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STATE OF NEBRASKA, APPELLANT, V. ERWIN C. SIMANTS ET AL., APPELLEES.

155 N. W. 2d 788

Filed January 19, 1968. No. 36663.

1. **Statutes: Criminal Law.** While a penal statute must be expressed in clear language, it is not necessary that it be so written as to be beyond the mere possibility of more than one construction.
2. **Statutes, Construction of.** In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.
3. ———. A penal statute is required to be construed strictly, but should be given a sensible construction, and general terms therein should be so limited in their construction as not to lead to injustice, oppression, or an absurd consequence.
4. ———. A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of words of a statute in the connection with which they are used and in the light of the mischief to be remedied; the rule requiring strict construction of a penal statute is not violated by giving to the words their full meaning in the connection in which they are employed.
5. ———. It is the duty of this court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done.
6. **Statutes: Constitutional Law.** Section 28-477, R. S. Supp., 1965, is not unconstitutional by reason of being vague and uncertain, an unlawful delegation of legislative power, or lacking in uniformity.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Reversed and remanded.

Walter R. Mullikin, for appellant.

Baskins, Baskins & Schneider, for appellees.

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

NEWTON, J.

In this action, defendants were charged with con-

tributing to the delinquency of a 14-year-old female child. On conviction in the county court, defendants appealed to the district court. Demurrer was filed to the complaint on the ground that section 28-477, R. S. Supp., 1965, is unconstitutional in that it is "vague and uncertain" and constitutes an unlawful delegation of legislative power. The demurrer was sustained on both counts, the complaint dismissed, and appeal taken to this court by the county attorney.

Section 28-477, R. S. Supp., 1965, provides in part: "Any person who by any act, encourages, causes, or contributes to the delinquency, neglect, or need for special supervision, of a child under eighteen years of age, so that such child becomes, or will tend to become, a delinquent or neglected child, or a child in need of special supervision as defined by section 43-201, shall be deemed guilty of a misdemeanor." Section 43-201, R. S. Supp., 1965, referred to in the statute last-above cited defines the terms neglected child, delinquent child, and child in need of special supervision as follows: "* * * (3) Neglected child shall mean any child under the age of eighteen years (a) who is abandoned by his parent, guardian, or custodian; (b) who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian; (c) whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child; (d) whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the child; or (e) who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such child;

"(4) Delinquent child shall mean any child under the age of eighteen years who has violated any law of the state or any city or village ordinance;

"(5) A child in need of special supervision shall mean any child under the age of eighteen years (a) who, by

reason of being wayward or habitually disobedient, is uncontrolled by his parent, guardian, or custodian; (b) who is habitually truant from school or home; or (c) who deports himself so as to injure or endanger seriously the morals or health of himself or others; * * *."

Defendants contend that the phrase "Any person who by *any act,* encourages, causes, or contributes to the delinquency," etc. (emphasis supplied) is so all inclusive as to render the statute so vague and indefinite that it must be held to violate the due process clauses contained in the Constitutions of the State of Nebraska and of the United States. Defendants state that under this statute, a minor could be prosecuted for contributing to the delinquency of another minor; and that it proscribes not only intentional acts directed to causing or contributing to the delinquency of a minor, but also acts not so intended. In this respect they refer primarily to examples set by adults on the theory that one who smokes, drinks alcoholic liquors, or engages in other activities of similar nature permissible for adults, but frowned upon for minors, could, when occurring in the presence of minors, set a bad example and thereby be said to encourage delinquency within the meaning of the statute.

Certainly one minor may contribute to the delinquency of another. Cannot a 17-year-old boy, as well as an adult, contribute to the delinquency of a 14-year-old girl?

The defendants are, in effect, contending that the statutory wording must be accepted in a strictly literal sense and that as a consequence, an individual committing a perfectly innocent act could conceivably be in violation of the statute. This is not correct. "While a penal statute must be expressed in clear language, it is not necessary that it be so written as to be beyond the mere possibility of more than one construction." State v. Levell, 181 Neb. 401, 149 N. W. 2d 46. "In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal

construction which will best effect its purpose rather than one which will refeat it." Rebman v. School Dist. No. 1, 178 Neb. 313, 133 N. W. 2d 384. A penal statute is required to be construed strictly, but should be given a sensible construction, and general terms therein should be so limited in their construction as not to lead to injustice, oppression, or an absurd consequence. Macomber v. State, 137 Neb. 882, 291 N. W. 674. See, also, State v. Tatreau, 176 Neb. 381, 126 N. W. 2d 157. A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of words of a statute in the connection with which they are used and in the light of the mischief to be remedied; the rule requiring strict construction of a penal statute is not violated by giving to the words their full meaning in the connection in which they are employed. State v. Buttner, 180 Neb. 529, 143 N. W. 2d 907. "It is the duty of this court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done." Heywood v. Brainard, 181 Neb. 294, 147 N. W. 2d 772.

The reasonable, sensible construction of this statute and the one which appears obvious complies with the legislative intention in that it refers only to conduct committed with reference to or directed toward a child or performed upon or against a child. When viewed in this light, it is apparent that defendants' objections are without foundation.

Defendants further state that since the statute in question defines a delinquent child as one who has violated any law of the state *or any city or village ordinance* that it constitutes an unlawful delegation of legislative authority and violates constitutional requirements of uniformity in application. It is true that the ordinances in the various cities and villages in Nebraska may, and undoubtedly do, vary in some respects and that an act which may be forbidden in one city may not be forbidden outside the city limits or in another city. This, however, is not the point at issue. Section 43-201, R. S. Supp.,

1965, is not a penal statute, but is one created for the protection of minors. The fact that a child may violate a law or ordinance and thus be considered a delinquent has only an indirect bearing on the proposition here presented. One prosecuted under section 28-477, R. S. Supp., 1965, is not prosecuted because a child violated a city ordinance or a state law, but rather because such offender encouraged, caused, or contributed toward the child's having done so. In other words, he is prosecuted because he, in effect, has encouraged or caused the child to regard the constituted authorities with contempt and encouraged or caused him to willfully perform an unlawful act. One may well be in violation of the statute even though the child does not actually violate any law or ordinance if such violation has been encouraged. There is, therefore, no unlawful delegation of legislative authority and the statute is uniform in its application.

It may be well to ascertain how statutes of this nature are generally regarded. It appears to be generally recognized that such statutes necessarily have a broad application. There is such a multitude of acts of this kind which can reasonably be expected to encourage, cause, or contribute to the delinquency of minors that it is, from a practical standpoint, well-nigh impossible to specify and forbid each particular act. The following language may be found in 31 Am. Jur., Juvenile Courts, Etc., § 95, p. 345: "It is broadly held under most statutes that any acts of commission or omission causing or tending to cause juvenile delinquency constitute the offense of contributing to delinquency. But it is impossible to lay down any rule as to what will or will not invariably tend to produce delinquency or dependency in minors." Notwithstanding the necessity of couching such statutes in general terms, they are generally upheld. In Loveland v. State of Arizona, 53 Ariz. 131, 86 P. 2d 942, the court upheld a statute which forbade one "* * * by *any act,* cause, encourage or contribute to the

dependency or delinquency of a child, * * *." (Emphasis supplied.) In Anderson v. State (Alaska), 384 P. 2d 669, the court dealt with a statute which provided: "Any person who shall commit *any act,* or omit the performance of *any duty,* which act or omission causes or tends to cause, encourage or contribute to the delinquency of any child * * *." (Emphasis supplied.) A delinquent child was there defined as: "* * * any child under the age of eighteen years who violates any law of the United States, or of the Territory, or *any city or town ordinance;* * * *." (Emphasis supplied.) The act was held to be constitutional. In State v. McKinley, 53 N. M. 106, 202 P. 2d 964, the statute dealt with provided: "Any person who shall commit *any act* or omit the performance of *any duty,* which act or omission causes, or tends to cause or encourage the delinquency * * *" shall be guilty of a felony. (Emphasis supplied.) The definition of a juvenile delinquent included one under the age of 18 years: "Who has violated any law of the state, *or any ordinance or regulation of a political subdivision thereof.*" (Emphasis supplied.) The court upheld the constitutionality of the statute. In State v. Montalbo, 33 N. J. Super. 462, 110 A. 2d 572, the court had before it a statute which provided that: "A parent, legal guardian or person having the custody or control of a child * * * or any other person who by *any willful act* encourages, causes or contributes to a child's delinquency, is guilty of a misdemeanor." (Emphasis supplied.) The New Jersey statutes further provided: "Juvenile delinquency is hereby defined as the commission by a child under 18 years of age (1) of any act which when committed by a person of the age of 18 years or over would constitute: * * * b. The violation of any penal law *or municipal ordinance* * * *." (Emphasis supplied.) The court upheld the act as constitutional. It will be noted that the cases last-above cited are very similar to the Nebraska act in that they use the terms "*any act* which encourages, causes, or contributes to the

delinquency of a minor" (emphasis supplied) and also include in the definition of a juvenile delinquent, a child under the age of 18 years who violates a *city or municipal ordinance*. For other cases not quite so directly in point but along the same general line, see, McDonald v. Commonwealth (Ky.), 331 S. W. 2d 716; People v. Beaugez, 232 Cal. App. 2d 650, 43 Cal. Rptr. 28; Brockmueller v. State, 86 Ariz. 82, 340 P. 2d 992; Sissom v. State, 210 Tenn. 556, 360 S. W. 2d 227; Millhollan v. State, 221 Ga. 165, 143 S. E. 2d 730; Fernandez v. Klinger, 346 F. 2d 210; State v. Evans, 73 Idaho 50, 245 P. 2d 788; State v. Barone (Fla.), 124 So. 2d 490.

In view of the foregoing, we find the statute first above-mentioned to be constitutional and that the district court erred in ruling to the contrary thus requiring a reversal of the judgment and a remand of the cause.

REVERSED AND REMANDED.

McCOWN, J., dissenting.

I respectfully dissent. The problem posed is accented dramatically by the transcript in this case. A thorough and complete examination of that transcript does not reveal what act or acts were done by the defendants. The complaint itself alleges only that on a given date, and within the county, the defendants "did then and there contribute to the delinquency" of a named female child under 18, "so that the child will tend to become a delinquent child."

The district court specifically found that the statute was vague and uncertain, and also constitutes an unlawful delegation of legislative power. The demurrer of the defendants was sustained for the reason that section 28-477, R. S. Supp., 1965, was unconstitutional.

The majority opinion discusses only the question of whether the statute itself is unconstitutional since that issue was the only one directly presented and argued, but the majority opinion reverses the judgment of the district court sustaining the demurrer. Impliedly or directly, the majority opinion, therefore, holds that it is

sufficient if an information or a complaint charges the crime of contributing to the delinquency of a minor in the statutory language. It would seem to be well established that in this state all public offenses are statutory and no act is criminal unless the Legislature has in express terms declared it to be so. "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." State v. Coomes, 170 Neb. 298, 102 N. W. 2d 454. State v. Buttner, 180 Neb. 529, 143 N. W. 2d 907, quoted the above language and also the following: "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."

The majority opinion quotes with approval 31 Am. Jur., Juvenile Courts, Etc., § 95, p. 345. The same authority states: "In such a prosecution (contributing to delinquency of a minor) the indictment, information, or complaint should allege the particular facts, acts, words, conduct, or omissions which it is contended causes the accused to be guilty of the offense. Thus, it has been held that in order to charge a defendant with contributing to the delinquency of a minor, an indictment or information must not only allege generally in the language of the statute that he committed such a crime but it must further allege a specific act or conduct on his part which directly tended to render the minor delinquent." § 97, p. 346.

Even though the general statute itself be deemed constitutional, it is completely impossible for any court to determine whether an act of commission or omission does or does not constitute the offense of contributing to delinquency if the court does not even know what par-

ticular act or acts were done or omitted.

It should be noted also that section 28-477, R. S. Supp., 1965, does not require any element of knowledge or intent, and any person may be charged with the offense, regardless of age. That statute also specifically ties the crime to the sole and specific definition of delinquent child set out in section 43-201, R. S. Supp., 1965. Most citizens would be amazed and shocked to learn that section 43-201, R. S. Supp., 1965, defines a delinquent child as: "* * * any child under the age of eighteen years who has violated any law of the state or any city or village ordinance." This change in definition occurred in 1965. That definition does not even differentiate between civil or criminal statutes of the state nor between ordinances of cities or villages civil or criminal in nature. Neither is it limited in any way to statutes or ordinances requiring criminal intent, or guilty or wrongful purpose, nor does it require any part of the old concept of mens rea. The same is true of section 28-477, R. S. Supp., 1965. On its face, therefore, the statute now makes criminal "any act," regardless of intent or purpose, which "encourages, causes, or contributes to" the violation of "any law of the state or any city or village ordinance" by any child under the age of 18 years.

Under the facts and circumstances here, even though the majority opinion holds the statute itself constitutional, the judgment should nevertheless be affirmed on the ground that a complaint or information in such a case is not sufficient unless it alleges the particular facts, acts, words, conduct, or omissions on the part of the defendant which cause him to be guilty of the offense. Anything less does not approach the most basic concepts of due process nor permit a proper judicial determination of whether or not an information or complaint is sufficient.

The foregoing only emphasizes the basic issue of constitutionality. Traditionally such statutes have been aimed at the protection of minors in the area of morals

and health. There is substantial authority to support the position that generally such statutes dealing with contributing to the delinquency of minors in the traditional areas of morals and health are constitutional. There is also authority to support the opposite view. For example, see, State v. Vallery, 212 La. 1095, 34 So. 2d 329 (1948). A change of one word in the act following that decision was held sufficient to support constitutionality. State v. Fulmer, 250 La. 29, 193 So. 2d 774 (1967).

Various states have taken varied approaches to the problem. Until 1965, Nebraska statutes were reasonably within the pattern. The amendments to section 28-477, R. R. S. 1943, and section 43-201, R. S. Supp., 1963, both made in 1965, however, introduced the problem which exists here. Nebraska's statutes now stand virtually alone in defining a delinquent child specifically and solely as one "who has violated any law of the state or any city or village ordinance." This is the only criterion for determining delinquency. This applies both to juvenile proceedings under section 43-201, R. S. Supp., 1965, and also to criminal proceedings for contributing to delinquency under section 28-477, R. S. Supp., 1965, by specific incorporation. It would seem crystal clear that such a broad and sweeping classification would be arbitrary, discriminatory, and unreasonable and would violate the equal protection clause as well as elementary due process. If any court were required to hold that one violation of a city or village curfew or parking ordinance by a minor was alone sufficient to classify the child as delinquent, remove him from the custody of his parents, and invoke the punitive action of the juvenile court, the consequent hue and cry would be fully justified. I do not believe the Legislature had any such intention.

I believe that subsection (4) of section 43-201, R. S. Supp., 1965, is so broad, general, and unreasonable as to be unconstitutional in itself. When directly attached by specific reference to section 28-477, R. S. Supp., 1965,

the constitutional problems are compounded. How could any court determine what act would tend to cause a child to violate any law of the state or any city or village ordinance? Such statutes go far beyond any traditional concepts.

