related to the penicillin reaction? * * * Question number one has been deferred for the present. While the EKG's taken do indicate non-specific changes, our Medical Department cannot say at this time whether or not this is of a permanent or transient nature. In regard to question number two, whether the condition is permanent or not, it is our Medical Department's opinion that the severe reaction likely was due to the ingestion of a penicillin tablet in the absence of any other precipitating factor."

A company doctor said in a memorandum of April 13, 1964: "The electrocardiogram changes previously reported do not necessarily constitute actual damage as the result of this episode. These changes may have

been present prior to the episode and certainly are not indicative of any permanent residual damage arising from a specific incident."

On de novo review we are influenced by the prior negative history, the severity of the penicillin reaction, the complaints of weekly chest pain and shortness of breath, the opportunity of the district court to observe the demeanor of plaintiff, and the opinion by Dr. Hartigan. We have considered those facts operating against an award, but we conclude that the judgment is correct.

A fee of $350 is allowed to plaintiff for services rendered by his attorney in this court.

AFFIRMED.

PAUL RHODES, APPELLANT, V. THE CONTINENTAL INSURANCE COMPANY, A CORPORATION, APPELLEE.
PAUL RHODES, APPELLANT, V. AETNA INSURANCE COMPANY, A CORPORATION, APPELLEE.
PAUL RHODES, APPELLANT, V. NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, A CORPORATION, APPELLEE.

146 N. W. 2d 66

Filed November 4, 1966. Nos. 36068, 36069, 36070.

SUPPLEMENTAL OPINION

Appeals from the district court for Morrill County: JOHN H. KUNS, Judge. On motion for rehearing. See *ante* p. 10, 141 N. W. 2d 415, for original opinion. Motion for rehearing overruled. Affirmed.

Paul Rhodes, pro se.

Haney, Walsh & Wall, for appellees.

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

SPENCER, J.

We affirmed judgments for the defendants in an

opinion appearing at *ante* p. 10, 141 N. W. 2d 415. In that opinion we refused to consider the unconstitutionality of section 44-501, R. R. S. 1943, because the record did not indicate the issue was raised in the district court. On rehearing herein, the plaintiff contended that the issue had been raised in the district court. The indication now is that the plaintiff orally raised it in his argument on the defendants' demurrers. Consequently, it is not reflected in any way by the pleadings or the record herein.

The issue of the statute of limitations appears from the face of plaintiff's petition. It was therefore properly raised by demurrer. This is a court of review. The rule that the unconstitutionality of a statute cannot be raised for the first time in this court requires that the issue be apparent from the pleadings or be evident from the record made in the trial court. If the plaintiff wished to inject the unconstitutionality of section 44-501, R. R. S. 1943, the proper procedure would have been to have amended his petition after the demurrers were sustained. By electing to stand on the sustaining of the demurrers, he has foreclosed the presentation of that issue in this court.

We adhere to our original opinion and judgments. Motion for rehearing overruled.

AFFIRMED.

PAULA E. OTTE, APPELLANT, V. JOHN ALVIN TAYLOR, APPELLEE.

146 N. W. 2d 78

Filed November 4, 1966. No. 36246.

1. **Trial: Appeal and Error.** Trial rulings permitting or excluding courtroom experiments will not be disturbed except for abuse of discretion.
2. **Negligence: Trial.** In a negligence action an instruction that an actor in certain circumstances is not required to anticipate negligence by another, does not inject into the case an issue

of a stranger's negligence. It defines the knowledge which the actor is required to have in relation to the risk involved.

3. **Trial.** In instructing a jury, the court is not required to define on its own motion language commonly used and generally understood.

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

Richard H. Hansen and Hyman Polsky, for appellant.

Baylor, Evnen, Baylor & Urbom, for appellee.

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

SMITH, J.

Plaintiff guest, claiming injury in an automobile collision, alleged that defendant, the host driver, had been under the influence of drugs. Jury verdict went for defendant, and from denial of a motion for new trial, plaintiff has appealed. She complains of a courtroom experiment with drugs and of jury instructions. Therefore, much of the conflicting evidence that probably affected the verdict is now unimportant.

While the parties were traveling north on U. S. Highway No. 77 in October 1962, they crested a hill 7.5 miles north of Beatrice, Nebraska. Defendant was driving 65 miles per hour. He was looking at plaintiff to his right. He was using a cigarette lighter located on the instrument panel. At the same time traffic ahead was moving north slowly. The automobile driven by defendant traveled downhill 600 feet, skidded 66 feet farther, struck the rear end of an automobile, went 87 feet into the side of a ditch, rolled over in the air, and came to rest facing south in an upright position.

Defendant had ingested aspirin tablets and 2 Nembutal capsules between 75 and 25 minutes before the collision. Each capsule contained 58/100 grain of sodium pentobarbital and 5 grains of aspirin. At no time during the trip did defendant appear drowsy.

At the trial, an opinion by an expert on drugs was first adduced by plaintiff over objection. A pharmaceutical chemist testified that animal experiments had led him to the following conclusion concerning the effect of Nembutal on humans: If an average person ingests 2 capsules equivalent to those taken by defendant, slower reactions and drowsiness will usually ensue within an hour.

The courtroom experiment was conducted by an orthopedic surgeon as a witness for defendant. At the beginning of his testimony the surgeon ingested 2 Nembutals containing 75/100 grain of sodium pentobarbital per capsule. At the close of direct examination he testified that he was not drowsy. He was on the witness stand approximately 1½ hours.

Irrelevance and lack of foundation constitute the main objections to the experiment. It was undisputed that Nembutal is a depressant which ordinarily induces sleep in a person with normal physiology. The connotation of drowsiness, however, somewhat justified the experiment, although the chemist used the modifiers "probably" and "may or may not." During the trip plaintiff had observed no sign of drowsiness, but additional evidence was neither irrelevant nor cumulative. The ruling on the objection to foundation in respect to similarity of conditions was discretionary. The record discloses no unfair prejudice, and no abuse of discretion.

"* * * the question is one of weighing the probative value of the evidence of experiments against the dangers of misleading the jury (who may attach exaggerated significance to the tests), unfair surprise, and, occasionally, undue consumption of time. * * * Though the similarity formula is sometimes overrigidly applied, most courts will recognize that the requirement is a relative one, so that where a high degree of similarity is not attainable, the court might still conclude that the results of the experiment are of substantial enlightening value to the jury and admit the evidence. Manifestly, if the

trial judge is to be given responsibility for exercising such an indefinable value-judgment he must be accorded a reasonable leeway of discretion reviewable only for abuse." McCormick on Evidence, § 169, p. 360.

"The general requirement of similarity of conditions applied to experimental evidence generally applies with equal force to experiments in court. Manifestly, the trial judge can best determine whether the confusion and delay incident to the court-room experiment outweigh its value, and his wide discretionary power to permit or exclude the experiment is constantly emphasized." McCormick on Evidence, § 182, p. 390. See, also, Dean v. State, 128 Neb. 466, 259 N. W. 175.

No issue of a stranger's negligence was submitted in the instruction on reasonable control. The court instructed that a driver is not required "to anticipate negligence by another, in the absence of notice, warning or knowledge of such negligence." The instruction defined the knowledge which a driver is required to have in relation to the risk involved. See Restatement, Torts 2d, § 290, comment c, p. 48. It was correct. See Tate v. Borgman, 167 Neb. 299, 92 N. W. 2d 697.

In instructing that momentary inattention alone does not constitute gross negligence, the court did not define the phrase "momentary inattention." The trial court is not required to define on its own motion language commonly used and generally understood. Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549. There was no error.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD WYCOFF, APPELLANT.

146 N. W. 2d 69

Filed November 4, 1966. No. 36247.

1. **Criminal Law: New Trial.** A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown, its determination will not be disturbed.
2. ———: ———. New cumulative evidence tendered in support of a motion for a new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict.
3. ———: ———. A new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial.

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

Lyle B. Gill, for appellant.

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

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

WHITE, C. J.

After a jury verdict of guilty, defendant, having been found by the court to be a habitual criminal, was sentenced on February 4, 1965, to concurrent terms of 10 years for the crimes of breaking and entering and possession of burglary tools. No appeal was taken. On November 3, 1965, defendant filed this motion for a new trial under section 29-2101, R. R. S. 1943, on the ground of newly discovered evidence. The motion was overruled and this appeal followed.

Only the facts necessary for the disposition of this appeal will be recited. About 1 or 2 o'clock in the morning of August 28, 1964, the Hilltop Cafe at Uehling, Nebraska, was broken into. Two officers, a deputy sheriff

and the town marshal of Uehling, stopped when they saw a car parked in the vicinity of the cafe that had not been there when they had driven by before. On investigation they apprehended two men, the defendant and one Richard Davis, Davis being observed coming out of the cafe building on the south side and the defendant being crouched or bent over on the north or east side of the building. The cash register and cigarette and pop machines had been broken into, and a door to the cafe had been broken open. A crow bar, screw driver, and other tools were found in a grease barrel on the side of the building and in Davis' car. Davis testified in the case for defendant admitting possession of the tools and that he had broken into the cafe, claiming that he did it on the spur of the moment and that defendant had nothing to do with the commission of the offense. Defendant testified that he was present at the scene as the officers had testified but that he had no knowledge of the breaking into the cafe or of the tools. Further facts as to the offense will not be elaborated as no issue is presented in this case as to the sufficiency of the evidence.

The claim of newly discovered evidence relates to a collateral matter not bearing directly on the guilt of the accused. One Howard Waterbury, operator of a tavern at Uehling, testified that on the afternoon of August 27, 1964, the afternoon before the offense was committed, the defendant and another man were in his tavern between the hours of 4 and 5 o'clock in the afternoon and had remained there about an hour. The defendant, Davis, and another witness, John Wallace, from Omaha, all denied this, testifying that the defendant was in Omaha the afternoon of August 27, 1964. Defendant, corroborated by Davis, testified that he bought a car in Omaha on the afternoon of August 27, 1964, returned home about 3 o'clock, then picked up Davis and another friend, drove to west Omaha to see about a paint job, and on rturning on the interstate had a

flat tire and his spare was flat. He then testified that he and Davis hitchhiked and got Davis' car, returned and had the spare fixed, taking about 2 hours time altogether. On the return home they picked up two girls whose car would not start and were walking on the interstate, took them in defendant's car to his home, then in Davis' car took the girls home to Council Bluffs, and the men returned to Omaha about 8:30 or 9 p.m. Davis and defendant had a few drinks and decided to drive to Norfolk to see a relative of defendant. They had carburetor trouble, then ran out of gas, were brought into a filling station in Fremont where the carburetor was repaired, and continued on to Norfolk by way of Oakland. Carburetor trouble developed again and they stopped at the Hilltop Cafe in Uehling where they were apprehended by the officers as related herein.

In support of his motion for a new trial, defendant produced the affidavits of the two girls to the effect that the defendant and Davis picked the girls up on Interstate 80 around 5 o'clock on the afternoon of August 27, 1964, spent several hours with them, and took them to Council Bluffs in the evening. He asserts that he never knew the names or addresses of the girls at the time of the trial and this is corroborated by the affidavits of the two girls offered in support of the motion for a new trial.

The statute, section 29-2101, R. R. S. 1943, provides that a new trial may be granted because of newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial. This court, in construing this statute, has laid down several rules applicable to this case. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown, its determination will not be disturbed. Smith v. State, 169 Neb. 199, 99 N. W. 2d 8; Fugate v. State, 169 Neb. 420, 99 N. W. 2d 868. New cumulative evidence tendered

in support of a motion for a new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. Wiegand v. Lincoln Traction Co., 123 Neb. 766, 244 N. W. 298; Gates v. State, 160 Neb. 722, 71 N. W. 2d 460; Smith v. Smith, *supra*. A new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial. Baskins v. State, 139 Neb. 803, 299 N. W. 188; Ogden v. State, 13 Neb. 436, 14 N. W. 165.

We point out that the proffered new evidence is entirely cumulative in nature. It simply corroborates the testimony of the defendant, Davis, and Wallace that the defendant was in Omaha the afternoon of August 27, 1964, at the time the witness Waterbury testified the defendant was in his tavern in Uehling. Just how this testimony would be potent enough under the rule quoted above to change the result of the trial does not appear. Defendant admitted he was present at the scene of the crime at the time in question. His defense was not an alibi that he was some other place at the time, but simply, though present, that he had no knowledge or participation in the acts of Davis, who admittedly broke into the cafe. The alleged new testimony had no bearing on this issue but only related to a dispute as to where the defendant was 8 or 9 hours before the commission of the offense. We hold that this proffered evidence is only cumulative in character and not of such strength as would change the result in event of a new trial.

There is a further reason why defendant's position cannot be sustained. Defendant's proffered new testimony would only serve to impeach or discredit the testimony of Waterbury as to where the defendant was 8 or 9 hours before the time of the commission of the offense. In Baskins v. State, *supra,* this court said: "A motion for a new trial for newly discovered evidence will not be granted where the other evidence is sufficient to sustain the verdict. The newly discovered evi-

dence offered in the instant case is of an impeaching character, to discredit the witness who testified at the trial. In 23 C. J. S. 1248, sec. 1460, it is said: 'Generally, a new trial will not be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testifed at the trial.' See, also, Ogden v. State, 13 Neb. 436, 14 N. W. 165; Kenyon v. State, 111 Neb. 175, 196 N. W. 143."

The statute requires that the new evidence must be material. Just how this evidence could be material in light of the admission of the defendant as to being present at the scene of the crime, we are unable to see. Under the circumstances of this case, the mere showing that the defendant was some other place 8 or 9 hours before the commission of the offense, where he was admittedly present, is immaterial.

We hold therefore that there was no abuse of discretion by the trial court in denying the motion for a new trial. The trial court's ruling is correct and is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

FRED PLISCHKE ET AL., APPELLEES, V. CHARLES A. JAMESON, APPELLANT.

146 N. W. 2d 223

Filed November 4, 1966. No. 36250.

1. **Boundaries: Adverse Possession.** Where a fence is constructed as a boundary fence between two properties, and where the parties claim ownership to the fence for the full statutory period of 10 years, and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly inclosed with their own.
2. **Adverse Possession.** Title to a part of a county road cannot be acquired by adverse possession.
3. **Highways.** In 1880, all county, state, and other public roads were required to have a width of 66 feet.

4. ———. **If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path but the right extends to such width as is reasonably necessary for public travel.**

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed in part, and in part reversed and remanded with directions.

Andrew J. McMullen, for appellant.

Dier & Ross, for appellees.

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

SPENCER, J.

This is an action to adjudicate the ownership of land along the west half of the east and west half-section line in Section 27, Township 10 North, Range 17 West of the 6th P.M., in Buffalo County.

The plaintiffs, Fred Plischke and Neta Plischke, who will hereafter be referred to as plaintiffs, are the owners of the north half of said section, and defendant Charles A. Jameson, who will hereafter be referred to as defendant, is the owner of the north half of the southwest quarter thereof. The trial court found that a 66-foot road had been established along the half-section line and that subsequent thereto a road 20 feet wide was established by prescription somewhat in variance to the road as laid out along the half-section line. The court also found that by action of the county board both roads were vacated in 1963, that no provision was made as to the disposition of the land covered by either road, and that under the provisions of section 39-1725, R. R. S. 1943, title thereto remains in Buffalo County until a period of 10 years of nonuse has elapsed. The court further quieted title to a strip of land south of the 66-foot road and on the east 734 feet thereof in the defendant. Defendant has perfected an appeal to this court.

Defendant purchased his property in July 1947. At

that time there was a fence running diagonally northeast for a distance of 1,873.5 feet from a point 9.5 feet north of the west quarter corner to a point 52.5 feet north of the half-section line. At that point the fence jogs 18 feet south. An 18-foot gate constitutes the fence at this jog. The fence then runs from the south end of the gate generally east 734 feet to a point 47.6 feet north of the east-west half-section corner. At the time defendant purchased his property there was a trail road approximately 10 feet wide running generally parallel to and south of the fence to the gate described heretofore. It then passed through the gate and thereafter was north of the fence. The area east of the gate and south of the fence is the area to which title was quieted in the defendant. Defendant claims the property south of the entire fence as being a part of the property purchased by him. At the time of his purchase in 1947 one of the hog sheds in the east portion of the property was against and directly south of the fence. A granary on the property was also located directly on the half-section line.

Plaintiffs purchased their property in 1953 but had farmed it for several years previously. In 1950, defendant sank an irrigation well north of the half-section line and 16 feet south of the fence. The location is not exactly described but appears to be approximately 1,320 feet east of the west quarter corner and directly south of the trail road. At that time Fred Plischke complained of the location of the well and had a survey made. This was at a time when he was still a tenant on and previous to the time Plischkes purchased the property. The survey showed the well to be located north of the half-section line, and that the half-section line ran through the middle of defendant's granary. Fred Plischke called defendant's attention to the result of the survey but defendant claimed the property between the half-section line and the fence as being a part of his property because the fence had always been accepted as the half-section line.

Subsequently, plaintiffs purchased their property. This present action was filed May 13, 1965.

Sometime previous to August 1880, a road petition was filed for the location of a county road, commencing at the northwest corner of Section 27, Township 10, Range 17, running thence south one-half mile to the quarter stake, and thence one-quarter mile east and from thence "a most straight and most practicable road" to the southeast corner of Section 36. Pursuant thereto, the county surveyor was appointed by the commissioners to view and locate the road and to report thereon. He reported favorably and the county board on August 23, 1880, "granted the petition and directed said road to be recorded as laid down in report * * *." A plat attached to the report of the surveyor would indicate that the road was to run one-half mile east rather than one-fourth mile east as set out in the petition. There is nothing further in the record to indicate exactly where the road was located or that it actually was located on the half-section line. The former surveyor and the present deputy surveyor, who were called by the plaintiffs, could not testify that the road actually was located on the half-section line. The only road they were familiar with was the trail road described above. A witness for the defendant, who was on the property for a week in 1897, testified that the road at that time was just a wagon-wheel trail, and is in the same place now as when he used it in 1897.

On the facts, it is apparent that the defendant at the time of purchase, and his predecessors in interest thereto, considered the fence as the half-section line. It is also true, as defendant argues, plaintiffs did not elicit any evidence that they or their predecessors in interest ever held possession of any part of the property south of the fence. The record indicates that all repairs to the fence were made by the defendant. If the case were not complicated by a road through the area, under the authority of Ohme v. Thomas, 134 Neb. 727, 279 N. W.

480, defendant would clearly have title to the land between the actual half-section line and the fence. The case holds: "Where a fence is constructed as a boundary fence between two properties, and where the parties claim ownership to the fence for the full statutory period of ten years, and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly inclosed with their own."

While the evidence that a road was ever actually established on the half-section line is incomplete and not entirely satisfactory, the request by the property owners in 1880 for a road did so locate it, and the drawing attached by the surveyor would indicate it was so located. However, the survey notes on the drawing could be interpreted to place the road 80 feet north of the half-section line if the section is actually a full mile north and south. The record does indicate that on August 23, 1880, the county commissioners did grant the request for and directed the location of a road near the point in controversy. Defendant does not dispute this fact. He insists, however, that if a road was ever laid out, it was abandoned before 1897 when his witness used the trail road, and locates it at the approximate location of the one in use when defendant purchased the property. It might be noted that all portions of the road described in the 1880 petition except that located on Section 27, were vacated and erased from the road record book at sometime in the distant past. The road record book does not indicate the date of said vacation.

The law is well established that it is not possible to acquire title to a public road against a county by adverse possession. See Krueger v. Jenkins, 59 Neb. 641, 81 N. W. 844, in which we said: "Title to a part of a country road can not be acquired by adverse possession."

Defendant argues that the petition for the road in 1880 did not describe the width thereof, and he disputes the intent to establish a road 66 feet in width. However,

the law at that time established the width of all public roads. G. S. 1873, c. 67, § 3, p. 951, provides: "All county, state, and other public roads shall have a width of sixty-six feet, * * *." The trial court properly determined that a public road 66 feet in width was dedicated along the half-section line in question.

The evidence is undisputed that a trail road not to exceed 10 feet ran generally parallel to and south of the fence. This road was used mainly by the parties or by a landowner to the east or his tenant, but occasionally was used by other members of the public. For the first approximately 1,050 feet of its length to the northeast, it is located within the area of the public road described above. From that point on, a portion of the trail road is north of the public road. From the point where any part of the trail road extends beyond the public road there is little question a road was established by prescription. A public highway may be established by prescription by continuous adverse use thereof by the public for a period of 10 years. Kunz v. Bornemeier, 170 Neb. 463, 102 N. W. 2d 842. The evidence in this case is that the trail road was used for a much longer period. Even the plaintiffs' evidence shows its existence unchanged since 1941 when they became familiar with it.

On the authority of State ex rel. Game, Forestation & Parks Commission v. Hull, 168 Neb. 805, 97 N. W. 2d 535, the trial court determined the prescriptive portion of the trail road to be 20 feet wide. In that case, we held: "If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path but the right extends to such width as is reasonably necessary for public travel." In that case, we determined that the record supported an easement of 20 feet for a frequently-used sandhills road.

The record in this case conclusively establishes that the trail road was never more than a one-vehicle road. The defendant fixed its maximum width at 10 feet, and this is undisputed. For the restricted use of this trail

road apparent from the record, a width of 16 feet would be ample.

It is obvious that the trail road was located at some distance south of the fence. It is impossible to determine this exact figure from the record. We conclude, however, that such area must have been a minimum of 3 feet. We determine therefore that the area up to 3 feet south of the fence where it leaves the public road along the half-section line south to the jog described heretofore, and an area of 3 feet north of the fence for the remaining distance of 734 feet to the north-south half-section line, is no part of the prescriptive road. With the exceptions noted herein, we affirm the trial court's location of the trail road.

We determine further that title should be quieted in the defendant to all land south of the fence line not actually embraced in the public road or in the prescriptive road as described above. This would include any portion up to 3 feet of the area paralleling the fence line on the south after it leaves the public road.

For the reasons given, we affirm the judgment of the trial court as to the location of the public road and the effect of its vacation as well as the quieting of title in the defendant to the area along the east 734 feet of said public road, but remand the cause with directions that the judgment be reversed as to the width and location of the prescriptive road as noted. and that judgment be entered in conformity with this opinion.

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

RALPH S. MOSELEY, SPECIAL ADMINISTRATOR OF THE ESTATE OF OTTO W. MILLER, DECEASED, ET AL., APPELLEES, V. MARY S. ZIEG ET AL., APPELLANTS.

146 N. W. 2d 72

Filed November 4, 1966. No. 36286.

1. **Deeds.** It is essential to the validity of a deed that there be a delivery and the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence.
2. ———. To constitute a valid delivery of a deed there must be an intent on the part of the grantor that the deed shall operate as a muniment of title to take effect presently.
3. ———. Where an unrecorded deed is found, after grantor's decease, in a safe deposit box to which the grantee had a right of access as a joint lessee thereof with such grantor, this of itself will not sustain a finding that the deed was delivered when the grantor retained control of the property, collected the rents, and made repairs thereon as he did before the date of the purported delivery.

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

Joseph J. Cariotto, for appellants.

Kier, Cobb & Luedtke, for appellees.

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

BROWER, J.

The appellees, Ralph S. Moseley as special administrator of the estate of Otto W. Miller, deceased, and Seth E. Cole, Sr., Robert A. Cole, Sr., Mamie Whitmarsh, and Margaret A. Hostreiter, the devisees and legatees under the will of said deceased, as plaintiffs, brought this action in the district court for Lancaster County against the defendants and appellants Mary S. Zieg and Henry G. Zieg, her husband, to cancel and declare void a deed conveying a lot and residence in Lincoln, Nebraska, and "All household goods contained therein," to Mary S. Zieg, sometimes referred to herein as Mrs. Zieg, and to obtain possession of the property and enjoin defendants

from interfering therewith or collecting the rents. During the trial Ralph S. Moseley, as executor of the estate of Otto W. Miller, was substituted as a party plaintiff for the special administrator.

A trial to the court resulted in a judgment finding that the grantor never delivered the deed in his lifetime to anyone, but retained the same in his own personal possession, and granting the plaintiffs the relief prayed for.

Defendants appeal from an order overruling their motion for a new trial, assigning as errors that the finding and judgment are contrary to the law and not sustained by the evidence which they contend support a finding for defendants.

During the period pertinent to this decision prior to his death, which occurred in a hospital at 2 a.m., on March 18, 1964, Otto W. Miller, hereafter called Miller, the grantor in the deed, had occupied the premises so conveyed as his home. He rented an upstairs apartment and rooms to students in the basement. Miller was an attorney and at an earlier period in his life had practiced law in Lincoln, Nebraska, about 2 years. Later his occupation concerned the manufacture of farm machinery. He had married rather late in life and his wife had predeceased him. By a prior marriage the wife had the four children hitherto designated as his devisees and legatees. The will was executed May 4, 1960. On November 9, 1961, Miller had his attorney, Ralph S. Moseley, prepare the deed in question, conveying the premises mentioned to the defendant Mrs. Zieg. The deed was witnessed by Moseley and was acknowledged by Miller before Ollie R. McMeen, a lady and notary public in Moseley's office. It was recorded by Mrs. Zieg at 11:55 a.m., on March 18, 1964. Mrs. Zieg lived across the street from the Miller home.

Harold Foster, a student at the University of Nebraska and a tenant of the deceased Miller, testified with respect to conversations had alone with the latter on an evening near the middle of February 1964. The witness stated

Miller said he was in love with Mrs. Zieg and was going to see she got the property after he died. Miller said he had made a new will within the past year that would give her the property and that she had been given a deed to the property. He said some of his stepchildren had borrowed money from him and had not repaid it or reimbursed him for certain bills paid by him for them, and his stepchildren would not get his property. On cross-examination, Foster stated he had paid the March rent to Miller after the conversation.

Mrs. Lillith Gluesing, the occupant of Miller's upstairs apartment, testified by deposition. She saw Miller practically every day and many times saw Miller cross over the street to speak with Mrs. Zieg. Miller had told her he would marry Mrs. Zieg if she were single and Mrs. Zieg had stated to her that if single she would marry Miller. In July or August 1963, he said, " 'This house belongs to Mary. I have taken care of that,' something about all the paper work has been done. * * * 'I have been to see my lawyer, all the paper work is signed and it has been delivered.' " On cross-examination, she stated she had always paid the rent to Miller up to his death, including that due in March 1964, but thereafter to Mrs. Zieg. On many occasions he had mentioned the house belonged to Mrs. Zieg and seemed happy when he said it.

William H. Owen, a son of Mrs. Zieg, testified that on August 14, 1963, Miller called him by telephone while the witness was at his mother's house. Miller asked him to come to his home. On going there, Miller stated he had been to see his lawyer the day before, spending most of the morning and that he had taken the deed to his house over to "my mother's house" the day before, after he had come home. He stated John Steinacher " 'knows all about this.' " " 'John will take your mother and have the deed recorded on my death.' " " 'Be sure that they do it immediately; don't wait one day.' "

Ralph S. Moseley, the attorney, testified for plaintiffs. He stated Miller came to his office and requested

him to prepare the deed on November 9, 1961. It was prepared, signed, and witnessed, and acknowledged by Miller there at that time. The witness told Miller that he would have to give it to Mrs. Zieg to make good delivery, but he knew Miller was an attorney. Miller stated the deed would not be effective until after his death. He testified that after Miller's death, Mrs. Zieg contacted him about the deed and she and Steinacher went with him to the safe deposit box in the basement of the National Bank of Commerce where Mrs. Zieg signed for admission to the box. She had a key that would permit her to open it. He testified that in the box was the deed in question which was in an old envelope on which was written " 'To be filed at my death.' " An inventory of the contents of the box was made by Moseley at the time. It listed a small amount of corporate stock and a considerable number of government bonds, $11,000 of which were payable to Miller alone and $15,000 made payable to him with $3,000 thereof payable on death to one of his stepchildren and $4,000 to each of the other three stepchildren. The inventory which is in evidence included the abstract of title to the lot in question but not the deed. It was signed by the three persons present. The deed was given by him to Mrs. Zieg at that time and he advised her to put revenue stamps thereon and to record it, and told the defendant the place was then hers.

John J. Steinacher, a witness for the defendants and a neighbor of Miller, who as a carpenter did the repair work for him in and about his home, testified that in August 1963, Miller said, "he gave—that Mary gets the house when he is gone." Later he related another conversation between him and Miller: "And so I went in the kitchen and he says, 'Well, I have got everything fixed.' I says, 'What do you mean?' And he says, 'I have got my obituary written,' and he says, 'I gave the deed to Mary, and I made' or 'changed my Will.' I don't remember whether he said he made or changed

his Will, at the time he told me he gave the deed to Mary. * * * Q. What did he say in that regard? A. He asked me if I'd do him a favor; if something happened to him, would I take Mary to the box and get the deed and have it put on record. I said, 'O.k., as long as it don't cost me anything.' " On direct examination he testified of the events after Miller's death as follows: "Q. So that was the next day, the date following the date when they took Mr. Miller to the hospital? A. After he died, because he says, 'When something happens, to me, take her to the Courthouse with that deed and have it recorded.' Q. Now, did you go over—then in compliance with that request, did you take Mrs. Zieg to the safety deposit box? A. I did. Q. Do you know whether she had a key to get in? A. Oh, yes. Q. Could you tell us whether you went, or she went in the deposit box and got the deed out? A. She went alone first. I stayed in the back room. I went right in the place where you sign in, and she got the deed and then we went up to Mr. Moseley's office. Q. By the place where you sign in, are you testifying you were in the National Bank of Commerce in Lincoln? A. That's right. Q. And you were in the back portion of the bank where the safety deposit boxes are located? A. That's right. Q. Now, did you see Mrs. Zieg take the deed out of the box? A. No, I didn't. Q. Do you know whether she had the deed with her when she came out? A. No. All she had was just a small purse. Q. Then after she had been in the box, did she have the deed? A. Yes. Q. And did you see the deed? A. Yes. Q. What did you do after she had gotten the deed out of the box? A. We went to Mr. Moseley's office." He subsequently states that Moseley later went with him and Mrs. Zieg to the box at the National Bank of Commerce, and on direct examination he testified concerning this incident: "Q. Well, did you take anything out of the box when Mr. Moseley was there? A. No, not that I know of. Q. In other words, are you telling the Court you didn't see any

papers or documents relieved from the safety deposit box? A. No, but Mary had a deed with her at all times. That wasn't in the box. She had that already. Q. What did you do after you and Mary Zieg and Mr. Moseley were in the safety deposit box? A. Then we went upstairs, and Mr. Moseley says, 'You can buy the stamps here in the bank.' Q. What happened, did you buy the stamps there in the bank? A. Yes." On cross-examination, the witness testified: "Q. Your testimony, Mr. Steinacher, is not clear to me. You say you and Mrs. Zeig (sic) went down to the safety deposit box at the National Bank of Commerce to get the deed, and yet now you are telling the Court she had the deed all along? A. That, I don't know. I never paid enough attention really. I had no axes to grind." On redirect examination, he said he first saw the deed at Moseley's office and told of the second visit to the box at which time Moseley made the inventory which he signed.

Ted Thompson, a vice president of the National Bank of Commerce, was a witness for the plaintiffs. He identified a rental contract for the safe deposit box between the bank and O. W. Miller and Mary Owen Zieg with a record of entries attached, which is in evidence. The contract is dated March 2, 1961. The record of entries shows O. W. Miller signed the entry sheet only on November 9, 1961, and November 12, 1963, and that Mary Owen Zieg signed it on March 18, 1964, at both 10 a.m., and 10:43 a.m., and on March 20, 1964, and several times thereafter.

This court, in the case of Lewis v. Marker, 145 Neb. 763, 18 N. W. 2d 210, laid down the following rules in its syllabi which we deem applicable to the case before us: "It is essential to the validity of a deed that there be a delivery and the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence.

"To constitute a valid delivery of a deed there must be an intent on the part of the grantor that the deed

shall operate as a muniment of title to take effect presently.

"Where an unrecorded deed is found, after grantor's decease, in a safety deposit box to which the grantee had a right of access as a joint lessee thereof with such grantor, this of itself will not sustain a finding that the deed was delivered when the grantor retained control of the property, collected the rents, made repairs and paid taxes thereon as he did before the date of the purported delivery." See, also, Owens v. Reed, 141 Neb. 796, 4 N. W. 2d 914, cited in Lewis v. Marker, *supra.*

The defendants cite the case of Cerveny v. Cerveny, 154 Neb. 1, 46 N. W. 2d 632, from which defendants maintain the burden to set aside a deed for want of delivery is upon the plaintiffs who seek to set it aside. In the Cerveny case the deed was seen in the possession of the grantee during his lifetime and the life of the grantor and found in the grantee's effects on his death. Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183, was a case where the deeds were in possession of the grantee in the grantor's lifetime, and this court held: "The possession of a deed by the grantee, in the absence of opposing circumstances, is prima facie evidence of delivery, and the burden of proof is on him who disputes this presumption." In the Kellner case the plaintiffs who sought to set aside the deeds, cited Lewis v. Marker, *supra,* and other cases of similar import, contending the rules in those cases should apply. This court in its discussion distinguished the two situations, stating: "The essential fact to render delivery effectual always is that the deed itself has left the control of the grantor who has reserved no right to recall it, and it has passed to the grantee. The deeds in the instant case, and there is no evidence to the contrary, were in the possession of the grantee, Laura B. Whaley, prior to the time of the grantor's death, and at the time of his death. The distinction between the cited cases and the instant case is therefore obvious."

In the present case we think the defendants have failed to show that the deed was in the possession of the defendant Mary S. Zieg during her lifetime. Although the testimony of attorney Moseley and the witness Steinacher is not in complete harmony, it plainly appears that the latter took Mrs. Zieg to the bank that she procure the deed from the safe deposit box. Parts of Steinacher's testimony clearly indicates she got it there. They went together to the safe deposit box of Miller after his death pursuant to the instruction given by Miller in his lifetime. It stretches credulity to believe that if Mrs. Zieg carried the deed with her before arriving at the bank she would not have told the person she accompanied that she already had it and exhibited it to him. It is of some significance also that William H. Owen on being informed by Miller that he had taken the deed to his mother the day before did not thereafter observe it in her possession. Steinacher's testimony, from which defendants claim it might be inferred she had it at all times, is inconsistent and unsatisfactory. We think it must be conceded the deed was procured from the joint safe deposit box. If so, it was placed there by Miller in his lifetime because he was the only person who had access to it before his death. The presumption of delivery of a deed found in the possession of a grantee in the grantor's lifetime does not obtain in the present case. The burden here was on the defendants to prove delivery.

The defendants argue that the evidence in any event is sufficient to show delivery, that manual tradition or physical possesson by the grantee or delivery to a third person for the grantee is not necessary. They contend the declarations of the grantor shown by the record is sufficient. It is unnecessary to review the numerous cases cited by defendants in practically all of which the physical possession of the deed by the grantee at some time or that of someone holding it for him was a controlling factor. The evidence here is susceptible of a different interpretation than urged by the defendants.

When the grantor executed the deed and was told by his lawyer that delivery to the grantee was necessary, he stated that it was to take effect upon his death. He placed it in the safe deposit box and his instructions indicate that he intended to keep control of it until his death. He remained free to destroy it or make other disposition of the property before his death. He remained in possession of the premises, collected the rents, and the repairs were made for him. His actions indicate he desired to remain the owner of the property. The evidence fails to show an intent on the part of the grantor that the deed should operate as a muniment of title to take effect presently. The present case is similar to that of Lewis v. Marker, *supra,* except there is no evidence with respect to who paid the taxes on the premises in question.

We conclude the defendants have not sustained the burden of proof to show the delivery of the deed in question.

The judgment of the trial court was without error and should be and is affirmed.

AFFIRMED.

IN RE PETITION OF RICHARD L. MONSON ET AL.
RICHARD L. MONSON ET AL., APPELLEES, V. BRYCE P. NEIDIG ET AL., APPELLANTS, IMPLEADED WITH PERCY H. NEIDIG ET AL., APPELLEES.
146 N. W. 2d 198

Filed November 4, 1966. No. 36298.

1. **Schools and School Districts.** A deputy county superintendent, deputy county clerk, or deputy county treasurer is not authorized to act as a member of the statutory board provided by section 79-403, R. S. Supp., 1963.
2. **Administrative Law.** A party is not denied a full hearing before an administrative board exercising a quasi-judicial function because the actual taking of testimony or conducting of the hearing is by less than all the members of the administrative

board who are charged with determining the matters involved.