As early as 1921 this court said: "Under the statute involved in this case, the person who causes or contributes to the delinquency of a child is made guilty of a misdemeanor. Prosecution upon that charge is clearly a criminal prosecution. It is not a proceeding to determine a status, but to establish guilt and inflict punishment. It is not such a proceeding as is within the general purview of the jurisdiction of a juvenile court, nor one in which special procedure or summary punishment can be logically justified." Swanson v. State, 105 Neb. 761, 181 N. W. 921. Incidentally, in that case, the charge specified the act done by the defendant.

Under the provisions of section 28-477, R. S. Supp., 1965, a minor might himself be guilty of contributing to the delinquency of another minor. It should be noted here also that the ages of the defendants in this case are not shown.

This court has said repeatedly that a criminal statute should operate uniformly throughout the jurisdiction. Where the only definition of delinquency includes the violation of any city or village ordinance, it is apparent on the face of the statute that some acts might contribute to the delinquency of a minor if done within a city or village while the same acts done outside the city limits or in another city or village, even in the same county, would not subject the actor to criminal responsibility under the statute.

This court in State ex rel. English v. Ruback, 135 Neb. 335, 281 N. W. 607, quoted the following: "Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible; but where the legislature declares an offense in words of no determinate

signification, or its language is so general and indefinite that it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal, the statute will be declared void for uncertainty. (Citing text.)

"The test to determine whether a statute defining an offense is void for uncertainty (1) is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. (Citing case.) (2) The dividing line between what is lawful and what is unlawful cannot be left to conjecture." See, also, Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322; Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888.

While I recognize that the moral welfare of children must be protected, constitutional imperatives require that no citizen should be held to answer charges based upon penal statutes whose mandates are so far-reaching, all-encompassing, arbitrary, and uncertain.

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

155 N. W. 2d 435

Filed January 19, 1968. No. 36672.

1. **Criminal Law: Evidence.** Intent is an essential element in the crime of shooting with intent to kill, wound, or maim and proof thereof is indispensable to sustain a conviction, but such intent is ordinarily inferable from the facts and circumstances.
2. ———: ———. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is competent evidence of that fact, and may, with slight corroborative circumstances, be sufficient to sustain a conviction.

3. **Trial.** Instructions must be considered as a whole in determining whether a particular instruction or the lack thereof is prejudicial.
4. **Criminal Law: Appeal and Error.** Where the punishment of a criminal offense is left to the discretion of a court within prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion. A substantial reason for the reduction of the sentence must be warranted by the evidence.
5. **Courts: Pleading.** When the transcript of the record of the examining magistrate shows that an accused has had or waived a preliminary examination, and it is contended that in fact no such examination was had or waived, the absence of such examination or waiver should be raised by plea in abatement.
6. ———: ———. Defects in procedure which might have been attacked by a motion to quash or a plea in abatement are waived when a defendant pleads to the general issue.
7. **Appeal and Error: Courts.** A claim of error on the ground of ineffective assistance of counsel must be supported by a record showing that counsel's assistance was so grossly inept as to shock the conscience of the court.

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

Charles I. Scudder, for appellant.

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

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

CARTER, J.

The defendant was convicted in the district court for Douglas County of the crime of shooting with intent to kill, wound, or maim. He has appealed to this court.

The complaining witness is Leslie Higgins, an entertainer. After getting off work on the early morning of December 25, 1966, he went to the Moss cafe in Omaha to pick up his girl friend who worked there. She had to work late and could not leave until 5 or 6 o'clock, a.m. While at the cafe Higgins met the defendant who attempted to sell him a pistol which Higgins did not

buy. Higgins walked from the Moss cafe to 2015 North Twenty-fourth Street, where, incidentally, defendant had a room. Defendant came to his place of residence where he joined with Higgins and Herman Williams in in a dice game. Defendant says Higgins dropped an extra dice accidentally and a quarrel ensued in which defendant claimed Higgins had cheated him out of his losses. Defendant drew the pistol and demanded his money back. Higgins left and defendant followed him out of the house and shot Higgins in the back as he walked up the street. Defendant asserts that he drew the pistol only to frighten Higgins into returning his money and that he fired into the air at the time he shot Higgins without any intention of hitting him. A police officer arrived on the scene shortly after the shooting and disarmed the defendant. There were witnesses at the scene of the shooting whose evidence was in some respects conflicting. Defendant admitted shooting Higgins, but contends that he had no intention of shooting him, his only intent being to frighten Higgins into paying back the money he had lost.

The evidence presented a jury question which it resolved against the defendant. The evidence was ample to sustain a conviction and defendant's motions for a directed verdict at the close of the State's evidence and at the close of all the evidence were properly overruled.

The defendant asserts error in the instructions, particularly instructions Nos. 7 and 8, which purport to define and explain malice and intent. We find no error in them. The defendant appears to claim that the instructions were erroneous in that they failed to inform the jury of the effect of an accidental shooting. But the instructions are replete with statements that the jury must find that defendant shot the prosecuting witness with intent to kill, wound, or maim. The jury was told in paragraph numbered 3 in instruction No. 6: "That the defendant so shot Leslie Higgins with either the intent to kill, or the intent to wound, or the intent to maim

Leslie Higgins." It was made abundantly clear that the shooting must have been with the intent to kill, wound, or maim, which excludes the idea of an accidental shooting, in order for the jury to find the defendant guilty. The contention has no merit.

Defendant argues that the circumstantial evidence was not sufficient to establish the corpus delecti of the crime. In his argument, the defendant overlooks the fact that the defendant admitted that he shot the prosecuting witness, which admission was testified to by the State's witnesses. Under such circumstances little corroborative evidence is required to establish the corpus delicti of the crime. The corroboration was ample. Sullivan v. State, 58 Neb. 796, 79 N. W. 721; Kirkendall v. State, 152 Neb. 691, 42 N. W. 2d 374.

An examination of all the instructions and giving consideration to them as a whole, as we are required to do, shows that the case was fairly submitted to the jury and that no error prejudicial to the defendant appears therein. State v. Brown, 174 Neb. 393, 118 N. W. 2d 332.

Defendant contends that the sentence of 15 years' imprisonment is excessive. It is a general rule that where punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of discretion. Guedea v. State, 162 Neb. 680, 77 N. W. 2d 166. A review of the facts before the court at the time of sentence is important in determining if the court abused its discretion. The facts of the case in which the sentence is being imposed is, of course, before the court. Here the defendant, after engaging in a quarrel with the prosecuting witness, followed him out of a house and shot him in the back as he walked up the street. It is just as likely that defendant failed to kill the prosecuting witness because of poor marksmanship as it was that he hit him at all by accidental, poor shooting. The jury, at least, found that the shoot-

ing was intentional. The court at the time of sentence had information that defendant had previously been convicted of murder and sentenced to life imprisonment resulting from a stabbing episode. From this imprisonment, defendant had been paroled in 1961. The record shows that the trial court took the previous conviction into consideration in fixing the sentence, as it had a right to do. Under all the circumstances, we cannot say that the trial court abused its judicial discretion in imposing a sentence of 15 years.

In his reply brief, defendant for the first time raises two new issues. He first asserts that defendant was denied a preliminary hearing. He then alleges that he was denied effective counsel. Neither of these contentions are assigned as error and for that reason alone cannot be considered on this appeal. It is fundamental that a claim that a defendant was not accorded a preliminary hearing, nor waived it, is determinable by plea in abatement. Gammel v. State, 101 Neb. 532, 163 N. W. 854; Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323. A plea of not guilty ordinarily waives all matters which might have been raised by motion to quash or plea in abatement. Huette v. State, 87 Neb. 798, 128 N. W. 519; Lindley v. State, 117 Neb. 597, 221 N. W. 706; Shaffer v. State, 123 Neb. 121, 242 N. W. 364. The sufficiency of the preliminary hearing was no longer a questionable issue after defendant entered his plea of not guilty in the district court. It is asserted that defendant's counsel failed to make such an investigation of the facts as to enable him to properly cross-examine the witnesses or to know how best to bring out the facts most helpful to defendant. It is pointed out as an example that defendant's counsel did not bring out whether or not the bullet entered Higgins' body directly from the gun or if it ricocheted off the pavement. The bullet was not received in evidence on defendant's objection to foundation. We have found nothing in the record before us to justify the charge that defendant's counsel was

ineffective unless the failure of the jury to acquit may afford the basis of such a charge, which it does not. There is nothing to indicate that counsel's assistance was so grossly inept as to shock the conscience of the court. State v. Putnam, *ante* p. 185, 153 N. W. 2d 456. Even if the claim of ineffective counsel was before us, there is nothing in the record before us that supports it.

We have examined the instructions, the evidence, and the sentence, and we find all to be free of prejudicial error. The judgment is affirmed.

AFFIRMED.

METROPOLITAN PROTECTION SERVICE, INC., ET AL., APPELLEES, V. ELMER C. TANNER, APPELLANT.
155 N. W. 2d 803

Filed January 19, 1968. No. 36676.

Trial: Evidence. Circumstances affecting contemporaneousness under the Uniform Business Records as Evidence Act are complexity of the information in the record, training and skill of the recorder, and reasonableness of the elapsed time generally.

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

Hal W. Bauer, for appellant.

Johnston, Grossman & Johnston, for appellees.

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

SMITH, J.

Metropolitan Protection Service, Inc., a private detective agency, sued on defendant's promise to pay it for investigating the activities of defendant's wife. A judgment for $2,800 resulted from a trial to the court, and defendant has appealed. The issues are admissibility of a corporate record in evidence and sufficiency of evidence to sustain the assessment of $2,800.

Metropolitan, a family corporation, maintained its place of business in the living room of the home of Edward and Verneta Itzen. The enterprise was small, and the Itzens hired 10 part-time investigators to assist in the surveillance of defendant's wife. Defendant promised, according to an implied finding by the court, to pay $4 an hour, $0.10 a mile, and other expenses. The claim covers the period from May 18 to September 2, 1963, defendant having paid $1,078.50 for prior services. Items of the claim are a charge of $5,420 for 1,355 hours of investigation, expenses of $615.10, and a credit of $500 for payments made in June 1963.

Corporate records of the surveillance kept by the part-time investigators disclose their observations, time spent, and mileage. The diaries or reports, marked exhibits 1 through 16, with one exception were received in evidence for a limited purpose. Exhibit 1, showing on May 18, 1963, time and mileage for a charge of $26.60, was received generally; and its admission is not assigned as error. The court said that exhibits 2 through 15 were not then "received as any evidence of the doing of the things described therein." It added that the exhibits were received as business records, and counsel for Metropolitan limited the offer accordingly. The parties subsequently stipulated that exhibit 16 was received "for the limited purpose of showing * * * that the business records of the plaintiff corporation contain these records, but not for the purpose of showing that the work indicated thereon was actually done." There was no reoffer.

Exhibit 17 is the focal point of controversy. Defendant contends that the exhibit was admitted into evidence erroneously while Metropolitan says that the exhibit sustains the assessment of $2,800. The exhibit lists dates, units of hours, mileage, and other expenses in connection with the work of each one of the 12 investigators. It was admitted on foundation testimony of Edward Itzen. During the entire period of the investigation Metropoli-

tan had kept no one other than defendant's wife under surveillance. The exhibit was prepared on September 6, 1963, from "all the other exhibits" in the regular course of business. Nothing like exhibits 1 through 16 relates to services of Edward or Verneta Itzen. Of the 1,355 hours listed in exhibit 17, approximately 53 percent was ascribed to the Itzens.

The ruling on exhibit 17 is defended on the single ground that the Uniform Business Records as Evidence Act applied. One requirement is that the record be made at or near the time of the act, condition, or event. § 25-12,109, R. R. S. 1943. The rule reflects the belief that "any trustworthy habit of making regular business records will ordinarily involve the making of the record contemporaneously." 5 Wigmore on Evidence (3d ed.), § 1526, p. 375. Circumstances affecting admissibility are complexity of the information in the record, training and skill of the recorder, and reasonableness of the elapsed time generally. The admission of exhibit 17 into evidence was erroneous, and the evidence is insufficient to sustain the assessment of $2,800.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

ELAINE DELAY, APPELLEE, V. HOMER BRAINARD, SHERIFF OF DODGE COUNTY, NEBRASKA, APPELLANT.

156 N. W. 2d 14

Filed January 26, 1968. No. 36594.

1. **Criminal Law.** A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of our Constitution.
2. ———. The purpose of a preliminary hearing 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.
3. **Criminal Law: Habeas Corpus.** In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of evidence taken at the preliminary examination to require a person to be

tried on a criminal charge, the court will not weigh the evidence but only inquire as to the existence of evidence to sustain the charge.

4. **Criminal Law: Evidence.** Evidence that would justify a committing magistrate in finding that probable cause existed for the detention of a defendant need not necessarily be sufficient to sustain a verdict of guilty when he is placed on trial.
5. ———: ———. In the reception of evidence a committing magistrate is not strictly governed by technical rules applicable on a final trial.
6. **Criminal Law: Negligence.** The negligence on which a charge of involuntary manslaughter is predicated may be the omission of an act which it is the person's duty to perform.
7. ———: ———. For a parent having special charge of an infant child to so culpably neglect it that death ensues as a consequence of such neglect is manslaughter, although death or grievous bodily harm were not intended.
8. ———: ———. Culpable neglect in omitting to perform a legal duty will sustain a manslaughter conviction.

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

Richard L. Kuhlman, for appellant.

Harry E. Stevens, for appellee.

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

SPENCER, J.

Relator, who was charged with the crime of manslaughter, was granted a writ of habeas corpus against the respondent, the sheriff of Dodge County, Nebraska, who prosecutes this appeal.

Relator contended the evidence introduced at the preliminary hearing before a justice of the peace was insufficient to show that a crime was committed, and further there was no probable cause to believe she committed the offense.

On March 24, 1966, a fire broke out at the home of the relator in Fremont, Nebraska. The alarm was turned

in at 9:45 a.m. The fire department arrived within 10 minutes thereafter. The firemen broke into the house and removed three children, aged 3½ years, 1½ years, and 6 months, who were alone in the house. Relator, their mother, was gone, and the door was locked on the outside with a hook and eye fastener to keep the children inside. The 6-month-old baby was found dead in its crib, with severe burns over 80 percent of its body. The autopsy report indicates that the baby was alive and well before the fire. The other two children were hospitalized.

Relator was located by a social worker who telephoned a downtown bar where relator said she was having a bottle of pop. Relator had been leaving the children alone during the early part of the morning for several weeks before the fire. She put the hook on the outside of the door after a social worker had found the children outside the house on a previous occasion. Relator told an investigator that she was waiting at the bar for a cab she had called to return home. The call for a cab was verified. Subsequently relator admitted that she had been at the apartment of a bartender she had been seeing for sometime, and that she had gone to the bar to call the cab. After she was located at the bar she did not wait for the cab but went directly to the police station where she arrived at 10:30 a.m.

The district court found the evidence insufficient to establish the crime of manslaughter, determined that relator's statements and admissions secured during the investigative process were inadmissible at the preliminary hearing, and granted the writ. We first address ourselves to the last point.

A preliminary hearing did not exist at common law. In this jurisdiction it is provided for by statute. Its functional purpose is stated in section 29-506, R. R. S. 1943. A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of our

Constitution. See Roberts v. State, 145 Neb. 658, 17 N. W. 2d 666.

We have repeatedly held that a preliminary hearing is in no sense a trial of the person charged 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. Fugate v. Ronin, 167 Neb. 70, 91 N. W. 2d 240. The effect of the foregoing, if found to exist, is to hold the accused for trial in district court, which has jurisdiction to try him. See Dobrusky v. State, 140 Neb. 360, 299 N. W. 539.

In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of evidence taken at the preliminary examination to require a person to be tried on a criminal charge, the court will not weigh the evidence but only inquire as to the existence of evidence to sustain the charge. Neudeck v. Buettow, 166 Neb. 649, 90 N. W. 2d 254.

Evidence that would justify a committing magistrate in finding that probable cause existed for the detention of a defendant need not necessarily be sufficient to sustain a verdict of guilty when he is placed on trial. Rhea v. State, 61 Neb. 15, 84 N. W. 414.

The rule that the accused is entitled to the benefit of any doubt does not apply in preliminary examinations. The test if not whether guilt is established beyond a reasonable doubt but whether evidence worthy of consideration in any aspect for a judicial mind to act upon renders the charge against the accused within reasonable probabilities. Circumstantial evidence may be sufficient basis to bind the accused over to the district court. See 21 Am. Jur. 2d, Criminal Law, § 449, p. 451. In the reception of evidence a committing magistrate is not strictly governed by technical rules applicable on a final trial. Harmer v. State, 121 Neb. 731, 238 N. W. 356. We have held voluntary confessions with slight corroborative evidence sufficient for purposes of a pre-

liminary hearing. Cotner v. Solomon, 163 Neb. 619, 80 N. W. 2d 587. To change this rule when we require prompt preliminary hearings would tend to make the preliminary hearing a trial and could seriously impede criminal prosecutions. As we view the record for purposes of a preliminary hearing, there is sufficient evidence to find that there is probable cause to believe the relator committed a crime if a crime was committed.

This raises the question then whether or not, assuming the evidence to be true, it constitutes a crime. Section 28-403, R. R. S. 1943, provides: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter; and upon conviction thereof shall be imprisoned in the Nebraska Penal and Correctional Complex not more than ten years nor less than one year."

Section 38-116, R. R. S. 1943, provides: "It shall be unlawful, and it is hereby declared to be cruelty for any person employing or having the care, custody or control of any child, willfully or negligently to cause or permit the life of such child to be endangered, or the health of such child to be injured, or willfully to cause or permit such child to be placed in such a situation that its life or health may be endangered, or to cause or permit such child to be overworked, cruelly beaten, tortured, tormented or mutilated."

Relator was in violation of a positive statute, section 38-116, R. R. S. 1943, when she locked her 3 children under 4 years of age in the house and took off on her own pleasure. Her husband left the home before 7 a.m. She got up shortly thereafter and drank some coffee. There is no evidence as to the exact time she left home, but she walked downtown and spent some time in her paramour's apartment. Relator did state she usually went downtown about 9 a.m. She would get back in time to get lunch for her husband who came home at noon. In any event, she was unavailable from before 9 a.m. until

she was located at the bar about 10:25 a.m. The fire alarm was turned in at 9:45 a.m. It must be conceded that the children were incapable of taking care of themselves. Relator was courting trouble. The law holds one so situated that his act may endanger the life of another to a high degree of caution, and he may be criminally responsible for loss of life consequent on his failure to exercise a proper degree of caution. When we apply the test of the reasonable man, we are forced to the conclusion that relator was deliberately jeopardizing the lives and safety of the children. She had a legal duty to see that they were protected, but left them unattended for long periods of time. Such neglect is criminal in its character and where it results in death will sustain a conviction for manslaughter. The negligence on which a charge of involuntary manslaughter is predicated may be the omission of an act which it is a person's duty to perform. 1 Wharton's Criminal Law and Procedure, § 296, p. 621.

In Stehr v. State, 92 Neb. 755, 139 N. W. 676, 45 L. R. A. N. S. 559, Ann. Cas. 1914A 573, we said: "For a parent having special charge of an infant child to so culpably neglect it that death ensues as a consequence of such neglect is manslaughter, although death or grievous bodily harm were not intended." That case involved neglect to seek medical aid for a stepson who had frozen his feet.

The degree of negligence which will make one criminally responsibile for a neglect of duty is difficult to define. Obviously, it is not any slight breach of duty but rather a gross failure to do what is required of one. On the record herein, we cannot say as a matter of law relator could not be guilty of manslaughter. Culpable neglect in omitting to perform a legal duty will sustain a manslaughter conviction. Relator had a legal duty to protect the children. She deliberately locked them in the house alone while she went off to pursue her own pleasures. As a result, one of them was burned to death.

It is for a jury to determine whether the conduct of relator crosses the line where her breach of duty renders her criminally negligent.

For the reasons given, we reverse the judgment of the trial court and remand the cause with directions to return relator to the custody of respondent to stand trial.

REVERSED AND REMANDED WITH DIRECTIONS.

McCOWN and SMITH, JJ., dissenting.

We respectfully dissent. The district judge in granting the writ of habeas corpus here specifically stated the basis for the order. He did not believe the evidence introduced at the preliminary hearing established the crime of manslaughter. Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, was effective. Objections were interposed and argued on the basis of Miranda, both at the preliminary examination and in the briefs here. The trial judge specifically found that: "* * * substantially all the evidence even if it does establish a crime was obtained in my opinion in violation of the rules set forth in the Miranda decisions and therefore inadmissible * * *."

It is deemed necessary to review the record with respect to the statements of the defendant, the facts surrounding the taking of them, and which portion of the evidence at the preliminary hearing was established by the defendant's statements.

Shortly before 10:35 a.m., detective Homes of the Fremont police department was just leaving the police station with a camera to go to the scene of the fire when he was met by the county attorney on the steps of the police station. The county attorney told him that Mrs. Delay would be coming in to the station and identified Mrs. Delay when she came.

The defendant's first statement was taken from her by detective Homes at the police station commencing at 10:35 a.m. Detective Homes at that time advised the defendant that she did not have to tell him anything and that anything she said could be used in court against her.

He typed the statement as he talked to her. This first statement showed that on that morning the defendant had gotten up sometime after 7 a.m., had some coffee, and that the children were still in bed asleep when she left the house; that she had walked downtown and had just run out of the house for a little while; that she had stopped at Saeger's Bar and had a bottle of pop; that this was the first and only place she went downtown; and that while there, she was contacted by a representative of the welfare department who told her that there had been a fire at her house and she was supposed to call the police department. She hung up the telephone and walked directly to the police department.

At this point appears the only blank line in the statement. The remainder of this first statement deals with her prior habits and customs when she left the children alone and revealed also that she was familiar with and frequently visited at least two local bars. The first statement was completed at approximately 11:15 a.m.

Detective Homes testified that he was conferring with the county attorney on and off all day long; and that he talked to him at noon and gave him the information obtained from the defendant. The defendant was never told at any time that she was free to leave and when she left the room to use the restroom, Mrs. Losee, the police clerk, went with her.

At 2:20 p.m. that afternoon, detective Homes took another statement from the defendant. Essentially, this statement had nothing whatever to do with her actions or conduct on the day of the fire, but dealt only with her conduct in connection with the children prior to that day. This statement showed that about 2 months before, she had started as a regular thing to leave the children home alone, usually in the mornings; that she never had anyone stay with them; and that the times she left were sometimes before 9 a.m. and her return was sometimes as late as shortly before noon. It also showed

that a representative of the welfare department had given her "the devil" for leaving the children alone. This statement was concluded and signed by the defendant at approximately 2:50 p.m.

At 3:40 p.m., the defendant asked to consult with a lawyer when she was told she would be held on a charge of manslaughter. She talked to her lawyer briefly by telephone and she and detective Homes were told that he would be there at approximately 5 p.m. The defendant was booked on a manslaughter charge at 5 p.m. and taken to jail. At 9:30 p.m. that night, detective Homes and another police officer went to the jail and again began "visiting" with the defendant. In detective Homes' words, they were "trying to fix the time she would have left the house."

At this conversation, the defendant told them that upon leaving the house she had gone to the apartment of a bartender, and that she had been going there for several months; and that she was there that morning after leaving the house, and had gone from the apartment to Saeger's Bar to call a taxicab and go home at the time she received the call to contact the police. She also told them that some weeks before she had installed a hook and eye lock on the outside of the one door to the house which was not obstructed. This was after a welfare department representative had found her children running around outside. She also told them that she had been locking the lock for several weeks, and had locked it that morning when she left.

All of these statements of the defendant, both written and oral, were admitted over strenuous objection at the preliminary hearing. At none of them were the required Miranda warnings given, and the last and most damaging one was taken after the officers knew the defendant had a lawyer.

Except for the defendant's own statements, the evidence at the preliminary hearing established only that there had been a fire at defendant's house at 9:45 a.m.;

her children were in the house alone; that no one, including the fireman who testified, knew how the fire commenced nor how long it had been burning; that the defendant was not present; and that her daughter was dead as a result of the fire.

This case is subject to the requirements of Miranda as well as prior and related cases dealing with in-custodial interrogation and the right to counsel. It seems crystal clear that the constitutional requirements applicable to in-custody interrogation of the defendant were not met. If trial had been involved rather than a preliminary hearing, the statements of the defendant could not have been introduced in evidence. Her own statements were the only evidence which might have completed the required proof that a crime had been committed.

In 22 C. J. S., Criminal Law, § 340, p. 879, it is stated: "* * * although the magistrate is not strictly governed by technical rules in the reception of evidence, the admissibility of evidence at the preliminary examination is governed by the same rules as those governing admissibility at trial." It is also stated: "* * * the principle, stated infra § 345, that less evidence is required to hold accused for trial than is exacted to support a conviction, does not go to the competency, relevancy, or character of the evidence."

In Cotner v. Solomon, 163 Neb. 619, 80 N. W. 2d 587, we held that the sufficiency of evidence adduced at a preliminary examination to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings, and also held that even a voluntary confession is insufficient standing alone to prove that a crime has been committed.

At a preliminary hearing we see no justifiable reason why the admissibility of a confession, admission, or statement of a defendant stemming from custodial interrogation should not be governed by the same constitutional rules as those governing its admissibility at trial. This

is emphatically true where the confession, admission, or statement is necessary to prove the essential requirement at a preliminary hearing that a crime has been committed.

The prosecution at the preliminary hearing only had the burden of establishing a body of facts sufficient to show that the crime of manslaughter was committed and that there was probable cause to believe the defendant committed it. It should not be permitted to flesh out the bare bones of the factual skeleton with confessions, admissions, or statements of the accused, obtained in violation of her constitutional rights, which would be inadmissible at the trial itself. When such statements are admitted not only to prove probable cause that the defendant was the one chargeable with responsibility, but also to establish the essential foundation fact that a specific crime has been committed, the effect of the error may well be compounded later. From the standpoint of efficient judicial administration, it is far better to correct such an error at an early stage when it may still be remediable.

While we can say nothing favorable as to the conduct of the defendant, either as a mother or otherwise, and this dissent in no way reflects a determination that she was innocent of any crime other than manslaughter, she is entitled to the constitutional rights of every citizen.

The district court found that the evidence introduced at the preliminary hearing in this case did not establish the crime of manslaughter, and that substantially all of the evidence at the preliminary hearing was obtained in violation of the constitutional rights of the defendant and was, therefore, inadmissible. We believe that the determination was correct in all respects and should have been affirmed.

WHITE, C. J., concurring.

I thoroughly agree with the majority opinion that there is sufficient evidence to bind the defendant over for trial on the merits to the district court. However, I wish to point out that this determination is in no way

controlling, or even indicative of the proper disposition of the issue of proximate cause on the trial of this case. The determination of this issue must abide the exploration of all of the evidence on the trial of the case on its merits. It is not necessary that the evidence at a preliminary hearing be sufficient to support a verdict of guilty or that it show guilt beyond a reasonable doubt. State ex rel. Pribyl v. Frank, 165 Neb. 239, 85 N. W. 2d 328; Neudeck v. Buettow, 166 Neb. 649, 90 N. W. 2d 254. The purpose of a preliminary hearing is not to determine guilt or innocence, but simply to determine whether society is justified in holding a defendant so that the issue of guilt or innocence may be fully explored after an investigation and presentation of all of the evidence on the relevant issues. As soon as this clear demarcation line between the purposes of a preliminary hearing and the trial on its merits is understood, most of the questions presented in this case have cleared up. The purpose of the criminal law is to protect society. The integrity and adaptability of the adversary system of criminal justice to accomplish this purpose and yet protect the rights of defendants is one of the great principles of our constitutional system. It is for the courts to protect the basic principles of fairness, not only to the defendant but also to the State. I do not believe that our adversary system should become distorted into a racing game in which the essential issue of guilt or innocence is not the final objective but rather whether, *under the prompt constitutional urgency of an immediate preliminary hearing,* society can be forced to produce immediately after arrest all of the competent and relevant evidence necessary to establish the guilt of the defendant beyond reasonable doubt. The concept of fundamental fairness within the due process clause requires, within the framework of our adversary system, that the defendant's rights are fully protected in all of their developing and burdensome ramifications. By the same token, it should be permitted as a minimum that the

State be given a full opportunity to explore, investigate, and present the evidence of guilt in order to carry this increasingly onerous burden. In our laudable constitutional zeal to protect individual rights we should not permit our adversary system of criminal jurisprudence to become distorted and perhaps converted into a device for the escape of the guilty and a mockery of the truth.

The record before us reveals grave questions as to the issue of proximate cause. I fail to see, at this point, how defendant's clandestine purpose or motivation in visiting her paramour is at all relevant to either the issue of neglect or proximate cause. This is a manslaughter case, and intent or purpose or motive is immaterial. Her conduct would be neither more nor less culpable or causative if her absence was for the purpose of visiting her minister, or, for that matter, absenting herself to consult with a social welfare agency about the care of her children. Is the fact that she removed herself from the visual proximity of her children, or the length of time that she so removed herself, the competent producing or proximate cause of the child's death? The direct cause of this child's death was a fire occurring not more than an hour and a half or two hours after she left the home. Just how the balance of the three or four hour period of time she was gone is relevant to the establishment of the issues of neglect and proximate cause in this case does not appear at this time. I see considerable difference, even as a matter of law, between a case in which a hungry child after being left alone all day drinks a bottle of poison liquid left exposed, and one in which a child is killed in a crib as a result of a fire a few minutes after the mother has left (even in her own home) and is out of the visual and hearing proximity of her child for a considerable time later. And, it may be that the detailed facts surrounding the exact location of the child, the previous conduct of the mother, and the possible conditions which might result in danger to the child which were present and should have been

known to the defendant, all may be highly relevant to determine the crucial issue of guilt and proximate cause in this case. I shall not take the facts as they rather sketchily appear in this record and attempt to relate them precisely to the rationale of the relevant rules of law as to proximate cause. Intentional misconduct is irrelevant but reasonably foreseeable harm and the legally imposed risk resulting therefrom are highly relevant issues. The close question of whether they may be determined as a matter of law or whether they present a jury question must abide determination of the case on its merits.