3. **Schools and School Districts.** The absence from the hearing of a designated member of the board provided for by section 79-403, R. S. Supp., 1963, or his failure to participate in the determination by the board does not oust the board of jurisdiction nor render the action taken by a majority of the statutory board invalid.
4. ———. Substantial compliance with statutory requirements for the creation or alteration of school districts is sufficient notwithstanding minor irregularities in the proceedings if no prejudice results.
5. ———. A notice of the filing of a translocation petition and hearing thereon, otherwise in compliance with section 79-403, R. S. Supp., 1963, is not insufficient merely because a member of the statutory board did not personally arrange for its publication and posting. Personal signatures of board members are not required on such notice.
6. ———. Whether a petitioner has met the statutory requirements of section 79-403, R. S. Supp., 1963, and is entitled to have his land set off from one school district and attached to another, is determinable on the facts existing on the date of the hearing before the board, or on the date of the trial in the district court, if appealed.
7. **New Trial.** In any but an extraordinary case in which an utter failure of justice will unequivocally result, evidence of facts occurring after the trial will not support a motion for a new trial as newly discovered evidence.
8. **Trial.** Whether a party may withdraw his rest and introduce further testimony rests within the sound discretion of the trial court.

Appeal from the district court for Madison County: GEORGE W. DITTRICK, Judge. Affirmed.

William G. Whitford, for appellants.

Moyer & Moyer, for appellees Monson.

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

MCCOWN, J.

The detachment of land from one school district and attachment to another under the provisions of section 79-403, R. S. Supp., 1963, is involved. The judgment of

the district court found for petitioners and transferred their real estate from school district No. 48, a rural district, to school district No. 1, a K-12 district, which includes the City of Madison.

Petitioners' evidence established the specific facts required by the statute. The appeal is primarily directed at procedural and other requirements of the statute.

The constitution of the board is first challenged. Section 79-403, R. S. Supp., 1963, provides for a board, "consisting of the county superintendent, county clerk, and county treasurer * * *." The board which conducted the hearing here consisted of the county treasurer, the county superintendent, and the deputy county clerk. The deputy county clerk was present but abstained from voting. The county superintendent and the county treasurer signed the board's conclusive report, but failed to insert in the blank in the printed form either of the words "grant" or "reject." On the same day, however, the county superintendent executed and delivered to the county clerk a certificate stating that changes in the boundary lines and maps of the school districts involved had been made and the real estate involved had been attached to school district No. 1.

It is contended first that a deputy county officer cannot serve as a member of a board constituted under section 79-403, R. S. Supp., 1963, and that consequently no proper board was ever constituted here. Section 84-802, R. R. S. 1943, dealing with deputies of state and county officers and their duties provides: "In the absence or disability of the principal, the deputy shall perform the duties of his principal pertaining to his own office, but when an officer is required to act in conjunction with or in place of another officer, his deputy cannot supply his place." Section 79-403, R. S. Supp., 1963, designates the county superintendent, county clerk, and county treasurer, as a separate independent "board" and has no provisions for substitutes or deputies. We hold that a deputy county superintendent, deputy coun-

ty clerk, or deputy county treasurer is not authorized to act as a member of the statutory board provided by section 79-403, R. S. Supp., 1963.

The statute, however, does not require all three members of the statutory board to be present at the hearing nor to participate in the determination. Neither does it specify that action by a majority is or is not sufficient. It does authorize appeals when the board fails to agree, as well as when it has taken action.

A party is not denied a full hearing before an administrative board exercising a quasi-judicial function because the actual taking of testimony or conducting of the hearing is by less than all the members of the administrative board who are charged with determining the matters involved. See State ex rel. Churchill v. Bemis, 45 Neb. 724, 64 N. W. 348.

We hold that the absence from the hearing of a designated member of the board provided for by section 79-403, R. S. Supp., 1963, or his failure to participate in the determination by the board does not oust the board of jurisdiction nor render the action taken by a majority of the statutory board invalid.

The appellants next challenge the notice of the filing of the petition and hearing thereon on the ground that the notice was not issued by the board and was not signed by anyone. The statute does not specifically place the responsibility of giving the notice on anyone, but merely provides that notice shall be given. Here the county superintendent authorized counsel for petitioners to give the necessary notice. There is no provision that a member of the board cannot delegate the preparation, publication, and posting of notice. Neither does the statute require that notices be signed. The purpose of the notice requirement is to advise the public, and particularly those having a direct interest in the proceedings, of the fact that such a petition has been filed and of the time and place of hearing. Substantial compliance with statutory requirements for the creation or alteration of

school districts is sufficient notwithstanding minor irregularities in the proceedings if no prejudice results. The record here discloses that all members of the school board of district No. 48, and at least some of the individual appellants were present at the hearing. Counsel for the appellants in this court also appeared at the hearing on behalf of some persons opposed to the petition. Under such circumstances, it can hardly be said that prejudice resulted even if there had been a minor irregularity. We hold that a notice of the filing of a translocation petition and hearing thereon, otherwise in compliance with section 79-403, R. S. Supp., 1963, is not insufficient merely because a member of the statutory board did not personally arrange for its publication and posting. Personal signatures of board members are not required on such notice. Printed or typed names and titles are sufficient.

The remaining arguments of the appellants center around the court's refusal to grant their motion for leave to withdraw their rest and introduce evidence that petitioners intended to change their residence and that of their children in the spring of the year following the hearings.

The original hearing before the board was held July 21, 1965. The original trial and hearing on appeal in the district court was held on November 15, 1965, after which both parties rested and the matter was submitted to the court and taken under advisement. On December 3, 1965, leave was granted to both parties to withdraw their rests and submit further evidence. On December 8, 1965, further evidence was submitted by both parties, both renewed their rests, and the cause was again submitted and taken under advisement. On January 10, 1966, the defendants filed an application for leave to again withdraw their rests which was denied on January 17, 1966.

There is little dispute that the newly discovered evidence upon which these motions were based was essen-

tially evidence of facts occurring after the trial. This evidence tended to prove that the school children residing on the premises involved here might or would be residing elsewhere at a future date. To entitle petitioners to translocation, the statute requires that the land involved "has children of school age residing thereon with their parents or guardians." Whether a petitioner has met the statutory requirements of section 79-403, R. S. Supp., 1963, and is entitled to have his land set off from one school district and attached to another, is determinable on the facts existing on the date of the hearing before the board, or on the date of the trial in the district court, if appealed.

"In any but an extraordinary case in which an utter failure of justice will unequivocally result, evidence of facts occurring after the trial will not support a motion for a new trial as newly discovered evidence." Wagner v. Loup River Public Power Dist., 150 Neb. 7, 33 N. W. 2d 300.

The newly discovered evidence offered by defendants here was not that a change of petitioners' residence in fact had occurred, but only that petitioners had announced their intention to change their residence in the future. A final determination of the right to translocate land from one school district to another is not conditional on the required facts remaining unchanged after trial. Its finality and validity would otherwise be subject to continual question.

Whether a party may withdraw his rest and introduce further testimony rests within the sound discretion of the trial court. Luikart v. Continental Nat. Bank, 126 Neb. 598, 253 N. W. 905. Here the court has already once granted both parties the right to withdraw rests and conducted the trial on November 15, 1965, and again on December 8, 1965. The additional request for withdrawal of rest came more than a month thereafter, and even at that time, the offered evidence dealt only with intentions as to a future change of residence. The denial

of the motion under the circumstances here was clearly proper.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEROME ERVING, JR., APPELLANT.

146 N. W. 2d 216

Filed November 11, 1966. No. 36200.

1. **Indictments and Informations.** Separate informations filed against two or more defendants may be consolidated for trial if the defendants are charged with having participated in the same act or transaction that constitutes the offense.
2. **Criminal Law.** The right to a separate trial now depends upon a showing that prejudice will result from a joint trial.
3. ———. In the absence of a showing of an abuse of discretion, the ruling of the trial court upon a motion for severance will not be disturbed.
4. **Criminal Law: Evidence.** A confession of guilt is not admissible in evidence unless it is first shown to have been voluntarily made. Under Nebraska procedure the admission of a confession in evidence constitutes the trial court's independent determination that the confession is voluntary.
5. ———: ———. In determining whether a confession is voluntary the trial court should consider all of the evidence.
6. ———: ———. 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.
7. ———: ———. Where the evidence as to what occurred immediately prior to and at the time of the making of a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducements or threats, the confession is voluntary and may be received in evidence.

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

Adolph Q. Wolf, Fred J. Montag, Michael McCormack,

Bennett G. Hornstein, and Lynn R. Carey, Jr., for appellant.

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

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

BOSLAUGH, J.

The defendant, Jerome Erving, Jr., was convicted of murder in the perpetration of a robbery and sentenced to life imprisonment. His motion for new trial was overruled and he has appealed.

The robbery took place at the Sip' N-Chin Bar in Omaha, Nebraska, on August 18, 1964. The record shows that defendant and Deborah Boston entered the bar at about 9 p. m. Shortly thereafter, Nathaniel Hall entered the bar and shot and killed the bartender. At the direction of the defendant, Deborah Boston took the money out of the cash register, the defendant took several bottles of whisky from the back bar, and they then fled from the scene in an automobile operated by Donald Henry Davis, Jr.

There were a number of persons in the bar who were eyewitnesses to the killing. Two of these persons identified the defendant at the trial.

Upon the motion of the State, the defendant's case and the cases of Deborah Boston and Donald Henry Davis, Jr., were consolidated for trial. The defendant's first assignment of error relates to the consolidation of the cases for trial and the overruling of the defendant's later motions for severance.

Section 29-2002, R. R. S. 1943, provides that separate informations filed against two or more defendants may be consolidated for trial if the defendants are charged with having participated in the same act or transaction that constitutes the offense. The right to a separate trial now depends upon a showing that prejudice will re-

sult from a joint trial. In the absence of a showing of an abuse of discretion, the ruling of the trial court upon a motion for severance will not be disturbed. State v. Brown, 174 Neb. 387, 118 N. W. 2d 328; State v. Hall, 176 Neb. 295, 125 N. W. 2d 918.

In this case the statement of each defendant was received in evidence only as against that defendant, and the jury was cautioned and instructed that each such statement could be considered as evidence only as against the defendant who had made the statement. The record does not show an abuse of discretion in overruling the defendant's motion for a separate trial.

The defendant argues that the trial court should have required that any reference to the defendant be deleted from the statements of the other defendants which were received in evidence against them. Under certain circumstances, deletion is a useful and proper device which may eliminate the prejudice or the possibility of prejudice that may result from receiving the statement unaltered. See People v. Aranda, 63 Cal. 2d 518, 47 Cal. Rptr. 353, 407 P. 2d 265. Under the circumstances in this case, we determine that the trial court did not abuse its discretion in receiving the statements of the other defendants without deletion.

Pitmon Foxall, a detective sergeant of the Omaha police department, testified over objection as to statements made by the defendant while in custody. Before this witness was permitted to testify in the presence of the jury, the trial court properly conducted a foundational hearing out of the presence of the jury at which the witness was examined and cross-examined as to the circumstances surrounding the interrogation of the defendant. The defendant also testified at this hearing concerning his arrest and interrogation, and the defendant's mother testified concerning her attempts to visit the defendant while he was in custody.

At the conclusion of the foundational hearing the trial court overruled the defendant's objections to the

testimony of sergeant Foxall and he was permitted to testify as to the defendant's statements in the presence of the jury. The defendant complains that the procedure followed by the trial court did not comply with the constitutional requirements established by the United States Supreme Court in Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R. 3d 1205, and that his conviction must be reversed.

Jackson v. Denno, *supra,* requires the trial court to make an independent determination that a confession is voluntary before receiving it in evidence. In State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66, we pointed out that under our procedure the admission of a confession in evidence constitutes the trial court's independent determination that the confession is voluntary.

The defendant's specific complaint is that the Nebraska procedure requires only that the trial court consider the affirmative evidence relating to the voluntariness of the confession. The correct rule is that the trial court should consider all of the evidence in determining whether the confession is voluntary and should be admitted in evidence. To the extent that any of our previous decisions may conflict with this statement of the rule they are disapproved.

There is nothing in the record in this case which indicates that the trial court did not consider all of the evidence presented in determining whether the statements of the defendant were voluntary and should be received in evidence. The defendant was permitted to present evidence as to all of the circumstances under which the statements were made. The procedure that was followed complied with all constitutional requirements.

The defendant's third assignment of error relates to the admission of sergeant Foxall's testimony concerning the defendant's statements. The defendant contends that his objection to the admission of this testimony should have been sustained because the confession was

involuntary, was the fruit of an unlawful arrest, and was obtained after the defendant had been denied the right to counsel.

The defendant was arrested at his home on the morning of August 19, 1964, the day after the robbery. He was taken to the police station, booked, and then questioned briefly by sergeant Foxall. At this time the defendant was advised that he was not required to make a statement, that any statement he made could be used against him, and that he was entitled to counsel. The defendant was questioned again by sergeant Foxall at the police station on two or three occasions and again on two occasions after the defendant had been moved to the county jail. The statements which were admitted in evidence were made to sergeant Foxall at the county jail on August 27, 1964.

The record shows that a complaint charging the defendant with murder while in the commission of a robbery was filed in the municipal court on August 21, 1964. The defendant was taken before a judge of the municipal court on that day and ordered held without bond pending preliminary hearing.

The defendant testified, at the foundational hearing out of the presence of the jury, that the periods of questioning varied from 5 minutes to 20 minutes. On cross-examination the defendant admitted that he knew that he did not have to answer any questions; that he was not threatened or beaten; and that the interrogations were short because he advised the police that he did not want to answer their questions.

Kathryn Erving, the defendant's mother, testified that she went to the police station but was not allowed to see the defendant or talk with him and that she was not allowed to see him until after he had been transferred to the county jail.

The defendant in this case was not held in custody for the purpose of forcing a confession from him. His custody resulted from the fact that he was charged with

murder and was being held for preliminary examination.

The record does not show prolonged periods of questioning, physical abuse, threats, promises, or that the defendant did not understand his rights. Although the defendant's testimony contradicted in part that of sergeant Foxall, the trial court and the jury were not required to believe the defendant and reject the testimony of sergeant Foxall. From our examination of the record we conclude that the evidence is sufficient to sustain the determination made by the trial court and the finding by the jury that the defendant's statements were made voluntarily.

The defendant's contention that his arrest was illegal is based upon the absence of a showing in the record rather than an affirmative showing that grounds for his arrest did not exist. The legality of the arrest was not an issue in the case until the appeal to this court. Under such circumstances this court will not assume that probable cause for the arrest of the defendant did not exist at the time it was made. Furthermore, the statements of the defendant were made long after the arrest and after he had been taken before a magistrate. It is unnecessary to consider further the defendant's contention that the arrest in some way made the statements inadmissible.

The defendant's contention that he was denied the right to counsel is based upon his testimony that he requested permission of sergeant Foxall to telephone a lawyer, which was not granted. This testimony was contradicted by sergeant Foxall. Furthermore, at the foundational hearing out of the presence of the jury, the defendant admitted on cross-examination that he did not ask for counsel or ask to make a telephone call when he was taken before the magistrate 2 days after his arrest. The record does not show a denial of counsel.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NERBASKA, APPELLEE, V. DONALD HENRY DAVIS, APPELLANT.

146 N. W. 2d 220

Filed November 11, 1966. No. 36201.

1. **Indictments and Informations.** Separate informations filed against two or more defendants may be consolidated for trial if the defendants are charged with having participated in the same act or transaction that constitutes the offense.
2. **Criminal Law.** The right to a separate trial now depends upon a showing that prejudice will result from a joint trial.
3. ———. In the absence of a showing of an abuse of discretion, the ruling of the trial court upon a motion for severance will not be disturbed.
4. **Criminal Law: Evidence.** A confession of guilt is not admissible in evidence unless it is first shown to have been voluntarily made. Under Nebraska procedure the admission of a confession in evidence constitutes the trial court's independent determination that the confession is voluntary.
5. ———: ———. In determining whether a confession is voluntary the trial court should consider all of the evidence.
6. ———: ———. 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.
7. ———: ———. Where the evidence as to what occurred immediately prior to and at the time of the making of a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducements or threats, the confession is voluntary and may be received in evidence.

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

Adolph Q. Wolf, Fred J. Montag, Michael McCormack, Bennett G. Hornstein, and Lynn R. Carey, Jr., for appellant.

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

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

BOSLAUGH, J.

The defendant, Donald Henry Davis, was convicted of murder in the perpetration of a robbery and sentenced to life imprisonment. His motion for new trial was overruled and he has appealed.

The robbery took place at the Sip' N-Chin Bar in Omaha, Nebraska, on August 18, 1964. The record shows that the defendant waited outside the bar in an Oldsmobile automobile owned by his father while Jerome Erving, Jr., Deborah Boston, and Nathaniel Hall entered the bar, committed the robbery, and shot and killed the bartender. After the robbery, Erving and Deborah Boston reentered the Oldsmobile outside the bar and Hall was picked up about a block west of the bar.

After the robbery the police broadcast a description of the Oldsmobile automobile. About 20 minutes later a southbound police cruiser observed it going north on Twenty-sixth Street. While the police cruiser was making a U-turn, the Oldsmobile turned east on a side street where it was abandoned. When found it contained a bottle of whisky that had been taken from the Sip' N-Chin Bar. The defendant was traced through the registration of the automobile. He was arrested at his girl friend's house shortly after 10 p.m. and taken to the police station.

Upon the motion of the State, the defendant's case was consolidated for trial with the cases of Deborah Boston and Jerome Erving, Jr. The first assignment of error relates to the consolidation of the cases for trial and the overruling of the defendant's later motions for severance.

The second assignment of error relates to the procedure which the trial court followed in determining whether the statements made by the defendant should be admitted in evidence. Identical assignments of error were considered in State v. Erving, *ante* p. 824, 146 N. W. 2d 216, and determined adversely to the contentions of the defendant. For the reasons stated in State

v. Erving, *supra,* we find these two assignments of error to be without merit.

The third assignment of error relates to the admission in evidence of statements which the defendant made after his arrest. The defendant contends that the confessions were involuntary, were the fruit of an unlawful arrest, and that he was denied the right to counsel.

The first statement was made to Pitmon Foxall, a detective sergeant of the Omaha police department. Sergeant Foxall was permitted to testify over objection, after a foundational hearing had been held out of the presence of the jury, that he first talked with the defendant on the morning of August 19, 1964. At that time the defendant did not want to talk to sergeant Foxall so the conversation was brief and not more than 5 or 10 minutes in length. That evening sergeant Foxall again interviewed the defendant and obtained an oral statement as to his participation in the crime. Sergeant Foxall testified that on each occasion he had first advised the defendant of his right not to answer questions, that any statement he made might be used against him, and of his right to have a lawyer.

The second statement was made early the next morning to a deputy county attorney in the presence of a court reporter. The stenographic report of this interview shows that before the defendant was questioned about the crime, he was warned that any statement he made could be used against him and that he had a right to have an attorney. In this statement the defendant again related his participation in the crime.

The defendant first contends that he was threatened with physical violence. This is based upon his testimony that when he was questioned at the police station shortly after the arrest, one of the officers said that he would kick him. His exact testimony at the foundational hearing was: "* * * when we first went down there, I guess we was getting kind of smart, and he said he would kick my young ass, you know." Before the jury the

defendant testified: "When we first got down there, well, I went in this one room with these three colored detectives, and when I was in there this one stud kept asking me questions, and I told him I don't remember. Then he asked me one question, and I don't know if I got smart with him, but he said he was going to kick my young punk ass." The statement, if made, was an unfortunate one. However, it was not such a threat of violence as could reasonably be expected to produce a confession some 24 hours later.

The defendant further testified at the foundational hearing that the same officer had also stated that unless the defendant made a statement, he would be placed in a cell and that " 'We don't care if you rot in there.' " This statement, if made, was also unfortunate. However, it is not the type of statement that could reasonably be expected to provoke a confession that would insure the continued incarceration of the defendant on a felony charge. The incidents to which the defendant testified did not cause the confessions made the following night to be inadmissible.

The defendant further testified that sergeant Foxall had offered to release the defendant's younger brother, who was also in custody, if the defendant would tell them where the gun was, and that the others involved had made complete statements about the crime. This testimony is denied by sergeant Foxall.

The defendant complains that he was not advised that the bartender who was shot during the robbery had died. This circumstance is not of great significance in view of the testimony of sergeant Foxall that he had told the defendant that same morning that the bartender might die.

The most serious question in this case arises because of the age of the defendant and his mental ability. There was evidence that the defendant's family had tried to see him at the police station on August 19, 1964, and had been refused permission. The defendant was 16½

years old, and this was not his first experience with the police. The defendant had been in the Boys' Training School twice and he admitted that he knew the colored detectives.

A clinical psychologist testified that the defendant was below average in intelligence; that he could be classified in the lower 7 percent of the population as to intelligence; that he was immature and tended to act in an impulsive manner; and that he showed evidence of a long-standing personality disturbance.

The defendant testified that he had been in the 10th grade in Technical High School. In his statement to the county attorney the defendant said that he had passed all of his courses the first semester; that he had left school early because he had found a job; and that if he returned to school he would be in the 11th grade.

So far as the legality of the arrest is concerned, the record shows sufficient circumstances to justify the arrest of the defendant in this case. It is unnecessary to consider this contention further.

The record does not show a denial of the right of counsel in this case. Sergeant Foxall testified that the defendant was advised as to his right to counsel and the defendant was similarly advised by the deputy county attorney. Although the defendant testified that he was refused permission to use the telephone, sergeant Foxall testified that he did not ask to use the telephone.

From our examination of the entire record we conclude that the evidence was sufficient to sustain the determination by the trial court and the finding by the jury that the statements of the defendant were voluntary and admissible in evidence.

The judgment of the district court is affirmed.

AFFIRMED.

EVELYN IRENE YOUNKER, ADMINISTRATRIX OF THE ESTATE OF THEODORE YOUNKER, DECEASED, APPELLEE AND CROSS-APPELLANT, V. PETER KIEWIT SONS COMPANY, A CORPORATION, ET AL., APPELLEES AND CROSS-APPELLEES, IMPLEADED WITH DONALD E. LEISTRA, APPELLANT AND CROSS-APPELLEE.

146 N. W. 2d 202

Filed November 11, 1966. No. 36258.

1. **Trial: Appeal and Error.** Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one.
2. **Trial.** It is the duty of the trial court to properly instruct, on its own motion, on the issues raised by the pleadings and the evidence.
3. **Trial: Appeal and Error.** Instructions must be considered as a whole, and if, when construed together they properly state the law, they are sufficient and error cannot be predicated thereon.

Appeal from the district court for Sarpy County: VICTOR H. SCHMIDT, Judge. Affirmed.

Story, Carl & Parker, for appellant.

Francis M. Casey, for appellee Younker.

Cassem, Tierney, Adams & Henatsch, for appellee Peter Kiewit Sons Co.

Gross, Welch, Vinardi, Kauffman & Schatz, for appellee McClain.

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

WHITE, C. J.

This is an action for wrongful death arising from an automobile accident occurring on U. S. Highway No. 73-75 south of Omaha, Nebraska, on September 20, 1963, about 4:40 p.m.

Plaintiff's decedent, Theodore Younker, was riding as a guest passenger in an automobile operated by the defendant-appellant, Donald E. Leistra, in a westerly direc-

tion across U. S. Highway No. 73-75, when the Leistra automobile and an automobile operated in a southerly direction by the defendant McClain were involved in a right-angle collision at an intersection. The defendant Peter Kiewit Sons Company was engaged in constructing an overpass across the highway and as a part of this work had erected barricades and other structures in the immediate vicinity of the intersection where the accident occurred.

Plaintiff's amended petition sets out specific acts of negligence of the defendants McClain and Kiewit, and also charges defendant Leistra with gross negligence in several specifications. The petition also alleges that the accident was the proximate result of the joint, several, and continuing negligence of all of the defendants. By separate answers, each defendant entered a general denial and alleged that the proximate cause of the accident was the negligence of the other defendants. The case was submitted to a jury, which returned a verdict for the plaintiff against the defendant Leistra and in favor of the other two defendants. Defendant Leistra appeals.

The first contention of the defendant Leistra is that the trial court failed to instruct as to the guest statute, section 39-740, R. R. S. 1943. It was admitted by the pleadings and undisputed in the evidence that the plaintiff's decedent was riding as a guest passenger in the Leistra automobile. The statute provides, in substance, that the operator of a motor vehicle shall not be liable to a guest unless such damage is caused by the gross negligence of the owner or operator of such motor vehicle. See § 39-740, R. R. S. 1943. While the court did not, in any special instruction, set out the precise terms of the statute, it did, in instructions No. 1 and No. 3 fully advise the jury that the plaintiff alleged gross negligence as to the defendant Leistra; and that the plaintiff could not recover unless it was proved by a preponderance of the evidence that the defendant Leistra was negligent and that such negligence was gross in character. In a

subsequent instruction the court properly defined gross negligence, to which no objection is made. The court, therefore, instructed as to the essential requirements of the statute and the law, and the defendant Leistra's liability was limited as the law requires. Under these circumstances, we see no need for the court to give an additional repetitive instruction setting out the terms of the statute. Furthermore, defendant Leistra requested no instruction in this respect. Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Nebraska Bottled Gas & App. Co. v. Aetna Cas. & Sur. Co., 173 Neb. 146, 112 N. W. 2d 740. There is no merit to this contention.

Defendant Leistra complains that in instruction No. 1 the court failed, in setting out these issues, to advise the jury that the defendant had pleaded in his answer that the accident was caused "for and by reason of the acts of negligence on the part of the other defendants." The court did advise the jury that the defendant Leistra denied any gross negligence on his part, which constituted a general denial. The defendant Leistra further contends that the jury should have been instructed that the defendant admitted the accident was caused by the negligence of the other defendants. Defendant Leistra cites as sole authority for this position the holding in Wright v. Lincoln City Lines, Inc., 160 Neb. 714, 71 N. W. 2d 182.

In the Wright case the plaintiff had sued two joint tort feasors, alleging specified acts of negligence against each. The defendant bus company denied negligence on its part and admitted that the negligent acts of the other driver, Miller, as specified in the petition, were the proximate cause of the accident and the injuries to the plaintiff resulting therefrom. Subsequently, and prior to trial, the action was dismissed as to the other driver, Miller, and the case proceeded to trial against the bus company and its operator only. The court held

that it was prejudicial error to refuse a requested instruction to the effect that the specified acts of negligence of Miller in the plaintiff's petition were admitted. It held that, in the light of the admission, the defendants were not required to make further proof of the negligence of Miller, the other driver. We point out, that in the present case, all three defendants remained in the case, each denying ngligence, and it was necessary for the trial court to submit to the jury the controverted allegations of negligence as to each party defendant. The court properly instructed as to the burden of proof in instruction No. 2, No. 3, and No. 4, as to all defendants, and gave a proper instruction on liability arising from concurrent negligence to which no objection has been made. Since each defendant denied negligence, the issues were clearly and properly submitted to the jury. We point out further that defendant Leistra by his answer did not admit the specific allegations of the petition alleged against the other defendants. He simply alleges "by reason of the acts of negligence on the part of the other defendants." This is not an admission of specific acts of negligence within the scope of the Wright case.

It is the duty of the trial court to properly instruct, on its own motion, on the issues raised by the pleadings and the evidence. We hold in this case, with issues raised as to negligence in the pleadings and evidence as to all three defendants, that the trial court properly instructed the jury.

As to defendant Leistra's contention that the court, in stating the issues, did not advise the jury that he had pleaded that the accident was due to the negligence of the other defendants, we see no prejudice in this respect. He was entitled to prove such negligence of other parties under his general denial as to gross negligence. Again, there could be no prejudice because the court properly instructed in later instructions as to the burden of proof as to each defendant and the elements thereof.

Instructions must be considered as a whole, and if, when construed together they properly state the law, they are sufficient and error cannot be predicated thereon. O'Brien v. Anderson, 177 Neb. 635, 130 N. W. 2d 560; Bunselmeyer v. Hill, 179 Neb. 140, 137 N. W. 2d 354.

In the light of our conclusions herein, it becomes unnecessary to consider the cross-appeal filed herein by plaintiff. The judgment of the district court is correct and is affirmed.

AFFIRMED.

IN RE APPEAL OF PARSONS CONSTRUCTION COMPANY. PARSONS CONSTRUCTION COMPANY, A CORPORATION, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.
146 N. W. 2d 221

Filed November 11, 1966. No. 36277.

1. **Contracts.** A contractor who is damaged as the result of delay in the performance of the work which is caused by a breach of the contract by the other party may recover his damages in the absence of an express provision in the contract exempting the other party from liability.
2. **Trial: Appeal and Error.** The judgment of the trial court in a law action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong.
3. **Appeal and Error.** It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
4. **Trial.** In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it.

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

Mason, Knudsen, Berkheimer & Endacott, for appellant.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, and Warren D. Lichty, Jr., for appellees.

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

SPENCER, J.

This is an appeal from the disallowance of a claim for $43,574.48 to cover increased costs occasioned by the breach of certain conditions of a construction contract by the State of Nebraska. The claim was disapproved by the State Engineer and disallowed by the Auditor of Public Accounts and the Secretary of State of the State of Nebraska.

The contract out of which the claim arose involved the building of two viaducts, which will hereinafter be referred to as the south and north bridges. It was one of several contracts included in a highway construction project on the Union-Omaha road (U. S. Highway No. 73-75) near Plattsmouth, Nebraska, in Cass County. One of the other successful bidders was Booth and Olson, Inc., a heavy highway contractor. Its contract covered grading, paving, and culvert work, and included the installation of the embankment fills for the bridges. It was necessary that certain culvert work and the embankment fills be completed before the plaintiff could begin work on its contract. The plans for the project used by the plaintiff as a basis for its bid had written above the profile for the bridge embankment the following: "Embankment to be constructed by the grading contractor before the bridge work begins."

All of the contracts on the project included an agreement that no work would be started prior to April 7, 1958. Subsequent to the acceptance of its bid, plaintiff notified the State that it desired a beginning date of April 7, 1958, on the south bridge, and of April 25, 1958, on the north bridge. These dates were approved by the State. Booth and Olson, Inc., who was to do the necessary grading and fill work before the plaintiff could be-

gin on its contract, also had a starting date of April 7, 1958. This fact was known to the plaintiff when it submitted its schedule of work, but it contends that the State, having approved its starting date, was obligated to coordinate the work and require the grading contractor to build the necessary embankments immediately.

On March 28, 1958, plaintiff notified Booth and Olson, Inc., that it would like to start on the south bridge not later than May 7, 1958, and on the north bridge not later than May 21, 1958. On April 2, 1958, plaintiff wrote the construction engineer for the State as follows:

"Re: Projects
FG-475 (2-3) Plattsmouth
IN-01-09(21) Millard

"Dear Mr. Graham:

"Following your suggestion we contacted Booth and Olson, Inc., in regard to this grading and the abutment fill on our projects near Plattsmouth and mailed you a copy of our letter. We are enclosing a copy of their reply.

"While we want to cooperate in every way possible with your office toward expediting the schedules on this project, it is our opinion that your office will have to take the responsibility of determining when the abutment fills will be in place so we can start our work. We have no power or authority over the contractors who are to place these fills and feel that we would be out of order to attempt to set their schedules.

"We have come to the conclusion that our construction schedules on the above projects will have to be revised and we will make our revised (revision) as soon as your department notifies us when we can expect the abutment fills to be in place. We are hoping that we can tentatively set the starting time now on FG-475 (2-3) about May 7, 1958, and IN-01-09(21) about June 7, 1958.

"Yours truly,
PARSONS CONSTRUCTION COMPANY
Earl G. Hawkins
President."

The Millard project referred to in the above letter is not included in this action. Project FG-475 (2-3) covers the two bridge projects involved herein.

There is a dispute as to when the sites were actually available and ready for the plaintiff. Plaintiff's testimony is that the job site was not available until August 4, 1958, and that it began work on August 11, 1958, on the south bridge, and on August 26, 1958, on the north bridge. The State's evidence is to the effect that the embankments for the south bridge were entirely completed by June 18, 1958. On June 9, 1958, the State notified the plaintiff that the south bridge site was available to them June 16, 1958.

The evidence for the State indicates that the last fill on the north bridge was not completed until July 22, 1958, but that there was ample work the plaintiff could have done previous to that date. In this respect, the State's evidence indicates that the work on the north bridge could have been started as soon as the south abutment on that project was built, which was June 4, 1958. The north bridge was the larger project, and there was sufficient area between the two embankments to permit work on the completed embankment and some of the area adjacent to it.

After the embankments were in, it was necessary for the State to stake the project before the plaintiff could begin its operation. There is a dispute as to when this was done. The specifications, which were a part of the plans used by the plaintiff in the submission of its bid, contain the following provisions on staking: "2. The department shall not be responsible for delays due to lack of grade or line stakes unless the contractor in moving on the work shall have given one week's notice and, thereafter, unless the contractor shall have given the engineer 48 hours' notice that such stakes would be needed." There is a dispute as to whether or not notice was ever given by the plaintiff to the State that the stakes were needed. It is the State's contention that the stakes were

set without notice as soon as possible after the project was ready for stakes.

The State further contends that the plaintiff did not start work previous to August 11, 1958, because of a carpenter's strike from June 9, 1958, to early in August 1958, which prevented it from doing so. On June 20, 1958, 4 days after plaintiff had been advised the south bridge site would be ready, plaintiff sent the State the following letter:

"Attention: Mr. L. O. Graham
Construction Engineer
Re: Project No. FG-475(2)
and F-FG-475(3) near
Plattsmouth, Nebraska
Carpenter Strike

"Dear Mr. Graham:

"We are unable to start the above referenced project because our firm as a member of the Associated General Contractors Employer's Association of Omaha has been a victim of strike by the Omaha Carpenter's District Council A. F. of L., C. I. O. and we are unable to start this job due to this action.

"As per the general conditions in the specifications governing our work, we hereby request an extension to the construction period of our contract equal to one and one-half the period of the actual construction time lost plus a period of re-organization of equipment and job personnel.

"At the conclusion of the above work stoppage, we will notify your office of the actual days required for the time extention requested.

"Yours truly,
PARSONS CONSTRUCTION COMPANY
Earl G. Hawkins Jr. (sgd.)"

On August 5, 1958, plaintiff wrote the State as follows:

"Attention: Mr. L. O. Graham
Construction Engineer
Re: Project FG-475(2) and
F-FG-475(3)

Near Plattsmouth, Nebraska
Carpenter's Strike

"Dear Mr. Graham:

"As per my letter of June 20, 1958, I am requesting the following extensions of time to our contract due to labor difficulties or striking on the above mentioned job.

"On Monday, June 9, 1958, the carpenter's union started picketing all our jobs in a jurisdictional dispute over wages, working conditions, fringe benefits, etc. This strike continued until Wednesday, July 30, 1958 at which time the carpenter's union voted that evening to accept an offer the Associated General Contractors had offered and the strike was settled. This was a period of fifty two (52) days. In trying to arrive at the time lost due to this strike of this magnitude or length of time, it is quite difficult and at times almost impossible as we will not realize the full results of this strike until next winter when the construction season shuts or slows down. The Associated General Contractors have met and have tried to establish by joint discussion a realistic formula or approach to the amount of time actually lost to us due to the strike or dispute of this duration. It was determined and decided by this committee that the time actually lost due to shutting down of the job, trying to reorganize, re-hire men when starting up and considering that the time lost was during the normal construction season and therefore for every day of strike, the contractor would be delayed a day and a half in completing their work. This determination took into account the following conditions that would be encountered due to this prolonged strike.

"1. Re-location, re-distribution and securing of equipment.

"2. Re-hiring, locating necessary qualified personnel.

"3. Removing and replacing work already completed due to damage caused by the standing of the work for the duration of time.

"4. Additional work necessitated by work standing this period of time unattended.

"5. Time lost during the normal construction season and the resulting extension of time being or resulting in the late fall or winter which is normally questionable or undesirable working conditions.

"Of the above conditions, some of these do not apply to this project as we have not started work at the time of the strike due to the enbankments (sic) not being built. However, I think Item No. 5 and Item No. 1 involve this project pertaining to winter work and also the equipment available to start these various projects.

"I am, therefore, requesting an extension of time in the amount of seventy eight (78) days for this strike. If there are any questions on this, please contact me.

"Yours truly,
PARSONS CONSTRUCTION COMPANY
Earl G. Hawkins Jr. (sgd.)"

Plaintiff contends these letters were form letters sent out on all of its jobs and that the State knew the strike was restricted to the Omaha area and did not affect the Plattsmouth projects. However, the letters specifically refer to the Plattsmouth projects, and the State did allow extentions of time on the contract due to the strike. Plaintiff insists that the extension was granted because of the delay in providing the site and not because of the strike, but until the time of the trial plaintiff made no attempt to dispute the statement in the letter granting the extension. The reasonable inference from the State's evidence is that the strike was one of the major considerations in allowing an extension of working days.