Turning now to the dissent, which further extends the thrust of Miranda to preliminary hearings, I feel that something further should be said in this respect. First, the defendant came voluntarily to the police station. Her statement was taken beginning 5 minutes after the time she arrived. There is not a suggestion or intimation in this record that there was any compulsion, coercion, intimidation, or "psychological pressure" exerted on her. There was a complete absence, as I read the evidence, of any Miranda-declared implied coercion resulting from an "in custody" required interrogation by the police officers. She was not being detained for the purpose of eliciting incriminating admissions. The defendant was not arrested or informed that charges would be presented against her until late in the afternoon, as the majority opinion points out. Investigation was the emphasis and not the accusatory interrogation. The plain implication of the dissenting opinion is to the effect that voluntary disclosure of information to the police, if made at the police station, is prohibited as an "in custody" interrogation under the Miranda doctrine. This unwarranted expansion we cannot conceive to be the law even under the furtherest reach of the Miranda holding. Unless police interrogation is to be indicted absolutely, there must be some minimum requirement of affirmative action on their part

over the physical custody and control of a defendant before the implied coercion of an "in custody" interrogation can be held to become operative. Despite the innuendoes and declarations made in many of the United States Supreme Court opinions on this subject, I do not believe that the courts can or should ever declare that coercion begins at the door of the police station as a matter of law.

Second, the evidence shows conclusively that, despite the voluntary nature of the defendant's statements, she was affirmatively warned of her right to remain silent and that anything she might say might be used against her. Is it possible that a voluntary statement, made after such a warning, is so inherently constitutionally evil and objectionable that society and law enforcement may not even use it in the apprehension and detention of an accused?

Third, after all of her statements were made, the defendant consulted with her attorney at the police station at about 5 o'clock in the afternoon on the day in question and after this consultation, and in the presence of the attorney, she stated that she had given the written statements and that they were true. In the light of all this, and giving full scope to the Miranda holding, it seems well-nigh incredible that such conduct on the part of the law enforcement officers could be held to be constitutionally evil.

But, quite as disturbing, is the contention, assuming a violation of Miranda, that such evidence is not admissible at a preliminary hearing to determine the issue of probable cause. Not only is a preliminary hearing not a trial, but our court and the federal courts have repeatedly held that under Nebraska law a preliminary hearing is not a critical stage of a criminal proceeding and that no constitutional rights are in jeopardy as a result thereof. Even the hallowed and undenied right to counsel or representation at a preliminary hearing is not required, and this is particularly true where, as here, the defend-

ant offered no testimony and made no admissions. State v. Sheldon, 179 Neb. 377, 138 N. W. 2d 428; Burnside v. State, 346 F. 2d 88; Ronzzo v. Sigler, 235 F. Supp. 839; Bird v. Sigler, 241 F. Supp. 1007; Pointer v. Texas, 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923. It is difficult, if not inconceivable, to understand a contention that there is no constitutional requirement of counsel at a preliminary hearing, but yet that there is a constitutional requirement of counsel being present at the giving and taking of a voluntary statement prior thereto.

Behind the legal structure of this case lie the realities of necessities of law enforcement. It is one thing to say that when society apprehends an individual he must be promptly and perhaps immediately brought before a magistrate for a hearing. It is an entirely different thing to say that society at that time must, in effect, present, in full array, completely sufficient proof of the defendant's guilt beyond a reasonable doubt, with all of the technical and burdensome ramifications inherent in our adversary criminal trial procedures. Such a holding would inhibit, if not render useless, post-arrest investigation, and emasculate law enforcement, particularly as to those types of violent crimes where immediate apprehension and detention is imperative if society is to be protected.

IN RE GUARDIANSHIP OF EMMA A. FEENAN.
THE UNITED STATES NATIONAL BANK ET AL., APPELLEES, V. EMMA A. FEENAN, APPELLANT.

156 N. W. 2d 29

Filed January 26, 1968. No. 36629.

1. **Appeal and Error: Judgments.** Consideration of a cause on appeal is limited to errors assigned and discussed, and unless error is assigned, the judgment of the lower court should be affirmed unless this court at its own option considers plain error not assigned.

2. **Appeal and Error: Costs.** Where an appeal in a probate matter is vexatious or for delay, the district court properly exercises its discretion by taxing the costs, including attorneys' fees, to the appellant.

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

Roy M. Harrop, for appellant.

Wincel C. Nelson, Jr., and Richard J. Spethman, for appellees.

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

WHITE, C. J.

On appeal by appellant Roy Harrop, the district court affirmed a county court judgment appointing guardians for Emma A. Feenan, incompetent. This judgment became final, and on subsequent motion, under section 30-1603, R. R. S. 1943, costs and attorneys' fees were taxed to appellant for taking an appeal vexatiously or for delay. Appellant's brief in this court contains no assignment of errors. Under Rule 8a2(3) of the Revised Rules of the Supreme Court, 1967, and section 25-1919, R. R. S. 1943, this generally requires affirmance. Smallcomb v. Smallcomb, 165 Neb. 191, 84 N. W. 2d 217; Hartman v. Hartman, 150 Neb. 565, 35 N. W. 2d 482.

No plain error, of which we may take notice, is present. The record conclusively supports the finding that the appeal was vexatious and for delay. Not only was appellant given ample notice of all original county court and appeal proceedings, but he made no appearance or introduced no evidence in the trial on appeal, and in a successive, lengthy series of motions, both prior and subsequent to the district court judgment, sought to set aside the orders of the court and the orders of the court refusing to set aside its previous orders. In an attempt to further delay proceedings, he filed a habeas corpus proceeding in the United States District Court, which is

still pending. The record justifies a conclusion that appellant, although a lawyer, resisted several efforts to take his testimony in the appeal proceedings, even to the extent of holding off the sheriff with a revolver when he was attempting to serve a warrant. There is much other evidence, unnecessary to repeat here.

Apparently the appellant objects to the appointment of special guardians without notice, during the pendency of the appeal proceedings, but the statute specifically authorizes such appointments to conserve the property of an incompetent during the pending of appeal proceedings. § 38-201.01, R. R. S. 1943.

The courts should be open, but process may not be abused to defeat the legitimate ends of litigation. The record reveals an exhaustive forbearance and restraint by the district judge. The appellant should be taxed the costs of an unwarranted taxing of the patience of the court and the parties involved.

The judgment of the district court is affirmed.

AFFIRMED.

EVELYN LOCK, APPELLANT, V. CITY OF IMPERIAL, NEBRASKA, A CORPORATION, ET AL., APPELLEES.
155 N. W. 2d 924

Filed January 26, 1968. No. 36640.

Public Administrative Bodies: Municipal Corporations. An airport authority, duly created by a city under the Cities Airport Authorities Act, is a supplementary, separate, and independent public corporation, and the parent municipal corporation is not liable for the torts of the authority.

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

Kier, Cobb & Luedtke, for appellant.

Luebs, Tracy & Huebner, Curtis & Curtis, and McGinley, Lane, Mueller & Shanahan, for appellees.

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

MCCOWN, J.

This is an action for personal injuries sustained in a plane crash after take-off at the airport near Imperial, Nebraska, on May 28, 1965. The plaintiff was Evelyn Lock, and her husband was the pilot. The only defendants were the City of Imperial, Nebraska, a corporation, and Glenn Packard, individually, and as manager and operator of the airport. The defendant City of Imperial, by answer and affidavit, established that on April 11, 1960, under the authorization of the Cities Airport Authorities Act, Chapter 3, article 5, R. R. S. 1943, the city created the Airport Authority of the City of Imperial. Since April 11, 1960, the airport authority has had sole and exclusive jurisdiction and authority over the airport and its operation and maintenance. The motion for summary judgment of the City of Imperial was sustained and the plaintiff's petition dismissed as to the City of Imperial.

The basic issue involved is whether the airport authority or the City of Imperial was the proper party defendant. There is no issue of governmental immunity from tort liability involved. The operation of an airport is a proprietary function and subject to tort liability if the city itself were operating it. Brasier v. Cribbett, 166 Neb. 145, 88 N. W. 2d 235. An airport authority by statute is clearly subject to tort liability. See § 3-512, R. R. S. 1943. The Cities Airport Authorities Act has been held constitutional. Obitz v. Airport Authority of the City of Red Cloud, 181 Neb. 410, 149 N. W. 2d 105.

It therefore becomes necessary to examine the enabling act to determine whether or not an airport authority is an agency or mere instrumentality of the city, or a separate public corporation with ordinary corporate insulation from its creator.

Under the Cities Airport Authorities Act, Chapter 3,

article 5, R. R. S. 1943, an airport authority is designated as a body politic and corporate. It is managed and controlled by a board which has full and exclusive jurisdiction and control over all facilities owned or thereafter acquired by the city for the purpose of aviation operation, air navigation, and air safety operation. The board is designated "a body corporate and politic, constituting a public corporation and an agency of the city for which such board is established." Initially board members are appointed by the mayor with the approval of the city council and upon the expiration of the initial terms, members of the board are nominated and elected in the manner provided by law for the officers of the city. Extensive powers are granted in the charter set out in the statute. An airport authority has power to sue and be sued, to have a seal and alter the same at pleasure, and to make bylaws for the management and regulation of its affairs. It has authority to issue bonds and to levy taxes. It has the power to contract with the creating city or with any other political subdivision of the state. It has power to appoint officers, agents, and employees and fix their compensation. Upon the authority ceasing to exist, all its remaining rights and properties pass to and vest in the city. Any city creating an authority is required to transfer to the authority any existing airport or any other property of the city for use in connection with it, including real and personal property owned or leased by the city and used or useful in connection therewith. Naked title to real property so conveyed remains in the city, but the authority has the use and occupancy thereof for so long as its corporate existence shall continue. While the act itself makes no specific reference to the method of establishing a corporate name, the resolution of the city council transferring the property of the city to the authority designates the transfer and conveyance to the "Airport Authority of the City of Imperial."

The plaintiff's position is that although an airport au-

thority is designated as a body politic and corporate constituting a public corporation, it is also specifically designated as "an agency of the city for which such board is established." It is argued that because of incidents of control, the airport authority is merely an agent of the city in the same sense as a municipal department, commission, or board. In essence, the plaintiff's position is that the airport authority is not merely an agency of the city, but the controlled agent of the city to the extent that the corporate veil and separate entity may be disregarded entirely as though the authority were simply the alter ego of the city.

There can be no real question that an airport authority, duly created under the Cities Airport Authorities Act, has all the basic characteristics and attributes of any corporation. "The distinguishing characteristics of a corporation are that it is an artificial person, a legal entity, capable of acting through its corporate officers and agents, of suing, being sued, of taking and holding property, and of contracting in its own name, and of continuing to exist independent of individuals who compose it." 1 Fletcher (Perm. Ed.), Cyclopedia Corporations, § 5, p. 22.

In virtually all respects, an airport authority is a municipal corporation in the strict sense of the term. See, 1 McQuillan (3d Ed.), Municipal Corporations, § 2.07, p. 451. But whether it be called a municipal corporation or a quasi-municipal corporation is immaterial. It is a public corporation with all the basic attributes of a corporation, and it is a separate and independent corporate entity.

"In no particular is the distinction between the corporation and its members more marked and important than in suing and being sued. * * * if the corporation sues or is sued instead of the member, or vice versa, the judgment will afford no decision of the intended cause of action. Judgment in personam for or against the wrong person amounts to little or nothing." 1 Fletcher

(Perm. Ed.), Cyclopedia Corporations, § 36, p. 150.

The problem of whether the Legislature intended the normal corporate attributes and consequent limited liability of the creator is at least partially answered in section 3-509, R. R. S. 1943: "The bonds, notes, and other obligations of an authority shall not be a debt of the State of Nebraska or of the city in which such authority is established, and neither the state nor the city shall be liable thereon, nor shall such bonds be payable out of any funds other than funds of the authority issuing same."

Whether "other obligations" of an authority, taken in context, were specifically intended to include judgments for torts or not is not decisive here. From an overall examination of the act, it seems evident that the Legislature did intend the normal corporate insulation of the creator from liabilities of the authority, including torts.

Antieau's Local Government Law, V. 3, Municipal Corporation Law, § 28.05, p. 526, states: "The weight of authority clearly holds that obligations of a supplementary public corporation are not obligations of the parent municipal corporation within the meaning of debt limitations."

There have been cases holding that a separate public corporation, for some purposes, may be an agency of the municipal corporation or other political subdivision creating it. This type of case has ordinarily involved an issue of whether the supplementary public corporation was sufficiently a governmental agency of the parent municipal corporation or political subdivision to justify the appropriation or use of public funds of the parent for the supplementary corporation. For example, see, Greensboro-High Point Airport Authority v. Johnson, 226 N. C. 1, 36 S. E. 2d 803. This is the sense in which we believe the Legislature intended the words "an agency of the city for which such board is established." In no way does the act indicate any intention to disregard the corporate entity of an airport authority nor to constitute that supplementary public corporation an agent

of the city for purposes of tort liability attribution.

Antieau's Local Government Law, V. 3A, Independent Local Government Entities, § 30E.09, states: "Even though brought into existence by municipal corporations and counties, airport authorities are independent corporate entities, 'rather than mere instrumentalities of the municipalities involved.' "

The basic principles involved here were enunciated by Roscoe Pound in 1902, long before the era of extensive use of supplementary public corporations. This court held that a municipal corporation was not liable for the torts of an independent board constituted by statute for the inspection of buildings. No separate public corporate entity was involved, but the issues of independence and agency were. Roscoe Pound, speaking for this court said: "The execution of laws and ordinances as to the erection, repair and removal of buildings was given expressly, not to the city, but to this board. The board was not under the control of the city government, but exercised its own discretion. * * * As the board was the creature of the statute, and exercised powers derived from the state, not from the city, we do not see how it can be said to represent the municipality so as to make the latter liable for its wrongful acts. The individual members are the persons to proceed against, not the city." Murray v. City of Omaha, 66 Neb. 279, 92 N. W. 299, 103 Am. S. R. 702. Where an independent public *corporate* entity rather than mere members of a board constituted by statute is involved, the rationale of the rule is even more compelling.

We hold that an airport authority, duly created by a city under the Cities Airport Authorities Act, is a supplementary, separate, and independent public corporation, and the parent municipal corporation is not liable for the torts of the authority.

The action of the district court in sustaining the motion for summary judgment was correct and is affirmed.

AFFIRMED.

AMERICAN OIL COMPANY, A CORPORATION, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.
155 N. W. 2d 805

Filed January 26, 1968. No. 36684.

1. **Appeal and Error: Evidence.** Where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal.
2. **Highways: Constitutional Law.** The right of an owner of property abutting on a street or highway to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without due process of law and compensation for his loss.
3. **Streets.** The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances.
4. **Highways: Damages.** An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the state of his right of access to an existing highway.
5. **Eminent Domain: Trial.** In a condemnation action, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong.
6. **Eminent Domain: Damages.** The amount of the damages sustained by a landowner for a right-of-way condemned across his land is peculiarly of a local nature to be determined by a jury, and its verdict will not ordinarily be interfered with if it is based on the testimony.