It is plaintiff's contention that the State breached an expressed and implied contractual obligation to timely provide plaintiff with a place to work and to make the construction site available on April 7, and April 25, 1958, as agreed, and that this failure on the part of the State extended the time of performance of the contract beyond the construction season and over the winter of 1958,

substantially increasing plaintiff's cost of performance. Plaintiff's theory is that the State, having approved an April 7 starting date for the plaintiff, obligated itself to see that the grading contractor had the site prepared for the plaintiff when it was ready to move onto the job.

In Roberts Constr. Co. v. State, 172 Neb. 819, 111 N. W. 2d 767, we said: "A contractor who is damaged as the result of delay in the performance of the work which is caused by a breach of the contract by the other party may recover his damages in the absence of an express provision in the contract exempting the other party from liability."

The State contends that plaintiff fully understood at the time its bid was submitted that the actual bridge work could not be started until after the embankments had been constructed in accordance with the terms of the specifications, and that the grading contractor could not begin work on any part of the project until April 7, 1958. It further insists that any delays which occurred were the usual and normal ones for heavy construction work, and that the plaintiff was familiar with this type of construction and could reasonably expect such delays.

Plaintiff relies heavily on Roberts Constr. Co. v. State, *supra,* but that case is distinguishable on the facts from the instant one. In that case, the State specifically represented that subgrade preparations on a detour would be completed, and a windrow of rock placed along the length of the detour so that the contractor could begin work on June 21, 1954, and, without notice to Roberts Construction Company, granted an extension of time to the subcontractor, which extended the period 90 working days beyond the starting date. In the instant case, all of the contractors agreed that no work would be done on the project prior to April 7, 1958, and the plaintiff fully understood that it could not begin its major work until after the grading contractor had installed certain culverts and had made embankment fills, which would

take some time as is evident from plaintiff's letter of March 28, 1958.

This was a law action in which a jury was waived. The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury, and will not be set aside unless clearly wrong. Weiss v. Weiss, 179 Neb. 714, 140 N. W. 2d 15.

As indicated above, there was a considerable conflict in the evidence herein. It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. Graves v. Bednar, 171 Neb. 499, 107 N. W. 2d 12.

In determining the sufficiency of the evidence to sustain the judgment in this case, it must be considered most favorably to the successful party, and so every controverted fact must be resolved in the State's favor and the State must have the benefit of any inferences reasonably deducible from the evidence. Smith v. Platte Valley Public Power & Irr. Dist., 151 Neb. 49, 36 N. W. 2d 478.

For the reasons given, the judgment herein is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

DONALD D. FOX, APPELLEE, V. MAXINE FOX, APPELLANT.
146 N. W. 2d 208

Filed November 11, 1966. No. 36302.

1. **Divorce.** A decree in a divorce case, insofar as minor children are concerned, is never final in the sense that it cannot be changed.
2. **Divorce: Parent and Child.** The provision for reasonable visitation rights does not mean visitation at the sole discretion of the party having custody of the child.
3. ———: ———. A father who is without fault should have an opportunity to become acquainted with his child and the child should not be deprived of the love and affection of his father. Consequently, the father should have a right, if he so desires,

to visit his child at reasonable times and with reasonable frequency.

4. ———: ———. A right of visitation to be meaningful should permit the child to visit with his father away from the control of the person having custody.

5. ———: ———. A determination of what constitutes reasonable visitation rights is within the discretion of the trial court and should not be disturbed except for an abuse of discretion.

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

Holtorf, Hansen & Kortum, for appellant.

Jack E. Lyman, for appellee.

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

SPENCER, J.

This is an application by Donald D. Fox in the original divorce action against his former wife Maxine, requesting the court to specifically provide the days and hours applicant should be permitted to visit his child.

Donald D. Fox was awarded a divorce from Maxine Fox on September 15, 1964, on the ground of extreme cruelty. Maxine was given the care, custody, and control of the 4-month-old son of the parties, subject to reasonable visitation rights, and Donald was ordered to pay $90 per month for the support and maintenance of the child. These payments have been made as directed.

Subsequent to the divorce a dispute arose as to the visitation rights and as to whether Donald should be permitted to take the child from the home of Maxine. She refused to permit him to do so. After a conference between the parties and their respective attorneys, she permitted him to take the child on two occasions. When she thereafter refused to permit him to take the child, this application was filed. After a contested hearing, the trial judge, who had heard the divorce action, entered an order specifically defining the visitation rights and providing that Donald should be permitted to take the

child of the parties to such reasonable places as he should see fit. The material portion of the order is as follows: "Wednesdays from 5:00 o'clock p.m., to 7:30 o'clock p.m.; Sundays from 1:00 o'clock p.m., to 7:30 o'clock p.m., and Holidays, consisting of Christmas Day, New Years Day, Declaration (Decoration) Day, Thanksgiving Day and the Fourth of July from 1:00 o'clock p.m., to 7:30 o'clock p.m., each of said Holidays, until further order of this court." The court assessed the court costs to Donald but decreed that each party should pay his own attorney.

Maxine has perfected an appeal to this court challenging the visitation rights allowed and the determination that each party should pay his own attorney.

A decree in a divorce case, insofar as minor children are concerned, is never final in the sense that it cannot be changed. Caporale v. Hale, 169 Neb. 751, 100 N. W. 2d 847. Our statute vests in the district court the right to change, revise, or modify any divorce decree so far as it concerns the care, custody, or maintenance of minor children. § 42-312, R. R. S. 1943.

No question is involved herein as to the custody of the child. Nor is the application technically one for modification of the divorce decree. It is merely an application to define the meaning of "reasonable visitation rights" as those words are used in the decree.

An indefinite provision in a divorce decree invites controversy where one of the parties may feel in the least abused. Here, the father secured the divorce but custody of the minor child was given to the mother. The practice in this state in the ordinary case has been to provide that the parent who does not have custody should have reasonable visitation rights, and to leave it to the parties to agree on what those words mean. It is evident here that the mother believed that custody gave her the right to dictate the time, frequency, and condition of the father's visitations. It should be obvious that the provision for reasonable visitation rights does

not mean visitation at the sole discretion of the party having custody of the child.

Section 38-107, R. R. S. 1943, provides that the father and mother are the natural guardians of their minor children, and are equally entitled to their custody. Here, because of the divorce, custody could only be vested in one of them. The tender age of the child made it desirable that such custody be given to the mother. However, the father, who is without fault, should have an opportunity to become acquainted with his child, and the child should not be deprived of the love and affection of his father. This can only be accomplished by association. Consequently, the father should have the right, if he so desires, to visit the child at reasonable times and with reasonable frequency. If this right is to be meaningful, it should permit the child to visit with the father away from the control of the person having custody.

When the parties were unable to agree, the same trial judge who granted the divorce, by the order appealed from herein, defined the meaning of reasonable visitation rights as used in the divorce decree. A determination of what constitutes reasonable visitation rights is within the discretion of the trial court, and should not be disturbed except for an abuse of discretion, which is not apparent here.

Maxine complains because no allowance was made to her for attorney's fees on the application. On the facts herein it does not seem right that Donald should be penalized for Maxine's obstinacy. We affirm the finding of the trial court.

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

AFFIRMED.

DUPLEX MANUFACTURING CO., APPELLANT AND CROSS-APPELLEE, V. ATLAS LEASING CORPORATION, APPELLEE AND CROSS-APPELLANT.

146 N. W. 2d 205

Filed November 11, 1966. No. 36318.

1. **Trial.** Where it is clear that a verdict is excessive but there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be properly required since a remittitur would amount only to a substitution of the judgment of the court for that of the jury.
2. **Contracts: Damages.** If a condition in a contract is excused, the promisor becomes subject to a duty to perform without the existence or occurrence of the condition, but the damages recoverable for breach of the duty are not always the same as they would have been if the condition existed or occurred.
3. **Contracts.** Where failure of a party to a contract to perform a condition or a promise is induced by a manifestation to him by the other party that he cannot or will not substantially perform his own promise, the duty of such other party becomes independent of performance of the condition or promise.

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

Frost, Meyers & Farnham, for appellant.

John W. Delehant, Jr., for appellee.

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

MCCOWN, J.

This is a contract action in which the plaintiff obtained a jury verdict and judgment for $17,110 for the manufacture of a custom-built mobile feed mill. Thereafter, defendant's alternative motion for new trial was granted, on the basis that the court improperly submitted the question of damages to the jury. Plaintiff appealed and defendant cross-appealed.

The plaintiff, Duplex Manufacturing Co., entered into negotiations with one Elvin Lamb in the fall of 1962, out of which the contract here involved arose. The de-

fendant, Atlas Leasing Corporation, was engaged in the business of financing machinery and equipment acquisitions, under the lease plan. The plaintiff and the defendant entered into the contract for a custom-built mobile feed mill on November 29, 1962. The price was $17,110 cash. The order stated: "This is a custom built Mill especially for Mr. Elvin Lamb to his exact specifications and therefore, this order is non-cancellable." The specifications for the machine included, among its components, "A Metering Device for weighing or metering Grain." Plaintiff commenced the manufacture and assembly of the mill. The feed mill, although not fully completed, was taken to Mr. Lamb's place of business in Missouri on March 9, 1963, for an advertising and promotion project. It was then returned to plaintiff's plant in Omaha, for completion and testing.

On April 5, 1963, an employee of Elvin Lamb came to Omaha; signed a delivery receipt which contained the words "Received and Accepted"; and took the mobile feed mill from plaintiff's plant and drove it to Missouri. There was a conflict in the evidence as to the reasons for the delivery before completion and testing, but the evidence is undisputed that the weighing or metering device was not on the mill at that time, and that both the plaintiff and Elvin Lamb were aware of that fact.

The plaintiff immediately attempted to obtain payment from the defendant, but the defendant refused to pay for the mill until Mr. Lamb certified that the mill had been completed and built to his exact specifications, which Mr. Lamb never did. Meanwhile, after April 5, 1963, representatives of the plaintiff went to Missouri to train Lamb's employees in the use and operation of the machine, and to test it as it was being used in the field. There is sharp conflict in the evidence as to how the machine operated in the field as well as to the reasons for various items of damage to or malfunction of certain components. On May 3, 1963, Lamb had the machine brought to plaintiff's

plant in Omaha and left there. He concurrently advised the plaintiff by letter that he would not accept the machine under any circumstances. The plaintiff's evidence was that the mill was to be returned to the plaintiff on May 3, 1963, for repairs to certain components, and also for installation of the weighing or metering device, which was by then at plaintiff's plant and ready for installation. The mobile feed mill remained at plaintiff's plant thereafter, although the weighing or metering device was never installed on it. This action to recover the full contract price followed.

The jury was instructed that if it found for the plaintiff, "the measure of plaintiff's damage would be the agreed contract price of the grinding mill." The motion for new trial was granted on the basis that this instruction improperly submitted the question of damages to the jury.

It is, of course, the duty of the court to instruct on the proper measure of damages. The evidence was undisputed that the weighing or metering device was never installed on the mill, although it was included in the specifications and in the contract price. There was no testimony as to the cost or market value of the device. There was no testimony concerning the value of the mill minus the metering device, nor was there any testimony as to "the contract rate" which might be applied to the mill minus the metering device.

Where it is clear that a verdict is excessive but there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be properly required since a remittitur would amount only to a substitution of the judgment of the court for that of the jury. See Main v. Sorgenfrei, 174 Neb. 523, 118 N. W. 2d 648. The action of the trial court in granting the motion for new trial was therefore proper.

For its cross-appeal, the defendant urges that it was entitled to a directed verdict or judgment notwith-

standing the verdict. Defendant argues that its liability was specifically conditioned on manufacture to the exact specifications of Lamb, which included a metering device for weighing or metering grain. It relies upon the rule that if a buyer's liability depends upon the seller's performance of a condition which buyer has not waived, the burden is upon the seller to prove performance of the condition before he can recover.

The defendant's contention rests on the assumption that there was no evidence upon which a jury could find a waiver or excuse of the condition. "If a condition in a contract is excused, the promisor becomes subject to a duty to perform without the existence or occurrence of the condition, but the damages recoverable for breach of the duty are not always the same as they would have been if the condition existed or occurred." Restatement, Contracts, § 294, p. 436. Where failure of a party to a contract to perform a condition or a promise is induced by a manifestation to him by the other party that he cannot or will not substantially perform his own promise, the duty of such other party becomes independent of performance of the condition or promise. See Restatement, Contracts, § 306, p. 451.

In this case, while it was in conflict, there was evidence from which a jury might find that Lamb had accepted the mill with knowledge of a nonconformity. Even though it be assumed that acceptance was on the assumption that the nonconformity would be seasonably cured, Lamb's subsequent manifestation of complete repudiation should not compel the plaintiff to perform a useless act. There is no evidence that the plaintiff could not or would not have installed the weighing and metering device had there been no repudiation. Nor is there proof that the mill would not operate or was not a commercial unit without the weighing and metering device. The facts upon which the legal issues of excuse, waiver, and failure to perform conditions turn are for determination by the jury. The defendant's

cross-appeal therefore cannot be sustained.

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

AFFIRMED.

DOMINIC S. SACCA, ADMINISTRATOR OF THE ESTATE OF JOHN SACCA, DECEASED, APPELLEE, V. MICHAEL A. MARSHALL, APPELLANT.

146 N. W. 2d 375

Filed November 18, 1966. No. 36187.

1. **Appeal and Error.** A verdict based upon conflicting evidence will not be reversed on appeal if there is evidence from which reasonable minds might draw different conclusions.
2. **Bicycles.** A bicycle is a "vehicle" as that term is used in the statutes of the State of Nebraska setting forth rules of the road.
3. **Bicycles: Trial.** The failure of the trial court to instruct on the duty of a bicyclist to maintain a proper lookout and control was reversible error.
4. ———: ———. Where there is evidence of violations of the rules of the road by a bicyclist it is the duty of the trial court to instruct with reference thereto.
5. ———: ———. An instruction relating to the duty to give an appropriate signal before turning a vehicle from a direct course upon a highway is incomplete if it fails to instruct as to the signals which are authorized and required.
6. **Negligence: Trial.** Instruction given by the trial court setting forth the defendant's burden of proof upon a plea of contributory negligence examined and held to have been properly given.
7. **Infants: Negligence.** Whether or not a minor between 14 and 15 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact for the jury.
8. **Trial.** Where a plaintiff, without reasonable explanation, testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded. Contradictory statements of witnesses examined and held not governed by the rule stated.
9. **Death: Damages.** In an action to recover damages resulting from the death of a minor child, where the record reflects the status of the family and the deceased, the income and assets

of the father and mother, the number of children, their earnings and contributions, and that the deceased assisted with normal household duties, evidence of the amount earned by the deceased and what he would earn in the future during his minority examined and the admission thereof held not to be prejudicial error.

Appeal from the District Court for Lancaster County: BARTLETT E. BOYLES, Judge. Reversed and remanded.

Ginsburg, Rosenberg, Ginsburg & Krivosha and Kier, Cobb & Luedtke, for appellant.

Merril R. Reller and John McArthur, for appellee.

Heard before CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and MCCOWN, JJ., and DITTRICK, District Judge.

DITTRICK, District Judge.

The plaintiff Dominic S. Sacca, administrator of the estate of John Sacca, deceased, commenced this action against the defendant Michael A. Marshall, to recover damages resulting from injuries which caused the death of the deceased, a minor of the age of 14 years. The injuries suffered by the deceased grew out of an accident in which an automobile operated by defendant and a bicycle which deceased was riding collided. The jury returned a verdict for the plaintiff. The defendant filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. The trial court overruled the motion and the defendant has appealed.

The accident happened Saturday, August 15, 1964, approximately 1½ miles northeast of Greenwood, Nebraska, on U. S. Highway No. 6. At the time both defendant's automobile and the deceased's bicycle were traveling on the same and in a northeasterly direction near a bridge across the highway. The deceased was traveling on the highway in the company of two other boys, his twin brother Joseph Sacca and one James Jackson. Each boy was riding a bicycle. James Jackson was riding in front of and Joseph Sacca to the rear

of the deceased. Their intention was to ride their bicycles from Greenwood to Ashland, Nebraska, a distance of approximately 6 miles. The traveled portion of the highway was concrete pavement 24 feet in width. The bridge was 28 feet in width and 82 feet in length. The bridge had concrete banisters or railings, and metal guard rails extended from the end of the banisters a distance of 54 feet to a point on the shoulder of the road 9 feet from the edge of the pavement.

Dominic S. Sacca was the first witness for the plaintiff. He testified that he lived at Greenwood, Nebraska. He was 46 years of age, married, and the father of five surviving children. The deceased was his son and was 14 years of age at the time of his death. He testified that he was the administrator of the estate of John Sacca, deceased. His sons Joseph Sacca and the deceased had permission to make the trip on their bicycles. An acquaintance advised the witness of the accident and took him to the scene. The deceased was then on a stretcher, was placed in an ambulance soon thereafter, and the witness accompanied the driver of the ambulance to a hospital at Lincoln, Nebraska. He did not inspect the surface of the road on his first visit to the scene. Later in the afternoon he returned and saw where glass had fallen on the highway; and that the glass was located about 3 feet from the right-hand side of the road and about 9 feet from the centerline of the highway.

The witness Dominic S. Sacca further testified that prior to the death of the deceased, his family consisted of his wife and six sons. The names and ages of his sons were Don age 16, Joseph and John age 14, Bradley age 6, Nicholas age 5, and Corey age 4. His earnings could not have been sufficient to rear his children without the help of the older children as his family grew up. He had no resources other than the family home and his earnings of $122 per week as a machinist. His 16-year-old son Don was employed at an automobile service station at Greenwood. The son Don earned an average

of $50 per week while attending high school and $60 per week after he discontinued attending school. That out of his earnings the son Don bought some of his own clothes, paid some of the household bills, and assisted the family whenever necessary. The witness testified that he was familiar with wages paid in Greenwood, Lincoln, and Omaha, Nebraska. That a boy in Greenwood, such as his deceased son John, upon reaching 16 years of age would be able to earn $60 per week, and upon reaching 18 years of age could earn $122 per week. That the deceased before his death contributed $6 or $7 per week to the household out of earnings at odd jobs.

On cross-examination it was developed that the deposition of the witness Dominic S. Sacca had been taken. In such deposition he testified that he first returned to the scene of the accident on the following Monday. When he first went to the scene he had not looked for anything and remained only long enough to place his son in an ambulance. On Monday the only thing he observed was a piece of headlight on the right shoulder of the road about 30 feet from the bridge. On redirect examination the witness testified that he made three trips to the scene, the first soon after the accident, the second during the afternoon of the same day, and the third the following Monday.

On cross-examination it was also developed that in his deposition Dominic S. Sacca testified further as follows: His oldest son worked at a filling station 3 hours or so a day and himself spent his earnings; his sons kept their earnings and whatever money they earned was their spending money; and his sons had an allowance.

Betty Jean Sacca, the mother of the deceased, was called as a witness for the plaintiff. She testified that the deceased helped with the normal household duties. Outside the home he mowed lawns, scooped snow, and did yard work for others. A share of his earnings were used for his own spending money. From his earnings he contributed an average of $6 per week to the family

budget. He bought clothes and school supplies for himself. As the deceased grew older he would have earned and helped the family more. On cross-examination the witness stated that her deposition had been taken; and that in such deposition she testified that her sons kept their earnings for spending money or little things she and her husband could not have obtained for them.

One James Armstrong, a road contractor and engineer, testified for the plaintiff as follows: He went to the scene of the accident at about 4:30 p.m. on August 15, 1964. He observed glass and skid marks on the pavement. A person present assisted him in making measurements with a tape. Three feet from the right side of the pavement facing Ashland, and 19 feet from the abutment he observed broken glass, pieces of headlight, chrome, and skid marks. The glass covered an area 6 inches wide and 3 feet in length.

Virgil Tweton, the town marshall of Greenwood, was called as a witness for the plaintiff. He testified that he investigated the scene of the accident. He observed glass on the right-hand side of the pavement but he could not tell where.

Joseph Sacca, the twin brother of the deceased, testified for the plaintiff as follows: That as James Jackson, the deceased, and the witness were approaching the bridge they were riding bicycles in single file, about 20 feet apart on the right side of the highway, and about 3 feet from the edge of the pavement. He was about 6 feet from the bridge when a car approached from the opposite direction. After the oncoming car had passed he heard a car coming from the rear. The car sounded close and he turned around to see how far it was from him. The other two bicycles were then straight ahead of him. The car when it passed him was very close, a distance of about a foot or 5 or 6 inches, and was traveling on the right-hand side of the highway. As it passed him the car turned toward the other bicycles. The right front headlight of the car hit the middle of the

bicycle his brother John was riding. The bicycle was thrown to the right shoulder of the road, and landed in the grass of the shoulder approximately a car length from the pavement. After the impact the car changed its course to the left. His brother, the deceased, did not suddenly turn his bicycle in any direction. The car was traveling from 55 to 60 miles per hour. The driver of the car did not sound his horn.

On cross-examination the witness Joseph Sacca testified that when he stated on direct examination that the car was 5 or 6 inches from him when it passed he meant 5 or 6 feet. It was further developed on cross-examination that the deposition of the witness had been taken and that in such deposition he testified as follows: When the car passed him it was 5 or 6 feet to his left. The car continued straight up the highway. At the time it was hit, the bicycle was at an angle and the car was going straight ahead. His brother was not near the centerline at the time of the impact. The part of the deposition made a part of the record reflects the following questions propounded to the witness and the answers thereto: "Q. What direction was the bike facing when it was hit? A. When it was hit? Q. Yeah. A. It was—the car was straight ahead and his bike was sort of an angle. Did you give that answer to that question? A. Yes. * * * Q. Was it kind of like a 45-degree angle across the road? A. You mean, after the bike—. Did you give that answer to the question? A. Yes. * * * Q. Now, was your brother near the center line of the road when this accident took place?—when the impact took place. A. No. * * * Q. How close was he to the center line? A. After impact, you mean? And my question was, No. At about the time of impact. A. I don't think he was quite halfway across the highway. I think he was mostly on this side of the road. Did you give that answer to that question? A. Yes. * * * Q. Did he ever swerve to the right or left before the accident? A. Not that I saw."

On redirect examination the witness testified his answer to the last question had reference to his brother. Further, that when he testified the bicycle was at an angle he meant when it was on the car.

James Jackson, one of the three boys who were riding the bicycles, testified for the plaintiff. He testified that they met a car coming from the opposite direction when they were near the bridge; and that he was just past the middle of the bridge when the car went by him. About the same time he heard a car approaching behind them. He glanced back as he was coming off the bridge and noticed the deceased was then about 30 feet behind him. He saw the car hit the deceased. There was no turn. As the car passed him the deceased was on the right front fender and the bicycle was along the side of the car with the left-hand portion of the handle bars in the headlight. After the car passed him the bicycle flew onto the right shoulder of the road and the deceased remained on the fender of the car for about half a block. The bicycle landed about three car lengths ahead of him. At the time of the accident they were riding in single file about 3 feet from the edge of the pavement, and the deceased was approximately 30 feet behind him.

Vernon O'Neal, a trooper with the Nebraska Safety Patrol, was called as the first witness for the defendant. He testified that he received word of the accident at 11:25 a.m. He proceeded immediately to the scene and made an investigation. He observed no glass or debris on the surface of the bridge. He observed two skid marks beginning 75 feet east of the bridge, the left mark starting on top of the centerline and the right skid mark near the center, or slightly to the left of the center, of the right-hand lane. About 35 to 40 feet east of where the skid marks curved across the centerline he observed bits of glass scattered in both lanes with no particular pattern. This was the only glass he observed in the area. The skid marks veered to the left, across the

pavement, onto the grass on the left and north shoulder of the road, from where they proceeded on the shoulder of the road a distance of 138 feet, where they veered to the right, across the pavement to the right and south. The defendant's car came to rest on the south shoulder of the road. The deceased was lying near the center of the pavement, 160 feet from the starting point of the skid marks. There was a total of 219 feet of skid marks.

William D. Barber, a witness for the defendant, testified that prior to the accident he approached the bridge in his automobile traveling in a southwesterly direction. The boys on their bicycles were approaching, riding back and forth across the highway. He sounded his horn after which they rode near the right-hand edge of the pavement. He was about 10 feet east of the bridge when he met and passed the boys. He observed the defendant's car approaching and going in the same direction as the boys. He met and passed defendant's automobile as the automobile of the witness was leaving the west side of the bridge and defendant's automobile was entering that side. The witness further testified that he observed the accident through his rearview mirror. The defendant's automobile after it crossed the bridge began to pull to the left. He saw the deceased veer to the left and north at an almost 90-degree angle. The defendant's automobile and the bicycle of the deceased collided on the centerline of the highway. The witness turned his car around and went back to the scene of the accident. The deceased was lying in the center of the highway about 140 yards from the east end of the bridge.

Virgil Tweton, the town marshal of Greenwood, was called as a witness for the defendant and testified that he observed the tire marks and assisted highway patrolman O'Neal in making measurements.

The defendant Marshall testified that he was about one quarter of a mile from the bridge when he first observed the Barber car and the bicycles. He was then

going approximately 55 miles per hour. He reduced his speed to 40 or 45 miles per hour. When the horn of the Barber car was sounded the boys pulled over in single file to about 1 foot from the bridge railing. When he arrived at the east end of the bridge the boys were just clearing the east end of the guard rail. He was gaining on the boys quite rapidly. The left wheel of his car was then approximately at the centerline of the pavement. As he arrived near them the deceased swung out at about a 45-degree angle across the highway. The witness then immediately veered to the left and applied his brakes. The headlight of his car struck the portion of the bicycle behind the front wheel. He did not sound his horn.

It is argued as a ground for reversal that the trial court erred in not granting defendant's motion that the plaintiff's petition be dismissed or in the alternative that a verdict be directed for the defendant for the reason the evidence was insufficient to support a verdict for the plaintiff. In support thereof the defendant cites Lindelow v. Peter Kiewit Sons', Inc., 174 Neb. 1, 115 N. W. 2d 776, in which case this court stated the following rule: "A mere scintilla of evidence is not enough to require the submission of an issue to the jury." The defendant also cites Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405, where this court held: "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, rather than submit it to a jury for determination." The defendant further contends that the rule stated in Bixby v. Ayers, 139 Neb. 652, 298 N. W. 533, applies to the instant case. In that case we held: "The competent relevant testimony of unimpeached witnesses should not be held to be contradicted by inferences from circumstantial evidence, unless these circumstances and the natural inferences to be adduced therefrom cannot

in reason be reconciled with the conclusion that the direct evidence is true."

The testimony of Joseph Sacca and James Jackson, witnesses for the plaintiff, was to the effect that the deceased did not turn to the left prior to the accident. The defendant and his witness William D. Barber testified that immediately before the accident the deceased veered suddenly to the left. Whether the bicycle of the deceased veered to the left before the accident was one of the main disputed questions of fact. In this respect the evidence of the plaintiff and defendant was in direct conflict. As stated in Trask v. Klein, 150 Neb. 316, 34 N. W. 2d 396: "A verdict based upon conflicting evidence will not be reversed on appeal if there is evidence from which reasonable minds might draw different conclusions."

In the light of all the evidence disclosed by the record we conclude that the trial court was correct in submitting the case to the jury.

The defendant contends that the trial court failed to instruct the jury respecting the law applicable to material issues raised by the pleadings and supported by the evidence. In Bixby v. Ayers, *supra,* this court stated: "Assuming that a bicycle is a 'vehicle,' as that term is used in our statutes, and as such upon public highways equal in right to that enjoyed by motor vehicles, it would seem that they are equally subject to the law of the road. * * * Bicyclists while traveling on the highway are controlled by the rules of the road as recognized at common law. They have the same right as automobile drivers to use streets and roads and are chargeable only with such ordinary care for their own safety as prudent persons of like age and experience would exercise."

The following are cases which hold that a bicycle is a "vehicle" subject to a vehicle code: Wright v. Sniffin, 80 Cal. App. 2d 358, 181 P. 2d 675; Miller v. Keller, 263 Wis. 509, 57 N. W. 2d 711; Van Dyke v. Atlantic Greyhound Corp., 218 N. C. 283, 10 S. E. 2d 727.

The instructions of the trial court defined the duty of the driver of a motor vehicle to keep a proper lookout and to have his vehicle under proper control. No instruction was given defining the duty of the operator or driver of a bicycle to do the same. We hold that a bicycle is a "vehicle" as that term is used in our statutes setting forth rules of the road. We further hold that the failure of the trial court in this case to instruct on the duty of a bicyclist to maintain a proper lookout and control was reversible error.

Instruction No. 7 given by the trial court is as follows: "You are instructed that the laws of Nebraska, in full force and effect at the time and place of the accident herein concerned, provide that no person shall turn a vehicle from the direct course upon a highway unless such movement can be made with reasonable safety and after giving an appropriate signal in the event any other vehicle may be affected by such movement. Such signal of intention shall be given continuously during *not* less than the last *50* feet traveled by the vehicle before turning." (Italics supplied.)

In Omey v. Stauffer, 174 Neb. 247, 117 N. W. 2d 481, this court held: "An instruction relating to the duty to give an appropriate signal before turning a motor vehicle from a direct course upon a highway is incomplete if it fails to instruct as to the signals which are authorized and required."

Instruction No. 7 heretofore set forth failed to instruct as to the signals required by the statutes. See, §§ 39-7,116 and 39-7,117, R. R. S. 1943, and 39-7,115, R. S. Supp., 1965. The failure so to do in the light of the rule set forth in Omey v. Stauffer, *supra,* and our further holding that bicyclists are subject to the rules of the road, constituted reversible error.

Instruction No. 11 given by the trial court is as follows: "You are further instructed that if you find from the evidence that the defendant driver violated any provision of the statutes of the state of Nebraska, set forth

in these Instructions, that the violation thereof, in and of itself, would not be negligence on the part of said violator, but would be evidence of negligence on his part to be considered by you, together with all other evidence, facts and circumstances in the case to determine whether such violator was guilty of negligence."

Instruction No. 11 applied only to the defendant driver. No similar instruction was given as to the effect of the violation of the statutes by a bicyclist, and the failure to give such instruction was likewise reversible error.

The defendant further urges as a ground for reversal the giving of the following instruction No. 3: "You are further instructed that the burden is upon the defendant to prove, by a preponderance of the evidence, all of the material affirmative allegations of his answer, and particularly that the decedent John Sacca was guilty of contributory negligence proximately causing the accident as claimed by him, except so far as the same may appear in the evidence adduced by the plaintiff, if such is the fact. If you first find that the defendant was negligent as claimed by the plaintiff, but that the decedent John Sacca was also guilty of contributory negligence causing the accident, you will then turn your attention to the instructions on comparative negligence, hereinafter given you, to determine whether or not the plaintiff shall recover in this action against the defendant."

The trial court properly instructed as to the plaintiff's burden of proof and as to contributory negligence. In instruction No. 4 the trial court defined proximate cause as follows: " 'Proximate cause,' as used in these Instructions, is that cause from which the result follows as a natural or probable consequence. It is the primary cause where no intervening cause, disconnected therefrom and self-operating, intervenes to produce the effect."

The defendant contends that the effect of instruction No. 3 is to say that contributory negligence to be a defense must be the sole proximate cause of the accident.

We do not agree. Instruction No. 3 was properly given when considered in conjunction with the other instructions mentioned as to the plaintiff's burden of proof, contributory negligence, and the definition of proximate cause.

The defendant contends that it was error for the trial court to give instruction No. 13, which is as follows: "You are instructed that very young children cannot be legally charged with either negligence or contributory negligence, and that what is required of other children is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. There is no arbitrary rule fixing the age or time at which a child, during its minority, may be wholly capable or incapable of understanding and avoiding dangers encountered while traveling upon a public highway; and whether or not negligence may be attributed to the minor, John Sacca, in this case is a matter for you to determine by an examination of all of the facts and circumstances shown by the evidence. In this connection, you are further instructed that if you determine that John Sacca cannot be charged with either negligence or contributory negligence because of his age, nevertheless, if his acts, whether negligent or not, were the proximate cause of his own injuries, there can be no recovery from the defendant in this case."

In the case of Bear v. Auguy, 164 Neb. 756, 83 N. W. 2d 559, this court held that whether or not a minor between 14 and 15 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law. In that case the court stated that the conduct of the plaintiff should not, his age considered, conclusively bar his right to recovery, conceding that he was a bright and intelligent boy, had lived in Omaha, was acquainted with the use of bicycles as most boys are, and was familiar with the

operation of motor bicycles, having ridden thereon with other boys, although this was the first occasion upon which he had operated one. We therefore conclude that instruction No. 13 was properly given by the trial court.

Defendant contends that by reason of the nature of the contradictions contained in the testimony at the trial and in the depositions of Dominic S. Sacca and Joseph Sacca, witnesses for the plaintiff, the court on the defendant's motion should have directed a verdict for the defendant. In support thereof defendant has cited the cases of Gormley v. Peoples Cab, Inc., 142 Neb. 346, 6 N. W. 2d 78; Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381; and Rahfeldt v. Swanson, 155 Neb. 482, 52 N. W. 2d 261. The foregoing cases adopted the rule that where a plaintiff, without reasonable explanation, testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded. We have examined the record and a résumé of the testimony of the witnesses does not disclose that their testimony falls within the rule stated. It is further to be noted that in each of the three cases cited the contradictory statements were made by a party litigant. Under the circumstances and record of this case the jury had the right to take into consideration the contradictory statements of the witnesses as bearing on their credibility.

The last assignment of error of the defendant is that the evidence of the amount earned by the deceased, and what he would be able to earn in the future during his minority, was speculative and should not have been admitted over objection. The trial court properly instructed the jury as to the measure of damages. There is no contention by the defendant that the verdict was excessive. The evidence adduced by the plaintiff reflects the status of the family and of the deceased, the income and assets of the father and mother, the number

of children, their earnings and contributions, and that the deceased assisted with the normal household duties. Section 38-107, R. R. S. 1943, provides that parents are equally entitled to the services and earnings of their minor children. In Dorsey v. Yost, 151 Neb. 66, 36 N. W. 2d 574, 14 A. L. R. 2d 544, this court said: "The amount being very problematical, it is peculiarly for the jury to determine, after hearing all the evidence bearing upon the situation, including the parents' position in life, the physical and mental condition of the child, his surroundings and prospects, and any other matter that sheds light upon the subject." We conclude that the admission of the evidence mentioned to which the defendant made objection did not constitute prejudicial error.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLANT, V. WILLIAM MICHAEL RUGGIERE, APPELLEE.
146 N. W. 2d 373

Filed November 18, 1966. No. 36289.

1. **Criminal Law.** If the complaint in a misdemeanor case is found insufficient or defective on appeal to the district court, the court shall order a new complaint to be filed.
2. ———. Such new complaint may allege a new offense that is closely related to the allegations of the original complaint.

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

Herbert M. Fitle, Charles A. Fryzek, Walter J. Matejka, Richard L. Dunning, John A. Gutowski, Raymond E. Gaines, Gary P. Bucchino, and John B. Abbott, for appellant.

McGowan & Troia, for appellee.

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

SMITH, J.

In the exercise of appellate jurisdiction over minor offenses the district court denied the State permission to file a new complaint. The complaint was dismissed on demurrer, and the county attorney has taken exceptions.

The State had commenced the prosecution in the municipal court of Omaha. The complaint contained the following allegation: Defendant had operated a motor vehicle on May 25, 1964, "during any period that his operator's license had been suspended pursuant to any law of this state." Judgment went against defendant, and he appealed to the district court.

In October 1964, the district court ordered forfeiture of defendant's bond and dismissal of the appeal. It subsequently vacated the dismissal, the bond being reinstated. In December 1964, defendant entered a plea of nolo contendere. Bond was again forfeited January 7, 1965.

In January 1966, the court permitted defendant to withdraw his plea and to demur instanter. By demurrer he objected that his license had been revoked, not suspended. At the hearing the parties stipulated that the license had been revoked under the point system for 1 year commencing September 5, 1963. See § 39-7,128, R. S. Supp., 1965. The State then sought permission to file a new complaint. The court denied the request, sustained the demurrer, and dismissed the complaint. Granting an application for leave to docket error proceedings, the district court appointed counsel to oppose the argument of the county attorney.

The county attorney contends that the allegation of license suspension was amendable by substitution of revocation for suspension. Opposing counsel counters that substitution of offenses is impermissible and that the record is insufficient for review.

The license statutes show a close relationship between suspension and revocation. The same sections prescribe the punishment in the following situations: Revocation under the point system, suspension or revocation under the safety responsibility act, and suspension or revocation under the general penalty provisions of the operators' license act. §§ 39-7,133, 60-557, and 60-430, R. R. S. 1943. Under the operators' license act the privilege after suspension is not restored by lapse of time alone; it depends upon receipt of a new license. § 60-418, R. R. S. 1943; Tyrrell v. State, 173 Neb. 859, 115 N. W. 2d 459. Loss of privilege by suspension or revocation is determinable from records in the Department of Motor Vehicles. See § 60-421, R. R. S. 1943.