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

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, Walter J. Matejka, James E. Fellows, Allen L. Morrow, John Abbott, and George Selders, for appellant.

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

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

NEWTON, J.

The American Oil Company, a corporation, plaintiff,

was the owner of a tract running 73 feet east and west by 90 feet north and south, located on the southeast corner of the intersection at Seventy-second and Pacific Streets in Omaha. The site was occupied and used as a filling station and had two points of ingress and egress on each of the streets mentioned, with two islands, each containing two pumps. It was possible for an automobile going north on Seventy-second Street to enter the station, be serviced at the west pump, and then continue on in the north-bound lane of traffic. In like manner, automobiles going east on Pacific Street could be serviced at the north pump and continue east on Pacific Street. As of July 20, 1964, the City of Omaha, defendant herein, appropriated a portion of plaintiff's property by eminent domain proceedings. The portion taken constituted the northwest corner of plaintiff's property adjoining the intersection and extended from the corner 20 feet south on Seventy-second Street and 40 feet east on Pacific Street. The base of the triangle taken is an arc joining the two points last mentioned, leaving a rounded corner. The tract taken contains 240.91 square feet. After the taking, plaintiff's boundary lines on Seventy-second Street and on Pacific Street were reduced in length to such an extent that it was impossible to maintain the two points of ingress and egress on such boundary lines and but one means of entrance and exit remained on each street. It was not feasible to maintain two pump islands and the filling station setup was changed so that only one island containing two pumps remained. It was then impossible for motor vehicles to exit again into the same street and into the same stream of traffic which they had followed on entering the filling station.

By stipulation, evidence was introduced showing the gallonage or quantity of gas sold at the station in the years 1962 through 1966 which figures showed a drop in the amount of business done at this station after the taking as compared to that done prior to the taking.

Three witnesses testified as to the extent of the damage sustained by plaintiff, one placing the figure at $55,000 to $60,000, one at $45,745, and one at $22,021. The jury returned a verdict for plaintiff in the sum of $35,000 and the defendant city appealed.

Defendant assigns as error the admission of evidence showing the loss of business or gallonage sold after the taking as compared with that before the taking. Having stipulated to the admission of this evidence, defendant cannot now be heard for the purpose of objecting thereto. "Where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal." State v. Dillon, 175 Neb. 444, 122 N. W. 2d 223.

A second assignment of error relates to the admission of evidence of loss of access to plaintiff's property and to the instructions given by the court on this subject. In Balog v. State, 177 Neb. 826, 131 N. W. 2d 402, the following propositions are set out, to wit: "The right of an owner of property abutting on a street or highway to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without due process of law and compensation for his loss. * * * The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances. * * * An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the State of his right of access to an existing highway."

It is evident that the question as to whether or not plaintiff's access to his property has been unreasonably interfered with, under the existing circumstances, was a question for the jury and the evidence pertaining thereto was admissible. We have examined the instructions given by the court on this subject and find that

they correctly state the law as set forth in the case last-above cited.

As a final assignment of error, defendant insists that the verdict is excessive. It will be noted that the verdict was well within the limits of the evidence submitted at the trial. In the case of State v. Dillon, *supra*, the court said: "In a condemnation action, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong. * * * The amount of the damages sustained by a landowner for a right-of-way condemned across his land is peculiarly of a local nature to be determined by a jury, and its verdict will not ordinarily be interfered with if it is based on the testimony."

No error appearing in the record, the judgment should be and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES ROAN EAGLE, APPELLANT.

156 N. W. 2d 131

Filed January 26, 1968. No. 36696.

Criminal Law: Evidence. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.

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

Charles A. Fisher and Charles F. Fisher, for appellant.

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

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

McCOWN, J.

The defendant, James Roan Eagle, was found guilty of petit larceny by a jury. Thereafter, at a hearing without a jury, the court found that the conviction was a subsequent offense as charged, enhancing the penalty, and sentenced the defendant to 2 years imprisonment.

The defendant first contends that his motion for mistrial, made during cross-examination of one of defendant's witnesses, should have been granted. The testimony of defendant's witnesses was principally directed toward establishing that the defendant was intoxicated at the time of the crime. The defendant's witness, Roger Lame, had testified extensively on direct examination as to the defendant's drinking and being drunk in public places both during the day of the crime and on the day preceding. His testimony also detailed drinking on both days by the witness and by other persons who were also witnesses. On cross-examination of this witness, after extensive probing of such testimony, the county attorney asked: "Any of you get picked up by the law enforcement people or the police that day on the 20th or the 21st?" The defendant objected immediately and moved for a mistrial. The defendant's objection was sustained and the witness was not permitted to answer, but the motion for mistrial was overruled.

Defendant relies on Coxbill v. State, 115 Neb. 634, 214 N. W. 256. In that case, a judgment of conviction was reversed because the defendant, over objection, was permitted to answer the question of whether he had not recently been convicted of a misdemeanor of the same kind for which he was being tried. The distinctions here are obvious. The defendant's objection was sustained and no answer was permitted in evidence. A witness was being cross-examined and not the defendant. In the context of the defendant's evidence at this trial, the defendant's contention that merely asking a witness such a question was sufficient misconduct to taint the entire proceedings and deny the defendant a

fair and impartial trial is without merit. The discretion of the trial court was not abused and the denial of the motion for mistrial does not constitute prejudicial error. See Rakes v. State, 158 Neb. 55, 62 N. W. 2d 273.

The defendant complains of the refusing of a requested instruction on circumstantial evidence and the giving of the court's own instruction on such evidence. It is also contended that the giving of an instruction on aiding and abetting was improper, and that certain other instructions are conflicting, confusing, and misleading. The evidence properly supported an instruction on aiding and abetting, and, in any event, the defendant could not have been prejudiced by the giving of such an instruction. The instruction on circumstantial evidence given by the court is almost identical with that approved by this court in State v. Nichols, 175 Neb. 761, 123 N. W. 2d 860. That case also stated: "However, all instructions must be read together and if the instruction or instructions taken as a whole correctly state the law and are not misleading, there is no prejudicial error." The defendant's assignments of error with respect to instructions are not supportable.

A large portion of defendant's argument is directed to the evidence of prior convictions at the hearing before the court after conviction and before sentencing under the rules of practice and procedure promulgated in Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462. Under those rules, if the court finds from the evidence submitted that the accused has been convicted prior thereto under the same statute, the court is required to sentence the accused according to the enhanced penalty applicable to the facts found. The defendant contends that under Danielson v. State, 155 Neb. 890, 54 N. W. 2d 56, approved in State v. Ninneman, 179 Neb. 729, 140 N. W. 2d 5, it is required that there be some evidence more than a record of prior convictions of a defendant of the same name. It is contended that additional identification evidence is necessary to establish that the defendant

is the same person presently before the court. The exact question has not previously been passed on by this court.

In this case, three authenticated copies of judgments of conviction and sentencing of a James Roan Eagle for petit larceny were introduced and received in evidence. The dates of conviction and sentence was May 16, 1960, October 24, 1960, and November 30, 1962. One was for first offense petit larceny and two were for subsequent offense petit larceny. One was in county court, and two in the district court, all in Dawes County, Nebraska. This is the same county and the same district court in which the current conviction arises. The defendant's name is not an ordinary one, nor is there any evidence in the record that anyone else in Dawes County had the same name. There was no denial of identity by the defendant and the issue raised here was certainly not made clear to the trial court either at the hearing or on motion for new trial. A presentence investigation report by the probation officer was in the possession of the court at the hearing and had been reviewed by the court.

See 11 A. L. R. 2d 870, for an extensive annotation on the question of evidence of identity for purposes of statutes as to enhanced punishment in case of prior conviction.

Under the circumstances here, we hold that an authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment; and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.

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

AFFIRMED.

SMITH, J., participating on briefs.

STATE OF NEBRASKA EX REL. DONALD R. NORTON, APPELLANT, v. THEODORE J. JANING, SHERIFF OF DOUGLAS COUNTY, NEBRASKA, APPELLEE.

156 N. W. 2d 9

Filed January 26, 1968. No. 36703.

Mechanics' Liens: Constitutional Law. Section 52-119, R. R. S. 1943, providing that it shall be unlawful for any person, firm, or corporation who has taken a contract for the erection, improvement, repair, or removal of any house, mill, manufactory, or building for another, and has received payment in whole or in part upon such contract, to fail to apply the money so received, or so much thereof as is necessary for that purpose, in payment of the lawful claims of such laborers or materialmen as would otherwise have a right to file a laborers' or materialmen's lien against said house or other structure in the absence of a written waiver being delivered to the property owner from all persons having a right to file a lien thereon, is unconstitutional as an attempted imprisonment for debt contrary to Article I, section 20, Constitution of Nebraska.

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

Charles Ledwith, for appellant.

Donald L. Knowles and Francis R. Pane, for appellee.

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

CARTER, J.

The relator commenced this action for a writ of habeas corpus to test the constitutionality of section 52-119, R. R. S. 1943. From a denial of the writ by the district court for Douglas County, relator appeals.

The relator, a contractor, was charged with the violation of section 52-119, R. R. S. 1943, in that he entered into a contract with Kathryn F. Kusek for the erection of a garage building and the repair of a retaining wall and concrete work and, having received the full contract price, failed to apply the money so received in payment of the claims of Larson Cement Stone Company and

McCan Concrete Company for their lienable materialmen's claims in the amounts of $141.47 and $295.23, respectively. After relator was bound over to the district court for trial and while being held by the sheriff of Douglas County for want of bail, this habeas corpus proceeding was commenced asserting the unconstitutionality of the aforesaid criminal statute.

Section 52-119, R. R. S. 1943, provides as follows: "It shall be unlawful for any person, firm or corporation who has taken a contract for the erection, improvement, repair or removal of any house, mill, manufactory or building of any kind for another, and has received payment in whole or in part upon such contract, to fail to apply the money so received, or so much thereof as may be necessary for that purpose, in payment of the lawful claims of such laborers or materialmen as would otherwise have a right to file a laborers' or materialmen's lien against said house or other structure, unless such person, firm or corporation, taking such contract, shall have received and delivered to the owner of the property the written waiver of lien from all persons who otherwise would have a right to file a lien thereon." It is asserted by relator that such statute is violative of Article I, section 20, Constitution of Nebraska, which provides: "No person shall be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud."

The case is one of first impression in this state. Differences exist in the constitutional provisions of other jurisdictions. Some have no constitutional provisions against imprisonment for debt. In discussing the issue before us, we shall give no consideration to the cases from jurisdictions having constitutional provisions materially different or having no such provision at all.

It is asserted by the relator that the money paid to him under his contract by the property owner is his money and that any legislation that makes it a crime for one to use his own money for any purpose other than the payment of his debts violates the constitutional in-

hibition against imprisonment for debt except in case of fraud. The respondent asserts that the statute is a proper exercise of the police power for the purpose of protecting property owners by prohibiting money paid on contracts dealing with property subject to laborers' and materialmen's liens from diverting the money paid by the property owner without paying laborers and materialmen, thereby permitting the filing of mechanics' liens and requiring a second payment by the property owner to protect his property interests in amounts which he has once paid.

The position of the relator is succinctly and forcibly stated in People v. Holder, 53 Cal. App. 45, 199 P. 832 (1921), as follows: "Any legislation that makes it a crime for one to use his own money for any purpose other than the payment of his debts is violative of section 15 of article I of the constitution of this state, which expressly inhibits imprisonment for debt except in cases of fraud. [Citing cases.] The provision in the California constitution inhibiting imprisonment for debt 'in civil actions' cannot be evaded by making the nonpayment of a debt a crime. [Citing cases.] In the Peonage Cases, Judge Jones, in a forceful opinion, very pertinently says that 'when a man's liberties are taken from him because he does not pay a debt, and he is punished if he does not perform a civil contract, . . . he is put in prison bounds and is imprisoned for debt in the meaning of the constitution.' (123 Fed. 686.) In Ex parte Hollman, supra [79 S. C. 9, 60 S. E. 19, 21 L. R. A. N. S. 242, 14 Ann. Cas. 1105], the court uses this language: 'It is strenuously urged, however, that the act does not provide for imprisonment for debt under civil process, and that the general assembly may make an act criminal and punishable by imprisonment which is not fraudulent nor recognized as morally wrong. The power of the general assembly to make an act criminal which was before innocent is familiar. But the legislative power to make acts criminal and punishable by imprisonment cannot be

extended to an invasion of the rights guaranteed the citizens by the constitution. It is impossible to frame a valid statute punishing by imprisonment the exercise of the right to religious liberty, or the right to petition for the redress of grievances, or the right to be exempt from imprisonment for debt except in cases of fraud. These are all constitutional rights, which cannot be abridged under the guise of legislation against crime. The exercise of them cannot be crime.' "

The property owner, Kusek, entered into an agreement with relator to perform the work upon the completion of which she agreed to pay a fixed amount. Relator purchased and used materials which he obtained from Larson Cement Stone Company and McCan Concrete Company. Upon nonpayment of the contract price, the general contractor and the materialmen were protected by mechanics' liens if filed in accordance with applicable statutes. The property owner, however, paid the contract price to relator while the right of the materialmen to file liens still existed. If the general contractor does not pay for labor and materials, liens may be filed against the property, under section 52-102, R. R. S. 1943, providing, "the risk of all payments made to the original contractor shall be upon the owner until the expiration of the three months hereinbefore specified." It is evident that the criminal statute here in question was for the protection of laborers and materialmen, and the property owner as well, by requiring any payment on the contract price to be paid to unpaid laborers and materialmen still having a right to file mechanics' liens.

We point out that section 52-119, R. R. S. 1943, does not make the general contractor an agent or trustee for laborers or materialmen in receiving payments from the property owner, nor does it make the amounts so received a trust fund, or create a lien, or require an intent to defraud. It is urged that the payments to the general contractor on the contract price belong to the contractor as his own and that a criminal statute coercing

him to pay a certain class of debts under the penalty of a criminal statute is unenforcible as imprisonment for debt. The respondent, in effect, contends that the nature of the relationship of the parties makes the failure to pay laborers and materialmen under the circumstances a constructive fraud, and that it is such fraud and not the failure to pay laborers and materialmen that the act purports to punish.

In People v. Holder, *supra,* one of the most cited cases on the subject, it is said: "Any legislation that makes it a crime for one to use his own money for any purpose other than the payment of his debts is violative of section 15 of article I of the constitution of this state, which expressly inhibits imprisonment for debt except in cases of fraud. * * * A man's constitutional liberty means more than his personal freedom. It means, with many other rights, his right freely to labor and to own the fruits of his toil. A statute that, in its practical operation, in effect declares that under any contract between the owner of property and a building contractor the payments that may be made to the latter shall not be absolutely his own to do with as he pleases, but shall be held by him in trust to pay debts due by him to certain preferred creditors, is unconstitutional in that it is an infringement upon the inalienable right of contract. * * * The right of contract is, it is true, subject to reasonable police regulation. But the amendment of 1919 is not a valid exercise of that power. * * * It is well settled that the police power cannot be made a cloak under which to overthrow or disregard constitutional rights. It is only when the general welfare, the interests of the public as distinguished from those of individuals, will be protected that the right of contract may be limited by a general exercise of the police power. * * * The payment of debts that may be due laborers or material men is not calculated to conserve the safety, health, or general welfare of the community. There can be nothing so injurious to the public welfare in the

failure of a debtor to pay his just debts as to require an exercise of the police power. In all free governments the good sense of mankind, since the day when imprisonment for debt was abolished, has condemned and frowned down any attempt to coerce the performance of civil obligations by criminal penalties."

In Commercial Nat. Bank of Sturgis v. Smith, 60 S. D. 376, 244 N. W. 521 (1932), it was held that a statute subjecting a contractor to imprisonment for failing to pay subcontractors furnishing labor and materials out of payments received by the contractor from the owner was violative of constitutional provisions inhibiting imprisonment for debt founded on contract. In Peairs v. State, 227 Ark. 230, 297 S. W. 2d 775 (1957), it was held that a criminal statute making it a felony for any contractor to fail or refuse to discharge a laborer's or materialman's lien to the extent of the contract price, without regard to fraud, was unconstitutional as an attempted imprisonment for debt. The Holder and Commercial National Bank cases, among others, were cited in support of the rule. See, also, Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513, 12 Am. S. R. 663, 1 L. R. A. 777.

The respondent relies upon a line of cases somewhat in conflict with the cases cited by the relator. In State v. Hertzog, 92 S. C. 14, 75 S. E. 374 (1912), the court held that the only reasonable construction of the statute before it is that it makes penal not the mere failure to pay a debt, but the disposition by the contractor of a specific sum of money held by him under a lien so as to defeat the lien. Under such construction the statute was held not to violate the constitutional inhibition against imprisonment for debt except in cases of fraud. The statute in this case created a lien in favor of laborers and materialmen on the money paid by the owner to the contractor, and the defendant was charged and convicted for violating a general statute "which in general terms made a criminal offense the disposition of any personal property upon which a lien exists * * *."

In State v. Williams, 133 Wash. 121, 233 P. 285 (1925), the statute provided that every person contracting to supply labor and materials for which a lien might lawfully be filed who shall receive the full price of his contract or the amount of any account stated thereon shall be deemed to receive the same as the agent of the party with whom the contract was made for the purpose of paying all claims for labor and materials supplied. The court held that the act does not provide for imprisonment for debt but punishes the contractor for his fraud for secreting it or failing to pay it as he should, with intent to deprive or defraud the owner thereof, and has appropriated it to his own use. The court held that it was the fraudulent act and not the indebtedness which is made the determining feature in establishing guilt under the statute.

In Pauly v. Keebler, 175 Wis. 428, 185 N. W. 554 (1921), the statute provided the payments by an owner of property to a contractor were to be a trust fund for the payment of materialmen and laborers entitled to a lien, and made the appropriation of such funds by the contractor without payment of the claims of the lienholders embezzlement not violative of the constitutional provision inhibiting imprisonment for debt. In the course of the opinion, the court said: "Without some statute the large class of persons referred to in sec. 4418, as to embezzlement, would not be criminally liable for the misappropriation of funds. * * * If it is within the legislative power to enact that moneys thus received from one class of persons for the benefit of another class are trust funds and are to be treated accordingly, there is clearly no valid objection to imposing adequate punishment for a violation of the trust."

The statute before us requires no finding of fraud, nor does it purport to establish the money paid to the contractor as a lien, trust, or other fiduciary relation. The cases relied on by relator hold that the Legislature may not, under a proper application of the police power,

provide that money paid under contract is anything other than the exclusive property of the payee. See People v. Holder, *supra*. On the other hand, the authorities cited by respondent hold that it is within the police power to create a lien or establish a fiduciary relationship in the money paid to the contractor and provide criminal punishment for a breach. See Pauly v. Keebler, *supra*. But we are not here concerned with the conflict in the two lines of cases since neither sustains the position of the respondent.

It is argued that the nature of the transaction and the relationship of the parties to each other is sufficient to establish the fraud necessary to sustain the act. We again point out that the statute does not require a finding of fraud, nor does the information charge fraud. The act as written permits a finding of guilt whether or not any fraud was involved. "Wilful and unjust failure to perform a contract does not necessarily connote fraud. Bad faith is the test. One may wilfully or intentionally abandon a contract under a bona fide claim of right without being subject to a charge of fraud, though in fact the other party had not impaired his right to require performance. In addition to the abandonment being wilful, it may also be unjust without being fraudulent. Justice is rendering to every man his due. An act may be wilful and unjust ethically and legally and yet not fraudulent, because it may be done with such right intention as to completely negative the suggestion of actual fraud, and the grounds upon which the doer thought it right may be too rational for the law to impute fraud. * * * But injustice and fraud and unjust and fraudulent are far from being convertible terms. Fraud is corrupt injustice. No greater injustice has ever been suffered than that inflicted by men not only incapable of fraud, but who in the doing of their unjust acts were impelled by zeal for righteousness as they conceived it." Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. N. S.

242, 14 Ann. Cas. 1105. See, also, Pauly v. Keebler, *supra.*

In Bailey v. Alabama, 219 U. S. 219, 31 S. Ct. 145, 55 L. Ed. 191, the defendant was charged with the following statutory offense: Defendant with intent to injure or defraud his employer entered into a written contract to perform labor or services for the employer and obtained thereby the sum of $15 from the employer, and afterwards with like intent, and without just cause, failed or refused to perform such services or to refund the money. Defendant was convicted and sentenced to pay a fine, and in default thereof, to 20 days at hard labor and 116 days in jail on account of the costs. A former statute had been amended to provide that the failure or refusal to perform the service contracted for, or to refund the money obtained, without just cause, should be prima facie evidence of the intent to injure or defraud. The court held: "The money received and repayable, nothing more being shown, constitutes a mere debt. The asserted difficulty of proving the intent to injure or defraud is thus made the occasion for dispensing with such proof, so far as the prima facie case is concerned. And the mere breach of a contract for personal service, coupled with the mere failure to pay a debt which was to be liquidated in the course of such service, is made sufficient to warrant a conviction. * * * It is no answer to say that the jury must find, and here found, that a fraudulent intent existed. The jury by their verdict cannot add to the facts before them. If nothing be shown but a mere breach of a contract of service and a mere failure to pay a debt, the jury have nothing else to go upon, and the evidence becomes nothing more because of their finding. Had it not been for this statutory presumption, supplied by the amendment, no one would be heard to say that Bailey could have been convicted. * * * It is not sufficient to declare that the statute does not make it the duty of the jury to convict, where there is no other evidence but the breach

of the contract and the failure to pay the debt. The point is that, in such a case, the statute authorizes the jury to convict. * * * The 'difficulty,' which admittedly the amendment was intended to surmount, did not exist where natural inferences sufficed. Plainly the object of the statute was to hit cases which were destitute of such inferences, and to provide that the mere breach of the contract and the mere failure to pay the debt might do duty in their absence. * * * It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions." See, also, Pollock v. Williams (Fla.), 322 U. S. 4, 64 S. Ct. 792, 88 L. Ed. 1095; Morrison v. California, 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. 664; Bandini Petroleum Co. v. Superior Court, 284 U. S. 8, 52 S. Ct. 103, 76 L. Ed. 136, 78 A. L. R. 826.

It is true, of course, that we are not here dealing with presumptions in the case before us. We do say that section 52-119, R. R. S. 1943, is unconstitutional in that it requires no proof of fraud. Nor can the failure of the statute to require proof of fraud be taken outside the constitutional inhibition against imprisonment for debt by permitting the jury to consider the nature of the transaction, the moral duty of the relator to pay subcontractors, or even his contract with the property owner to pay them. If a statutory presumption appearing in a statute cannot afford a basis for a conviction under the circumstances shown, how can it be said that a jury's conclusion as to the nature of the relationship without even a fiduciary relationship being established by statute is sufficient to sustain an otherwise unconstitutional statute. If such a procedure is acceptable in the instant case, there would be no reason why a statute stating any debtor-creditor relationship to be criminal would be constitutional if the jury found payment was withheld unjustifiably and with a willful intent. We submit that

section 52-119, R. R. S. 1943, is unconstitutional in that it fails to require a finding of fraud and permits a prosecution for a criminal offense for the failure to pay a contractual obligation without proof of fraud. A writ of habeas corpus should have been granted.

REVERSED AND REMANDED.

ALIENE ALICE FLETCHER, APPELLEE, V. GLEN W. FLETCHER, APPELLANT.

156 N. W. 2d 1

Filed January 26, 1968. No. 36711.

1. **Domicile.** It is the universal rule that residence in a community is determined by the intention of the parties.
2. **Domicile: Divorce.** The residence of one of the parties in the county in which the action is brought is necessary to the jurisdiction of the court in a divorce action.
3. **Divorce.** Condonation is forgiveness, express or implied, for a breach of marital duty with the implied condition that the offense shall not be repeated.
4. ———. Forgiveness and condonation are complete if there is a voluntary resumption of marital relations.
5. ———. Condonation is dependent upon future good conduct and a repetition of the offense revives the wrong condoned.

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

Robert E. Paulick, for appellant.

Ely & Weems and Mattson, Ricketts & Gourlay, for appellee.

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

SPENCER, J.

Plaintiff and appellee sued defendant and appellant for divorce, alleging extreme cruelty. Plaintiff was granted the divorce and the custody of the five children of the parties. Defendant has perfected an appeal to this court.

The petition herein was filed October 31, 1966, in the district court for Brown County. The parties had been residing together in Grand Island. The plaintiff left her husband October 30, 1966, and moved into a home owned by her parents at Ainsworth, Nebraska, which is in Brown County, on October 31, 1966. The petition for divorce was filed the same day.

An examination of the record discloses that defendant's drinking and his association with a Mrs. Elnora Davis were the principal sources of the trouble between the parties. Previous to the move to Grand Island, Mrs. Davis had worked as a waitress for the parties in a hotel at Long Pine, Nebraska. In February 1965, defendant obtained employment at Grand Island, Nebraska. The plaintiff, who was teaching at that time, remained behind with the children, and the defendant moved to Grand Island. Mr. Davis went with defendant to Grand Island and lived in an apartment with him and his brother. The testimony is that this apartment had two bedrooms. Mrs. Davis occupied one, and defendant and his brother the other. Defendant's driving privileges had been suspended for driving while under the influence of intoxicating liquor. He was required to do some driving in his employment, and his explanation of Mrs. Davis' presence is that she went along with him to act as his driver. When the family moved to Grand Island after school was out, defendant secured a home for them and moved Mrs. Davis into that home. When defendant started in business in Grand Island, Mrs. Davis was taken on as an employee and she was so employed at the time of the trial.

The evidence indicates that the defendant and Mrs. Davis drank together at the shop. They would be together away from home during the evening, and would return together under the influence of intoxicating liquor at late hours. The record amply supports plaintiff's contention that throughout their marriage the defendant had verbally abused and ridiculed the plaintiff in public

as well as in private. The record would indicate that the plaintiff became increasingly nervous and harangued the defendant about his conduct. Defendant made a tape recording of one of these sessions. On the evening of October 29, 1966, he repeatedly played this recording and verbally abused the plaintiff. The next day, October 30, plaintiff called her parents and asked them to come for her. They did so. Defendant returned home before they left and resisted the plaintiff's leaving. Defendant and the plaintiff's father came to blows, and defendant sustained severe cuts and bruises. The police were called, and plaintiff left with the children. Thereafter, on several occasions defendant importuned the plaintiff to return to Grand Island, and threatened that if she did not he would bring charges against her father for assault and battery, and would also file a civil action against him. These threats were corroborated by the testimony of plaintiff's mother. Defendant denied he ever threatened criminal action, but admits the threat of civil action.

On November 22, 1966, the plaintiff returned to Grand Island on the condition that the defendant would spend more time with his family; would spend his evenings at home with them; would go to church with them; that he would stop drinking himself and would not permit drinking at the shop; and that he would furnish adequate funds for the support of the family. Mrs. Davis moved from the home before plaintiff's return. The parties resumed marital relations, which continued until December 22, 1966, when plaintiff again left. During this period, defendant had not performed on his promises. On December 15, 1966, plaintiff found Mrs. Davis and some teenagers drinking in the shop. On December 22, 1966, plaintiff looked into the office and saw defendant and Mrs. Davis drinking. The front door was locked. Defendant let plaintiff in the side door and immediately put on a welding helmet and refused to visit with her. She left again that day, but on December 23, 1966, she

was induced to return for Christmas. On December 28, 1966, the parties visited with a psychiatrist. Plaintiff testified the psychiatrist told defendant, "* * * frankly, Mr. Fletcher, I believe your drinking is a problem, * * * why do you drink with other women?" On the way home from the psychiatrists, defendant insisted plaintiff needed shock treatments and he became abusive. The next day plaintiff decided they could not make a go of the marriage, and she again left. She temporarily went to Mountain Home, Idaho, with a sister, but she was living in Ainsworth at the time the case came on for trial on April 24, 1967.

Defendant questions the jurisdiction of the Brown County district court and the sufficiency of the evidence; pleads condonation; and questions the granting of the custody of the children to the plaintiff.

Jurisdiction must be determined as of the time of the filing of the action. Plaintiff filed the action in Brown County the same day she moved into Brown County. In Williams v. Williams, 101 Neb. 369, 163 N. W. 147, we stated: "It is elementary and it is the universal rule that residence in a community is determined by the intention of the parties." It is also elementary that a wife may have a residence separate and apart from that maintained by her husband. Section 42-301, R. R. S. 1943, provides that a divorce may be decreed by the district court of the county where the parties, or one of them, reside. The residence of one of the parties in the county in which the action is brought is necessary to the jurisdiction of the court. Aldrich v. Steen, on rehearing, 71 Neb. 57, 100 N. W. 311. On the record herein, we determine that the plaintiff moved to Brown County with the intention of residing in that community, and that the Brown County district court had jurisdiction herein.

Condonation is forgiveness, express or implied, for a breach of marital duty with the implied condition that the offense shall not be repeated. Forgiveness and condonation are complete if there is a voluntary resump-

tion of marital relations. Wetenkamp v. Wetenkamp, 140 Neb. 392, 299 N. W. 491. The trial court determined herein that there was no voluntary resumption of marital relations. We question this holding, but it is not important because condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. Condonation is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned. Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368. See, also, Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 808. We determine that the defendant did not keep the promises made to the plaintiff to induce her to return. It is clear there was a repetition of some of defendant's former acts. This repetition revived the wrongs previously condoned. Accordingly, we find no merit in defendant's contention that the evidence is insufficient and that a divorce should be denied because of condonation.

Relative to the custody of the children, it is apparent from the record that the best interests of the children will be served by giving their mother their custody. We approve the arrangement made by the trial court permitting the oldest child, who was 14 years of age at the time of the trial, to live with his maternal grandparents on their ranch in Keya Paha County so long as plaintiff is willing that he do so.

For the reasons given, we find no merit in defendant's assignments of error and affirm the judgment. Costs of appeal are taxed to the defendant, including an attorney's fee of $350.