Procedure for amendment of a complaint on appeal is regulated by the following statutory provision: "The district court shall hear and determine * * * (the) cause * * * upon the original complaint, unless such complaint shall be found insufficient or defective, in which event the court, at any stage of the proceedings, shall order a new complaint to be filed * * *, and the case shall proceed thereon the same in all respects as if the original complaint had not been set aside." § 29-613, R. R. S. 1943.

Prior decisions have not resolved the problem of an amendment that alleges a new offense. In affirmance of a conviction a Supreme Court Commissioner said: "The amended complaint * * * charges the offenses more in detail, but does not essentially or materially alter the original charge." Ruffing v. State, 80 Neb. 555, 114 N. W. 583. Substitution of a new complaint for a lost one has been approved, but identity of offense was not an issue. See, Bays v. State, 6 Neb. 167; Lindley v. State, 117 Neb. 597, 221 N. W. 706. The standard of interpretation was set long ago in this language: "It is evident that, * * * no matter how utterly deficient the complaint * * * may be, even if totally wanting in the essential requisites to show the offense intended to be charged, the

prosecution will not be thwarted, but 'the court shall order a new complaint to be filed,' upon which the trial must proceed. * * * This section establishes a positive rule of practice * * *. And it does more than this—it furnishes a safe guide to the courts in matters of practice whenever a contingency shall arise, which, although not within the letter, is clearly within the spirit of the statute." Bays v. State, *supra.*

A trial de novo benefits the accused, and the provision for a new complaint serves as a balance. Nebraska has a stake in protecting not only the individual but the public also. We attempt no formula definition of the extent to which statutory policy authorizes the State to allege a new offense. A requirement of identity would be reasonable in some cases but unreasonable in others.

Distinctions between suspension and revocation in other contexts are often crucial. Two offenses possibly exist under rules concerning limitation of actions, but limitations operate within the ambit of the statute establishing the practice on appeal. See § 29-610, R. R. S. 1943. The gist of suspension and revocation is loss of privilege, and in that sense the proposed complaint tracked the original one. The close relationship leads us to the conclusion that amendment should have been permitted. We see no unjust prejudice to defendant.

The record is sufficient for review, although the State omitted to incorporate the proposed complaint into its request. The point concerning suspension and revocation was presented to the court. If the complaint is found insufficient or defective, "the court * * * shall order a new complaint to be filed * * *." § 29-613, R. R. S. 1943.

The district court erred in denying the request by the State and in dismissing the complaint on demurrer. The judgment is reversed and the cause remanded. See, § 29-2316, R. R. S. 1943; State v. Amick, 173 Neb. 770, 114 N. W. 2d 893.

REVERSED AND REMANDED.

BOSLAUGH, J., participating on briefs.

CORNHUSKER DEVELOPMENT AND INVESTMENT GROUP, INC., A CORPORATION, APPELLANT, V. HARRY KNECHT, APPELLEE.

146 N. W. 2d 567

Filed November 18, 1966. No. 36291.

1. **Corporations.** Any agreement by which a person shows an intention to become a stockholder in a corporation is sufficient as a contract of subscription, as against both himself and the corporation.
2. ———. A subscription to corporate shares, made before the corporation comes into existence, but accepted by the corporation after coming into existence, either expressly by issuing the share certificates, or impliedly by recognizing the subscriber as a shareholder, makes him a shareholder, and the corporation may maintain an action upon the subscription against the signer.
3. **Contracts: Evidence.** If the existence of a written contract has been induced by prior or contemporaneous oral agreement, parol evidence is not admissible to add to or contradict the terms of the written contract.
4. ———: ———. If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce their agreement to writing, execute, and deliver it, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract.
5. **Evidence.** The parol evidence rule is one of substantive law as well as of evidence, and as a rule of substantive law it renders ineffective proof of an oral prior or contemporaneous agreement the effect of which would be to vary, alter, or contradict the terms of a written agreement.
6. **Contracts: Evidence.** Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of the payment of a money consideration, and is of a contractual nature, parol or extrinsic evidence is not admissible to vary or contradict the consideration expressed.
7. **Pleading.** Where the defendant pleads a failure of consideration, he has the burden of proving it.
8. **Corporations.** The mere mismanagement of the affairs of a corporation by its officers or agents does not warrant the withdrawal therefrom of stockholders or the repudiation of the obligations assumed by them as such.

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

Pierson & Pierson, for appellant.

Norman E. Stephens and Emory P. Burnett, for appellee.

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

BROWER, J.

This is an action brought by the plaintiff and appellant Cornhusker Development and Investment Group, Inc., a corporation, to recover on a promissory note given by the defendant, Harry Knecht, under a subscription contract executed by the defendant for stock in the plaintiff corporation.

The trial court submitted to the jury the sole question of whether there was a failure of consideration for the promissory note. The jury returned a verdict for the defendant and a judgment was entered thereon.

The plaintiff has appealed from the judgment to this court. There is no cross-appeal.

On July 23, 1963, the defendant executed a subscription agreement for the purchase of stock in the plaintiff corporation to be formed by the subscribers for such stock, pertinent portions of which are here set forth: "WHEREAS, it is proposed to organize a Nebraska Corporation to be known as 'Cornhusker Development and Investment Group, Inc.;' and * * * it is proposed that said corporation shall be authorized to engage in any business that is permitted a Nebraska corporation, including and with emphasis upon the development of its assets through the acquisition, formation and/or capitalization of wholly-owned, majority-owned or substantially-owned corporations for the establishment of convalescent, rest, care and nursing homes; * * * no salesman or any other person has been authorized to give any information or make any representations other than those contained in this agreement, and, if given or made,

such information or representations must not be relied upon as having been authorized;

"NOW THEREFORE, the undersigned, in consideration of the Subscription Agreements of other incorporators and founders, does hereby agree with such other incorporators and founders, and with Edwin C. Bowman and his associates, the organizer of said corporation, that the undersigned does hereby subscribe to 80 shares of the common stock of the proposed corporation at the price of Twenty-five and No/100 Dollars ($25.00) per share, said sum being due and payable upon the execution of this Subscription Agreement. * * * NO GUARANTEES OR REPRESENTATIONS ORAL OR WRITTEN ARE MADE TO THE UNDERSIGNED EXCEPT THOSE EXPRESSLY SET OUT IN THIS SUBSCRIPTION AGREEMENT." On that day he gave a check for $500 and executed the promissory note involved in the action for $1,500.

On August 30, 1963, the articles of incorporation of plaintiff were filed and recorded in the offices of the Secretary of State and of the county clerk of Lancaster County, its principal place of business being in Lincoln. The articles of incorporation were signed by the defendant and acknowledged by him on August 21, 1963, as one of the incorporators. The general nature of the business of the corporation stated therein closely follows that contained in the subscription contract. It was to start business at once. Its affairs were to be conducted by a board of directors elected by the stockholders.

Over objections that there was no proper or sufficient foundation, that it was incompetent, irrelevant, immaterial, and tending to alter the terms of a written agreement, the defendant was allowed to testify that sometime in the evening of July 23, 1963, Ed Bowman and Harold Pritz came to defendant's home in Loup City and induced him to sign the note now in litigation as well as a check for $500. Defendant wanted to discuss the matter first with others who are not identified by

him, but was told that all of them had given $500 and a note and that he was holding everything up. He later found some of these unnamed persons had paid $200, some $300, and some $2,000.

They also at that time told him that if a nursing home was not built in Loup City, he would receive a refund of $300 and the note would be returned. Defendant was also told on this occasion that the proceeds of the check would be placed in the bank in escrow until construction of a rest home was started in Loup City and that the note would be similarly escrowed. The endorsement on the check shows that it was not placed in escrow, but rather that it was deposited to plaintiff's general account.

Over similar objections, other subscribers testified to similar statements, some of which were made to them by Bowman without the presence of the defendant.

On July 30, 1963, the defendant and four others, who later also signed the articles of incorporation as the first parties, executed a written agreement purportedly signed on behalf of the plaintiff as second party by Edwin C. Bowman, the promoter mentioned in the agreement of July 23, 1963. It recites the desire of the first parties to have a care or rest home built and operated in Loup City and that the second party desires to build and operate such a home therein and desires the help, cooperation, planning, and opportunities offered by the parties of the first part. It then provided: "NOW, THEREFORE, party of the second part, in consideration of the signing of Subscription Agreements with Cornhusker Development and Investment Group, Inc., by parties of the first part, does hereby covenant, agree and obligate itself to erect, construct, manage, operate and maintain in Loup City, Nebraska, a nursing, care or rest home upon such terms, conditions and provisions as may be mutually agreed upon by parties of the first part and party of the second part; it being understood by and between both parties hereto that there shall subsequently be entered into a contract more particularly defining

the specific rights, duties and obligations of the parties hereto.

"And parties of the first part, in consideration of this Agreement and the promises and covenants herein made by party of the second part, do pledge, promise and covenant that they will use their utmost efforts to secure and promote favorable conditions and cooperation in Loup City, Nebraska, to the end that party of the second part may promptly enter upon the construction, erection, management and operation of a nursing, care or rest home in Loup City, Nebraska."

Defendant, subsequent to executing the documents mentioned, on two occasions, the dates of which are not mentioned, attended meetings at Lincoln in which Bowman was present. At the first one Bowman was asked questions by certain persons who had put money in the corporation with respect to what was happening to it. He answered that it was in the bank and was to be subsequently accounted for. At the second meeting a report was given by him, but neither the report nor its substance are in evidence. Another one of the incorporators who attended a stockholders' meeting at Lincoln, also on an undisclosed date, testified that they found the corporation had no officers, and that an incorporator was to call another meeting and there "get officers" and set up the corporation.

It appears no stock had been issued to the defendant.

At the conclusion of the defendant's evidence, the plaintiff moved for a directed verdict for the amount of the note for the reason that the defendant had failed to prove any defense to the subscription agreement and note.

Plaintiff contends the trial court erred in failing to sustain its motion for a directed verdict and in admitting evidence concerning conversations with the promoter Bowman, stating a consideration at variance with that contained in the subscription contract; and that because thereof the verdict and judgment are contrary to the

evidence. We will consider this assignment of error first because if the plaintiff's contention is correct, it will control and determine our decision.

In Nebraska Chicory Co. v. Lednicky, 79 Neb. 587, 113 N. W. 245, this court laid down the following rules: "Any agreement by which a person shows an intention to become a stockholder in a corporation is sufficient as a contract of subscription, as against both himself and the corporation. * * *

"A subscription to corporate shares, made before the corporation comes into existence, but accepted by the corporation after coming into existence, either expressly by issuing the share certificates, or impliedly by recognizing the subscriber as a shareholder, makes him a shareholder, and the corporation may maintain an action upon the subscription against the signers."

In Bitler v. Terri Lee, Inc., 163 Neb. 833, 81 N. W. 2d 318, it was stated: "If the existence of a written contract has been induced by prior or contemporaneous oral agreement, parol evidence is not admissible to add to or contradict terms of the written contract.

"If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce their agreement to writing, execute, and deliver it, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract."

In the present case, no issue of fraud, misrepresentations, or rescission was submitted to the jury, and the defendant, in his brief herein, expressly states that fraud or misrepresentation are not involved and that the sole defense is failure of consideration. Defendant contends, however, that failure of consideration has been shown. He cites section 62-128, R. R. S. 1943, from the Uniform Negotiable Instruments Law, to the effect that a failure of consideration is a matter of defense to a negotiable instrument, and therefore urges the true consideration for the note in suit may be shown, maintaining a failure

thereof appears from the evidence. Defendant relies on the case of Elmcreek Ditch Co. v. St. John, 127 Neb. 253, 255 N. W. 16. There the ditch company as plaintiff brought an action to recover on a stock subscription. The purpose of the corporation was to construct a ditch to conduct the water for irrigation. The note in question had set out on its face, " '3 assessments on ditch payment.' " The articles of incorporation of the company showed that no stockholder was to receive any benefit whatever aside from putting water upon his land for irrigation. Its by-laws provided that the company should deliver water to the land of each stockholder, or the amount of the subscription paid should be returned. The ditch on being built was 4 miles from the defendant's land. The court held under the negotiable instrument statute, then section 62-205, Comp. Stat. 1929, that failure of consideration could be shown. It was so shown and it conclusively appeared to be of no benefit to the defendant.

In the present case, the consideration was shown to be the stock subscription of July 23, 1963. Its provisions are set forth. However, the defendant seeks to vary the expressed consideration therein. "The parol evidence rule is one of substantive law as well as of evidence and as a rule of substantive law it renders ineffective proof of an oral prior or contemporaneous agreement the effect of which would be to vary, alter, or contradict the terms of a written agreement." Perry v. Gross, 155 Neb. 662, 53 N. W. 2d 73.

In Spiegal & Son v. Alpirn, 107 Neb. 233, 185 N. W. 415, this court held: "Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of the payment of a money consideration, and is of a contractual nature, parol or extrinsic evidence is not admissible to vary or contradict the consideration expressed." The consideration in the subscription contract was contractual in nature and cannot be varied by oral contemporary evi-

dence. Particularly is this true where the agreement itself provides, as here, that "no salesman or any other person has been authorized to give any information or make any representations other than those contained in this agreement, and, if given or made, * * * must not be relied upon as having been authorized."

Defendant points to the fact that the subsequent written agreement of July 30, 1963, clearly provides that the plaintiff was obligated to build a care or rest home in Loup City, and contends that consequently this written agreement sets out true consideration which has failed. It appears to be an independent or collateral agreement to be performed in the future after incorporation. It recites the desire of the first parties to have a nursing, care, or rest home in Loup City and the desire of the second party (the plaintiff) to build it. It contains what purports to be an agreement of the plaintiff to build such a home in the future with the cooperation of the first parties. Its performance is to be governed by a subsequent contract to be entered into "defining the specific rights, duties and obligations" of the parties. Although the defendant knew this purported contract was executed by a promoter prior to the time of the plaintiff's incorporation, we think it unnecessary here to discuss the questions involving the scope of his authority. If the plaintiff became bound to build the rest home in Loup City by the subsequent agreement, there is no evidence which shows that it had repudiated such an agreement or intended not to comply therewith. The only evidence even remotely bearing on the plaintiff's intention with respect to building the home at Loup City after its organization occurred at the second meeting which the defendant attended at Lincoln at a date undesignated. The defendant testified: "Q And at the last meeting which you had in Lincoln where Mr. Bowman was present and subsequent to the formation of the corporation, was there any discussion at this meeting by any of the persons about building a home at Loup

City? * * * (Objections were here made by plaintiff's counsel and overruled.) BY MR. STEPHENS: Q State who made this proposal. Read the question back. * * * (The question previously stated was read to Mr. Stephens.) What was this—who made these statements about building a home at Loup City? A I can't remember. Q If you don't remember, just say so. A I don't remember. * * * Q Were there any statements by the officers of the corporation at that time made that the home would not be built at Loup City? A At that meeting, the last meeting at Lincoln, we had other troubles besides building a home. Q Were there any statements made that any home would be built anywhere at that time? MR. PIERSON: Objection to the question. Withdraw the objection. THE WITNESS: No." Where the defendant pleads a failure of consideration, he has the burden of proving it. 17A C. J. S., Contracts, § 583, p. 1120. We think testimony that at some particular meeting of the stockholders of the corporation at an undisclosed time no statements were made concerning building of any home is no proof whatever that there was a failure of consideration even with respect to the second agreement providing for such building in the future if the defendant was bound thereby.

The defendant claims the failure to place his check and note in escrow at the bank as testified to is a failure of consideration. This oral evidence is another variation in contradiction of the subscription agreement which sets forth the price to be paid for the shares, and states "said sum being due and payable upon the execution of this Subscription Agreement." Under the circumstances, it cannot constitute a part of the subscription agreement.

There appears to be some dissatisfaction with the management of the corporation and an intimation without proof thereof that it is in financial difficulties. "The mere mismanagement of the affairs of a corporation by its officers or agents does not warrant the withdrawal

therefrom of stockholders or the repudiation of the obligations assumed by them as such." American Building & Loan Assn. v. Rainbolt, 48 Neb. 434, 67 N. W. 493. Neither can the subscriber complain of the nondelivery of the certificates for stock until he has paid his subscription. Nebraska Exposition Assn. v. Townley, 46 Neb. 893, 65 N. W. 1062.

We have carefully examined the evidence and applied it to the law cited. We find no proof of the affirmative defense of failure of consideration for the note in action. That was the only issue submitted to the jury by the trial court and the only issue before this court on appeal. Plaintiff's motion for a directed verdict should have been sustained.

It follows that the judgment of the trial court must be and is reversed and the cause remanded with directions to enter judgment for the plaintiff for the amount of the defendant's note and interest.

REVERSED AND REMANDED WITH DIRECTIONS.

ELMER MUSSER ET AL., APPELLEES, V. GIDEON ZURCHER ET AL., APPELLANTS.

146 N. W. 2d 559

Filed November 18, 1966. No. 36328.

1. **Homesteads: Acknowledgments.** As between the parties a contract for the sale of real estate need not be acknowledged unless the property is a homestead.
2. **Homesteads.** Where the owner of a homestead removes therefrom with his family and moves to another home, of which he is the owner, it will be presumed that he has abandoned the first home and thereby the homestead right in it.
3. ———. Where the evidence shows that the parties left the premises claimed as a homestead, without any intention of returning to it for homestead purposes, an abandonment of the homestead right will be deemed to have been established.
4. **Specific Performance: Vendor and Purchaser.** The fact that land increases in value after an option is given is no reason to deny specific performance.

5. **Alteration of Instruments.** The filling of blanks in a written instrument is not, strictly speaking, an alteration of the instrument. Where a blank is filled in after the execution and delivery of a written instrument, it is a question of authority to do so. The right to fill blanks in a written instrument after execution and delivery is based upon an assumption of consent, in the absence of specific instructions, and the leaving of such blanks is considered to imply authority to fill them, and creates an agency in the receiver to do so in the way contemplated by the maker.
6. **Contracts.** In the absence of fraud, a person who signs an instrument without reading it, when he can read and has the opportunity, cannot avoid the effect of his signature merely because he was not informed of its contents.
7. ———. The consideration of a contract need not move to the promisor. A disadvantage to the promisee is sufficient, although the promisor derives no benefit therefrom.
8. **Specific Performance: Tender.** Tender is not a prerequisite to a suit for specific performance where the owner of the land repudiates the transaction.

Appeal from the district court for Madison County: GEORGE W. DITTRICK, Judge. Affirmed.

Brogan & Monan, for appellants.

William G. Whitford, for appellees.

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

MANASIL, District Judge.

Gideon and Aurel Zurcher were married in 1929 and the following year, as tenants, they moved onto the farm legally described as the northeast quarter of Section 3, Township 22 North, Range 5 west of the 6th P.M., Boone County, Nebraska, where they lived for 33 years. They purchased the farm in 1959 for $15,000. After said purchase the defendants made some improvements of less than $1,000 and withdrew from the farm house the bathroom fixtures, which were placed in their home in Tilden, which they had purchased and intended to move into after farming one more year, 1964. Gideon was 69 years old and Aurel 55 at time of trial.

Gideon had farmed the place without hired help. He had never engaged in any other occupation or business and had only an eighth grade education. On September 9, 1963, he suffered a paralyzing stroke. Up to that time he had actively engaged in farming, both livestock and crop operations. Since the stroke, he has not worked one day, is unable to drive or ride in a car, cannot walk any distance, suffers from dizziness, and was unable to dress or feed himself for a long time. Due to the illness, Gideon was unable to continue farming, and the defendants of necessity moved into a house in nearby Tilden. The farm was rented to LeRoy Warneke on a crop-share basis.

Without any solicitation on the part of defendants, the plaintiff, Elmer Musser, appeared at defendants' place in Tilden. Musser claims he was there twice on the same day, which is denied by defendants. In any event, an option to purchase said land was entered into between the parties dated September 8, 1964. All parties to the option stated that the signatures were theirs. The plaintiffs, Mussers, contend that the option was complete when signed. The defendants, Zurchers, contend neither the description, nor the sale price, nor the provisions pertaining to crops and taxes, nor the $1 consideration were included or in the option when they signed the same.

The option provided, among other things not pertinent to this opinion, that: "In consideration of the sum of $1.00 in hand paid and other valuable considerations, the receipt and sufficiency of which are hereby acknowledged, * * *. It is agreed that the Buyer's efforts to obtain such a loan constitute a part of the consideration for this option. * * * This option may be exercised by the Buyer, * * * by mailing * * * a written notice of acceptance of the offer * * * in the City of Tilden, County of Madison, State of Nebraska. The offer herein shall remain irrevocable for a period of three months from the date hereof * * *. The Seller may terminate this

offer at any time after the three months' irrevocable period provided herein by giving to the Buyer ten (10) days' written notice of intention to terminate at the address of the Buyer."

On November 9, 1964, an acceptance of the option was, by certified mail, sent to the Zurchers. They received the same on November 10, 1964. This is within the 3-month period.

Prior to the acceptance of the option by Mussers, Gideon Zurcher, by telephone, called the Musser residence, talking to Mrs. Musser and stating that they, the Zurchers, were withdrawing their offer to sell and to notify Mr. Musser.

Defendants refused to perform and plaintiffs brought this action for specific performance.

Further facts that are disclosed by the testimony are: That the Zurcher farm had not been previously listed for sale with a licensed broker; that the defendants had offered this farm for sale to their tenant for $20,000 in the fall of 1964; and that Warneke advised, however, after a lapse of a few days that he was unable to make the downpayment or complete the purchase.

Elmer Musser, one of the plaintiffs, then visited with defendants, Zurchers, on two occasions. There is a conflict as to whether both visits were on the same day or different days. Musser stated they were on the same day; Zurchers stated they were on different days. At the first visit, after preliminary conversations, Gideon Zurcher, with his wife present at the conversation, advised Elmer Musser that he wanted $20,000 for the farm, who advised that he could not pay that much; whereupon, Gideon Zurcher reduced the purchase price to $18,000. Elmer Musser advised that it was necessary for him to borrow the money and proceeded to have the option drawn. Elizabeth Musser signed the same at Neligh, Nebraska, and Elmer Musser either signed it at the same time and place, or in the dining room of the Zurchers, where the Zurchers signed the option to pur-

chase. On this visit by Elmer Musser the defendant called his wife, Aurel, into the house to sign the paper, which she stated she did not read, but in response to a question of whether she understood that it had anything to do with selling the farm, she replied, "I just knew we was going to sell it."

There is evidence in this record that the farm was discussed, including the price for the same, by Elmer Musser and both Zurchers. There is no evidence in this record of any disability, either mental or physical, of Mrs. Zurcher. There is no question of the physical disability of Mr. Zurcher; however, as to his mental condition there is no medical testimony as to any disability and as to a discussion of his testimony, the answers are lucid and direct. He had complete knowledge of the transaction and the offering of sale to the tenant, Warneke; and to Elmer Musser he stated from whom he purchased the farm, the date, the cost, and the improvements made thereon. Furthermore, he directed his wife to call the Mussers and cancel the option giving as his reason that "it would be worth more to me to keep it."

Defendants placed on the evidence stand two witnesses who testified that the land was worth more than was agreed to be received by the defendants. Inadequacy of consideration alone is no defense to an action for specific performance of a contract unless so great as of itself to furnish an irresistible inference of fraud. Garsick v. Dehner, 145 Neb. 73, 15 N. W. 2d 235.

Defendants further question the inadequacy of the option to purchase for the reason that the same was not executed and acknowledged and that said property was a homestead. The undisputed evidence of the defendants themselves is that they had left the farm with no intent of returning. Phifer v. Miller, 153 Neb. 748, 45 N. W. 2d 907.

The question of inadequacy of consideration was raised by defendants who claim the $1 was not paid

which testimony is in conflict with that of plaintiff, Elmer Musser, who stated that the same was paid. The option reads: "In consideration of the sum of $1.00 in hand paid and other valuable considerations, the receipt and sufficiency are hereby acknowldged * * *. This option is given to enable the Buyer to obtain a loan insured or made by the United States of America, acting through the Farmers Home Administration, United States Department of Agriculture, and its duly authorized representatives, * * * for the purchase of said property. It is agreed that the Buyer's efforts to obtain such a loan constitute a part of the consideration for this option."

The consideration of a contract need not move to the promisor. A disadvantage to the promisee is sufficient, although the promisor derives no benefit therefrom. Faulkner v. Gilbert, 57 Neb. 544, 77 N. W. 1072; United States Fidelity & Guaranty Co. v. Curry, 126 Neb. 705, 254 N. W. 430.

Defendants also contend that the option to purchase was not complete when signed by them which is also denied by each of plaintiffs. Defendants contend that the $1, the sale price, the legal description, and a provision regarding crops and taxes were inserted after their signature. Defendants' testimony reveals no question as to the amount of the sale price; and that they owned only one farm, and the farm in question was the only one discussed. If these items were left out there most certainly would be implied authority to fill them in. Montgomery v. Dresher, 90 Neb. 632, 134 N. W. 251, 38 L. R. A. N. S. 423; Mazanec v. Lincoln Bonding & Ins. Co., 169 Neb. 629, 100 N. W. 2d 881; Central Constr. Co. v. Blanchard, *ante* p. 62, 141 N. W. 2d 416.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT M. CASEY, APPELLEE, SUMMIT FIDELITY & SURETY COMPANY, SURETY FOR ROBERT M. CASEY, APPELLANT.

146 N. W. 2d 370

Filed November 18, 1966. No. 36336.

1. **Bail: Principal and Surety.** The surety's obligation on a bail bond, as on any other surety contract, is limited to the surety's promise, reasonably interpreted, unless there is a statute providing that certain statutory conditions are deemed to be contained in the bond, whether or not expressed.
2. ———: ———. While a bail bond or recognizance should be construed with reasonable strictness, and a surety should not be required to fulfill any conditions that he did not covenant to perform, and while the omission of material words cannot be supplied by inference or intendment, the court should not close its eyes to any reasonable intendment of the language employed by the parties. This rule applies with particular emphasis in the case of a surety company engaged in the business of furnishing bail bonds.
3. ———: ———. In general, the obligation of the surety on a criminal bail bond is to produce the accused whenever necessary in the prosecution of the charges which have been made against him or at any stage of the proceedings until the prosecution is ended, and the defendant is discharged by the court or by operation of law, or custody of the defendant is transferred to proper officers of the law.
4. **Bail.** The words "of said day" in an appearance bond are interpreted as meaning the date the bond was dated, executed, and filed and as carrying with it the connotation of immediately or forthwith.

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

Michael W. Brown, for appellant.

Paul L. Douglas, William D. Blue, Ronald D. Lahners, Floyd A. Sterns, and Janice L. Gradwohl, for appellee State of Nebraska.

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

McCOWN, J.

Summit Fidelity & Surety Company has appealed from a judgment against it on an appearance bond executed by it as surety for one Robert M. Casey. The principal question involves the construction of the bond as to the time for appearance.

On May 26, 1965, the defendant, Robert M. Casey, was charged with burglary. He was arrested July 19, 1965, appeared before the county judge on the same day, and preliminary hearing was set for August 4, 1965, and an appearance bond was fixed in the sum of $5,000. On August 4, 1965, the defendant appeared before the county judge with his attorney, waived preliminary hearing, and was "bound over to the District Court of Lancaster County, Nebraska, at present term of Court, for further disposition." Appearance bond was fixed in the sum of $4,000. The bond was executed by Casey and by Summit Fidelity & Surety Company, as surety. The appearance bond was on a printed form in which several words were lined through. The relevant portions of the bond required Robert M. Casey to "personally be and appear before the District Court of Lancaster County, Nebraska, for trial therein, on the ____ day of _____, 19____, at ____ o'clock _____M., of said day or at subsequent dates or times to which said cause may be lawfully continued or adjourned, to answer a charge preferred against him for the crime or offense of Burglary and to do and to receive what shall be enjoined by said Court upon him, and shall not depart the said Court without leave."

On October 19, 1965, the court ordered the bond forfeited when Robert M. Casey failed to appear. On December 1, 1965, the State filed a motion for a judgment of default and execution on the bond pursuant to section 29-1108, R. R. S. 1943. The court set hearing on the motion for the 13th day of December, and directed that the motion and notice of hearing be served on the clerk, and that copies be mailed forthwith to the ob-

ligors. After two continuances, a motion for a further continuance and setting a new date for hearing was filed, and the hearing was set for February 14, 1966. After denying the surety's motion for further continuance, hearing was had on February 14, 1966, after copy of the motion and the notice of hearing was again sent to the obligors by the clerk of the district court together with the order of continuance. The attorney for the defendant, Robert M. Casey, was also notified personally of the hearing. After the hearing, the court entered a judgment in the sum of $4,000 against the obligors, Robert M. Casey and Summit Fidelity & Surety Company. The record shows that the defendant, Robert M. Casey, has never appeared before the district court for Lancaster County, and that no objection to the order of forfeiture of October 19, 1965, was made nor has any motion to set the order aside ever been filed. The surety filed a motion for a new trial listing no specific errors, which motion was overruled.

It is the basic contention of the surety that the recognizance here is void because it fails to specify a time certain for the appearance of Robert M. Casey. It relies principally on the case of Joelson v. United States, 287 F. 106, and contends that a bail bond "must be construed according to its express terms, and when it is defective as to the place and time at which defendant is to appear, these may not be supplied by intendment."

We think the proper rule to be that the surety's obligation on a bail bond, as on any other surety contract, is limited to the surety's promise, reasonably interpreted, unless there is a statute providing that certain statutory conditions are deemed to be contained in the bond, whether or not expressed. See Restatement, Security, § 203, comment c, p. 549.

"While a bail bond or recognizance should be construed with reasonable strictness, and a surety should not be required to fulfill any conditions that he did not covenant to perform, and while the omission of material

words cannot be supplied by inference or intendment, the court should not close its eyes to any reasonable intendment of the language employed by the parties." 8 C. J. S., Bail, § 62, p. 186. This rule applies with particular emphasis in the case of a surety company engaged in the business of furnishing bail bonds.

Section 29-506, R. R. S. 1943, provides in part: "Provided, if the offense be bailable, he may be ordered released upon entering into a recognizance in such sum as may be fixed by the magistrate with one or more good and sufficient sureties to be approved by him, conditioned that the accused appear forthwith before the district court, if then in session, and if not in session, then on the first day of the next jury term thereof and not depart the county without leave. No recognizance requiring the accused to appear at the next term of court shall be rendered invalid by the fact that the court is in session."

Section 29-901, R. R. S. 1943, dealing with bail and its incidents, provides that recognizance shall be "conditioned for his appearance before the proper court, to answer the offense wherewith he may be charged, and to appear at such times thereafter as may be ordered by the proper court." It also provides that all recognizances be continuous from term to term until final judgment.

Section 29-1105, R. R. S. 1943, provides: "No action brought on any recognizance shall be barred or defeated, nor shall judgment thereon be reversed by reason of any neglect or omission to note or record the default, nor by reason of any defect in the form of the recognizance if it sufficiently appears from the tenor thereof at what court the party or witness was bound to appear and that the court or officer before whom it was taken was authorized by law to require and take such recognizance."

It is the position of the surety that a bail bond must have a specific date expressed in its terms for a first

appearance in order to make operative the remaining language of the bond requiring appearance at subsequent dates or times to which the cause may be lawfully continued or adjourned.

In general, the obligation of the surety on a criminal bail bond is to produce the accused whenever necessary in the prosecution of the charges which have been made against him or at any stage of the proceedings until the prosecution is ended, and the defendant is discharged by the court or by operation of law, or custody of the defendant is transferred to proper officers of the law. 8 Am. Jur. 2d, Bail and Recognizance, § 99, p. 840.

Under the circumstances here, we hold that the reasonable intendment of the language employed by the parties, and the proper construction of the bond here involved, require the words "of said day" to be interpreted as August 4, 1965, the date the bond was dated, executed, and filed, and that it carries with it the connotation of immediately or forthwith. The bond, so construed, required the defendant to appear on that day forthwith before the district court for Lancaster County, Nebraska, and at subsequent dates or times to which the cause might be lawfully continued or adjourned, to answer a charge preferred against him for the crime of burglary. Such a construction, we believe, gives effect to the real intention of the parties, according to the laws of this jurisdiction. The construction contended for by the surety requires this court to close its eyes to practical realities and makes errors or omissions of technical form the overriding gauge of validity and enforceability of a surety contract.

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

AFFIRMED.

MARY KULA, APPELLANT, V. TOM KULA, APPELLEE, JOE KULA ET AL., INTERVENERS-APPELLEES.

146 N. W. 2d 384

Filed November 18, 1966. No. 36469.

Appeal from the district court for Nance County: NORRIS CHADDERDON, Judge. On motion for order requiring surrender of property. Motion denied.

Kelley, Grant & Costello, for appellant.

Lathrop & Albracht, for appellee.

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

MCCOWN, J.

The defendant and appellee has filed a motion in this court for an order requiring the plaintiff and appellant to surrender possession of a dwelling in accordance with the final decree of the district court in a divorce action. Although the case is now pending on appeal in this court, no supersedeas was filed. The appeal, therefore, does not operate as a stay of proceedings. The district court has jurisdiction and may enforce the award as in the case of any other nonsuperseded judgment. See Hall v. Hall, 176 Neb. 555, 126 N. W. 2d 839. The motion is therefore denied.

MOTION DENIED.

INDEX

Acknowledgments.

As between the parties a contract for the sale of real estate need not be acknowledged unless the property is a homestead. Musser v. Zurcher ---------- 882

Actions.

Ordinarily, an intervener must take the suit as he finds it, is bound by the previous proceedings in the case, and cannot complain of the form of the action or of informalities or defects in the proceedings between the original parties. Essay v. Essay 47

Administrative Law.

A party is not denied a full hearing before an administrative board exercising a quasi-judicial function because the actual taking of testimony or conducting of the hearing is by less than all the members of the administrative board who are charged with determining the matters involved. Monson v. Neidig ---------- 818

Adverse Possession.

1. Elements of adverse possession stated. Satterfield v. Dunne ---------- 274
2. The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. Foos v. Reuter 301
   Onstott v. Olsen ---------- 393
3. The claim of adverse possession is founded upon the intent with which the occupant has held possession, and this intent is ordinarily determined by what he has done in respect thereto. Foos v. Reuter ---- 301
4. The burden of proving adverse possession is on the person asserting it. He must recover upon the strength of his own claim and not upon the weakness of his adversary's title. Foos v. Reuter ---------- 301
5. Where a fence is constructed as a boundary fence between two properties, and where the parties claim ownership to the fence for the full statutory period of 10 years, and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may

have been improperly enclosed with their own. Onstott v. Olsen ---------- 393
Plischke v. Jameson ---------- 803
6. Title to a part of a county road cannot be acquired by adverse possesion. Plischke v. Jameson -------- 803

Affidavits.
1. An affidavit may be used to verify a pleading, to prove the service of a summons, notice, or other process in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law. Erdman v. National Indemnity Co. 133
2. An affidavit may be used to impeach an officer's return on the service of a summons. Erdman v. National Indemnity Co. ---------- 133

Alteration of Instruments.
1. Under the circumstances in this case, the filling of a blank in the written instrument was not a material alteration, and the plaintiff, in the absence of specific instructions otherwise, had implied authority to fill in the date. Central Constr. Co. v. Blanchard ---------- 62
2. Rule stated as to legal effect of filling of blanks in a written instrument. Musser v. Zurcher ------ 882

Animals.
Rule defining care required of owner of cattle to confine them to prevent hazard on public highway stated. Countryman v. Ronspies ---------- 76

Appeal and Error.
1. Under the law of Iowa, where it appears that a verdict was prompted by passion and prejudice or other ulterior influence, or the jury disregarded the evidence or the court's instructions, or the verdict appears unconscionable or clearly not warranted by the record, it is the duty of the appellate court to set aside the verdict. Lorenzen v. Continental Baking Co. ---------- 23
2. Functions of assignment of error upon appeal stated. Cook v. Lowe ---------- 39
3. The brief of appellant should set out particularly each error asserted and intended to be urged for reversal, vacation, or modification of the judgment alleged to be erroneous. Cook v. Lowe ---------- 39

4. Error may not be predicated upon a refusal to give tendered instructions where the court has covered the substance thereof in other instructions. Countryman v. Ronspies ---------- 76
5. A party may not proceed with trial without objection and speculate on the outcome of the jury's verdict and, if unfavorable, obtain a reversal on a ground upon which he might have but did not move for a mistrial at the time. Countryman v. Ronspies 76
6. A verdict of a jury based upon conflicting evidence will not be set aside unless it is clearly wrong. Countryman v. Ronspies ---------- 76
Lang v. Kerr ---------- 106
Bauerle v. Frosh ---------- 170
Holiday Mobil Homes Resorts, Inc. v. Frosh ---------- 174
McGerr v. Beals ---------- 767
7. In determining whether or not there was error in the use of the phrase "the proximate cause" in one instruction, and "a proximate cause" in other instructions, the true meaning will be determined from a consideration of all that is said on the subject. Lang v. Kerr ---------- 106
8. If the want of legal capacity to sue is not raised by demurrer or answer in the trial court, it is waived and cannot be considered on appeal. Ebberson v. School Dist. No. 64 ---------- 119
9. An issue not presented in the trial court may not be raised for the first time in the Supreme Court. Ebberson v. School Dist. No. 64 ---------- 119
10. Any person adversely affected by the changes made by the county superintendent in reoganization of school districts may appeal to the district court of any county in which the real estate or any part thereof involved in the dispute is located. School Dist. of Wilber v. Pracheil ---------- 121
11. When the Legislature enacts a law providing for an appeal without providing the procedure therefor, the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions. School Dist. of Wilber v. Pracheil ---------- 121
12. The term "appeal" as used in statute specified is a process of civil law origin, and removes the cause entirely, subjecting the fact as well as the law to a review and retrial. It is, in fact, granting a new trial upon the same issue in the district court. School Dist. of Wilber v. Pracheil ---------- 121

13. The undertaking required in an appeal from the order of the county superintendent under school district statute specified is a cost bond and not a supersedeas. School Dist. of Wilber v. Pracheil -- 121
14. 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. Bauerle v. Frosh 170
15. The effect of an overruling decision may be retrospective, partially retrospective, or prospective. The choice is influenced by considerations of judicial policy. Myers v. Drozda ---------- 183
16. When testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. Ripp v. Riesland 205
17. Where errors are assigned but are not discussed in the appellant's brief and another is discussed which is not assigned, none of which are plain errors, they will not be considered by this court on appeal. Ripp v. Riesland ---------- 205
18. An appeal from order detaching land from city of the first class must be taken as in other civil actions, and in addition thereto, notice of appeal must be given and a copy of the petition on appeal must be served as required by the statute. Ulbrick v. City of Nebraska City ---------- 229
19. In a case where the appellate court has jurisdiction of the subject matter, the failure to object to procedural defects does not have the effect of a judicial construction of the statute providing the manner and method of appeal. Ulbrick v. City of Nebraska City ---------- 229
20. In reviewing the evidence where a jury has returned a verdict for the defendant, the defendant must have the benefit of any and all reasonable inferences deducible from the proof. Vacanti v. Montes ---------- 232
Satterfield v. Watland ---------- 386
21. All parts of instructions must be considered in determining whether there was error in any part. Vacanti v. Montes ---------- 232
22. One may not complain of alleged misconduct of adverse counsel if, with knowledge of such alleged misconduct, he does not ask for a mistrial but consents to take the chances of a favorable verdict. Vacanti v. Montes ---------- 232

23. An appeal by a party from a judgment of the district court invokes the jurisdiction of the Supreme Court over the cause and all persons made parties in the district court. Westinghouse Electric Corp. v. Brookley ---------- 244
24. A mandate which incorporates the opinion of the Supreme Court is to be interpreted in conjunction with the opinion. Westinghouse Electric Corp v. Brookley ---------- 244
25. A judgment against multiple defendants may be reversed as to one defendant alone, unless the reversal would be prejudicial or inequitable because of a special factor, such as interdependent rights of all defendants. Westinghouse Electric Corp. v. Brookley 244
26. Procedure for appeal from county court or justice of the peace court to the district court outlined. Anoka-Butte Lumber Co. v. Malerbi ---------- 256
27. The provision relative to the showing of good cause in justice of peace statute does not apply to a plaintiff who is an appellee. Anoka-Butte Lumber Co. v. Malerbi ---------- 256
28. The remedy for the failure on the part of a plaintiff appellee to file petition on appeal within 50 days is the entry of an order nonsuiting the plaintiff unless a petition on appeal is filed within the time specified. Anoka-Butte Lumber Co. v. Malerbi 256
29. Opinions in specified cases, insofar as they are in conflict with the opinion, are overruled. Anoka-Butte Lumber Co. v. Malerbi ---------- 256
30. Rule for trial of equity case de novo in Supreme Court stated. Satterfield v. Dunne ---------- 274
Foos v. Reuter ---------- 301
Meyer v. Meyer ---------- 379
Onstott v. Olsen ---------- 393
State v. Merritt Brothers Sand & Gravel Co. ------ 660
Russell v. Western Nebraska Rest Home, Inc. ------ 728
31. An appeal will be dismissed as premature where no judgment has been rendered or final order made in the district court. Essay v. Essay ---------- 291
32. If different instructions are given on the same subject, or there be separate paragraphs in one instruction, they should be considered together, and if they fairly submit the case, the judgment will not be reversed for indefiniteness or ambiguity. LeMieux v. Sanderson ---------- 311
33. Instructions which authorize a double recovery for

the same element of loss are prejudicially erroneous. LeMieux v. Sanderson ---------- 311

34. A paragraph of an instruction which informs the jury of the extent of the recovery authorized by another instruction, or another paragraph of the same instruction, is not ordinarily erroneous as submitting a double recovery for the same element of loss. LeMieux v. Sanderson ---------- 311

35. Where a party agrees in open court to the manner of correcting an alleged error which the court adopts, such party after taking his chances on a favorable verdict will not be permitted to reassert the error after receiving an unfavorable result. LeMieux v. Sanderson ---------- 311

36. An opinion of the Supreme Court, which by reference is made a part of the mandate, must be examined to determine the judgment to be entered or the action to be taken by the trial court on remand. Muller Enterprises, Inc. v. Gerber ---------- 318

37. Duty of district court after remand of case to it by Supreme Court stated. Muller Enterprises, Inc. v. Gerber ---------- 318

38. Public interest requires that there shall be an end to litigation. When a cause has received the consideration of the Supreme Court, has had its merits determined, and has been remanded with specific directions, the court to which such mandate is directed has no power to do anything other than to enter judgment in accordance with such mandate. Muller Enterprises, Inc. v. Gerber ---------- 318

39. A judgment of the district court brought to the Supreme Court for review is supported by a presumption of correctness, and the burden is upon the party complaining of the action of the district court to show by the record that it is erroneous. Blanco v. General Motors Acceptance Corp. ------ 365

40. Where there is no bill of exceptions, a judgment will be affirmed if the pleadings support the judgment. Blanco v. General Motors Acceptance Corp. 365

41. In the absence of a bill of exceptions, it is presumed that an issue of fact raised by the pleadings was sustained by the evidence and that it was correctly determined. Blanco v. General Motors Acceptance Corp. ---------- 365

42. An affidavit used as evidence in the district court cannot be considered on an appeal of a cause to the Supreme Court unless it is offered in evidence

in the trial court and preserved in and made a part of the bill of exceptions. Blanco v. General Motors Acceptance Corp. ---------- 365

43. The fact that an affidavit used as evidence in the district court was filed in the office of the clerk of the district court and made a part of the transcript is not important to a consideration and decision of an appeal in the cause to the Supreme Court. If such an affidavit is not preserved in the bill of exceptions, its existence or contents cannot be considered by the Supreme Court. Blanco v. General Motors Acceptance Corp. ---------- 365

44. It is not within the province of the Supreme Court to determine moot questions. Blanco v. General Motors Acceptance Corp. ---------- 365

45. Unless an abuse of discretion is shown, the Supreme Court will not disturb the ruling of the trial court upon a motion for a change of venue. Satterfield v. Watland ---------- 386

46. A jury verdict based upon conflicting evidence will not be set aside unless it is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record. Satterfield v. Watland ---------- 386

47. It is not the province of the Supreme Court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. Satterfield v. Watland ---------- 386
Parsons Constr. Co. v. State ---------- 839

48. A party requesting instructions on a certain theory cannot be heard to complain on appeal that the trial court gave other instructions on the same theory. Satterfield v. Watland ---------- 386

49. An assignment of error that the court erred in overruling a motion for new trial is too indefinite where there are several grounds of error set forth in such motion. Durand, Jackson & Associates, Inc. v. Nasr ---------- 409

50. Where the record of the proceedings before the State Board of Equalization and Assessment shows that the order of the board was unreasonable and arbitrary, it will be reversed. County of Blaine v. State Board of Equalization & Assessment ---------- 471
County of Loup v. State Board of Equalization & Assessment ---------- 478

County of Kimball v. State Board of Equalization & Assessment ---------- 482
County of Brown v. State Board of Equalization & Assessment ---------- 487
51. If a record on appeal from an order in a proceeding for equalization of assessed property valuations establishes an arbitrary adjustment, arbitrariness is not dispelled by speculation that extra-record information sufficient to support the adjustment may have been used. County of Box Butte v. State Board of Equalization & Assessment ---------- 492
52. On appeal from an order of the State Board of Equalization and Assessment for equalization of assessed valuations of property among counties, the Supreme Court considers the entire record for the purpose of deciding whether the order was made arbitrarily. County of Keith v. State Board of Equalization & Assessment ---------- 494
53. On review the question concerning the issues before the State Board of Equalization and Assessment is not the adequacy of the original notification but the fairness of the whole procedure. County of Lancaster v. State Board of Equalization & Assessment ---------- 497
54. In the absence of error, or a showing that the action of the trial court was unreasonable, such action will not ordinarily be disturbed on appeal. Stinehagen v. Stinehagen ---------- 551
55. An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to the Supreme Court it is tried de novo. Grainger Brothers Co. v. Board of Equalization ---------- 571
56. An appeal from action of the city council of a first class city annexing real estate must be taken as in other civil actions, and in addition thereto, notice of appeal must be given and a copy of the petition on appeal must be served. Wurtele v. City of Nebraska City ---------- 591
57. Where evidence is irreconcilable and in direct conflict, the Supreme Court will consider that the trial court had the opportunity of observing the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Cardenas v. Peterson Bean Co. ---- 605
58. From the very nature of an error proceeding, the rights of the parties are determined by the appellate

court solely on the record made by the tribunal whose action is being reviewed. No new facts or evidence can enter into the consideration of the court. Moser v. Turner ---------- 635

59. Questions not presented to or passed on by the trial court will not be considered on appeal. State v. Merritt Brothers Sand & Gravel Co. ---------- 660

60. An application for a hearing under the Post Conviction Act is not a substitute for an appeal. Unless the facts alleged indicate a violation or infringement of constitutional rights sufficient to void the conviction and sentence, the application fails to state grounds for relief. State v. Erving ---------- 680

61. Where an instruction, although erroneous, is not prejudicially so and cannot, by any course of logical reasoning, be deemed to have resulted in disadvantage to the complaining party, it is not legal cause or reason for granting a new trial. McKinney v. County of Cass ---------- 685

62. It is reversible error for the trial court to include in its instructions to the jury allegations of fact found in the pleadings, but which have not been supported by any evidence. McKinney v. County of Cass ---------- 685

63. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. McKinney v. County of Cass 685

64. Procedure for appeal from an order denying an evidentiary hearing upon a motion under the Post Conviction Act outlined. State v. Fugate ---------- 701

65. The remedy for the failure on the part of a plaintiff appellee to file a petition on appeal within prescribed time is the entry of an order nonsuiting the plaintiff. Sankey v. Williamson ---------- 714

66. On appeal from an order of the State Railway Commission which requires the exercise of legislative authority, the only questions to be determined are whether or not the commission acted within the scope of its powers and whether or not the order complained of was reasonable and not arbitrarily made. Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc. ---------- 764

67. In testing the sufficiency of the evidence to support a judgment, the evidence must be considered

in the light most favorable to the successful party. McGerr v. Beals ---------- 767
68. A verdict based upon speculation or conjecture cannot be sustained. Farmer v. S. M. S. Trucking Co. 779
69. When plaintiff as a matter of law would not have been entitled to a verdict had the cause been submitted upon his theory of the case, failure to submit such theory is without prejudice. Farmer v. S. M. S. Trucking Co. ---------- 779
70. Trial rulings permitting or excluding courtroom experiments will not be disturbed on appeal except for abuse of discretion. Otte v. Taylor ---------- 795
71. Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Younker v. Peter Kiewit Sons Co. ---------- 835
72. Instructions must be considered as a whole, and if, when construed together they properly state the law, they are sufficient and error cannot be predicated thereon. Younker v. Peter Kiewit Sons Co. ------ 835
73. The judgment of the trial court in a law action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. Parsons Constr. Co. v. State ---- 839
74. A verdict based upon conflicting evidence will not be reversed on appeal if there is evidence from which reasonable minds might draw different conclusions. Sacca v. Marshall ---------- 855

Assault and Battery.

The crimes of assault with intent to commit robbery and assault and battery are included within a charge of robbery. State v. McClarity ---------- 246

Assumpsit, Action of.

Wherever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter and the obligation may be enforced by assumpsit. Nebraska State Bank v. Sherlock ---- 772

Attorney and Client.

1. Allowances made under attorney's fee statute, within the limitations provided, are within the sound discretion of the trial court. Anoka-Butte Lumber Co. v. Malerbi ---------- 256

2. The competency and qualifications of a member of the district court bar as a lawyer before such court are matters of which the trial court can take judicial notice on a motion to vacate judgment and sentence imposed thereby on a plea of guilty to a criminal offense by one represented by such attorney. State v. Losieau ---------- 671

Automobiles.

1. In an action growing out of a motor vehicle accident, any evidence of the conditions and circumstances leading up to and surrounding the accident which will throw light upon the conduct of the parties and the care, or lack of care, exercised by them, is, as a general proposition, admissible. Ripp v. Riesland ---------- 205
2. Opinion evidence as to the distance within which a motor vehicle can be stopped is competent and admissible where such evidence is material and relevant to the issues and is given by a witness qualified to give such an opinion. Ripp v. Riesland 205
3. The Supreme Court, recognizing the difficulties attending an offer of evidence of illustrative experiments, has adopted the rule that in such cases discretion is conferred upon the trial court and that, unless there is a clear abuse of discretion, a judgment will not be reversed on account of the admission or rejection of such evidence. Ripp v. Riesland 205
4. The duty to sound a signal warning of the approach of a motor vehicle depends largely on the circumstances of the particular case. Vacanti v. Montes -- 232
5. Until the driver of an automobile has notice of the presence or likelihood of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that others will do likewise; and until he has such notice the rule is the same as respects children and adults. Vacanti v. Montes ---------- 232
6. The rule that generally it is negligence as a matter of law for a motorist to drive a motor vehicle on the highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision has no application to an operator of a vehicle who undertakes to pass another. Scofield v. Haskell ---------- 324
7. A left-hand turn across a public highway into a private road is fraught with danger, and one making

such a move is required to exercise a degree of care commensurate with the danger. Scofield v. Haskell ---------- 324

8. The operator of an automobile approaching or entering an intersection is required to see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and a failure to see such favored automobile is negligence as a matter of law. Mills v. Bauer ---------- 411

9. The driver of an automobile entering an intersection of two highways is obligated to look for approaching automobiles and to see any vehicle within the radius which denotes the limit of danger. Mills v. Bauer ---------- 411

10. Gross negligence within the meaning of motor vehicle quest statute is defined. Callen v. Knopp 421

11. Momentary inattention in the operation of a motor vehicle does not ordinarily amount to gross negligence. Callen v. Knopp ---------- 421

12. Duty of driver of motor vehicle to keep a lookout stated. Callen v. Knopp ---------- 421

13. Although a driver is traveling upon an arterial street, he is required to look for approaching vehicles and see those which are in plain sight. Callen v. Knopp ---------- 421

14. The death of a named insured caused by one operating his automobile with his consent is within the coverage of the omnibus clause of his liability insurance policy. Iowa Mut. Ins. Co. v. Meckna ---- 516

15. The failure of an arresting officer to inform a motorist of the provision of the implied consent law which permits him to take an additional test by a physician of his own choosing, does not constitute a lack of compliance with the mandatory terms of the statute and did not render the result of the test inadmissible. State v. Oleson ---------- 546

16. The taking of a sample of blood or urine for chemical analysis on the request of the arresting officer, as authorized by the implied consent law, is not required to be delayed by a request of the arrested motorist that he be permitted to contact legal counsel. State v. Oleson ---------- 546

17. Where the named insured grants his permittee broad and unfettered dominion over his insured automobile, he also impliedly authorizes his permittee to allow a third person to use it, thus rendering the latter

an additional insured. Farm Bureau Ins. Co. v. Allied Mut. Ins. Co. ---------- 555

18. Where an owner is entrusted with a substitute automobile while his own is in the possession of the lender, in the absence of something to the contrary in the agreement, he should enjoy broad and unfettered dominion over the substitute automobile. Farm Bureau Ins. Co. v. Allied Mut. Ins. Co. ---- 555

19. Under the implied consent law a person, charged with driving a motor vehicle on the public highways of the state, consents to the giving of a sample of blood or urine for chemical analysis when he makes use of the highways. State v. Hagen ------ 564

20. An arresting officer is not required to inform one charged with operating a motor vehicle while under the influence of alcoholic liquor of the consequences of his refusal to give a blood or urine sample as provided by the implied consent law. State v. Hagen 564

21. The automobile guest statute provides two distinct grounds of recovery by a guest again his host for negligence, one where the host driver is under the influence of intoxicating liquor in which event he is liable for ordinary negligence, and the other where the host is guilty of gross negligence. Kaufman v. Tripple ---------- 593

22. Evidence as to a host's drinking of intoxicants a short time previous to an accident is a circumstance in determining whether or not the host was guilty of gross negligence. Kaufman v. Tripple -- 593

23. The contributory negligence of a guest is ordinarily a question of fact for the jury. Kaufman v. Tripple 593

24. Degree of care of guest passenger in automobile stated. Kaufman v. Tripple ---------- 593

25. It is not contributory negligence for a guest to sleep while riding in an automobile when he has no knowledge of negligent driving on the part of his host, or of impending danger on the highway. Kaufman v. Tripple ---------- 593

26. Where the head of a family maintains a motor vehicle for the general use of the family, the use of the vehicle for the pleasure and convenience of the family is in the furtherance of his purpose in providing it. Under such circumstances, it is treated as if it were being used in the conduct of the owner's business. McBroom v. Wolsleger ---------- 622

27. A family purpose automobile is one which is furnished by the head of the family for the general use,

pleasure, and convenience of the members of the family. McBroom v. Wolsleger ---------- 622
28. An automobile which is furnished by someone other than the head of the family is not a family purpose automobile. McBroom v. Wolsleger ---------- 622
29. When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery. Lileikis v. Kudirka 742

Bail.

1. The surety's obligation on a bail bond, as on any other surety contract, is limited to the surety's promise, reasonably interpreted, unless there is a statute providing that certain statutory conditions are deemed to be contained in the bond, whether or not expressed. State v. Casey ---------- 888
2. Rule as to construction of a bail bond stated. State v. Casey ---------- 888
3. Duty on the surety on a bail bond in a criminal case stated. State v. Casey ---------- 888
4. The words "of said day" in an appearance bond are interpreted as meaning the date the bond was dated, executed, and filed and as carrying with it the connotation of immediately or forthwith. State v. Casey 888

Bailments.

1. The burden is upon the party who seeks recovery to establish upon the whole case facts and circumstances showing a breach by the opposite party of some duty under the bailment upon which a liability may be predicated. Sankey v. Williamson ---------- 714
2. When a bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee and makes him responsible for ordinary negligence. Sankey v. Williamson ------ 714

Banks and Banking.

A bank which pays an overdraft is generally entitled to recover the amount thereof from the owner of the account. Nebraska State Bank v. Sherlock ---- 772

Bicycles.

1. A bicycle is a "vehicle" as that term is used in the

statutes of the State of Nebraska setting forth rules of the road. Sacca v. Marshall ---------- 855
2. The failure of the trial court to instruct on the duty of a bicyclist to maintain a proper lookout and control was reversible error. Sacca v. Marshall 855
3. Where there is evidence of violations of the rules of the road by a bicyclist it is the duty of the trial court to instruct with reference thereto. Sacca v. Marshall ---------- 855
4. An instruction relating to the duty to give an appropriate signal before turning a vehicle from a direct course upon a highway is incomplete if it fails to instruct as to the signals which are authorized and required. Sacca v. Marshall -------- 855

Bills and Notes.
1. Where a claimant against an estate has possession of a promissory note shown to have been signed by the deceased, and produces it at the trial, it is admissible in evidence and makes a prima facie case of due delivery of the note. Thompson v. De Voe 654
2. Under former section of Negotiable Instruments Act, where a negotiable instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved. Thompson v. De Voe ---------- 654
3. The burden of proving the nondelivery of a negotiable instrument in an action between the original parties is upon the party who asserts such nondelivery. Thompson v. De Voe ---------- 654
4. A person having a direct legal interest in the result of a civil action or proceeding, where the adverse party is a representative of a deceased person, is incompetent under the dead man's statute to testify to facts from which inferences of delivery and possession of a note may be drawn, such note being the basis of claim against the estate of the deceased person. Thompson v. De Voe ---------- 654

Boundaries.
1. Either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of 10 consecutive years. Foos v. Reuter ---------- 301

2. An owner of property does not recognize and acquiesce in the ownership by an adjoining landowner of any part of his property merely because he does not construct his fence on his property line. Foos v. Reuter ---------- 301
3. Where a fence is constructed as a boundary fence between two properties, and where the parties claim ownership to the fence for the full statutory period of 10 years, and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. Onstott v. Oleson ---------- 393
Plischke v. Jameson ---------- 803

Business Coercion.

1. Elements necessary to constitute business coercion by threats stated. McCubbin v. Buss ---------- 624
2. An unjust and inequitable threat is wrongful, although the threatened act would not be a violation of duty in the sense of an independent actionable wrong in the law of crimes, torts, or contracts. McCubbin v. Buss ---------- 624
3. The power of avoiding a transaction for business coercion is lost if the injured party unreasonably delays manifesting his intention to the other party. McCubbin v. Buss ---------- 624
4. A determination of unreasonableness of delay is influenced by the following circumstances: The speculative character of the contract; and the likelihood or the occurrence of a material change of position by the culpable party or of unjust prejudice to a third person. McCubbin v. Buss ---------- 624
5. A person who possesses a power to avoid a transaction for business coercion loses the power by electing to affirm the transaction. McCubbin v. Buss -- 624

Charities.

1. A nonprofit charitable hospital possesses no exemption from tort liability in respect to causes of action arising after April 22, 1966. Myers v. Drozda -- 183
2. The liability of a nonprofit charitable hospital to its patients for negligence in respect to causes of action arising prior to April 23, 1966, is limited to the applicable amount of its liability insurance, if any. Myers v. Drozda ---------- 183

Constitutional Law.

1. Under the facts shown, the defendant's constitutional rights were not violated. State v. Homan -------- 7
2. An attack upon the constitutionality of a statute cannot ordinarily originate in an appeal from the district court. Rhodes v. Continental Ins. Co. ---- 10
3. The power to classify for tax purposes is primarily in the Legislature and not in the courts. Statutes so providing should not be declared invalid unless it clearly appears that they transgress the Constitution. Rehkopf v. Board of Equalization ---------- 90
4. Prior cases referred to in opinion held controlling upon question of constitutionality of legislative act involving change in boundaries of school districts. Ebberson v. School Dist. No. 64 ---------- 119
5. Riparian water rights were not abolished by Article XV, sections 4 to 6, Constitution of Nebraska. Wasserburger v. Coffee ---------- 149
6. A finding of guilt of an offense included within the charge of a greater offense is proper under Article I, section 11, Constitution of Nebraska. State v. McClarity ---------- 246
7. The 1965 Nebraska Installment Sales Act held constitutional. Engelmeyer v. Murphy ---------- 295
8. In construing constitutional amendments, consideration should be given to the circumstances leading to their adoption and the purpose sought to be accomplished. Engelmeyer v. Murphy ---------- 295
9. A constitutional amendment should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed. Engelmeyer v. Murphy ---------- 295
10. Statute providing for detachment of territory of rural fire protection district upon annexation by city or village held constitutional. City of Bellevue v. Eastern Sarpy County S. F. P. Dist. ---------- 340
11. The Post Conviction Act specifically authorizes the trial court to examine the files and records to determine whether a prisoner may be entitled to the relief he seeks. State v. Clingerman ---------- 344
12. A mere declaration or self-serving statement by a prisoner that his constitutional rights were violated does not entitle him to a hearing on a motion to vacate his conviction or sentence. State v. Clingerman ---------- 344
13. In a proceeding under the Post Conviction Act, the

applicant is required to allege facts which, if proved, constitute a violation or infringement of constitutional rights. Mere conclusions of fact do not suffice. State v. Clingerman ---------- 344
State v. Erving ---------- 680
14. Post Conviction Act was intended to provide relief in those cases where a miscarriage of justice may have occurred and not to be a procedure to secure a routine review for any defendant dissatisfied with his sentence. State v. Clingerman ---------- 344
State v. Snyder ---------- 787
15. The Grid System Act is a special act inhibited by Article XII, section 1, Constitution of Nebraska, in that it purports to create a public corporation by special law rather than by a general law as the provision requires. Wittler v. Baumgartner ------ 446
16. An act which relates exclusively to a particular public corporation and none of its provisions apply, or are intended to apply, to any other public corporation in the state, is a special law. Wittler v. Baumgartner ---------- 446
17. If the provisions of a law establishing a class of public corporations based on the extent of the area in which they operate are such that other public corporations may in the future, without additional legislation, enter the specified class, the law is general. Wittler v. Baumgartner ---------- 446
18. Article XII, section 1, Constitution of Nebraska, is applicable alike to private and public corporations. Wittler v. Baumgartner ---------- 446
19. Article I, section 22, and Article VI, section 1, Constitution of Nebraska, have no application to a public corporation or political subdivision where it operates solely in a proprietary capacity. Wittler v. Baumgartner ---------- 446
20. The Legislature may provide for the election of directors of a public corporation engaged solely in a proprietary capacity and prescribe the qualifications of such electors, but in so doing the classification of electors must not be arbitrary or unreasonable. Wittler v. Baumgartner ---------- 446
21. A classification of electors for the purpose of electing directors of a public corporation engaged solely in a proprietary capacity must rest upon some reason of public policy, some real differences of situation and circumstances, that would naturally suggest the justice or expediency of diverse legisla-

tion relative to the subject of the legislation which renders appropriate its enactment. Wittler v. Baumgartner ---------- 446

22. Where the Legislature in creating a public corporation engaged solely in a proprietary function designates some members of a class as electors for electing directors and denies the right to others in the same class, it constitutes a grant of special privileges, constitutes an unlawful splitting of a class for purposes of legislation and is in violation of Article I, section 16, and Article III, section 18, of the Constitution of Nebraska. Wittler v. Baumgartner ---------- 446

23. The provision in the Grid System Act limiting the appointment of directors by the Governor to a single person in each of several districts and to a few persons in others is an encroachment upon the executive department and is violative of Article IV, section 6, of the Constitution of Nebraska. Wittler v. Baumgartner ---------- 446

24. Under Nebraska constitutional provisions reserving to the people the rights of initiative and referendum, the Legislature, on the one hand and the electorate on the other, are coordinate legislative bodies, and there is no superiority of power between the two. In the absence of specific constitutional restraint, either may amend or repeal the enactments of the other. Klosterman v. Marsh -------- 506

25. An "act of the Legislature" under Article III, section 3, of the Constitution of Nebraska, means a particular legislative bill which has been passed by the Legislature and becomes law either by the necessary passage of time for veto, or by the signature of the Governor. Klosterman v. Marsh -- 506

26. Constitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed to make effective the powers reserved. Klosterman v. Marsh ---------- 506

27. The initiative and referendum provisions of the Constitution of Nebraska reserve to the people the right to act in the capacity of legislators. The presumption should be in favor of the validity and legality of their acts. Klosterman v. Marsh -------- 506

28. Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any sub-

sequent prosecution for the same offense. State v. Buttner ---------- 529

29. It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. State v. Adams ---------- 542

30. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. The dividing line between what is lawful and unlawful cannot be left to conjecture. State v. Adams -- 542

31. A statute which forbids 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. State v. Adams ---------- 542

32. Statute providing for penalty for immoderate use of the highway in operation of motor vehicle held unconstitutional. State v. Adams ---------- 542

33. The privilege against self-incrimination is limited to the giving of oral testimony and does not extend to defendant's body, nor to secretions therefrom, nor to the introduction of the chemical analysis in evidence if it is otherwise properly obtained. State v. Hagen ---------- 564

34. Under the Constitution of Nebraska, Article VIII, section 1, business inventories and real estate are in the same class for taxation purposes, and properties within the same class are required to be valued and assessed uniformly and proportionately in order that equalization obtain. Grainger Brothers Co. v. Board of Equalization ---------- 571

35. The purpose of the Post Conviction Act is to provide a remedy to a convicted defendant in a criminal action whose rights under the state or federal Constitutions have been denied or infringed so as to render the judgment void or voidable. State v. Erving ---------- 680

36. Matters not subject to reexamination under the Post Conviction Act stated. State v. Erving ---------- 680

37. The case of Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, affects only those cases in which the trial began after June 22, 1964. State v. Parker ---------- 707

38. In the absence of a showing of real miscarriage of justice, the question of whether a confession was obtained unlawfully cannot be raised under the Post

Conviction Act, where the facts relied on by the petitioner have been the subject of and decided in a former appeal to this court from conviction. State v. Parker ---------- 707

39. In the absence of proof that a confession, admission, or statement obtained from the defendant as a result of pretrial interrogation was used in evidence at the trial, such interrogation does not constitute prejudicial error. State v. Silvacarvalho --- 755

40. Once a defendant, under the advice of counsel, requests or submits to an examination by court-appointed psychiatrists, he is not constitutionally entitled to the presence of his counsel at the examination. State v. Snyder ---------- 787

41. Under the Post Conviction Act, the sentencing court has discretion to adopt reasonable procedures for determining what the motion and the files and records show before granting a full evidentiary hearing. State v. Snyder ---------- 787

Contracts.

1. Every contract is made with reference to and subject to existing law, and every law affecting such contract is read into and becomes a part of the same. Bobbitt v. Order of United Commercial Travelers 285

2. Elements necessary to constitute business coercion by threats stated. McCubbin v. Buss ---------- 624

3. An unjust and inequitable threat is wrongful, although the threatened act would not be a violation of duty in the sense of an independent actionable wrong in the law of crimes, torts, or contracts. McCubbin v. Buss ---------- 624

4. The power of avoiding a transaction for business coercion is lost if the injured party unreasonably delays manifesting his intention to the other party. McCubbin v. Buss ---------- 624

5. A determination of unreasonableness of delay is influenced by the following circumstances: The speculative character of the contract; and the likelihood or the occurrence of a material change of position by a culpable party or of unjust prejudice to a third person. McCubbin v. Buss ---------- 624

6. A person who possesses a power to avoid a transaction for business coercion loses the power by electing to affirm the transaction. McCubbin v. Buss -- 624

7. While as a general rule a contract will be treated as abandoned or rescinded where the acts and con-

duct of one party inconsistent with its existence are acquiesced in by the other party, to be sufficient the acts and conduct must be positive and unequivocal. Russell v. Western Nebraska Rest Home, Inc. ---------- 728

8. A contractor who is damaged as the result of delay in the performance of the work which is caused by a breach of the contract by the other party may recover his damages in the absence of an express provision in the contract exempting the other party from liability. Parsons Constr. Co. v. State ------ 839

9. If a condition in a contract is excused, the promisor becomes subject to a duty to perform without the existence or occurrence of the condition, but the damages recoverable for breach of the duty are not always the same as they would have been if the condition existed or occurred. Duplex Manuf. Co. v. Atlas Leasing Corp. ---------- 851

10. Where failure of a party to a contract to perform a condition or a promise is induced by a manifestation to him by the other party that he cannot or will not substantially perform his own promise, the duty of such other party becomes independent of performance of the condition or promise. Duplex Manuf. Co. v. Atlas Leasing Corp. ---------- 851

11. If the existence of a written contract has been induced by prior or contemporaneous oral agreement, parol evidence is not admissible to add to or contradict the terms of the written contract. Cornhusker Development & Inv. Group, Inc. v. Knecht 873

12. If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce their agreement to writing, execute, and deliver it, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract. Cornhusker Development & Inv. Group, Inc. v. Knecht ---------- 873

13. Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of the payment of a money consideration, and is of a contractual nature, parol or extrinsic evidence is not admissible to vary or contradict the consideration expressed. Cornhusker Development & Inv. Group, Inc. v. Knecht -------- 873

14. In the absence of fraud, a person who signs an instrument without reading it, when he can read and has the opportunity to do so, cannot avoid the

effect of his signature merely because he was not informed of its contents. Musser v. Zurcher ---- 882

15. The consideration of a contract need not move to the promisor. A disadvantage to the promisee is sufficient, although the promisor derives no benefit therefrom. Musser v. Zurcher ---------- 882

Cooperative Associations.

1. Statute requiring the accumulation of an amount of surplus equal to 20 percent of its paid capital stock of a cooperative corporation does not restrict the corporation from providing a greater amount. Schmeckpeper v. Panhandle Coop. Assn. ---------- 352
2. A cooperative corporation, after making distribution specified, may distribute the rest of its earnings and savings by prorating them among its patrons and paying them in cash, stock, stock credits, deferred credit certificates, or certificates of participation as determined by the board of directors when its by-laws so provide. Schmeckpeper v. Panhandle Coop. Assn. ---------- 352

Corporations.

1. Two sections of intangible tax law contemplate the valuation of shares of stock upon the basis of book value, less the deductions set out in the respective sections. Rehkopf v. Board of Equalization ------ 90
2. The tax imposed upon the shares of stock is a property tax upon the owner of the shares and not a tax upon the corporation. Rehkopf v. Board of Equalization ---------- 90
3. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situations and circumstances. Rehkopf v. Board of Equalization 90
4. The classifying of stock in foreign corporations differently from that in domestic corporations, for assessment, does not contravene the constitutional provision for uniformity. Rehkopf v. Board of Equalization ---------- 90
5. A shareholder in a domestic corporation whose property is taxed in the hands of the corporation by the state is not in the same class with the shareholder in a foreign corporation whose property is not taxed and cannot be taxed by the taxing authority of the state. Rehkopf v. Board of Equalization -------- 90

6. Taxing shares of foreign corporations when owned by the inhabitants of the state does not deny the owners the equal protection of the laws, because, in the case of domestic corporations, it is the property, and not the shares, which is taxed. Rehkopf v. Board of Equalization ---------- 90
7. Manner of service of summons upon a corporation outlined. Erdman v. National Indemnity Co. ---- 133
8. The Grid System Act is a special act inhibited by Article XII, section 1, Constitution of Nebraska, in that it purports to create a public corporation by special law rather than by a general law as the provision requires. Wittler v. Baumgartner ---------- 446
9. An act which relates exclusively to a particular public corporation and none of its provisions apply, or are intended to apply, to any other public corporation in the state, is a special law. Wittler v. Baumgartner ---------- 446
10. If the provisions of a law establishing a class of public corporations based on the extent of the area in which they operate are such that other public corporations may in the future, without additional legislation, enter the specified class, the law is general. Wittler v. Baumgartner ---------- 446
11. Article XII, section 1, Constitution of Nebraska, is applicable alike to private and public corporations. Wittler v. Baumgartner ---------- 446
12. A public corporation organized for the purpose of generating, transmitting, and distributing electrical energy operates in a proprietary as distinguished from a governmental capacity. Wittler v. Baumgartner ---------- 446
13. Article I, section 22, and Article VI, section 1, Constitution of Nebraska, have no application to a public corporation or political subdivision where it operates solely in a proprietary capacity. Wittler v. Baumgartner ---------- 446
14. The Legislature may provide for the election of directors of a public corporation engaged solely in a proprietary capacity and prescribe the qualifications of such electors, but in so doing the classification of electors must not be arbitrary or unreasonable. Wittler v. Baumgartner ---------- 446
15. A classification of electors for the purpose of electing directors of a public corporation engaged solely in a proprietary capacity must rest upon some reason of public policy, some real differences

of situation and circumstances, that would naturally suggest the justice or expediency of diverse legislation relative to the subject of the legislation which renders appropriate its enactment. Wittler v. Baumgartner ---------- 446

16. Where the Legislature in creating a public corporation engaged solely in a proprietary function designates some members of a class as electors for electing directors and denies the right to others in the same class, it constitutes a grant of special privileges, constitutes an unlawful splitting of a class for purposes of legislation and is in violation of Article I, section 16, and Article III, section 18, of the Constitution of Nebraska. Wittler v. Baumgartner ---------- 446

17. The provision in the Grid System Act limiting the appointment of directors by the Governor to a single person in each of several districts and to a few persons in others is an encroachment upon the executive department and is violative of Article IV, section 6, of the Constitution of Nebraska. Wittler v. Baumgartner ---------- 446

18. Any agreement by which a person shows an intention to become a stockholder in a corporation is sufficient as a contract of subscription, as against both himself and the corporation. Cornhusker Development & Inv. Group, Inc. v. Knecht ---------- 873

19. A subscription to corporate shares, made before the corporation comes into existence, but accepted by the corporation after coming into existence, either expressly by issuing the share certificates, or impliedly by recognizing the subscriber as a shareholder, makes him a shareholder, and the corporation may maintain an action upon the subscription against the signer. Cornhusker Development & Inv. Group, Inc. v. Knecht ---------- 873

20. The mere mismanagement of the affairs of a corporation by its officers or agents does not warrant the withdrawal therefrom of stockholders or the repudiation of the obligations assumed by them as such. Cornhusker Development & Inv. Group, Inc. v. Knecht ---------- 873

Costs.