AFFIRMED.

CARTER, J., dissenting.

On October 31, 1966, Aliene Fletcher took up her residence in Ainsworth, Brown County, Nebraska, and on the same day filed a petition for divorce on the ground of physical and mental cruelty. On April 24, 1967, Glen Fletcher filed a general denial to plaintiff's petition. On April 25, 1967, defendant filed an amended answer alleging that plaintiff had condoned the acts of cruelty

set out in her petition. No reply was ever filed. On November 22, 1966, to December 29, 1966, the parties cohabited together as husband and wife, during which period they purchased a new home in Grand Island and placed their five children in school in that city. There is no question that the parties cohabited as husband and wife for 5 weeks in November and December 1966. The plaintiff contends that this cohabitation was not voluntary which is incredible on its face. The condonation was complete. Wetenkamp v. Wetenkamp, 140 Neb. 392, 299 N. W. 491; Wright v. Wright, 153 Neb. 18, 43 N. W. 2d 424; Sewell v. Sewell, 160 Neb. 173, 69 N. W. 2d 549. During the pendency of a divorce suit, the parties must live apart. Ellis v. Ellis, 115 Neb. 685, 214 N. W. 300; Wright v. Wright, *supra*. A complete condonation restores the marriage relation to the same extent as if a divorce suit had never been filed. A pending action for divorce after condonation is abated and, I submit, it is subject to dismissal. Collins v. Collins, 194 La. 446, 193 So. 702.

I find no fault with the rule stated in many cases that condonation is forgiveness for the past upon condition that the wrong shall not be repeated, and it is dependent upon future good conduct and a repetition of the offense revives the wrong condoned. See Hodges v. Hodges, 154 Neb. 178, 47 N. W 2d 361. But in order to revive the wrong condoned, a new petition must be filed alleging the repetition of the wrongs condoned and the allegations of fact arising subsequent to the condonation showing the repetition of the acts giving rise to the reviver of such prior wrongs.

"It has been held that there must be some corroboration of the subsequent act, Henry v. Henry, 11 O. Dec. Rep. 781; 29 W. Law Bul. 115, but the prior acts are supporting testimony to the subsequent acts, Kleinhenz v. Kleinhenz, supra, and it is not necessary that such a subsequent act be of such a nature as would support a divorce action of itself. If such an act shows a breach

of the conditional forgiveness, then all acts complained of, whether previously condoned or not, may be alleged. * * * If the condonation takes place during the pendency of the suit the cause of action abates but may be revived in the same action where subsequent acts of aggression have taken place by the filing of a supplemental petition. * * * Not only have the courts of Ohio seemed to follow the view that a single resumption of marital intercourse shall constitute condonation, but this court feels that such a decision is proper. During recent years, because of a liberalization of our general beliefs it has become easier for the parties to obtain a divorce. Purely as a moral proposition, this court does not feel that parties should be allowed to maintain sexual relations and at the same time seek a divorce as the two acts are completely incompatible. The court feels that a single voluntary act of marital intercourse, where the injured party is in full knowledge of the other party's aggressions, shall act as a condonation of all aggressions up to that time. This can work no hardship upon the parties as the decisions of Ohio have clearly held that such an act must be voluntary and with full knowledge and that the foregiveness is conditional. This latter rule protects a party that might resume relations following acts of cruelty or habitual drunkenness, for if there is a breach of the implied condition, even though the act constituting the breach is not enough to constitute a grounds for divorce, not only that act but all previous acts of aggression may be alleged and proved." Huffine v. Huffine, 36 Ohio O. 56, 74 N. E. 2d 764. In my judgment, the foregoing decision correctly states the law as it has heretofore existed in this state. I submit that if the parties to a divorce are friendly enough during its pendency to engage in sexual relations, they are friendly enough to continue the marriage relation.

There is no pleading in this case alleging such facts as would overcome the pleaded and proven condonation. It

is fundamental that a judgment to be valid must be supported by the pleadings. State ex rel. Connolly v. Haverly, 62 Neb. 767, 87 N. W. 959; National Fire Ins. Co. v. Evertson, 153 Neb. 854, 46 N. W. 2d 489; Muller Enterprises, Inc. v. Gerber, 178 Neb. 463, 133 N .W. 2d 913.

The result is that plaintiff is granted a divorce on a petition that has abated and, even if it could be amended to state a cause of action, it was not done. No affirmative defense to the plea and proof of condonation were alleged, and consequently the pleadings do not support the judgment. I submit that the judgment of the district court should be reversed and the opinion of this court is in error.

There are serious questions of public policy involved in this case. This court has consistently held that cohabitation by the parties pending divorce proceedings will not be permitted. The cases plainly infer that where cohabitation does occur the cause of action is abated and the petition for divorce will be dismissed. The public interest will not be subserved unless this be the rule. Public decency will not be maintained and fraud and collusion will not be deterred in this type of case if the rule against cohabitation is not effectively enforced. It is not enough to merely give whimsical effect to the announced rule of this court requiring the parties to a divorce action to live apart during its pendency. Nor is it enough to ignore such issues when they are properly raised on appeal as they are here. I submit that the law is being ignored and the public policy of the state circumvented by the treatment given the appeal by the majority. The case should be reversed and dismissed.

SMITH and NEWTON, JJ., concur in the foregoing dissent.

THE WYMORE ARBOR STATE, INC., A NEBRASKA CORPORATION, APPELLEE, V. MILO KORINEK ET AL., DOING BUSINESS AS THE WILBER REPUBLICAN, APPELLANTS.

156 N. W. 2d 24

Filed February 2, 1968. No. 36537.

Newspapers: Statutes. Performing the mechanical acts of reproducing a newspaper, outside the county in which the newspaper has its office and is produced, published, issued, and distributed, does not violate the requirement of section 25-523, R. R. S. 1943, that a legal newspaper "be printed, either in whole or in part, in an office maintained at the place of publication."

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

Dean R. Sackett, for appellants.

Andersen & Hubka, for appellee.

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

MCCOWN, J.

This is a declaratory judgment action to determine the rights of the parties under a contract to reproduce a newspaper.

The plaintiff, The Wymore Arbor State, Inc., is owner and publisher of a legal newspaper which plaintiff reproduces by photo offset process in Wymore, Gage County, Nebraska. The defendants, Milo Korinek and Arlene Korinek, are owners and publishers of "The Wilber Republican," a newspaper with offices in Wilber, Saline, County, Nebraska. It has been a legal newspaper in Saline County for many, many years. The contract provided for the reproduction in volume of The Wilber Republican in Wymore, Nebraska, by the photo offset reproduction process. Under the contract, the defendants are required to assemble in its entirety, each complete and original edition of The Wilber Republican. This original edition is to be delivered to the plaintiff at Wymore, where the plaintiff will reproduce it in volume.

The defendants then take the press run as reproduced and return it to Wilber. The contract specifically provides that if the reproducing procedures contemplated by the contract would deprive The Wilber Republican of its qualification as a legal newspaper in Saline County, the contract was subject to immediate termination.

The district court determined that the contract involved was a valid contract and that The Wilber Republican would continue to be a legal newspaper in the County of Saline if reproduced pursuant to the terms of the contract.

A brief résumé of the operation of the photo offset reproduction process is necessary for clarification and comparison with traditional newspaper printing processes and procedures. Under traditional processes, linotype machines and other devices are used in setting the lead type and preparing the page forms for the presswork. Under the offset process, other machines and devices are used in place of the traditional composing room methods. No metal type is used in the offset process. Two machines are ordinarily employed, sometimes known as Justo-writers or Vari-typers. The first of these machines has substantially a typewriter keyboard. It not only types the material, but perforates a tape. The tape, in turn, is fed into the second machine which automatically adjusts margins and, in effect, types or prints material in newspaper columnar form. Errors or deletions may be made from the tape and material may be edited or reprinted either through the machines or by paste-over. The material in newspaper columnar form is then pasted on a layout page along with photographs or advertising material, and the final layout page becomes the original or master page form. A similar paste-up sheet or master sheet is made up for each page. Each page is photographed and, by the offset process, the image is transferred to a rubber roller or blanket which, in turn, is wrapped on a cylinder and from it the ink is offset to the paper. This final portion of the process is

sometimes referred to as offset lithography.

Under the facts here, the defendants continue to gather the news and advertising, prepare, compose, edit, and assemble it in its entirety as a newspaper in the page form in which it is to be reproduced. This work will all be done at the office of The Wilber Republican in Saline County. The original or master page copies will be delivered to the plaintiff. The plaintiff then furnishes all camera work, paper, ink, and press and presswork necessary for printing and reproducing the newspaper. The defendants will then return it to Saline County where it will be issued and distributed by mail or otherwise, in the same fashion as it has been in the past.

The crucial question here is whether the performance of the mechanical acts of printing or reproduction outside the county destroys the qualification as a legal newspaper in the county in which the newspaper has its office, and is prepared, published, and issued.

The statute directly involved is section 25-523, R. R. S. 1943, which, insofar as is applicable here, provides: "No newspaper shall be considered a legal newspaper for the publication of legal and other official notices unless the same shall have a bona fide circulation of at least three hundred copies weekly, and shall have been published within the county for fifty-two successive weeks prior to the publication of such notice, and be printed, either in whole or in part, in an office maintained at the place of publication; * * *."

The problem of interpretation of such statutes has been considered many times by courts over a long period of years. Statutory variations make it difficult to determine consistent principles. See 66 C. J. S., Newspapers, § 7, p. 30.

Many cases have recognized that the purpose sought to be accomplished must be considered, and that statutes of this character are principally designed to see that notice is given of legal or official proceedings pending or contemplated to those persons who are, or may be pre-

sumed to be, interested therein. Cases taking this approach suggest a broad or liberal construction of such provisions rather than construction in a narrow or technical sense. The case of Dearborn Independent, Inc. v. City of Dearborn, 331 Mich. 447, 49 N. W. 2d 370, represents this view. It specifically held that a charter provision requiring that the official newspaper of the city be "printed and published in the city" did not disqualify a newspaper notwithstanding the mechanical work incident to the printing was not done within the city. The court in that case held that the underlying purpose of the provision was to give notice, and that purpose was not affected or accomplished by the doing of the mechanical acts which were only incidental to publication. For cases supporting such construction on closely related facts, but in terms of traditional printing processes, see, In re Application of McDonald, 187 Cal. 158, 201 P. 110; North Central Pub Co. v. City of St. Paul, 198 Minn. 335, 269 N. W. 835; Bayer v. City of Hoboken, 44 N. J. Law 131; Bebermeyer v. Board of Commissioners, 63 S. D. 593, 262 N. W. 175. The latter case involved relevant statutory language identical to the Nebraska statute.

As long ago as 1897, this court had occasion to construe a statute requiring notice to be given "in some newspaper printed in the county, or in case no newspaper be printed in the county, in some newspaper of general circulation therein." The case was Nebraska Land, Stock-Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co., 52 Neb. 410, 72 N. W. 357. The affidavit involved certified that the notice was "published" in the county. This court said: "We do not think that the word 'print' was by the legislature used in the specific and somewhat technical sense of designating the purely mechanical act of impressing the characters upon the paper. The object of the statute was to give notice, and if the legislature had the distinction at all in view it would not for that purpose have selected the place of printing instead of that of publication." This

language was reaffirmed in 1902 in Aetna Life Ins. Co. v. Wortaszewski, 63 Neb. 636, 88 N. W. 855.

The cases which have been referred to discuss the problem of statutory interpretation within a frame of reference involving traditional printing processes. There have been few cases in which the particular problems or differences involved in offset lithograph as contrasted with traditional printing have been considered or discussed. See, Peckham v. California Newspaper Publishers Assn., 108 Cal. App. 2d 53, 238 P. 2d 111; Garten v. Tibbitts, 63 Cal. Rptr. 69 (October 18, 1967). These two cases are not cited in the briefs and involved radically different statutes from ours. However, they clearly held that with reference to a newspaper "printing" was not limited to "impressing type on paper," but includes the mechanical work of producing a newspaper by any reasonable means, and includes offset lithography.

Our statute requires only that the printing be done *either in whole or in part* in an office maintained at the place of publication. Here the procedures to be performed by the defendants in Saline County should be viewed in the light of the traditional newspaper printing procedures they replace. The procedures of offset lithography in a newspaper office, up to and including the paste-up of the master page copy of the newspaper, replace the traditional printing procedures of preparation of metal and type, setting of type, and assembly and setting of page forms for the presswork. Those procedures constitute a substantial and important part of newspaper printing under traditional methods. The newspaper procedures of offset lithography which replace them should be considered comparable in construing a statute dealing with newspaper printing.

We think the Legislature intended to provide for notice by means of a local newspaper where possible, and that in the contemplation of the Legislature, a local newspaper was one having an office in the county in which the material for publication would be gathered,

organized, arranged, and edited, and from which office the ultimate publication would be issued and distributed. We do not believe the Legislature intended to prohibit doing the mechanical acts of printing or reproduction outside the county. The place of mechanical reproduction bears no vital relationship to the underlying problem of notice.

We hold that performing the mechanical acts of reproducing a newspaper, outside the county in which the newspaper has its office and is produced, published, issued, and distributed, does not violate the requirement of section 25-523, R. R. S. 1943, that a legal newspaper "be printed, either in whole or in part, in an office maintained at the place of publication."

The district court was correct in holding that the contract was a valid and binding agreement and that The Wilber Republican would continue its status as a legal newspaper in the County of Saline if reproduced pursuant to the terms of the agreement. The judgment is affirmed.

AFFIRMED.

ROBERT P. STEPHENS, APPELLEE, V. ALLIED MUTUAL INSURANCE COMPANY, A CORPORATION, APPELLANT.
156 N. W. 2d 133

Filed February 2, 1968. No. 36651.

1. **Insurance.** An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made.
2. ———. The language of an insurance contract should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean. If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted.

3. **Insurance: Automobiles.** A provision drawn by the insurer to comply with the statutory requirement of uninsured motorist coverage must be construed in light of the purpose and policy of the statute.
4. ———: ———. The purpose of a statute or provision is to give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy.
5. ———: ———. The insolvency of a tort-feasor's insurance carrier occurring subsequent to an accident, with a consequent refusal or inability of the carrier to defend or pay a judgment or claim resulting therefrom for which the tort-feasor has become liable, constitutes a "denial of coverage" within the meaning of such provision in the uninsured motorist clause of the insured's policy.
6. ———: ———. A provision in an automobile liability policy that an insurer shall not be obligated to pay under uninsured motorist coverage for that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured automobile which represents expenses for medical services paid or payable under the medical payments coverage of the policy is void and against public policy in that it reduces the minimum coverage of uninsured motorist protection prescribed by the law.
7. **Insurance: Attorney and Client.** Uninsured motorist coverage in an insurance contract is in the nature of a substitute liability or guaranty contract, and recovery thereon permits the allowance of attorney's fees under section 44-359, R. R. S. 1943.
8. **Attorney and Client.** The amount of the allowance of the attorney's fees generally rests in the sound discretion of the court, considering the applicable elements involved therein.

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

Wilson, Barlow & Watson, for appellant.