1. In an action to recover the valid principal amount due on a usurious contract, the defendant is entitled to recover costs. Central Constr. Co. v. Blanchard 62

2. Allowances made under attorney's fee statute, within the limitations provided, are within the sound discretion of the trial court. Anoka-Butte Lumber Co. v. Malerbi ---------- 256

Counties.

1. A county is obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence. McKinney v. County of Cass 685
2. The duty of the county to maintain its highways and bridges will not be extended beyond the words and fair implications of the statutory liability. McKinney v. County of Cass ---------- 685

County Courts.

1. Procedure for appeal from county court or justice of the peace court to the district court outlined. Anoka-Butte Lumber Co. v. Malerbi ---------- 256
2. The provision relative to the showing of good cause in justice of peace statute does not apply to a plaintiff who is an appellee. Anoka-Butte Lumber Co. v. Malerbi ---------- 256
3. The remedy for the failure on the part of a plaintiff appellee to file petition on appeal within 50 days is the entry of an order nonsuiting the plaintiff unless a petition on appeal is filed within the time specified. Anoka-Butte Lumber Co. v. Malerbi -- 256
4. Opinions in specified cases, insofar as they are in conflict with the opinion, are overruled. Anoka-Butte Lumber Co. v. Malerbi ---------- 256

Courts.

1. It is the duty of courts of justice to carry into effect the true intent of the parties to a deed so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law. Bauer v. Bauer ---------- 177
2. The term "discretion" is defined. Svoboda & Hannah v. Board of Equalization ---------- 215

Criminal Law.

1. In order to predicate error on the reception of inadmissible evidence, there must have been objec-

tion made contemporaneously with the offer thereof. State v. Homan ---------- 7

2. The Supreme Court, in a criminal action, will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that it can be said, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Quinn ---------- 70

3. Malice is an element of the offense of maliciously shooting a person with intent to kill, wound, or maim. State v. Quinn ---------- 70

4. Where the trial court defines "malice" or "maliciously" by a general definition, it is not prejudicial error in the absence of a request that the jury be given the more recognized legal definition. State v. Quinn ---------- 70

5. Discrepancies within the evidence as to description and identification of the defendant will not impair the probative force of other positive evidence as to description and identification to the extent of rendering the evidence insufficient to support a verdict of guilty. State v. McClarity ---------- 246

6. When defendant requests the trial court to submit a lesser included offense in the instructions, the trial court must submit all included offenses as to which the evidence is sufficient to support a verdict. State v. McClarity ---------- 246

7. A finding of guilt of an offense included within the charge of a greater offense is proper under Article I, section 11, Constitution of Nebraska. State v. McClarity ---------- 246

8. Under the Post Conviction Act, the sentencing court has discretion to adopt reasonable procedures for determining what the motion and files and records show, and to ascertain whether any substantial issues are raised before granting a full evidentiary hearing. State v. Woods ---------- 282
State v. Silvacarvalho ---------- 755
State v. Snyder ---------- 787

9. Circumstances outlined where hearing is not required under Post Conviction Act. State v. Woods -- 282

10. Under the Post Conviction Act, a defendant may not be prevented from testifying in support of a claim under circumstances where his testimony would be material. However, the mere filing of a motion under the Post Conviction Act, alleging a denial or infringement of constitutional rights does

not automatically entitle a petitioning prisoner to a trip to the sentencing court, even where an evidentiary hearing is required. State v. Woods ---- 282

11. The Post Conviction Act specifically authorizes the trial court to examine the files and records to determine whether a prisoner may be entitled to the relief he seeks. State v. Clingerman ---------- 344

12. A mere declaration or self-serving statement by a prisoner that his constitutional rights were violated does not entitle him to a hearing on a motion to vacate his conviction or sentence. State v. Clingerman ---------- 344

13. A petitioner is required to allege facts which if proved would constitute an infringement of his constitutional rights. State v. Clingerman ---------- 344

14. A motion to set aside a judgment of conviction or a sentence cannot serve the purpose of an appeal to secure a review of the conviction. State v. Clingerman ---------- 344

15. Post conviction remedies are intended to provide relief in those cases where a miscarriage of justice may have occurred, and are not to be a procedure to secure a routine review for any defendant dissatisfied with his sentence. State v. Clingerman -------- 344

State v. Silvacarvalho ---------- 755

State v. Snyder ---------- 787

16. In this state all public offenses are statutory; no act is criminal unless the Legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law. State v. Buttner ---------- 529

17. In all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation. State v. Buttner ---------- 529

18. Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense. State v. Buttner 529

19. It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. State v. Adams ---------- 542

20. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder.

The dividing line between what is lawful and unlawful cannot be left to conjecture. State v. Adams 542

21. A statute which forbids 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. State v. Adams 542

22. Statute providing for penalty for immoderate use of the highway in operation of motor vehicle held unconstitutional. State v. Adams 542

23. The statute awarding a preliminary hearing to one accused of crime is for the benefit of the accused. It is a right accorded, a personal privilege granted, which the accused may waive. State v. Brevet 616

24. Since one accused of crime may waive his right to a preliminary hearing, he may likewise waive any procedure having for its purpose the granting of such right. State v. Brevet 616

25. Where an accused demurs to an information, pleads in bar, or to the general issue, his right to a preliminary hearing is deemed to have been waived. State v. Brevet 616

26. Whether or not a person accused of crime has waived his right to counsel, either at this own expense or at the expense of the state, is dependent upon the record before the court at the time the question was for determination. It is the substance and not the form that is controlling. State v. Brevet 616

27. If a judgment of conviction is reversed or held void at a time when the defendant is serving a void sentence, and, following a new trial and a second conviction, a new sentence is imposed, the defendant is not entitled to credit as a matter of law against the second sentence for time served under the void sentence. State v. King 631

28. The crediting of time served on a void sentence on a subsequent conviction and valid sentence is a matter of sound judicial discretion on the part of the trial court. State v. King 631

29. In the absence of a showing of an abuse of judicial discretion by the trial court in imposing a sentence within the limits provided by statute, the Supreme Court will not ordinarily interfere with the sentence imposed by the trial court. State v. King 631

30. When a motion is made to vacate, set aside, or

correct a sentence, the movant must set forth facts and not merely conclusions. State v. Losieau ------ 671

31. Alleged extraction of involuntary extrajudicial confession does not entitle the defendant to a vacation of sentence where the record affirmatively discloses that the alleged confession has played no part in the guilty plea or sentence imposed. State v. Losieau 671

32. Defendant is not entitled to a vacation of sentence on the ground that following his arrest he made a confession to enforcement officers which might be inadmissible, where in a proceeding in which sentence was imposed, the confession was not received in evidence against the defendant and the sentence was imposed on the defendant's voluntary plea of guilty. State v. Losieau ---------- 671

33. A strong inference of invalidity of claims made by a prisoner arises as a result of the prisoner's failure to assert such claims earlier although he had an opportunity to do so. State v. Losieau ---------- 671

34. The competency and qualifications of a member of the district court bar as a lawyer before such court are matters of which the trial court can take judicial notice on a motion to vacate judgment and sentence imposed thereby on a plea of guilty to a criminal offense by one represented by such attorney. State v. Losieau ---------- 671

35. The Supreme Court may take judicial notice of inconsistent claims and statements of a defendant in successive post conviction proceedings appealed to it in order to prevent an imposition on the court. State v. Losieau ---------- 671

36. Where the record shows the defendant was represented by counsel at the time of his conviction he cannot on motion to vacate the sentence offer testimony to contradict the record. State v. Losieau -- 671

37. Even though one of the grounds of a motion to vacate a sentence raises a factual issue, where the issue is one that is readily determinable by reference to files and records of the district court, the prisoner is not entitled to hearing on the motion. State v. Losieau ---------- 671

38. The question of a defendant's guilt or innocence is not an issue on a motion to vacate a sentence based upon a plea of guilty. State v. Losieau ---------- 671

39. The purpose of the Post Conviction Act is to provide a remedy to a convicted defendant in a criminal action whose rights under the state or federal Con-

stitutions have been denied or infringed so as to render the judgment void or voidable. State v. Erving ---------- 680

40. In a proceeding under the Post Conviction Act, the applicant is required to allege facts which, if proved, constitute a violation of infringement of constitutional rights. Mere conclusions of fact do not suffice. State v. Erving ---------- 680

41. Error may not ordinarily be predicated on the admission of evidence as permitted by existing rules of law even though such evidence may be inadmissible under subsequent rules having a prospective application only. State v. Erving ---------- 680

42. Matters not subject to reexamination under the Post Conviction Act stated. State v. Erving ---------- 680

43. An application for a hearing under the Post Conviction Act is not a substitute for an appeal. Unless the facts alleged indicate a violation or infringement of constitutional rights sufficient to void the conviction and sentence, the application fails to state grounds for relief. State v. Erving ---------- 680

44. Under the particular circumstances, defendant was "in custody under sentence" and the remedies of the Post Conviction Act may be sought against the validity of a final judgment of conviction, even though the petitioner has not yet begun to serve the sentence imposed. State v. Losieau ---------- 696

45. The district court may adopt reasonable procedures for determining what the motion and the files and records in a case show before granting a full evidentiary hearing under the Post Conviction Act. State v. Fugate ---------- 701

46. Where an issue of fact is readily determinable by reference to the files and records of the case, an evidentiary hearing upon a motion under the Post Conviction Act may be denied. State v. Fugate ---------- 701

47, Procedure for appeal from an order denying an evidentiary hearing upon a motion under the Post Conviction Act outlined. State v. Fugate ---------- 701

48. Where the allegations in a motion under the Post Conviction Act are vague and conclusory in nature, relate to matters which have been fully litigated previously, or are effectively disproved by the record, the motion should be denied. State v. Fugate 701

49. The case of Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, affects only those

cases in which the trial began after June 22, 1964. State v. Parker ---------- 707

50. In the absence of a showing of real miscarriage of justice, the question of whether a confession was obtained unlawfully cannot be raised under the Post Conviction Act, where the facts relied on by the petitioner have been the subject of and decided in a former appeal to this court from conviction. State v. Parker ---------- 707

51. The otherwise valid conviction of a defendant properly represented by counsel at a criminal trial is not rendered void or voidable solely because at a pretrial police interrogation, the defendant was denied counsel and was not warned of his absolute right to remain silent. State v. Silvacarvalho ---- 755

52. In the absence of proof that a confession, admission, or statement obtained from the defendant as a result of pretrial interrogation was used in evidence at the trial, such interrogation does not constitute prejudicial error. State v. Silvacarvalho 755

53. The action of the district court in imposing sentence and denying probation in a criminal prosecution will not be disturbed on appeal unless the record shows an abuse of discretion. State v. Steinhausen ---------- 778

54. Once a defendant, under the advice of counsel, requests or submits to an examination by court-appointed psychiatrists, he is not constitutionally entitled to the presence of his counsel at the examination. State v. Snyder ---------- 787

55. The otherwise valid conviction of a defendant properly represented by counsel in a criminal case is not rendered void or voidable solely because at a pretrial police interrogation the defendant was denied counsel, and was not warned of his absolute right to remain silent. State v. Snyder ---------- 787

56. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown, its determination will not be disturbed. State v. Wycoff ---------- 799

57. New cumulative evidence tendered in support of a motion for a new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Wycoff ---------- 799

58. A new trial will not ordinarily be granted for new-

ly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial. State v. Wycoff ---------- 799
59. The right to a separate trial depends upon a showing that prejudice will result from a joint trial. State v. Erving ---------- 824
State v. Davis ---------- 830
60. In the absence of a showing of an abuse of discretion, the ruling of the trial court upon a motion for severance will not be disturbed. State v. Erving -- 824
State v. Davis ---------- 830
61. A confession of guilt is not admissible in evidence unless it is first shown to have been voluntarily made. Under Nebraska procedure the admission of a confession in evidence constitutes the trial court's independent determination that the confession is voluntary. State v. Erving ---------- 824
State v. Davis ---------- 830
62. In determining whether a confession is voluntary the trial court should consider all of the evidence. State v. Erving ---------- 824
State v. Davis ---------- 830
63. 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. Erving -- 824
State v. Davis ---------- 830
64. Where the evidence as to what occurred immediately prior to and at the time of the making of a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducements or threats, the confession is voluntary and may be received in evidence. State v. Erving ---- 824
State v. Davis ---------- 830
65. If the complaint in a misdemeanor case is found insufficient or defective on appeal to the district court, the court should order a new complaint to be filed. State v. Ruggiere ---------- 869
66. A new complaint upon appeal may allege a new offense that is closely related to the allegations of the original complaint. State v. Ruggiere -------- 869

Crops.

1. Under an executory contract for the sale of real estate where the purchaser is given no right to the possession until a specified time, he acquires no in-

terest in the growing crops which mature and are harvested before he is entitled to possession. Dixon v. O'Connor ---------- 427

2. An action by a landlord against his tenant for an accounting for the rent share of crops is properly brought as an action in equity. Dixon v. O'Connor 427

Damages.

1. The measure of damages under the Iowa survival statute is the present worth or value of that which the deceased would reasonably be expected to save and accumulate as a result of his efforts if he had lived out the usual time of his life expectancy. Lorenzen v. Continental Baking Co. ---------- 23

2. Under the Iowa survival statute in a wrongful death case the loss of the ability of the deceased to earn and accumulate money or property is an important element in the measure of damages. Lorenzen v. Continental Baking Co. ---------- 23

3. The measure of damage under the Iowa survival statute for wrongful death is the amount of money and property which the deceased would reasonably save and accumulate in his lifetime but for his wrongful death, reduced to its present worth. Lorenzen v. Continental Baking Co. ---------- 23

4. The damages under Iowa survival statute are ordinarily for the jury to determine, even though they are speculative in nature, but the amount of damages found by the jury must be within the maximum amount shown by the evidence. Lorenzen v. Continental Baking Co. ---------- 23

5. Instructions which authorize a double recovery for the same element of loss are prejudicially erroneous. LeMieux v. Sanderson ---------- 311

6. A paragraph of an instruction which informs the jury of the extent of the recovery authorized by another instruction, or another paragraph of the same instruction, is not ordinarily erroneous as submitting a double recovery for the same element of loss. LeMieux v. Sanderson ---------- 311

7. Where there is competent evidence of future pain and suffering that is reasonably certain to continue into the future, the amount of damages is for the jury. If the damages awarded bear a reasonable relationship to the injuries sustained, the court will not

interfere with the verdict of the jury. LeMieux v. Sanderson ---------- 311

8. Damages for the temporary injury to real property are measured by the loss sustained by the owner, and may include cost of restoration and repair not exceeding the diminution in value of the real estate, and reduction in value of the use or in rental value. Hunt v. Chicago, B. & Q. R.R. Co. ---------- 375

9. Damages for injury to personal property are measured by the value before injury of property destroyed; as to property injured but not destroyed, damages are measured either by its diminution in value or by the cost of restoration or repair, whichever is less. Hunt v. Chicago, B. & Q. R.R. Co. -- 375

10. An instruction which fails to state correctly all of the items and elements necessary to be considered by the jury in assessing damages is erroneous. Hunt v. Chicago, B. & Q. R.R. Co. ---------- 375

11. The general rule is that profits derived from a business are not to be considered as earnings and cannot be used as a measure of loss of earning power, but where profits are almost entirely the direct result of personal management and endeavor, they are admissible for the sole purpose of estimating loss of earning capacity. Kaufman v. Tripple ---------- 593

12. The fact that a person was not engaged in a gainful occupation when injured by the negligence of another does not bar recovery for impairment of his earning capacity. Kaufman v. Tripple ---------- 593

13. If a condition in a contract is excused, the promisor becomes subject to a duty to perform without the existence or occurrence of the condition, but the damages recoverable for breach of the duty are not always the same as they would have been if the condition existed or occurred. Duplex Manuf. Co. v. Atlas Leasing Corp. ---------- 851

14. In an action to recover damages resulting from the death of a minor child, admission in evidence of various factors was not prejudicial error. Sacca v. Marshall ---------- 855

Death.

1. The law of the place of wrong governs the amount of recovery for wrongful death, as well as the right to recover. Any limitation upon the amount imposed by the law of the place of wrong will be applicable to

determine the maximum amount recoverable elsewhere. Lorenzen v. Continental Baking Co. -------- 23

2. The wrongful death statute of Iowa is a survival statute and not an ordinary Lord Campbell's Act statute by which damages may be awarded to beneficiaries for the loss they sustained. Lorenzen v. Continental Baking Co. ---------- 23

3. Under the Iowa survival statute, the basis of recovery is such damages as deceased himself might have recovered had he survived the injury and brought the action, enlarged to include the wrongful death. Lorenzen v. Continental Baking Co. -------- 23

4. The measure of damages under the Iowa survival statute is the present worth or value of that which the deceased would reasonably be expected to save and accumulate as a result of his efforts if he had lived out the usual time of his life expectancy. Lorenzen v. Continental Baking Co. ---------- 23

5. Under the Iowa survival statute in a wrongful death case the loss of the ability of the deceased to earn and accumulate money or property is an important element in the measure of damages. Lorenzen v. Continental Baking Co. ---------- 23

6. The measure of damage under the Iowa survival statute for wrongful death is the amount of money and property which the deceased would reasonably save and accumulate in his lifetime but for his wrongful death, reduced to its present worth. Lorenzen v. Continental Baking Co. ---------- 23

7. The damages under Iowa survival statute are ordinarily for the jury to determine, even though they are speculative in nature, but the amount of damages found by the jury must be within the maximum amount shown by the evidence. Lorenzen v. Continental Baking Co. ---------- 23

8. In an action to recover damages resulting from the death of a minor child, admission in evidence of various factors was not prejudicial error. Sacca v. Marshall ---------- 855

Declaratory Judgments.

1. The granting of declaratory relief is discretionary with the court. There is no absolute mandate compelling it to exercise its jurisdiction to grant such relief. Blanco v. General Motors Acceptance Corp. ---------- 365

2. A declaratory judgment will be refused, where, in the court's opinion, it is inexpedient for some reason outside the record, such as public policy, or where the question involved might be raised again in some other way. Blanco v. General Motors Acceptance Corp. ---------- 365
3. Courts should exercise a maximum of caution where a ruling in a declaratory judgment action is sought that would reach far beyond the particular case. Blanco v. General Motors Acceptance Corp. ------ 365
4. In a declaratory judgment action on a contract, the court may not only construe the contract, but is authorized to enter judgment for the amount due in the light of the interpretation made. Dixon v. O'Connor ---------- 427

Deeds.

1. A reservation in a deed must be to the grantor, or to one of them, where there are two or more. An estate cannot be created in a stranger to a deed by reservation or recital therein. Bauer v. Bauer -- 177
2. An exception in a deed is a qualification by which some part of the estate is not conveyed which could have passed to the grantee but for the exception. Bauer v. Bauer ---------- 177
3. Exceptions and reservations can only be created by and for the benefit of the grantor and his heirs and not for a stranger. Bauer v. Bauer ---------- 177
4. It is the duty of courts of justice to carry into effect the true intent of the parties to a deed so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law. Bauer v. Bauer ---------- 177
5. In construing a reservation which is obscure, uncertain, or ambiguous, the intention of the parties is to be pursued, if possible, and emphasis is given to a determination of what the grantor meant by the language of the reservation. Bauer v. Bauer ---------- 177
6. A reasonable construction should be given to a deed. The entire instrument and the surrounding circumstances, including the purpose for which the property or right reserved is intended to be used, should be considered. Bauer v. Bauer ---------- 177
7. Where lands are conveyed to a municipality by absolute gift or purchase from the general fund, without restriction or condition of any kind, the

municipality may devote it to such public use as its needs require. Carlson v. City of Fremont ------ 262
8. Where lands are conveyed to a municipality in fee simple and thereafter used as a public park, the municipality may at any time thereafter change the use to one required by the welfare and necessities of the municipality. Carlson v. City of Fremont -- 262
9. It is only where property is dedicated or donated for some specific use, conveyed with some restriction or condition, or where payment is provided by assessment on property benefited by the contemplated use, that a different use may be enjoined. Carlson v. City of Fremont ---------- 262
10. Where a deed is deposited in escrow subject to conditions, the title remains in the grantor until performance of the conditions. Dixon v. O'Connor -- 427
11. It is essential to the validity of a deed that there be a delivery. The burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence. Moseley v. Zieg ------ 810
12. To constitute a valid delivery of a deed there must be an intent on the part of the grantor that the deed shall operate as a muniment of title to take effect presently. Moseley v. Zieg ---------- 810
13. Rule stated as to delivery of deed found in safe deposit box to which deceased grantor had access as a joint lessee. Moseley v. Zieg ---------- 810

Divorce.

1. In a divorce suit the court has the authority to adjust all the respective property interests and rights of the parties. Foltyn v. Foltyn ---------- 42
2. The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case. Foltyn v. Foltyn ---------- 42
3. Rule for division of property in divorce case stated. Foltyn v. Foltyn ---------- 42
4. Ordinarily an application for a change with respect to care and custody of minor children, which has been provided for in a decree of divorce, made at any time after the decree has been entered, must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances, it will be deemed res judicata. Goodman v. Goodman 83
5. In a divorce case, the custody of a minor child is to be determined by the best interests of the

child, with due regard for the superior rights of fit, proper, and suitable parents. Goodman v. Goodman 83
Ball v. Ball ---------- 145

6. Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right. Goodman v. Goodman ---------- 83

7. In a divorce suit, the wishes of a child who has reached sufficient age, and has the ability to express an intelligent preference, are entitled to consideration, the wishes of the child are not controlling as to custody. Goodman v. Goodman ---------- 83

8. The courts preserve an attitude of impartiality between religions and will not disqualify a parent because of his or her religious beliefs. Particularly is this true where there is no showing that the religious beliefs, or a conflict between them, seriously threaten the health or well-being of the child. Goodman v. Goodman ---------- 83

9. A parent found unfit for custody should not, by the mere passage of time without further misconduct, be able to change child custody provisions in a divorce decree in the absence of specified showing. Goodman v. Goodman ---------- 83

10. Where there is no evidence that the party having custody has failed in the responsibility of caring for and maintaining the children, evidence of reformation or rehabilitation of the parent formerly found unfit is, in itself, not sufficient evidence of changed circumstances to warrant a change in custody. Goodman v. Goodman ---------- 83

11. An application for a change of custody of a minor child, provided for in a decree of divorce, must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances, the decree will be deemed res judicata. Ball v. Ball -- 145

12. A divorce case is for trial de novo on the record in the Supreme Court which is required to reach independent conclusions of fact without reference to findings made by the trial court. Kuta v. Kuta 443

13. A court of equity will not grant a divorce to one whose conduct has been such as to furnish sufficient grounds for divorce even if the conduct of the other party has been grossly more culpable. In such

case, the court will deny relief to either. Kuta v. Kuta ---------- 443
14. In any action for divorce, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusions of the trial court as to such reliablity will be carefully regarded by the Supreme Court. Kuta v. Kuta 443
15. Where the circumstances of the parties have changed, the court may revise or alter a decree of divorce as it concerns the care, custody, and maintenance of the minor children. The modification of such a decree may not ordinarily be made on speculative evidence. Stinehagen v. Stinehagen ---------- 551
16. In the absence of error, or a showing that the action of the trial court was unreasonable, such action will not ordinarily be disturbed on appeal. Stinehagen v. Stinehagen ---------- 551
17. Rule governing elements to be taken into consideration in the allowance of alimony in a divorce case stated. Trimble v. Trimble ---------- 647
18. In a proper case the allowance of permanent alimony may exceed the value of the husband's estate at the time the marriage is dissolved. Trimble v. Trimble ---------- 647
19. The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into the determination such as the husband's age, health, earning capacity, future prospects, and social standing. Trimble v. Trimble ---------- 647
20. There is no general rule as to the degree of corroboration required in a divorce action. The determination as to the sufficiency of the corroboration in each case is made upon the facts and circumstances in that case. Humann v. Humann ---- 719
21. Ordinarily acts of personal violence by a husband toward his wife are not justified by conduct on the part of the wife that does not threaten bodily harm. Humann v. Humann ---------- 719
22. A divorce case is for trial de novo on the record in the Supreme Court which is required to reach independent conclusions of fact without reference to findings made by the trial court. Benton v. Benton 759
23. The mere use of intoxicants is not a ground for divorce. Benton v. Benton ---------- 759
24. Corroborative evidence is required of the acts or

conduct asserted as a ground for divorce. Benton v. Benton ---- 759
25. A general rule by which to measure the exact amount of the degree of corroboration required in a divorce case cannot be formulated. Each case must be determined on its own facts and circumstances. Benton v. Benton ---- 759
26. To constitute extreme cruelty, the unjustifiable conduct must be such as to destroy the legitimate aims and objects of matrimony. Benton v. Benton ---- 759
27. Mere incompatibility does not constitute extreme cruelty. Benton v. Benton ---- 759
28. A decree in a divorce case, insofar as minor children are concerned, is never final in the sense that it cannot be changed. Fox v. Fox ---- 847
29. The provision for reasonable visitation rights does not mean visitation at the sole discretion of the party having custody of the child. Fox v. Fox ---- 847
30. A father who is without fault should have reasonable visitation rights. Fox v. Fox ---- 847
31. A right of visitation to be meaningful should permit the child to visit with his father away from the control of the person having custody. Fox v. Fox 847
32. A determination of what constitutes reasonable visitation rights is within the discretion of the trial court and should not be disturbed except for an abuse of discretion. Fox v. Fox ---- 847

Easements.

1. Elements of adverse possession stated. Satterfield v. Dunne ---- 274
2. To establish a prescriptive right to an easement, all of the elements of a prescriptive use and enjoyment must be established by clear, convincing, and satisfactory evidence. Satterfield v. Dunne ---- 274
3. Unless a contrary intent appears, an easement granted by one landowner to a second adjoining landowner to construct and maintain a fence upon the land of the first landowner carries with it the incidental right of free and unobstructed passage onto and over the grounds thereby enclosed. State v. Merritt Brothers Sand & Gravel Co. ---- 660

Elections.

1. Under Nebraska constitutional provisions reserving to the people the rights of initiative and referendum, the Legislature, on the one hand and the electorate

on the other, are coordinate legislative bodies, and there is no superiority of power between the two. In the absence of specific constitutional restraint, either may amend or repeal the enactments of the other. Klosterman v. Marsh ---------- 506

2. Constitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed to make effective the powers reserved. Klosterman v. Marsh ---------- 506

3. Signatures on a referendum petition obtained after the act sought to be referred was passed are not rendered invalid merely because they were obtained before the adjournment of the legislative session at which the act was passed. Klosterman v. Marsh 506

4. Under the facts shown, the title and text of an act set out in a referendum petition were sufficient. Klosterman v. Marsh ---------- 506

Electricity.

1. If a municipality funishes electric energy at retail within its extraterritorial zoning jurisdiction, it has the right to serve the zoning area except for present customers of other retail suppliers. City of Gering v. Gering Valley Rural P. P. Dist. ---------- 241

2. A city which fails to file a claim in advance of hearing on the issue of service area boundaries waives the right to serve its extraterritorial zoning area, unless reasonable excuse for the failure is shown. City of Gering v. Gering Valley Rural P. P. Dist. ---------- 241

3. A public corporation organized for the purpose of generating, transmitting, and distributing electrical energy operates in a proprietary as distinguished from a governmental capacity. Wittler v. Baumgartner ---------- 446

Eminent Domain.

1. The measure of compensation for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. Berlowitz v. State ---------- 164

2. If an owner of property abutting on a highway possesses a property right of access to the highway the measure of his right is reasonable ingress and egress under the circumstances. Berlowitz v. State 164

3. Destruction or substantial impairment of the property right of access to a highway is ordinarily a question of fact. Berlowitz v. State ---------- 164
4. The petition by which proceedings for condemnation of rights of ingress and egress over land are instituted must accurately describe the property and such a description is necessary to confer jurisdiction. Brodine v. State ---------- 433
5. In condemnation proceedings, the property must be described, not with meticulous exactness, but with a reasonable degree of accuracy, or substantial accuracy. Brodine v. State ---------- 433

Equity.
1. Where a court of equity has obtained jurisdiction of a case for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation. Muller Enterprises, Inc. v. Gerber 318
Dixon v. O'Connor ---------- 427
2. Rule for trial of equity cases de novo in Supreme Court stated. Meyer v. Meyer ---------- 379
State v. Merritt Brothers Sand & Gravel Co. ------ 660
Russell v. Western Nebraska Rest Home, Inc. ------ 728
3. A court of equity having obtained jurisdiction of a cause will retain it for all purposes, and render such a judgment as will protect the rights of the parties before it. Meyer v. Meyer ---------- 379
4. That the relief sought would serve no useful purpose to promote the convenience or welfare of the party seeking the relief is a factor to be considered by a court of equity whose assistance is asked. State v. Merritt Brothers Sand & Gravel Co. ---------- 660

Escrows.
Where a deed is deposited in escrow subject to conditions, the title remains in the grantor until performance of the conditions. Dixon v. O'Connor -- 427

Evidence.
1. In order to predicate error on the reception of inadmissible evidence, there must have been objection made contemporaneously with the offer thereof. State v. Homan ---------- 7
2. Written statements of witnesses in the possession of an adversary are not obtainable as a matter of right under discovery statute. Haarhues v. Gordon 189

3. The burden is upon the party seeking discovery under statutes referred to in opinion to demonstrate from facts appearing in the record that good cause exists for production of statements taken by adversary or his agents. Haarhues v. Gordon -------- 189
4. A court is not justified in ordering production of statements by witnesses simply on the theory that facts sought are relevant and not privileged, or merely to help counsel to prepare himself to examine witnesses and to make certain that nothing is overlooked. Haarhues v. Gordon ---------- 189
5. Special circumstances are necessary to the establishment of good cause to sustain the entry of an order requiring a party to produce statements taken from witnesses. Haarhues v. Gordon ---------- 189
6. A court is not justified in ordering a litigant to produce the statements of witnesses which he has procured in preparing for trial upon his adversary's mere surmise or suspicion that he might find impeaching material in the statements. Haarhues v. Gordon ---------- 189
7. Good cause for production of statements of witnesses for the benefit of an adversary ordinarily is not shown if it appears that the witnesses are known and available to the party moving for their production. Haarhues v. Gordon ---------- 189
8. Good cause requiring the production of a written statement by a witness is ordinarily not shown because of a long lapse of time since the taking of the statement where it appears that statements were taken at substantially the same time by both parties and the memory of the witness can be refreshed from one statement as well as the other. Haarhues v. Gordon ---------- 189
9. Where a statement of a witness contains specific facts available to him but not to the witnesses of the other party, which are essential to the establishment of his case, an order for production of the statement is usually warranted in the interest of justice. Haarhues v. Gordon ---------- 189
10. Where a witness is unavailable or hostile, a statement made by such witness may be required to be produced where it is shown that there is a reasonable probability of materiality or that it may afford clues to relevant evidence essential to the establishment of the cause of action. Haarhues v. Gordon 189
11. Showing of good cause was not made for production

of statement where another statement was taken 3 days later and was available. Haarhues v. Gordon 189

12. The possibility that a witness might make two statements in different language, or restrict or extend them in different degrees, does not constitute a showing of good cause. A holding to the contrary would have the effect of requiring production of the statement in every case. Haarhues v. Gordon 189

13. It is generally the rule that written statements in the exclusive possession of an adverse party, and therefore unavailable to movant, does not constitute good cause where substance of the statement is discoverable by depositions, interrogatories, or personal interview. Haarhues v. Gordon ---------- 189

14. While it is an objective in discovery proceedings to eliminate surprise in the trial of the issues of a case, it is not its purpose to strip an adversary of the means of insuring truth in the trial of a contested case except where it is shown that the demands of justice are paramount thereto. A contested law suit remains an adversary proceeding. Haarhues v. Gordon ---------- 189

15. In an action growing out of a motor vehicle accident, any evidence of the conditions and circumstances leading up to and surrounding the accident which will throw light upon the conduct of the parties and the care, or lack of care, exercised by them, is, as a general proposition, admissible. Ripp v. Riesland ---------- 205

16. Opinion evidence as to the distance within which a motor vehicle can be stopped is competent and admissible where such evidence is material and relevant to the issues and is given by a witness qualified to give such an opinion. Ripp v. Riesland ---- 205

17. The Supreme Court, recognizing the difficulties attending an offer of evidence of illustrative experiments, has adopted the rule that in such cases discretion is conferred upon the trial court and that, unless there is a clear abuse of discretion, a judgment will not be reversed on account of the admission or rejection of such evidence. Ripp v. Riesland 205

18. When testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. Ripp v. Riesland 205

19. Circumstantial evidence is insufficient to warrant a recovery in a civil case unless the circumstances proved are of such a nature and so related to each

other that only one conclusion can be reasonably drawn therefrom. Popken v. Farmers Mutual Home Ins. Co. ---------- 250

20. Where there is competent evidence of future pain and suffering that is reasonably certain to continue into the future, the amount of damages is for the jury. If the damages awarded bear a reasonable relationship to the injuries sustained, the court will not interfere with the verdict of the jury. LeMieux v. Sanderson ---------- 311

21. In this state the strict rule of cross-examination has been adopted. It is not ordinarily permissible to cross-examine a witness upon a matter not related to his testimony-in-chief simply because such matter is relevant to the issues. Scofield v. Haskell ------ 324

22. Cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of witnesses. Scofield v. Haskell ---------- 324

23. Where testimony is given by a witness on direct examination from which an inference of fact arises favorable to the party producing him, anything tending to rebut that inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right. Scofield v. Haskell ---------- 324

24. A left-hand turn across a public highway into a private road is fraught with danger, and one making such a move is required to exercise a degree of care commensurate with the danger. Scofield v. Haskell 324

25. A jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence. Satterfield v. Watland ---------- 386

26. Audits or statements of account prepared for use at the trial are not ordinarily admissible, but the trial court may, in the exercise of its judicial discretion, admit them when they are merely abstracts, tabulations, or summaries of other evidence capable of calculation which has been properly admitted. Durand, Jackson & Associates, Inc. v. Nasr -------- 409

27. 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, indicate with reason-

able certainty the negligent act charged. Mills v. Bauer ---------- 411
28. A voluntary statement by a witness, not responsive to a question, should be stricken. Cardenas v. Peterson Bean Co. ---------- 605
29. The Supreme Court may take judicial notice of inconsistent claims and statements of a defendant in successive post conviction proceedings appealed to it in order to prevent an imposition on the court. State v. Losieau ---------- 671
30. A confession of guilt is not admissible in evidence unless it is first shown to have been voluntarily made. Under Nebraska procedure the admission of a confession in evidence constitutes the trial court's independent determination that the confession is voluntary. State v. Erving ---------- 824
State v. Davis ---------- 830
31. In determining whether a confession is voluntary the trial court should consider all of the evidence. State v. Erving ---------- 824
State v. Davis ---------- 830
32. 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. Erving -- 824
State v. Davis ---------- 830
33. Where the evidence as to what occurred immediately prior to and at the time of the making of a confession shows that it was freely and voluntarily made and excludes the hypothesis of improper inducements or threats, the confession is voluntary and may be received in evidence. State v. Erving ------ 824
State v. Davis ---------- 830
34. If the existence of a written contract has been induced by prior or contemporaneous oral agreement, parol evidence is not admissible to add to or contradict the terms of the written contract. Cornhusker Development & Inv. Group, Inc. v. Knecht -- 873
35. If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce their agreement to writing, execute, and deliver it, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract. Cornhusker Development & Inv. Group, Inc. v. Knecht ---------- 873
36. The parol evidence rule is one of substantive law

as well as of evidence. As a rule of substantive law it renders ineffective proof of an oral prior or contemporaneous agreement the effect of which would be to vary, alter, or contradict the terms of a written agreement. Cornhusker Development & Inv. Group, Inc. v. Knecht ---------- 873

37. Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of the payment of a money consideration, and is of a contractual nature, parol or extrinsic evidence is not admissible to vary or contradict the consideration expressed. Cornhusker Development & Inv. Group, Inc. v. Knecht -- 873

Executors and Administrators.

1. A special administrator has the power to initiate litigation to preserve the assets of the estate. His authority in maintaining litigation is a continuing one until the appointment and substitution of a general administrator or executor. Meyer v. Meyer -- 379
2. Where a claimant against an estate has possession of a promissory note shown to have been signed by the deceased, and produces it at the trial, it is admissible in evidence and makes a prima facie case of due delivery of the note. Thompson v. De Voe -- 654

Fences.

A fence is defined. State v. Merritt Brothers Sand & Gravel Co. ---------- 660

Fraud.

1. Fraud is never presumed but must be clearly proved by the party who pleads and relies on it. Moser v. Turner ---------- 635
2. Evidence that the defendants knowingly made a false representation of a material fact, with the intention that it be acted upon, and that the plaintiffs relied thereon to their damage will sustain a judgment for damages for false representation. McGerr v. Beals ---------- 767

Frauds, Statute of.

1. In an action brought for specific performance of an alleged oral contract to convey land, the proof as to the alleged oral contract must meet the exacting test as to the quality of being clear, satisfactory, and unequivocal. Meyer v. Meyer ---------- 379

2. Acts of part performance necessary to enforce an oral contract to convey land must not only relate to the contract but must further constitute part performance of it to the extent that its nonfulfillment would amount to a fraud on the party who has partly performed. Meyer v. Meyer ------ 379

Good Will.

Where the defendant, who as managing partner has had the exclusive control of the production, sales, and distribution of the production, sales, and distribution of the products of the partnership, seeks to establish the value of the good will and franchise thereof, the burden of doing so will rest upon him. Essay v. Essay ---------- 47

Guardian and Ward.

1. Where one is, by reason of old age, disease, weakness of mind, or from any cause, unable or incapable, unassisted, to properly manage his property, he is incompetent, and a guardian should be appointed. Malnick v. Malnick ---------- 748
2. The incapacity of a person, which will authorize the appointment of a guardian, is a question of fact in each case. The finding of the trial court will not ordinarily be disturbed. Malnick v. Malnick -------- 748

Highways.

1. Rule defining care required of owner of cattle to confine them to prevent hazard on public highway stated. Countryman v. Ronspies ---------- 76
2. If an owner of property abutting on a highway possesses a property right of access to the highway the measure of his right is reasonable ingress and egress under the circumstances. Berlowitz v. State 164
3. Destruction or substantial impairment of the property right of access to a highway is ordinarily a question of fact. Berlowitz v. State ---------- 164
4. If the owner of land encloses it with a fence and installs gates therein at the entrance and exit where the right-of-way is claimed across the tract, it is evidence that he recognizes the right of those who use the road to continue to use it. Satterfield v. Dunne ---------- 274
5. It is not indispensable to the establishment of a highway by prescription that there has been no deviation in the line of travel. If the course of

travel has remained substantially unchanged for the full period, it is sufficient even though at times, to avoid encroachments, obstructions, or the like upon the road, there have been slight changes in the line of travel. Satterfield v. Dunne ---------- 274

6. It is not indispensable to the establishment of a road by prescription that there be an expenditure of public funds or work by the public authorities for its improvement or maintenance. Where there has been such an expenditure of public funds or work on such road with the knowledge of the owner, then such public expenditure or work may have the legal effect of the owner's acknowledgment of the right of the public to use such road. Satterfield v. Dunne ---------- 274

7. By statute, the rights-of-way acquired by the Department of Roads shall be held inviolate for state highway and departmental purposes. No physical or functional encroachments, structures, or uses shall be permitted within such right-of-way limits, except by written consent of the department. State v. Merritt Brothers Sand & Gravel Co. ---------- 660

8. A landowner whose property abuts upon a highway right-of-way may have rights in such right-of-way different in kind from, and greater than, the rights of the public generally, and at least has the same rights. State v. Merritt Brothers Sand & Gravel Co. ---------- 660

9. That a highway right-of-way has not been used to its full width, and that some portion of it has been enclosed or occupied by a private individual for a period in excess of the statute of limitations, does not vest that individual with any title thereto. State v. Merritt Brothers Sand & Gravel Co. ---------- 660

10. A county is obligated to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence. McKinney v. County of Cass ---------- 685

11. The duty of the county to maintain its highways and bridges will not be extended beyond the words and fair implications of the statutory liability. McKinney v. County of Cass ---------- 685

12. In 1880, all county, state, and other public roads were required to have a width of 66 feet. Plischke v. Jameson ---------- 803

13. If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path but the right extends to such width as is reasonably necessary for public travel. Plischke v. Jameson ---------- 803

Homesteads.

1. As between the parties a contract for the sale of real estate need not be acknowledged unless the property is a homestead. Musser v. Zurcher ---- 882
2. Where the owner of a homestead removes therefrom with his family and moves to another home, of which he is the owner, it will be presumed that he has abandoned the first home and thereby the homestead right in it. Musser v. Zurcher ---------- 882
3. Where the evidence shows that the parties left the premises claimed as a homestead, without any intention of returning to it for homestead purposes, an abandonment of the homestead right will be deemed to have been established. Musser v. Zurcher 882

Indictments and Informations.

1. An information or indictment must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to later prosecution for the same offense. State v. Buttner ---- 529
2. Separate informations filed against two or more defendants may be consolidated for trial if the defendants are charged with having participated in the same act or transaction that constitutes the offense. State v. Erving ---------- 824
   State v. Davis ---------- 830

Infants.

1. The age when an infant during its minority may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by arbitrary rule, and is generally a question of fact for the jury. Vacanti v. Montes ---------- 232
2. Whether or not an infant between 9 and 10 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law. Vacanti v. Montes 232

3. What is required of an infant is the exercise of that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger would use in the same situation. Vacanti v. Montes ---------- 232
4. Whether or not a minor between 14 and 15 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact for the jury. Sacca v. Marshall -- 855

Injunction.
1. The appropriateness of injunction against tort depends upon a comparative appraisal of all factors in the case. Some of the primary factors are enumerated. Wasserburger v. Coffee ---------- 149
2. An injunction will not lie if the right thereto is unclear, or the damage complained of nonexistent. State v. Merritt Brothers Sand & Gravel Co. -------- 660

Insurance.
1. Statute prescribing the 1943 New York standard form of fire insurance policy is definite notwithstanding adoption of the form by reference. Rhodes v. Continental Ins. Co. ---------- 10
2. Under statute, the falsity of any statement in the application for any sickness and accident insurance policy does not bar the right to recovery unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer. Corrigan v. Fireman's Fund Ins. Co. -- 13
3. If an incorrect answer is inserted in an insurance application by an agent of the insurer when correct information was given to him by the insured, the insurer cannot rely upon such answer in an action in equity to rescind or reform the policy issued on the application. Corrigan v. Fireman's Fund Ins. Co. ---------- 13
4. By statute, every agent or broker who shall solicit an application for insurance of any kind shall, in any controversy between the insured or his beneficiary and the company issuing any policy upon such application, be regarded as representing the company and not the insured. Corrigan v. Fireman's Fund Ins. Co. ---------- 13
5. Where an insured can prove that he truthfully provided correct information to complete an insurance

application, he may have the policy reformed in equity. The mere fact that he retained the policy and did not examine it until after a loss occurs will not prevent reformation. Corrigan v. Fireman's Fund Ins. Co. ---------- 13

6. Whether or not a certain institution is a hospital or a convalescent home is solely a question of law. Waak v. National Bankers Life Ins. Co. ---------- 129

7. A hospitalization insurance policy providing indemnity while confined as a bed patient in a specified type hospital, and excluding a convalescent home from coverage, relates to the place of treatment and care and not to the type or degree of care required. Waak v. National Bankers Life Ins. Co. 129

8. The care of a patient, even though convalescent in nature, rendered by a qualified and licensed hospital, is within the terms of an insurance policy providing coverage to an insured required to be confined as a bed patient within a regularly licensed hospital. Waak v. National Bankers Life Ins. Co. ---------- 129

9. A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. Waak v. National Bankers Life Ins. Co. ---------- 129

10. The language of a policy of insurance should be considered, not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean. Waak v. National Bankers Life Ins. Co. ---------- 129

11. When an insurance contract prepared by the insurer contains provisions reasonably subject to different constructions, one favorable to it and one favorable to insured, the construction favorable to insured will be adopted. Waak v. National Life Ins. Co. ---------- 129

12. The liability of a nonprofit charitable hospital to its patients for negligence in respect to causes of action arising prior to April 23, 1966, is limited to the applicable amount of its liability insurance, if any. Myers v. Drozda ---------- 183

13. An insurer cannot assert a breach of the cooperation clause as a policy defense in the absence of a showing of prejudice or detriment to the insurer. MFA Mutual Ins. Co. v. Sailors ---------- 201

14. An exclusionary proviso in an accident insurance policy covering death from intracranial hemorrhage is not violative of the public policy of this state. Bobbitt v. Order of United Commercial Travelers -- 285
15. Although an insurance policy obligates the insurer to defend all suits brought against the insured, even though groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy. Iowa Mut. Ins. Co. v. Meckna ---------- 516
16. The purpose of the omnibus clause of an insurance policy is to fix the liability of additional insureds and to eliminate ambiguities and defenses with reference thereto as a matter of public policy. Iowa Mut. Ins. Co. v. Meckna ---------- 516
17. The omnibus clause of an insurance policy imposes liability on the insurer for the negligence of any person using the insured's automobile with his permission. Iowa Mut. Ins. Co. v. Meckna ---------- 516
18. The death of a named insured caused by one operating his automobile with his consent is within the coverage of the omnibus clause of his liability insurance policy. Iowa Mut. Ins. Co. v. Meckna ---- 516
19. Where an insurer has all the information the insured can give it, and has ample notice to permit it to take any and all necessary steps to protect its interest, it cannot avoid liability by alleging a breach of the notice provision of the policy. Iowa Mut. Ins. Co. v. Meckna ---------- 516
20. An insurer cannot assert a breach of the cooperation clause as a policy defense in the absence of a showing of prejudice or detriment to the insurer. Iowa Mut. Ins. Co. v. Meckna ---------- 516
21. An insurer does not have a right to insist on a reservation of rights agreement with its insured as a condition precedent to undertaking the defense it is obligated to take by the terms of the policy. Iowa Mut. Ins. Co. v. Meckna ---------- 516
22. The burden of proving noncooperation is on the insurer who urges it as a policy defense. Iowa Mut. Ins. Co. v. Meckna ---------- 516
23. A misstatement by an insured promptly or seasonably corrected or withdrawn prior to trial of the action against the insured does not constitute a breach of the cooperation clause. Iowa Mut. Ins. Co. v. Meckna ---------- 516
24. The purpose of the cooperation clause is to pre-

vent collusion between the injured and the insured, and to facilitate the handling of the claims by the insurer. Iowa Mut. Ins. Co. v. Meckna ---------- 516

25. Where an insurer sees fit to gamble on its insistence on a reservation of rights agreement and to ignore the fact that an action against its insured is in default, it is in no position to complain about a default judgment entered against its insured. Iowa Mut. Ins. Co. v. Meckna ---------- 516

26. The Supreme Court is committed to a liberal construction of the omnibus statute to effectuate its purpose. Farm Bureau Ins. Co. v. Allied Mut. Ins. Co. ---------- 555

27. The Supreme Court is committed to a broad rather than a narrow construction of the word "permission" as it is used in the omnibus clause. Farm Bureau Ins. Co. v. Allied Mut. Ins. Co. ---------- 555

28. Where the named insured grants his permittee broad and unfettered dominion over his insured automobile, he also impliedly authorizes his permittee to allow a third person to use it, thus rendering the latter an additional insured. Farm Bureau Ins. Co. v. Allied Mut. Ins. Co. ---------- 555

Interest.

1. Where the defense of usury is established, the plaintiff is not entitled to interest on the judgment awarded him. Central Constr. Co. v. Blanchard -- 62

2. The 1965 Nebraska Installment Sales Act held constitutional. Engelmeyer v. Murphy ---------- 295

Intervention.

Ordinarily, an intervener must take the suit as he finds it, is bound by the previous proceedings in the case, and cannot complain of the form of the action or of informalities or defects in the proceedings between the original parties. Essay v. Essay ---- 47

Intoxicating Liquors.

1. The failure of an arresting officer to inform a motorist of the provision of the implied consent law which permits him to take an additional test by a physician of his own choosing, does not constitute a lack of compliance with the mandatory terms of the statute and did not render the result of the test inadmissible. State v. Oleson ---------- 546

2. The taking of a sample of blood or urine for

chemical analysis on the request of the arresting officer, as authorized by the implied consent law, is not required to be delayed by a request of the arrested motorist that he be permitted to contact legal counsel. State v. Oleson ---------- 546

3. Under the implied consent law a person, charged with driving a motor vehicle on the public highways of the state, consents to the giving of a sample of the blood or urine for chemical analysis when he makes use of the highways. State v. Hagen ------ 564

4. An arresting officer is not required to inform one charged with operating a motor vehicle while under the influence of alcoholic liquor of the consequences of his refusal to give a blood or urine sample as provided by the implied consent law. State v. Hagen ---------- 564

5. The privilege against self-incrimination is limited to the giving of oral testimony and does not extend to defendant's body, nor to secretions therefrom, nor to the introduction of the chemical analysis in evidence if it is otherwise properly obtained. State v. Hagen ---------- 564

Judgments.

1. When a question of fact is once determined on its merits, that question is settled so far as the litigants are concerned and it may not be relitigated between the same parties. Essay v. Essay ---------- 47

2. Ordinarily an application for a change with respect to care and custody of minor children, which has been provided for in a decree of divorce, made at any time after the decree has been entered, must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances, it will be deemed res judicata. Goodman v. Goodman -- 83

3. The effect of an overruling decision may be retrospective, partially retrospective, or prospective. The choice is influenced by considerations of judicial policy. Myers v. Drozda ---------- 183

4. All matters decided expressly or by necessary implication in an opinion reversing a judgment become the law of the case in any future trial. Ripp v. Riesland ---------- 205

5. Where there is a genuine issue of material fact it is error to render a summary judgment, but where the only question involved is one of law, summary

judgment is proper. Bobbitt v. Order of United Commercial Travelers ---------- 285

6. Duty of district court after remand of case to it by Supreme Court stated. Muller Enterprises, Inc. v. Gerber ---------- 318

7. Public interest requires that there shall be an end to litigation. When a cause has received the consideration of the Supreme Court, has had its merits determined, and has been remanded with specific directions, the court to which such mandate is directed has no power to do anything other than to enter judgment in accordance with such mandate. Muller Enterprises, Inc. v. Gerber ---------- 318

8. In determining whether or not the pleadings support the judgment, they must be taken as a whole, and construed so as to support the judgment, if capable of such construction. The presumption is that the relief granted is authorized by the pleadings, and the burden is upon him who attacks the judgment to show that it was not. Blanco v. General Motors Acceptance Corp. ---------- 365

9. Where an insurer sees fit to gamble on its insistence on a reservation of rights agreement and to ignore the fact that an action against its insured is in default, it is in no position to complain about a default judgment entered against its insured. Iowa Mut. Ins. Co. v. Meckna ---------- 516

Juries.

It is within the sound discretion of the trial court to permit a party in a civil case to withdraw his waiver of a right to jury trial if the application to do so is timely made and the waiver has not been acted upon to the prejudice of any party. McKinney v. County of Cass ---------- 685

Landlord and Tenant.

1. In the absence of express contract to the contrary, a tenant takes demised premises as he finds them. There is no implied warranty by the landlord that they are safe or fit for occupancy. Roan v. Bruckner 399

2. A landlord is under no duty to change the visible form and mode of construction of leased premises in order to make the premises safe for his tenant, nor is he bound to remove obvious sources of danger, as to these the tenant assumes the risk. Roan v. Bruckner ---------- 399

3. Guests and invitees of a tenant derive their right to enter upon leased premises through the tenant, and have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects on the premises than the tenant has. Roan v. Bruckner ---------- 399
4. Subject to specific exceptions, the lessor of land is not liable for bodily harm caused to his lessee, or others upon the demised land with the consent of the lessee or sublessee, by any dangerous condition, whether natural or artificial, which existed when the lessee took possession. Roan v. Bruckner 399
5. An action by a landlord against his tenant for an accounting for the rent share of crops is properly brought as an action in equity. Dixon v. O'Connor 427

Limitations of Actions.

That a highway right-of-way has not been used to its full width, and that some portion of it has been enclosed or occupied by a private individual for a period in excess of the statute of limitations, does not vest that individual with any title thereto. State v. Merritt Brothers Sand & Gravel Co. ---------- 660

Master and Servant.

1. The refusal of an employer to allow an employee to perform the duties required of him by his employment amounts to his dismissal from such employment. Lee v. Ralston School Dist. ---------- 784
2. The proper remedy for the wrongful discharge of an employee is an action for damages for the breach of the contract of employment. Lee v. Ralston School Dist. ---------- 784
3. Proper measure of damages for breach of contract for personal services stated. Lee v. Ralston School Dist. ---------- 784
4. Where an employee who has been wrongfully discharged obtains other employment during the unexpired term of the contract, which is not consistent with the performance of all of the duties required under the original contract, the employer is entitled to a reduction in damages by reason of the employee's earnings in the subsequent employment. Lee v. Ralston School Dist. ---------- 784

Mechanics' Liens.

1. Where there is a contract for a specified sum to

furnish labor and materials for the repair of a building, a detailed account is not necessary for filing a mechanic's lien. Central Constr. Co. v. Blanchard ---------- 62

2. A subcontractor who performs labor or furnishes materials for any of the purposes mentioned in statute may file a mechanic's lien therefor within 3 months from the performance of labor or the furnishing of the materials. Stoltenberg v. Caffrey 113

3. The burden of proof is upon one claiming a mechanic's lien to show that the labor performed, or the materials furnished, were performed or furnished within 3 months prior to the filing of a claim of lien; otherwise the purported lien is not enforcable. Stoltenberg v. Caffrey ---------- 113

4. Materials or labor furnished a contractor for the purpose of replacing defective material previously furnished, or correcting construction defects, do not operate to extend the time for filing a mechanic's lien. Stoltenberg v. Caffrey ---------- 113

Motor Carriers.

1. Evidence of operations under color of authority may be considered by the State Railway Commission in determining whether or not the proposed service is or will be required by the present or future public convenience and necessity. Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc. ---------- 764

2. The issue of public convenience and necessity is ordinarily one of fact. Where there is evidence in the record to sustain the State Railway Commission's order, the Supreme Court cannot say that it is unreasonable and arbitrary. Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc. ---------- 764

Municipal Corporations.

1. If a municipality furnishes electric energy at retail within its extraterritorial zoning jurisdiction, it has the right to serve the zoning area except for present customers of other retail suppliers. City of Gering v. Gering Valley Rural P. P. Dist. -- 241

2. A city which fails to file a claim in advance of hearing on the issue of service area boundaries waives the right to serve its extraterritorial zoning area, unless reasonable excuse for the failure is shown. City of Gering v. Gering Valley Rural P. P. Dist. ---------- 241

3. Where lands are conveyed to a municipality by absolute gift or purchase from the general fund, without restriction or condition of any kind, the municipality may devote it to such public use as its needs require. Carlson v. City of Fremont ------ 262
4. Where lands are conveyed to a municipality in fee simple and thereafter used as a public park, the municipality may at any time thereafter change the use to one required by the welfare and necessities of the municipality. Carlson v. City of Fremont 262
5. Generally, a city may annex territory that is also a part of the territory of a district or public corporation formed for a limited purpose. City of Bellevue v. Eastern Sarpy County S. F. P. Dist. -------- 340
6. The rule against distinct municipal corporations exercising the same powers, jurisdiction, and privileges within the same territory at the same time applies to municipal corporations under stated circumstances. City of Bellevue v. Eastern Sarpy County S. F. P. Dist. ---------- 340
7. The Legislature has provided for the automatic detachment of a part of the territory of a fire protection district upon its annexation by a city or village. City of Bellevue v. Eastern Sarpy County S. F. P. Dist. ---------- 340
8. Statute providing for detachment of territory of rural fire protection district upon annexation by city or village held constitutional. City of Bellevue v. Eastern Sarpy County S. F. P. Dist. -------- 340
9. The validity of a zoning ordinance must be determined by an examination of the facts presented in the particular case. Whether a zoning ordinance is arbitrary and unreasonable, or illegal, must be determined by the evidence of the special surrounding conditions and circumstances. Jamson v. City of Grand Island ---------- 438
10. The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary. The burden is on the party who attacks the validity of a zoning ordinance to prove facts which establish its invalidity. Jamson v. City of Grand Island ---------- 438
11. Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control. Unless an abuse of discretion has been clearly shown, it is

not the province of the court to interfere. Jamson v. City of Grand Island ---------- 438
12. An appeal from action of the city council of a first class city annexing real estate must be taken as in other civil actions, and in addition thereto, notice of appeal must be given and a copy of the petition on appeal must be served. Wurtele v. City of Nebraska City ---------- 591
13. There is no statute conferring upon a city of the metropolitan class the power to annex territory located in a foreign county. Barton v. City of Omaha ---------- 752
14. A power of annexation is strictly construed. Barton v. City of Omaha ---------- 752

Negligence.
1. Where different minds may reasonably draw different conclusions or infernces from the evidence on issues of negligence, the determination of such issues is for the jury. Lorenzen v. Continental Baking Co. ---------- 23
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, indicate with reasonable certainty the negligent act charged. Lorenzen v. Continental Baking Co. ---------- 23
Mills v. Bauer ---------- 411
3. Negligence is never presumed and it cannot be inferred from the mere fact that an accident happened. Costello v. Simon ---------- 35
Mills v. Bauer ---------- 411
4. Duty and liability of owner of premises to invitee stated. Costello v. Simon ---------- 35
5. The presence of natural moisture in level, open ground in a residential yard, even though under a natural covering of grass and leaves, does not constitute a trap under the facts in this case nor establish negligence on the part of the defendant. Costello v. Simon ---------- 35
6. The possessor of land is subject to liability for bodily harm caused to a business invitee by a natural or artificial condition thereon if he knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk. Cook v. Lowe 39

7. Where reasonable minds may draw different conclusions as to whether or not acts of negligence charged have been proved, the case must be submitted to the jury for decision. Countryman v. Ronspies 76
8. The duty to sound a signal warning of the approach of a motor vehicle depends largely on the circumstances of the particular case. Vacanti v. Montes 232
9. Until the driver of an automobile has notice of the presence or likelihood of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that others will do likewise; and until he has such notice the rule is the same as respects children and adults. Vacanti v. Montes 232
10. The age when an infant during its minority may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by arbitrary rule, and is generally a question of fact for the jury. Vacanti v. Montes 232
11. What is required of an infant is the exercise of that degree of care which an ordinary prudent child of the same capacity to appreciate and avoid danger would use in the same situation. Vacanti v. Montes 232
12. The rule that generally it is negligence as a matter of law for a motorist to drive a motor vehicle on the highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision has no application to an operator of a vehicle who undertakes to pass another. Scofield v. Haskell 324
13. A licensee may be defined as a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor. Roan v. Bruckner 399
14. Difference between an invitee and a licensee stated. Roan v. Bruckner 399
15. The negligence of a person charged with responsibility for an accident cannot be inferred from a presumption of due care on the part of a person killed in an accident. A presumption of due care in the performance of duty attends a person so charged as well as a person so killed. Mills v. Bauer 411
16. The burden of proving negligence is on the party alleging it. Mills v. Bauer 411

17. The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured. Mills v. Bauer ------ 411
18. If defendant pleads that the plaintiff was guilty of contributory negligence, the burden is upon him to prove that defense and this burden does not shift during the trial. However, if the evidence adduced by the plaintiff tends to prove that issue, the defendant is entitled to receive the benefit thereof. Mills v. Bauer ---------- 411
19. The operator of an automobile approaching or entering an intersection is required to see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and a failure to see such favored automobile is negligence as a matter of law. Mills v. Bauer ---------- 411
20. The driver of an automobile entering an intersection of two highways is obligated to look for approaching automobiles and to see any vehicle within the radius which denotes the limit of danger. Mills v. Bauer ---------- 411
21. Gross negligence within the meaning of motor vehicle guest statute is defined. Callen v. Knopp ---- 421
22. Momentary inattention in the operation of a motor vehicle does not ordinarily amount to gross negligence. Callen v. Knopp ---------- 421
23. Duty of driver of motor vehicle to keep a lookout stated. Callen v. Knopp ---------- 421
24. Although a driver is traveling upon an arterial street, he is required to look for approaching vehicles and see those which are in plain sight. Callen v. Knopp ---------- 421
25. The automobile guest statute provides two distinct grounds of recovery by a guest against his host for negligence, one where the host driver is under the influence of intoxicating liquor in which event he is liable for ordinary negligence, and the other where the host is guilty of gross negligence. Kaufman v. Tripple ---------- 593
26. Evidence as to a host's drinking of intoxicants a short time previous to an accident is a circumstance in determining whether or not the host was guilty of gross negligence. Kaufman v. Tripple -- 593
27. The contributory negligence of a guest is ordinarily a question of fact for the jury. Kaufman v. Tripple 593
28. It is essential to the defense of contributory neg-

ligence that negligence of the plaintiff be a proximate cause or a proximately contributing cause of the injury. Kaufman v. Tripple ---------- 593
29. Degree of care of guest passenger in automobile stated. Kaufman v. Tripple ---------- 593
30. It is not contributory negligence for a guest to sleep while riding in an automobile when he has no knowledge of negligent driving on the part of his host, or of impending danger on the highway. Kaufman v. Tripple ---------- 593
31. Assumption of risk is available as a defense when one voluntarily exposes himself to the injury, even though it plays no part in causing the injury. Kaufman v. Tripple ---------- 593
32. The defense of contributory negligence and assumption of risk are not inconsistent defenses, although the evidence as to one may tend to prove the other. Kaufman v. Tripple ---------- 593
33. The fact that a person was not engaged in a gainful occupation when injured by the negligence of another does not bar recovery for impairment of his earning capacity. Kaufman v. Tripple ---------- 593
34. Where the head of a family maintains a motor vehicle for the general use, pleasure, and convenience of the family, the use of the vehicle for the pleasure and convenience of the family is in the furtherance of his purpose in providing it. Under such circumstances, it is treated as if it were being used in the conduct of the owner's business. McBroom v. Wolsleger ---------- 622
35. A family purpose automobile is one which is furnished by the head of the family for the general use, pleasure, and convenience of the members of the family. McBroom v. Wolsleger ---------- 622
36. An automobile which is furnished by someone other than the head of the family is not a family purpose automobile. McBroom v. Wolsleger ---------- 622
37. In an action based on specified acts of negligence, the plaintiff, in order to recover, must establish the specific negligence alleged and the doctrine of res ipsa loquitur cannot be applied. Sankey v. Williamson ---------- 714
38. In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. Sankey v. Williamson 714

39. When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery. Lileikis v. Kudirka -- 742
40. A definition of negligence is given. Farmer v. S.M.S. Trucking Co. ---------- 779
41. The very concept of negligence presupposes that the party charged therewith either fails to foresee an unreasonable risk of injury to another, or could have foreseen it had he conducted himself as a reasonably prudent person. Farmer v. S.M.S. Trucking Co. ---------- 779
42. In a negligence action an instruction that an actor in certain circumstances is not required to anticipate negligence by another does not inject into the case an issue of a stranger's negligence. It defines the knowledge which the actor is required to have in relation to the risk involved. Otte v. Taylor ------ 795
43. Instruction given by the trial court setting forth the defendant's burden of proof upon a plea of contributory negligence was free from error. Sacca v. Marshall ---------- 855
44. Whether or not a minor between 14 and 15 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact for the jury. Sacca v. Marshall -- 855

New Trial.

1. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and unless an abuse of discretion is shown, its determination will not be disturbed. State v. Wycoff ---------- 799
2. New cumulative evidence tendered in support of a motion for a new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Wycoff ---------- 799
3. A new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial. State v. Wycoff ---------- 799
4. In any but an extraordinary case in which an

utter failure of justice will unequivocally result, evidence of facts occurring after the trial will not support a motion for a new trial as newly discovered evidence. Monson v. Neidig ---------- 818

Officers.

1. A member of a planning board of the metropolitan city of Omaha is a ministerial officer within the meaning of statute defining bribery, and a conviction of a member thereof may be had for the violation of that statute. State v. Buttner ---------- 529
2. Inaction by administrative officials, who would be alert to exercise a power granted by the Legislature, sometimes bespeaks lack of statutory power. Barton v. City of Omaha ---------- 752

Parent and Child.

1. Ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right. Goodman v. Goodman ---------- 83
   Ball v. Ball ---------- 145
2. In a divorce suit, the wishes of a child who has reached sufficient age, and has the ability to express an intelligent preference, are entitled to consideration, the wishes of the child are not controlling as to custody. Goodman v. Goodman ---- 83
3. Findings of fact must rest on a preponderance of evidence, the verity of which has been carefully and legally tested. The relationship of parent and child should not be severed or disturbed unless the facts justify it. Goodman v. Goodman ------ 83
4. The custodial parent normally has the right to control the religious training of the child. Goodman v. Goodman ---------- 83
5. The provision for reasonable visitation rights does not mean visitation at the sole discretion of the party having custody of the child. Fox v. Fox -- 847
6. A father who is without fault should have reasonable visitation rights. Fox v. Fox ---------- 847
7. A right of visitation to be meaningful should permit the child to visit with his father away from the control of the person having custody. Fox v. Fox ---------- 847
8. A determination of what constitutes reasonable visitation rights is within the discretion of the

trial court and should not be disturbed except for an abuse of discretion. Fox v. Fox ---------- 847

Parties.

An appeal by a party from a judgment of the district court invokes the jurisdiction of the Supreme Court over the cause and all persons made parties in the district court. Westinghouse Electric Corp. v. Brookley ---------- 244

Partnership.

1. Where the defendant, who as managing partner has had the exclusive control of the production, sales, and distribution of the products of the partnership, seeks to establish the value of the good will and franchise thereof, the burden of doing so will rest upon him. Essay v. Essay ---------- 47
2. A managing partner who acquiesces in the matter of the depreciation relating to the partnership business as set up by an accountant is in no position to complain about such depreciation. Essay v. Essay 47
3. A managing partner having exclusive control of a partnership business not only controls production, sales, and distribution of products but is responsible for keeping all records and books of account. Essay v. Essay ---------- 47
4. A managing partner, who has been held by the court to be responsible for keeping its records and accounts, has the burden of showing any errors in a balance sheet prepared from such accounts by an auditor appointed by the court pursuant to a stipulation of the partners in which such managing partner joined. Essay v. Essay ---------- 47
5. For taxation purposes a partnership is a distinct entity, and neither the residence of the partners nor their abstract intent is material in determining taxable situs. Svoboda & Hannah v. Board of Equalization ---------- 215
6. Evidence held to sustain the findings of the trial court that taxpayer partnership was operating a wheat farm in one taxing district, and a stock farm or ranch in two other taxing districts, rather than one integrated farming operation; and further that the partnership had no principal place of business on the farm. Svoboda & Hannah v. Board of Equalization ---------- 215

Pleading.

1. If the want of legal capacity to sue is not raised by demurrer or answer in the trial court, it is waived and cannot be considered on appeal. Ebberson v. School Dist. No. 64 ---------- 119
2. An affidavit may be used to verify a pleading, to prove the service of a summons, notice, or other process in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law. Erdman v. National Indemnity Co. ------ 133
3. A general demurrer tests the substantive rights of parties upon admitted facts, including reasonable inferences from facts well pleaded. Ladenburger v. Platte Valley Bank of North Bend ---------- 167
4. In determining whether or not the pleadings support the judgment, they must be taken as a whole, and construed so as to support the judgment, if capable of such construction. The presumption is that the relief granted is authorized by the pleadings, and the burden is upon him who attacks the judgment to show that it was not. Blanco v. General Motors Acceptance Corp. ---------- 365
5. Where the defendant pleads a failure of consideration, he has the burden of proving it. Cornhusker Development & Inv. Group, Inc. v. Knecht -------- 873

Principal and Agent.

Apparent or ostensible authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declarations, or conduct of the agent. The principal is only liable for appearance of authority caused by himself. Ostensible and apparent agency have been treated in this jurisdiction as being synonymous. Anoka-Butte Lumber Co. v. Malerbi ---------- 256

Principal and Surety.

1. The surety's obligation on a bail bond, as on any other surety contract, is limited to the surety's promise, reasonably interpreted, unless there is a statute providing that certain statutory conditions are deemed to be contained in the bond, whether or not expressed. State v. Casey ---------- 888
2. Rule as to construction of a bail bond stated. State v. Casey ---------- 888

3. Duty of the surety on a bail bond in a criminal case stated. State v. Casey ---------- 888

Process.

1. An affidavit may be used to impeach an officer's return on the service of a summons. Erdman v. National Indemnity Co. ---------- 133
2. It is essential to the integrity and permanency of judicial records that the return of an officer, which is a part of the judicial record in a case, be impeached only by clear and convincing evidence. Erdman v. National Indemnity Co. ---------- 133
3. Manner of service of summons upon a corporation outlined. Erdman v. National Indemnity Co. ---- 133
4. Statutes prescribing the manner of service of summons are mandatory and must be strictly pursued. Erdman v. National Indemnity Co. ---------- 133

Property.

1. Damages for the temporary injury to real property are measured by the loss sustained by the owner, and may include cost of restoration and repair not exceeding the diminution in value of the real estate, and reduction in value of the use or in rental value. Hunt v. Chicago, B. &. Q. R.R. Co --------- 375
2. Damages for injury to personal property are measured by the value before injury of property destroyed; as to property injured but not destroyed, damages are measured either by its diminution in value or by the cost of restoration or repair, whichever is less. Hunt v. Chicago, B. & Q. R.R. Co. -- 375

Public Lands.

Where a new lessee files a notice of appeal to the district court from an appraisement of the improvements upon school land, the costs in that court are taxable to the new lessee. Bauerle v. Frosh -- 170
Holiday Mobile Homes Resorts, Inc. v. Frosh ---- 174

Public Service Commissions.

1. Interconnecting facilities which carry television signals between studios and transmitters are used in interstate communication and are not subject to the jurisdiction of the State Railway Commission. Hamilton County Tel. Co. v. Northwestern Bell Tel. Co. ---------- 1
2. The object and purpose of 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. Northwestern Bell Tel. Co. v. Consolidated Tel. Co. ---------- 268

3. The invasion by a telephone company of the territory of another telephone company, either in service or construction, was intended to be prohibited unless the invading company first applied for and received a certificate of convenience and necessity. Northwestern Bell Tel. Co. v. Consolidated Tel. Co. 268

4. Duplicate lines of transportation by competing common carriers are ordinarily incompatible with public interest. Such a competing line will be authorized only for compelling reasons. Northwestern Bell Tel. Co. v. Consolidated Tel. Co. ---------- 268

5. The State Railway Commission is without authority to fix or change a schedule and classification of rates and charges in the absence of notice and hearing as required by statute. Chicago, B. & Q. R.R. Co. v. Nebraska State Railway Commission -- 587

6. Where the evidence is sufficient to support the finding, the State Railway Commission may grant an application in whole or in part or may restrict or limit the grant, but it may not extend the effect of the application and thus engage in rate making without notice and hearing. Chicago, B. & Q. R.R. Co. v. Nebraska State Railway Commission ---------- 587

7. On appeal from an order of the State Railway Commission which requires the exercise of legislative authority, the only questions to be determined are whether or not the commission acted within the scope of its powers and whether or not the order complained of was reasonable and not arbitrarily made. Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc. ---------- 764

8. Evidence of operations under color of authority may be considered by the State Railway Commission in determining whether or not the proposed service is or will be required by the present or future public convenience and necessity. Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc. ---------- 764

9. The issue of public convenience and necessity is ordinarily one of fact. Where there is evidence in the record to sustain the State Railway Commission's order, the Supreme Court cannot say that it is

unreasonable and arbitrary. Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc. ---------- 764

Railroads.

1. The State Railway Commission is without authority to fix or change a schedule and classification of rates and charges in the absence of notice and hearing as required by statute. Chicago, B. &. Q. R.R. Co. v. Nebraska State Railway Commission -- 587
2. Where the evidence is sufficient to support the finding, the State Railway Commission may grant an application in whole or in part or may restrict or limit the grant, but it may not extend the effect of the application and thus engage in rate making without notice and hearing. Chicago, B. & Q. R.R. Co. v. Nebraska State Railway Commission ------ 587

Reformation of Instruments.

Rule respecting burden of proof in action for reformation of written instrument stated. Corrigan v. Fireman's Fund Ins. Co. ---------- 13

Restitution.

The law of restitution deals with situations in which one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss. Ladenburger v. Platte Valley Bank of North Bend ---------- 167

Robbery.

1. The elements of the crime of robbery are (1) the taking of property from the person, (2) by the use of force, (3) with intent on the part of defendant to steal, and (4) without consent by the one from whom the property was taken. State v. McClarity 246
2. The crimes of assault with intent to commit robbery and assault and battery are included within a charge of robbery. State v. McClarity ---------- 246

Schools and School Districts.

1. A school district having no territorial integrity may not maintain an action involving a change of the boundaries of the school district. Ebberson v. School Dist. No. 64 ---------- 119
2. Prior cases referred to in opinion held controlling upon question of constitutionality of legislative act

involving change in boundaries of school districts. Ebberson v. School Dist. No. 64 ---------- 119
3. Any person adversely affected by the changes made by the county superintendent in reorganization of school districts may appeal to the district court of any county in which the real estate or any part thereof involved in the dispute is located. School Dist. of Wilber v. Pracheil ---------- 121
4. The undertaking required in an appeal from the order of the county superintendent under school district statute specified is a cost bond and not a supersedeas. School Dist. of Wilber v. Pracheil ---------- 121
5. Any person adversely affected by the changes in the boundaries of a school district made by a county superintendent may proceed either by appeal or by error. Moser v. Turner ---------- 635
6. The county superintendents of schools of the counties involved have the authority and jurisdiction when acting jointly and multilaterally to create new districts or change the boundaries of existing districts where territory lies in one or more counties. Moser v. Turner ---------- 635
7. Where a school district contains land in more than one county, a statute provides that the county committee of the county in which the schoolhouse of the district lies is the only county committee that represents such district in a proceeding to change the boundaries thereof. Moser v. Turner ---------- 635
8. A deputy county superintendent, deputy county clerk, or deputy county treasurer is not authorized to act as a member of the statutory board provided by statute on change of boundaries of school district. Monson v. Neidig ---------- 818
9. The absence from the hearing of a designated member of the board provided for by school district statute, or his failure to participate in the determination by the board does not oust the board of jurisdiction nor render the action taken by a majority of the statutory board invalid. Monson v. Neidig 818
10. Substantial compliance with statutory requirements for the creation or alteration of school districts is sufficient notwithstanding minor irregularities in the proceedings if no prejudice results. Monson v. Neidig ---------- 818
11. A notice of the filing of a translocation petition and hearing theron, otherwise in compliance with statute, is not insufficient merely because a member of the

statutory board did not personally arrange for its publication and posting. Personal signatures of board members are not required on such notice. Monson v. Neidig ---------- 818

12. Whether a petitioner has met the statutory requirements and is entitled to have his land set off from one school district and attached to another, is determinable on the facts existing on the date of the hearing before the board, or on the date of the trial in the district court, if appealed. Monson v. Neidig 818

Set-Off and Counterclaim.

Ordinarily, a debt due at a future time cannot be set off against a debt presently due. McGerr v. Beals 767

Specific Performance.

1. In an action brought for specific performance of an alleged oral contract to convey land, the proof as to the alleged oral contract must meet the exacting test as to the quality of being clear, satisfactory, and unequivocal. Meyer v. Meyer -------- 379
2. Acts of part performance necessary to enforce an oral contract to convey land must not only relate to the contract but must further constitute part performance of it to the extent that its nonfulfillment would amount to a fraud on the party who has partly performed. Meyer v. Meyer ---------- 379
3. When land, or any interest therein, is the subject matter of an agreement, the power of a court of equity to enforce specific performance is beyond question. Russell v. Western Nebraska Rest Home, Inc. ---------- 728
4. Rule respecting specific performance of a contract stated. Russell v. Western Nebraska Rest Home, Inc. ---------- 728
5. The specific performance of a contract by a court of equity is not generally demandable or awarded as a matter of absolute right, but is directed to and governed by the sound legal discretion of the court, dependent upon the facts and circumstances of each particular case. It will not be granted where enforcement would be unjust and may be denied when the party seeking it has failed to perform. Russell v. Western Nebraska Rest Home, Inc. ---------- 728
6. The general rule is that from the time when a contract of sale of land should be performed the land is in equity the property of the vendee held by the

vendor in trust for him, and the purchase price is the property of the vendor held in trust for him by the vendee, and that upon specific performance the vendor is liable to account for the rents and profits and the vendee for the interest on the purchase price. Russell v. Western Nebraska Rest Home, Inc. ------ 728

7. A vendor, sued for specific performance, who has retained possession and received the rents and profits of the land, is liable for taxes accruing between the time of the contract and the trial. Russell v. Western Nebraska Rest Home, Inc. ---------- 728

8. The fact that land increases in value after an option is given is no reason to deny specific performance. Musser v. Zurcher ---------- 882

9. Tender is not a prerequisite to a suit for specific performance of a contract for the sale of real estate where the owner of the land repudiates the transaction. Musser v. Zurcher ---------- 882

States.

The State may hold property in a dual capacity, proprietary and govermental; and to the extent it functions with regard thereto in its proprietary capacity, it is subject to the same laws as its citizens. State v. Merritt Brothers Sand & Gravel Co. ---- 660

Statutes.

1. In the construction of statutes on the same subject a special statute ordinarily controls a general one. Rhodes v. Continental Ins. Co. ---------- 10

2. An attack upon the constitutionality of a statute cannot ordinarily originate in an appeal from the district court. Rhodes v. Continental Ins. Co. ------ 10

3. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. Rehkopf v. Board of Equalization -- 90

4. While the intent statute does not have the effect of changing substantive law, it is declaratory of a rule of construction long adopted by this court. Bauer v. Bauer ---------- 177

5. In construing a statute, effect must be given, if possible, to every word, clause, and sentence therein. A statute should be so construed as to make all its parts harmonize with each other and render them consistent with its general scope and object. Ulbrick v. City of Nebraska City -------- 229

6. In construing a statute, a court must look to the

objective to be accomplished, the evils and mischiefs sought to be remedied, or the purpose to be served, and place on it a reasonable construction which will best effect its purposes, rather than one which will defeat it. City of Grand Island v. Ehlers ---- 331
7. In determining the legislative intent, all statutes relating to the same subject should be construed and considered together. City of Grand Island v. Ehlers 331
8. The court takes judicial notice of the contents of legislative journals. City of Grand Island v. Ehlers 331
9. Courts will assume that the Legislature acted with full knowledge of the facts on which the legislation is based, particularly as to statutes passed at the same session. City of Grand Island v. Ehlers -- 331
10. Where statutes involve the same general field and where they are enacted at the same session of the Legislature, the last of the two enacted supersedes the former. City of Grand Island v. Ehlers -------- 331
11. All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision. City of Grand Island v. Ehlers ---------- 331
State v. Merritt Brothers Sand & Gravel Co. ------ 660
12. General rule governing construction of statutes stated. Schmeckpeper v. Panhandle Coop. Assn. -- 352
State v. Buttner ---------- 529
13. An "act of the Legislature" under Article III, section 3, of the Constitution of Nebraska, means a particular legislative bill which has been passed by the Legislature and becomes law either by the necessary passage of time for veto, or by the signature of the Governor. Klosterman v. Marsh -- 506
14. The initiative and referendum provisions of the Constitution of Nebraska reserve to the people the right to act in the capacity of legislators. The presumption should be in favor of the validity and legality of their acts. Klosterman v. Marsh ------ 506
15. Signatures on a referendum petition obtained after the act sought to be referred was passed are not rendered invalid merely because they were obtained before the adjournment of the legislative session at which the act was passed. Klosterman v. Marsh 506
16. Under the facts shown, the title and text of an act set out in a referendum petition were sufficient. Klosterman v. Marsh ---------- 506
17. Inaction by administrative officials, who would be alert to exercise a power granted by the Legisla-

ture, sometimes bespeaks lack of statutory power. Barton v. City of Omaha ---------- 752

Taxation.

1. Two sections of intangible tax law contemplate the valuation of shares of stock upon the basis of book value, less the deductions set out in the respective sections. Rehkopf v. Board of Equalization ------ 90
2. The tax imposed upon the shares of stock is a property tax upon the owner of the shares and not a tax upon the corporation. Rehkopf v. Board of Equalization ---------- 90
3. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situations and circumstances. Rehkopf v. Board of Equalization ---------- 90
4. The classifying of stock in foreign corporations differently from that in domestic corporations, for assessment, does not contravene the constitutional provision for uniformity. Rehkopf v. Board of Equalization ---------- 90
5. A shareholder in a domestic corporation whose property is taxed in the hands of the corporation by the state is not in the same class with the shareholder in a foreign corporation whose property is not taxed and cannot be taxed by the taxing authority of the state. Rehkopf v. Board of Equalization -------- 90
6. Taxing shares of foreign corporations when owned by the inhabitants of the state does not deny the owners the equal protection of the laws, because, in the case of domestic corporations, it is the property, and not the shares, which is taxed. Rehkopf v. Board of Equalization ---------- 90
7. The power to classify for tax purposes is primarily in the Legislature and not in the courts. Statutes so providing should not be declared invalid unless it clearly appears that they transgress the Constitution. Rehkopf v. Board of Equalization -------- 90
8. Statute referred to in opinion makes it the duty of the county board to determine where within the county personal property shall be assessed when questions arise, and its decision will not be disturbed unless an abuse of discretion is shown. Svoboda & Hannah v. Board of Equalization --------- 215
9. For taxation purposes a partnership is a distinct

entity, and neither the residence of the partners nor their abstract intent is material in determining taxable situs. Svoboda & Hannah v. Board of Equalization ---------- 215

10. The residence of the taxpayers is determinative of the place where livestock and other personal property connected with a farm will be taxed only if such property does not come under other specific statutory provisions. Svoboda & Hannah v. Board of Equalization ---------- 215

11. The term "farm" as used in tax statute means a tract of land used for cultivation or production of crops of any nature, or the raising of any animal embraced within the term "livestock." Svoboda & Hannah v. Board of Equalization ---------- 215

12. The operation of multiple tracts of land as a unit under the government Soil Bank Program, although binding upon the contracting parties, does not bind or affect the rights of taxing authorities in the determination of applicable taxing statutes. Svoboda & Hannah v. Board of Equalization ---------- 215

13. Evidence held to sustain the findings of the trial court that taxpayer partnership was operating a wheat farm in one taxing district, and a stock farm or ranch in two other taxing districts, rather than one integrated farming operation; and further that the partnership had no principal place of business on the farm. Svoboda & Hannah v. Board of Equalization ---------- 215

14. County board did not abuse its discretion in listing property of partnership for taxation. Svoboda & Hannah v. Board of Equalization ---------- 215

15. A notice issued by the State Board of Equalization and Assessment, pursuant to statute, should specify the percentage adjustment which the board proposes to make in that county. County of Blaine v. State Board of Equalization & Assessment ---------- 471
County of Brown v. State Board of Equalization & Assessment ---------- 487

16. The State Board of Equalization and Assessment has a wide latitude of judgment and discretion in equalizing the assessment of property between counties and may adopt any reasonable method. County of Blaine v. State Board of Equalization & Assessment ---------- 471
County of Kimball v. State Board of Equalization & Assessment ---------- 482

County of Brown v. State Board of Equalization & Assessment ---------- 487

17. Where the record of the proceedings before the State Board of Equalization and Assessment shows that the order of the board was unreasonable and arbitrary, it will be reversed. County of Blaine v. State Board of Equalization & Assessment -------- 471

County of Loup v. State Board of Equalization & Assessment ---------- 478

County of Kimball v. State Board of Equalization & Assessment ---------- 482

County of Brown v. State Board of Equalization & Assessment ---------- 487

18. The final decision of the State Board of Equalization and Assessment ordering Garfield County to increase its assessed valuation of rural land 39 percent was arbitrary. County of Garfield v. State Board of Equalization & Assessment ---------- 491

19. If a record on appeal from an order in a proceeding for equalization of assessed property valuations establishes an arbitrary adjustment, arbitrariness is not dispelled by speculation that extra-record information sufficient to support the adjustment may have been used. County of Box Butte v. State Board of Equalization & Assessment ---------- 492

20. On appeal from an order of the State Board of Equalization and Assessment for equalization of assessed valuations of property among counties, the Supreme Court considers the entire record for the purpose of deciding whether the order was made arbitrarily. County of Keith v. State Board of Equalization & Assessment ---------- 494

21. In the absence of statute the State Board of Equalization and Assessment may adopt any reasonable method of equalization, including reasonably reliable assessment-sales ratios. County of Keith v. State Board of Equalization & Assesment ------ 494

County of Lancaster v. State Board of Equalization & Assessment ---------- 497

22. In the absence of a specific statute the State Board of Equalization and Assessment is not required to notify taxpayers of a hearing to be held for the purpose of equalizing assessed valuations of property among counties. County of Lancaster v. State Board of Equalization & Assessment ---------- 497

23. On review the question concerning the issues before the State Board of Equalization and Assessment

is not the adequacy of the original notification but the fairness of the whole procedure. County of Lancaster v. State Board of Equalization & Assessment ---------- 497

24. Taxes on all tangible property and franchises are to be levied by valuation uniformly and proportionately. Grainger Brothers Co. v. Board of Equalization ---------- 571

25. The rule of uniformity applies to both the rate of taxation and the valuation of property for tax-raising purposes. Grainger Brothers Co. v. Board of Equalization ---------- 571

26. When a study of sales assessment ratios is shown to be statistically reliable, it is entitled to probative value. Grainger Brothers Co. v. Board of Equalization ---------- 571

27. Under the Constitution of Nebraska, Article VIII, section 1, business inventories and real estate are in the same class for taxation purposes, and properties within the same class are required to be valued and assessed uniformly and proportionately in order that equalization obtain. Grainger Brothers Co. v. Board of Equalization ---------- 571

28. An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to the Supreme Court it is tried de novo. Grainger Brothers Co. v. Board of Equalization ---------- 571

29. The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Grainger Brothers Co. v. Board of Equalization ---------- 571

30. To secure a reduction in the assessed value of tangible property it must be demonstrated by evidence that its value has not been fairly and proportionately equalized, and is a result of arbitrary or unlawful action. The evidence must be such as to indicate the exercise of arbitrary action or the failure of plain legal duty, and not a mere error in judgment. Grainger Brothers Co. v. Board of Equalization ---------- 571

31. Where the county assessor does not act upon his own information, or does not make a personal inspection of the property, any presumption as to the

validity of the official assessment does not obtain. Grainger Brothers Co. v. Board of Equalization ---- 571
32. Scope and effect of presumption that taxing officials performed their duty stated. Grainger Brothers Co. v. Board of Equalization ---------- 571

Telecommunications.
1. Interconnecting facilities which carry television signals betwen studios and transmitters are used in interstate communication and are not subject to the jurisdiction of the State Railway Commission. Hamilton County Tel. Co. v. Northwestern Bell Tel. Co. ---------- 1
2. A telephone toll line serves a "territory" and the extent of the territory served is a question of fact. Northwestern Bell Tel. Co. v. Consolidated Tel. Co. 268
3. Extended area telephone service is exchange service and not toll service. Northwestern Bell Tel. Co. v. Consolidated Tel. Co. ---------- 268
4. The object and purpose of 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. Northwestern Bell Tel. Co. v. Consolidated Tel. Co. ---------- 268
5. The invasion by a telephone company of the territory of another telephone company, either in service or construction, was intended to be prohibited unless the invading company first applied for and received a certificate of convenience and necessity. Northwestern Bell Tel. Co. v. Consolidated Tel. Co. 268
6. Duplicate lines of transportation by competing common carriers are ordinarily incompatible with public interest. Such a competing line will be authorized only for compelling reasons. Northwestern Bell Tel. Co. v. Consolidated Tel. Co. ---------- 268

Tender.
Tender is not a prerequisite to a suit for specific performance of a contract for the sale of real estate where the owner of the land repudiates the transaction. Musser v. Zurcher ---------- 882

Torts.
The law of the place of wrong governs the amount of recovery for wrongful death, as well as the right to recover. Any limitation upon the amount imposed

by the law of the place of wrong will be applicable to determine the maximum amount recoverable elsewhere. Lorenzen v. Continental Baking Co. -- 23

Trial.

1. Where reasonable minds may draw different conclusions as to whether or not acts of negligence charged have been proved, the case must be submitted to the jury for decision. Lorenzen v. Continental Baking Co. ---------- 23
   Countryman v. Ronspies ---------- 76
2. Negligence is a question of fact and may be proved by circumstantial evidence. Where the facts and circumstances proved, together with the inferences that may be legitimately drawn therefrom, indicate with reasonable certainty the commission of the negligent act charged, the issue is for the jury. Lorenzen v. Continental Baking Co. ---------- 23
3. Under the law of Iowa, where it appears that a verdict was prompted by passion and prejudice or other ulterior influence, or the jury disregarded the evidence or the court's instructions, or the verdict appears unconscionable or clearly not warranted by the record, it is the duty of the appellate court to set aside the verdict. Lorenzen v. Continental Baking Co. ---------- 23
4. Rule for consideration of motion for dismissal or in the alternative for a directed verdict stated. Costello v. Simon ---------- 35
5. Where the facts adduced to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law, and not submit it to a jury. Costello v. Simon -------- 35
6. Rule for consideration of motion for directed verdict stated. Countryman v. Ronspies ---------- 76
   Lang v. Kerr ---------- 106
   Popken v. Farmers Mutual Home Ins. Co. -------- 250
   Mills v. Bauer ---------- 411
7. A party may not proceed with trial without objection and speculate on the outcome of the jury's verdict and, if unfavorable, obtain a reversal on a ground upon which he might have but did not move for a mistrial at the time. Countryman v. Ronspies 76
8. Findings of fact must rest on a preponderance of evidence, the verity of which has been carefully and legally tested. The relationship of parent and

child should not be severed or disturbed unless the facts justify it. Goodman v. Goodman ------- 83

9. A verdict of a jury in a law action based upon conflicting evidence will not be disturbed on appeal unless clearly wrong. Lang v. Kerr ---------- 106
Bauerle v. Frosh ---------- 170
Holiday Mobile Homes Resorts, Inc. v. Frosh ------ 174
McGerr v. Beals ---------- 767

10. In determining whether or not there was error in the use of the phrase "the proximate cause" in one instruction, and "a proximate cause" in other instructions, the true meaning will be determined from a consideration of all that is said on the subject. Lang v. Kerr ---------- 106

11. It is within the discretion of the district court to take testimony orally for the determination of issues of fact arising upon motions, and not a right of either party to compel the adduction of such testimony. Erdman v. National Indemnity Co. ------ 133

12. 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. Bauerle v. Frosh 170

13. While it is an objective in discovery proceedings to eliminate surprise in the trial of the issues of a case, it is not its purpose to strip an adversary of the means of insuring truth in the trial of a contested case except where it is shown that the demands of justice are paramount thereto. A contested law suit remains an adversary proceeding. Haarhues v. Gordon ---------- 189

14. In reviewing the evidence where a jury has returned a verdict for the defendant, the defendant must have the benefit of any and all reasonable inferences deducible from the proof. Vacanti v. Montes 232

15. Whether or not an infant between 9 and 10 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law. Vacanti v. Montes 232

16. All parts of instructions must be considered in determining whether there was error in any part. Vacanti v. Montes ---------- 232

17. One may not complain of alleged misconduct of adverse counsel if, with knowledge of such alleged misconduct, he does not ask for a mistrial but

consents to take the chances of a favorable verdict. Vacanti v. Montes ---------- 232

18. Circumstantial evidence is insufficient to warrant a recovery in a civil case unless the circumstances proved are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom. Popken v. Farmers Mutual Home Ins. Co. ---------- 250

19. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the parties producing it, upon whom the burden of proof is imposed. Popken v. Farmers Mutual Home Ins. Co. ---------- 250

20. Where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover. Popken v. Farmers Mutual Home Ins. Co. ---------- 250

21. Where there is a genuine issue of material fact it is error to render a summary judgment, but where the only question involved is one of law, summary judgment is proper. Bobbitt v. Order of United Commercial Travelers ---------- 285

22. In a jury case where different minds may draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn therefrom, the question is one of law for the court. LeMieux v. Sanderson ---------- 311

23. If different instructions are given on the same subject, or there be separate paragraphs in one instruction, they should be considered together, and if they fairly submit the case, the judgment will not be reversed for the indefiniteness or ambiguity. LeMieux v. Sanderson ---------- 311

24. In this state the strict rule of cross-examination has been adopted. It is not ordinarily permissible to cross-examine a witness upon a matter not related to his testimony-in-chief simply because such matter is relevant to the issues. Scofield v. Haskell ---- 324

25. Cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of witnesses. Scofield v. Haskell ---------- 324
26. Where testimony is given by a witness on direct examination from which an inference of fact arises favorable to the party producing him, anything tending to rebut that inference is admissible on cross-examination, and the opposing party is entitled to pursue that line of cross-examination as a matter of right. Scofield v. Haskell ---------- 324
27. Where plaintiff offers evidence of his physical condition, he thereby waives the right conferred by statute as to any physician who shall have attended him, even though such physician attended him before the time fixed by plaintiff's testimony as the beginning of his disability. Scofield v. Haskell ---- 324
28. An instruction which fails to state correctly all of the items and elements necessary to be considered by the jury in assessing damages is erroneous. Hunt v. Chicago, B. & Q. R.R. Co. ---------- 375
29. A jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence. Satterfield v. Watland ---------- 386
30. Audits or statements of account prepared for use at the trial are not ordinarily admissible, but the trial court may, in the exercise of its judicial discretion, admit them when they are merely abstracts, tabulations, or summaries of other evidence capable of calculation which has been properly admitted. Durand, Jackson & Associates, Inc. v. Nasr ------ 409
31. The negligence of a person charged with responsibility for an accident cannot be inferred from a presumption of due care on the part of a person killed in an accident. A presumption of due care in the performance of duty attends a person so charged as well as a person so killed. Mills v. Bauer -------- 411
32. Negligence is not presumed; the mere happening of an accident does not prove negligence. Mills v. Bauer ---------- 411
33. The burden of proving negligence is on the party alleging it. Mills v. Bauer ---------- 411
34. The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured. Mills v. Bauer ---- 411
35. If defendant pleads that the plaintiff was guilty

of contributory negligence, the burden is upon him to prove that defense and this burden does not shift during the trial. However, if the evidence adduced by the plaintiff tends to prove that issue, the defendant is entitled to receive the benefit thereof. Mills v. Bauer ---------- 411

36. Where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover. Mills v. Bauer ---------- 411

37. 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. Callen v. Knopp ---------- 421

38. Rule for consideration of motion for judgment on the pleadings stated. Wittler v. Baumgartner -- 446

39. The making of a motion for judgment on the pleadings is not a waiver of the right to trial of an issue of fact. Such a motion is available where the pleadings present only a question of law. Wittler v. Baumgartner ---------- 446

40. A misstatement by an insured promptly or seasonably corrected or withdrawn prior to trial of the action against the insured does not constitute a breach of the cooperation clause. Iowa Mut. Ins. Co. v. Meckna ---------- 516

41. The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Grainger Brothers Co. v. Board of Equalization ---------- 571

42. To secure a reduction in the assessed value of tangible property it must be demonstrated by evidence that its value has not been fairly and proportionately equalized, and is a result of arbitrary or unlawful action. The evidence must be such as to indicate the exercise of arbitrary action or the failure of plain legal duty, and not a mere error in judgment. Grainger Brothers Co. v. Board of Equalization ---------- 571

43. Where the county assessor does not act upon his own information, or does not make a personal inspection of the property, any presumption as to the

validity of the official assessment does not obtain. Grainger Brothers Co. v. Board of Equalization ---- 571
44. Scope and effect of presumption that taxing officials performed their duty stated. Grainger Brothers Co. v. Board of Equalization ---------- 571
45. Where a party tenders an instruction to the court, he may not after an adverse verdict complain of its submission to the jury. Kaufman v. Tripple -- 593
46. Counsel who is not conducting the questioning has no standing to ask that a nonresponsive answer be stricken upon the sole ground of lack of responsiveness. Cardenas v. Peterson Bean Co. ---------- 605
47. A voluntary statement by a witness, not responsive to a question, should be stricken. Cardenas v. Peterson Bean Co. ---------- 605
48. A reason for an objection will not be considered where it is not stated. Cardenas v. Peterson Bean Co. 605
49. Trial courts have broad discretion in the general conduct of a trial, including sanctions involving discovery procedures. Cardenas v. Peterson Bean Co. ---------- 605
50. The trial court has discretionary power to exclude the testimony of a witness whose identity is deliberately withheld in discovery under proper circumstances. The trial court would also have discretion to impose other sanctions. Cardenas v. Peterson Bean Co. ---------- 605
51. Objection to the introduction of testimony of a witness whose name has not been properly disclosed in answer to an interrogatory must ordinarily be made as soon as the applicability of the objection is known or could reasonably have been known to the opponent. Cardenas v. Peterson Bean Co. ---- 605
52. Instructions should be read and construed together, and, if as a whole they state the law correctly, they will be held sufficient, although one or more of them considered separately may be subject to just criticism. McKinney v. County of Cass ---------- 685
53. Where an instruction, although erroneous, is not prejudicially so and cannot, by any course of logical reasoning, be deemed to have resulted in disadvantage to the complaining party, it is not legal cause or reason for granting a new trial. McKinney v. County of Cass ---------- 685
54. It is reversible error for the trial court to include in its instructions to the jury allegations of fact found in the pleadings, but which have not been

supported by any evidence. McKinney v. County of Cass ---------- 685
55. It is within the sound discretion of the trial court to permit a party in a civil case to withdraw his waiver of a right to jury trial if the application to do so is timely made and the waiver has not been acted upon to the prejudice of any party. McKinney v. County of Cass ---------- 685
56. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. McKinney v. County of Cass ---- 685
57. Where the evidence is irreconcilable and in direct conflict, the Supreme Court will consider that the trial court had the opportunity of observing the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other. Humann v. Humann ---------- 719
58. A verdict based upon speculation or conjecture cannot be sustained. Farmer v. S.M.S. Trucking Co. 779
59. When plaintiff as a matter of law would not have been entitled to a verdict had the cause been submitted upon his theory of the case, failure to submit such theory is without prejudice. Farmer v. S.M.S. Trucking Co. ---------- 779
60. Trial rulings permitting or excluding courtroom experiments will not be disturbed on appeal except for abuse of discretion. Otte v. Taylor ---------- 795
61. In a negligence action an instruction that an actor in certain circumstances is not required to anticipate negligence by another does not inject into the case an issue of a stranger's negligence. It defines the knowledge which the actor is required to have in relation to the risk involved. Otte v. Taylor ------ 795
62. In instructing a jury, the court is not required to define on its own motion language commonly used and generally understood. Otte v. Taylor -------- 795
63. Whether a party may withdraw his rest and introduce further testimony rests within the sound discretion of the trial court. Monson v. Neidig ------ 818
64. Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Younker v. Peter Kiewit Sons Co. ---------- 835

65. It is the duty of the trial court to properly instruct, on its own motion, on the issues raised by the pleadings and the evidence. Younker v. Peter Kiewit Sons Co. ---------- 835
66. Instructions must be considered as a whole, and if, when construed together they properly state the law, they are sufficient and error cannot be predicated thereon. Younker v. Peter Kiewit Sons Co. -- 835
67. The judgment of the trial court in a law action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. Parsons Constr. Co. v. State ---- 839
68. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it. Parsons Constr. Co. v. State ---------- 839
69. Where it is clear that a verdict is excessive but there is no method by which the court can rationally ascertain the extent of the excess, a remittitur cannot be properly required. Duplex Manuf. Co. v. Atlas Leasing Corp. ---------- 851
70. The failure of the trial court to instruct on the duty of a bicyclist to maintain a proper lookout and control was reversible error. Sacca v. Marshall ---- 855
71. Where there is evidence of violations of the rules of the road by a bicyclist it is the duty of the trial court to instruct with reference thereto. Sacca v. Marshall ---------- 855
72. An instruction relating to the duty to give an appropriate signal before turning a vehicle from a direct course upon a highway is incomplete if it fails to instruct as to the signals which are authorized and required. Sacca v. Marshall ---------- 855
73. Instruction given by the trial court setting forth the defendant's burden of proof upon a plea of contributory negligence was free from error. Sacca v. Marshall ---------- 855
74. Where a plaintiff, without reasonable explanation, testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded. Contradictory statements of witnesses as

distinguished from parties are not subject to the foregoing rule. Sacca v. Marshall ---------- 855

Trusts.

It is only where property is dedicated or donated for some specific use, conveyed with some restriction or condition, or where payment is provided by assessment on property benefited by the contemplated use, that a different use may be enjoined. Carlson v. City of Fremont ---------- 262

Usury.

1. In an action to recover the valid principal amount due on a usurious contract, the defendant is entitled to recover costs. Central Constr. Co. v. Blanchard 62
2. Where the defense of usury is established, the plaintiff is not entitled to interest on the judgment awarded him. Central Constr. Co. v. Blanchard ---- 62

Vendor and Purchaser.

1. Under an executory contract for the sale of real estate where the purchaser is given no right to the possession until a specified time, he acquires no interest in the growing crops which mature and are harvested before he is entitled to possession. Dixon v. O'Connor ---------- 427
2. Under an executory contract for the sale of real estate where a purchaser is entitled to possession, he is not entitled to the rentals accruing prior to the time he becomes entitled to possession. Dixon v. O'Connor ---------- 427
3. When land, or any interest therein, is the subject matter of an agreement, the power of a court of equity to enforce specific performance is beyond question. Russell v. Western Nebraska Rest Home, Inc. ---------- 728
4. The general rule is that from the time when a contract of sale of land should be performed the land is in equity the property of the vendee held by the vendor in trust for him, and the purchase price is the property of the vendor held in trust for him by the vendee, and that upon specific performance the vendor is liable to account for the rents and profits and the vendee for the interest on the purchase price. Russell v. Western Nebraska Rest Home, Inc. 728
5. A vendor, sued for specific performance, who has retained possession and received the rents and

profits of the land, is liable for taxes accruing between the time of the contract and the trial. Russell v. Western Nebraska Rest Home, Inc. -------- 728

6. The fact that land increases in value after an option is given is no reason to deny specific performance. Musser v. Zurcher ---------- 882

Venue.

Unless an abuse of discretion is shown, the Supreme Court will not disturb the ruling of the trial court upon a motion for a change of venue. Satterfield v. Watland ---------- 386

Waters.

1. The common law fixes the reciprocal rights and duties of riparian proprietors, except as it has been modified by Constitution or statute. Wasserburger v. Coffee ---------- 149
2. A right to the use of waters under the doctrine of prior appropriation is superior to a competitive riparian right in land which was part of the public domain prior to April 4, 1895, the effective date of the irrigation act of 1895. Wasserburger v. Coffee 149
3. Riparian water rights were not abolished by Article XV, sections 4 to 6, Constitution of Nebraska. Wasserburger v. Coffee ---------- 149
4. At common law riparian land consists of a continuous parcel on a watercourse or lake and in one possession. Wasserburger v. Coffee ---------- 149
5. In respect to competing water claims by an appropriator and by a riparian proprietor, land is considered riparian if by common law standards it was such immediately prior to April 4, 1895, and if it has not since lost its riparian status by severance. Wasserburger v. Coffee ---------- 149
6. An appropriator of water in a watercourse who, in using water pursuant to a statutory permit, intentionally causes substantial harm to a riparian proprietor, through invasion of the proprietor's riparian interest in the use of the waters, is liable to the proprietor in an action for damages if, but only if, the harmful use is unreasonable in respect to the riparian proprietor. Wasserburger v. Coffee ------ 149
7. An appropriator's use of water is unreasonable with respect to a competing riparian right unless the utility of the use outweighs the gravity of the harm. Wasserburger v. Coffee ---------- 149

8. In evaluation of the utility of an appropriation causing intentional harm to the riparian proprietor, the following factors are to be considered: (1) The social value which the law attaches to the use for which the appropriation is made; (2) the priority date of the appropriation; and (3) the impracticability of preventing or avoiding the harm. Wasserburger v. Coffee ---------- 149
9. In evaluation of the gravity of intentional harm to the riparian proprietor through the appropriator's use of the water, the following factors are important: (1) The extent of the harm involved; (2) the social value which the law attaches to the riparian use; (3) the time of initiation of the riparian use; (4) the suitability of the riparian use to the watercourse; and (5) the burden on the riparian proprietor of avoiding the harm. Wasserburger v. Coffee ---- 149

Witnesses.

1. Written statements of witnesses in the possession of an adversary are not obtainable as a matter of right under discovery statute. Haarhues v. Gordon 189
2. A court is not justified in ordering production of statements by witnesses simply on the theory that facts sought are relevant and not privileged, or merely to help counsel to prepare himself to examine witnesses and to make certain that nothing is overlooked. Haarhues v. Gordon ---------- 189
3. Special circumstances are necessary to the establishment of good cause to sustain the entry of an order requiring a party to produce statements taken from witnesses. Haarhues v. Gordon ---------- 189
4. A court is not justified in ordering a litigant to produce the statements of witnesses which he has procured in preparing for trial upon his adversary's mere surmise or suspicion that he might find impeaching material in the statements. Haarhues v. Gordon ---------- 189
5. Good cause for production of statements of witnesses for the benefit of an adversary ordinarily is not shown if it appears that the witnesses are known and available to the party moving for their production. Haarhues v. Gordon ---------- 189
6. Good cause requiring the production of a written statement by a witness is ordinarily not shown because of a long lapse of time since the taking of the statement where it appears that statements

were taken at substantially the same time by both parties and the memory of the witness can be refreshed from one statement as well as the other. Haarhues v. Gordon ---------- 189

7. Where a statement of a witness contains specific facts available to him but not to the witnesses of the other party, which are essential to the establishment of his case, an order for production of the statement is usually warranted in the interest of justice. Haarhues v. Gordon ---------- 189

8. Where a witness is unavailable or hostile, a statement made by such witness may be required to be produced where it is shown that there is a reasonable probability of materiality or that it may afford clues to relevant evidence essential to the establishment of the cause of action. Haarhues v. Gordon 189

9. Showing of good cause was not made for production of statement where another statement was taken 3 days later and was available. Haarhues v. Gordon 189

10. The possibility that a witness might make two statements in different language, or restrict or extend them in different degrees, does not constitute a showing of good cause. A holding to the contrary would have the effect of requiring production of the statement in every case. Haarhues v. Gordon ---- 189

11. Where plaintiff offers evidence of his physical condition, he thereby waives the right conferred by statute as to any physician who shall have attended him, even though such physician attended him before the time fixed by plaintiff's testimony as the beginning of his disability. Scofield v. Haskell -- 324

12. The trial court has discretionary power to exclude the testimony of a witness whose identity is deliberately withheld in discovery under proper circumstances. The trial court would also have discretion to impose other sanctions. Cardenas v. Peterson Bean Co. ---------- 605

13. Objection to the introduction of testimony of a witness whose name has not been properly disclosed in answer to an interrogatory must ordinarily be made as soon as the applicability of the objection is known or could reasonably have been known to the opponent. Cardenas v. Peterson Bean Co. ---------- 605

14. A person having a direct legal interest in the result of a civil action or proceeding, where the adverse party is a representative of a deceased

person, is incompetent under the dead man's statute to testify to facts from which inferences of delivery and possession of a note may be drawn, such note being the basis of claim against the estate of the deceased person. Thompson v. De Voe ---------- 654

Workmen's Compensation.

1. A workman is entitled to recover compensation for neurosis if it is a proximate result of his injury and results in disability. Cardenas v. Peterson Bean Co. ---------- 605
2. Except for scheduled member losses, workmen's compensation awards are not made for injury as such, but for inability to perform or obtain work produced by such injury. Cardenas v. Peterson Bean Co. ---------- 605
3. Total disability for workmen's compensation purposes is defined. Brockhaus v. L. E. Ball Constr. Co. 737
4. An employee may be totally disabled for all practical purposes and yet be able to obtain trivial occasional employment under rare conditions at small remuneration. The claimant's status in such respect remains unaffected thereby unless he is able to obtain, hold, or do any substantial amount of remunerative work, either in his previous or any other established field of employment for which he is fitted. Brockhaus v. L. E. Ball Constr. Co. ---------- 737
5. Under the Workmen's Compensation Act plaintiff sustained a permanent partial disability from organic heart disease and a cardiac arrest. Arlauskas v. Western Electric Co. ---------- 790

Zoning.

1. The validity of a zoning ordinance must be determined by an examination of the facts presented in the particular case. Whether a zoning ordinance is arbitrary and unreasonable, or illegal, must be determined by the evidence of the special surrounding conditions and circumstances. Jamson v. City of Grand Island ---------- 438
2. The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary. The burden is on the party who attacks the validity of a zoning ordinance to prove facts which establish its invalidity. Jamson v. City of Grand Island ---------- 438
3. Where the validity of the legislative classification

for zoning purposes is fairly debatable, the legislative judgment must be allowed to control. Unless an abuse of discretion has been clearly shown, it is not the province of the court to interfere. Jamson v. City of Grand Island ---------- 438