Mattson, Ricketts and Gourlay, for appellee.

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

WHITE, C. J.

The plaintiff sues his own insurer for recovery under the uninsured motorist provision of his automobile liability policy. The primary question is whether the in-

solvency or the failure to defend or pay a claim subsequent to the accident by a tort-feasor's liability carrier constitutes a denial of such coverage by the tort-feasor's carrier thereby invoking the liability of the plaintiff's carrier under the uninsured motorist clause. The district court found for the plaintiff on this issue and we affirm the judgment.

Plaintiff, on November 17, 1964, was negligently injured by tort-feasor Russell in an automobile accident. Russell was insured on that date by Royal Standard Insurance Company (hereinafter referred to as Royal Standard). Royal Standard was notified but, in effect, did nothing. On April 5, 1965, Royal Standard became insolvent and was placed in receivership.

Plaintiff had been in correspondence with Royal Standard. The defendant's files indicated a request by Royal Standard for plaintiff's bills and a valuation of the claim. The defendant, in a letter of August 17, 1965, reviewed this situation and notified the plaintiff it denied liability. Plaintiff then sued Russell for damages and recovered a valid default judgment in the sum of $50,000 on September 28, 1965. A claim in this amount was filed with the receiver of Royal Standard, which was allowed in the amount of $5,000. Subsequently, on November 17, 1965, this action was filed and is before this court on the sustaining of a motion for summary judgment in favor of plaintiff in the sum of $10,000, which is the policy limit under the plaintiff's uninsured motorist coverage on his policy for which a separate premium was paid by him. Our Nebraska statute (section 60-509.01, R. S. Supp., 1965), requiring uninsured motorist coverage, does not define the term "uninsured motorist." Therefore the terms of the policy in this respect are controlling. The family protection coverage (uninsured motorist) endorsement in the policy defining an uninsured automobile is as follows:

"(c) 'uninsured automobile' means:

"* * * an automobile with respect to the * * * use of

which there is * * * no bodily injury liability bond or insurance policy applicable at the time of the accident * * * or with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident but the company writing the same denies coverage thereunder * * *."

In construing an insurance policy, such as in the present case, the following basic principles are applicable: " 'An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made.' Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874. See, also, Rathbun v. Globe Indemnity Co., 107 Neb. 18, 184 N. W. 903, 24 A. L. R. 191.

" 'The language should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean. If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted.' Koehn v. Union Fire Ins. Co., supra. See, also, 29 Am. Jur., Insurance, § 166, p. 180." Lonsdale v. Union Ins. Co., 167 Neb. 56, 91 N. W. 2d 245.

The controlling question is whether the subsequent insolvency of the tort-feasor's insurance company or its failure to defend the claim or pay the judgment constitutes a "denial of coverage" within the meaning of this clause in the insurance contract.

A provision, drawn by the insurer to comply with the statutory requirement of uninsured motorist coverage, must be construed in light of the purpose and policy of the statute. Such a provision, drawn in pursuance of a statutorily declared public policy, is enacted for the benefit of injured persons traveling on the public highways. Its purpose is to give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused

by an automobile covered by a standard liability policy. Such provisions are to be liberally construed to accomplish such purpose. 7 Am. Jur. 2d, Automobile Insurance, § 135, p. 460; Bryant v. State Farm Mutual Automobile Ins. Co., 205 Va. 897, 140 S. E. 2d 817; Storm v. Nationwide Mutual Ins. Co., 199 Va. 130, 97 S. E. 2d 759, 69 A. L. R. 2d 849; Travelers Indemnity Co. v. Kowalski, 233 Cal. App. 2d 607, 43 Cal. Rptr. 843; Mills v. Farmers Ins. Exchange, 231 Cal. App. 2d 124, 41 Cal. Rptr. 650; State Farm Mutual Automobile Ins. Co. v. Brower, 204 Va. 887, 134 S. E. 2d 277.

By its terms, the policy provision extends the coverage beyond the mere existence of an insurance contract at the time of the accident. It is to be assumed, considering the separate premium charge and the remedial and public policy purpose of the statute, that the voluntary inclusion of this clause by the defendant-insurer itself was intended to make the coverage effectual rather than merely nominal.

The uninsured motorist on the highway is a real risk. He is a real risk because of his probable inability to pay or respond for damages for negligent driving. The purpose of the statute and this particular clause is to eliminate that risk. To subdivide or apportion this risk and to make it dependent upon the whimsical uncertainty of solvency of an unidentified and uncertain tort-feasor insurance carrier is both unrealistic and unreasonable. It invokes an entirely unrelated and undeterminable factor that mitigates and lessens the accomplishment of the purpose of the statute and the area of effectual coverage sought to be reached by the voluntary inclusion of the clause in the insuring provision. The majority rule, almost without contradiction, is that where uninsured motorist statutes or policy provisions have defined an uninsured motorist in the same language as was used in the present policy, subsequent insolvency of an insurer constitutes a denial of coverage within the meaning of the provisions of the policy or statute. State Farm

Mutual Automobile Ins. Co. v. Brower, *supra;* North River Ins. Co. v. Gibson, 244 S. C. 393, 137 S. E. 2d 264; Katz v. American Motorist Ins. Co., 244 Cal. App. 2d 886, 53 Cal. Rptr. 669; Pattani v. Keystone Ins. Co., 426 Pa. 332, 231 A. 2d 402.

The identical issue presented in this case was decided by the Pennsylvania Supreme Court (June 29, 1967) in Pattani v. Keystone Ins. Co., *supra.* The Pennsylvania uninsured motorist statute, as in Nebraska, did not define the term, and the policy provisions were the same as in the present case. The Supreme Court of Pennsylvania held "* * * that insolvency of the tort feasor's carrier occurring subsequent to the accident, and the consequent refusal or inability of that carrier to defend or pay judgments to which its insured had become liable, constitutes a denial of coverage within the uninsured motorist provision of the insured's policy and entitles the other insured to proceed in accordance with his own insurance policy." These cases illustrate, and reason dictates, that at a minimum a policy provision which provides for coverage when the tort-feasor's insurer "denies coverage" is reasonably subject to different interpretations. A reasonable person could well have understood that to deny coverage was to fail to meet the liabilities of the insured tort-feasor. The insurance policy was prepared by the insurer, and reasonably differing interpretations must be decided in favor of the insured. Lonsdale v. Union Ins. Co., 167 Neb. 56, 91 N. W. 2d 245. It appears, therefore, that either as a matter of original construction, or upon the grounds of ambiguity, this clause must be construed contrary to the contention of the defendant.

Defendant cites Uline v. Motor Vehicle Accident Indemnification Corp., 213 N. Y. S. 2d 871, 28 Misc. 2d 1002. This case apparently holds to the contrary, but a close analysis of this case reveals that the court was not construing an uninsured motorist statute or a policy provision in an insurance contract. Rather, New York has set up a corporation contributed to by insurance

companies, and recovery is limited to seven specific categories, one of which is denial of coverage by the tort-feasor's insured. The court held that the statute must be strictly construed and that since insolvency of the tort-feasor's carrier was not specifically provided as one of the categories for recovery, the insurer was not liable. This, of course, while authority for the defendant's position, is a considerably different situation than we have under our statute and the specific provisions of the insuring contract between the plaintiff and defendant. Defendant cites a recent intermediate court of appeals decision in Michigan which apparently is contrary to our holding herein and to the majority rule. Michigan Mutual Liability Co. v. Pokerwinski (Mich. App.), 154 N. W. 2d 609. This decision is not from Michigan's court of last resort and is not persuasive because it apparently holds, despite the cited decisions therein to the contrary, that the language of the policy is not subject to construction. It is interesting to note that although this is a recent case (November 30, 1967), the two authorities cited therein for the position taken were subsequently overruled by the courts of last resort of the states therein and become authority for the decision we have reached in this case. North River Ins. Co. v. Gibson, *supra;* Pattani v. Keystone Ins. Co., *supra.*

The proper constructon of this separately paid for insurance coverage clause should not be an exercise in the blind semantics of literal language construction. We do not feel that the Legislature intended to restrict the benefits of uninsured motorist coverage to those cases where the tort-feasor lacks insurance at the very moment of injury. We feel that when an insurer fails to defend a claim or to satisfy a judgment against its insured, whether *voluntarily or involuntarily,* it "denies coverage" in the only meaningful sense of the term. Realistically, an injured person is as unprotected by a tort-feasor insurance carrier who has become insolvent prior to the satisfaction of his claim just as much as is the

person injured by a tort-feasor who has no insurance at all. We therefore hold that the insolvency of a tort-feasor's carrier occurring subsequent to the accident, with a consequent refusal or inability of the carrier to defend or pay a judgment or claim resulting therefrom for which the tort-feasor has become liable, constitutes a "denial of coverage" within the meaning of such provision in the uninsured motorist clause of the insured's policy. The above rule is bottomed upon the fundamental principles that the uninsured motorist statute established in this state a public policy that every insured is entitled to recover damages he or she would have been able to recover if the offending motorist had maintained a policy of liability insurance in a solvent company capable of responding for damages duly adjudicated against its insured.

A more difficult question is next presented by the defendant in the contention that it is entitled to a setoff in the amount of $1,000 for medical payments paid under the medical payments coverage provision of the policy in the event that it is determined that the Russell automobile was uninsured. This exemption is claimed under section 6(d) of the uninsured motorist coverage which provides as follows: "* * * the company *shall not be obligated* to pay under this Coverage that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured automobile which represents expenses for medical services paid *or payable* under the Medical Payments Coverage of the policy." (Emphasis supplied.)

The mimimum coverage required by statute is $10,000 per person and $20,000 per accident. The uninsured motorist protection required to be offered by this statute as between the insured and his insurer is in the nature of a substitute liability policy; and to permit a limitation of this coverage by a policy provision so that it may be reduced below that required by statute, would be void as being contrary to the statute and the declared

public policy and purpose as embodied in the provisions of the law.

The two coverages (medical payment and uninsured motorist) are separate and independent contractual provisions in the policy for which a separate premium is charged and collected. On its face, this provision limits the coverage by providing that the company "shall not be obligated to pay under this coverage * * *." By its terms, the liability is limited to a "portion of the damages" recoverable against the tort-feasor, and, in effect, carves out a restricted cause of action against the substitute carrier. But it is argued that the setoff in medical payments which reduces the coverage is supplied by the insurer under this separately contracted for medical payment coverage. Nevertheless, the provision either limits the substituted liability coverage or the separately contracted and charged for liability under the medical payment coverage and this is accomplished by transporting the medical payment coverage into the uninsured motorist coverage by way of limitation. The argument as to the effect of this provision, as distinguished from its basic nature, becomes dialectically complex. If the provision does not limit coverage, as the insurer contends, we fail to see its purpose. Surely its object is not to give additional coverage to the insured. Conversely, if its purpose is to alter or change the company liability for the separately charged premium for medical payments, it would have to be struck down as an alteration of the separately contracted for contractual risk assumed by the insurer under the terms of the medical payment coverage.

The complex, if not devious, ramifications of the application of the language of this clause can be quite simply illustrated. If the plaintiff in this case had contracted for medical expense coverage in the sum of $10,000 and had suffered medical expenses in excess of this amount, the effect of the setoff clause herein involved would be to completely eliminate the uninsured motorist coverage. By its terms this provision is not in the nature of sub-

rogation but a limitation of liability. It can be contended that not only would the insurer pay nothing under the statutory coverage, but under its policy subrogation rights it would be entitled, to the extent of its medical expense payments, to any proceeds recovered from the uninsured tort-feasor motorist. It may also be contended that if it be true that this setoff provision does not reduce the company's liability on the uninsured motorist coverage, then payment of part or all of the insurer's liability under its medical expense coverage would not have the result of reducing the amount of the insurer's claim against amounts recovered from the uninsured tort-feasor. We refuse to be drawn into this dialectical quagmire. The separately contracted for and paid for uninsured motorist coverage, required under the statutorily declared public policy purpose of the statute, may not be restricted or inhibited by the effect or the risk of the effect of the application of this provision which on its face is a limitation of liability.

The general rule is that an insurer may not limit its liability under uninsured motorist coverage by setoffs or limitations through "other insurance," excess insurance, or medical payment reduction clauses, and this is true even when the setoff for the reduction is claimed with respect to a separate, independent policy of insurance (workmen's compensation) or other insured motorist coverage. And this is true because the insured is entitled to recover the same amount he would have recovered if the offending motorist had maintained liability insurance. Phoenix Ins. Co. v. Kincaid (Fla. App.), 199 So. 2d 770; Sellers v. United States Fidelity & Guaranty Co. (Fla. App.), 185 So. 2d 689; Standard Accident Ins. Co. v. Gavin (Fla. App.), 184 So. 2d 229; Sims v. National Casualty Co. (Fla.), 171 So. 2d 399; Hack v. Great American Ins. Co. (Fla.), 175 So. 2d 594.

We therefore hold that a provision in an automobile liability policy that an insurer shall not be obligated to pay under uninsured motorist coverage for that part of

the damages which the insured may be entitled to recover from the owner or operator of an uninsured automobile which represents expenses for medical services paid or payable under the medical payments coverage of the policy is void and against public policy in that it reduces the minimum coverage of uninsured motorist protection prescribed and required by the law.

Next, defendant contends it is not liable for attorney's fees because under our statute, section 44-359, R. R. S. 1943, this is an indemnity policy on which recovery does not permit the allowance of attorney's fees. Security State Bank v. Aetna Ins. Co., 106 Neb. 126, 183 N. W. 92; Borden v. General Ins. Co., 157 Neb. 98, 59 N. W. 2d 141.

The statute permits an allowance of attorney's fees on liability and guaranty policies. Ordinarily, as the above cases hold, fire insurance and collision coverage under an automobile policy are indemnity contracts for the payment of loss direct to the insured. But the uninsured motorist coverage herein is a substituted liability policy by which the insurer becomes liable for the negligence or fault of the uninsured motorist. It is a guaranty contract because it is a promise to answer for the debt, default, or miscarriage of another person. See Belk v. Capital Fire Ins. Co., 102 Neb. 702, 169 N. W. 262. There is no indemnification for loss direct to the insured in this case, but rather an assumption of liability or a promise to answer for the debt and default of a third uninsured person resulting therefrom. There is no merit to this contention.

This action was decided on motion for summary judgment, and the defendant contends that there was a genuine issue of fact because there is no evidence that the tort-feasor's carrier, Royal Standard, refused to defend the action. This is the same argument, cast in a different form, that the defendant is not liable because there has been no "denial of coverage" under the provisions of the policy. The subsequent insolvency and

inability or failure to pay the claim or judgment by the the tort-feasor's carrier, Royal Standard, is conclusively established in the record. As we have previously seen, this is sufficient under the law to constitute a denial of coverage, and the invocation of liability under the uninsured motorist coverage clause of the defendant's policy. There is, therefore, no genuine material issue of fact remaining, and this contention is without merit.

Defendant complains that the allowance of attorney's fees in the sum of $2,500 was excessive. The amount allowed rests in the sound discretion of the district court, considering the elements of the amount involved, the responsibility assumed, the questions of law raised, the time and labor necessarily required in the performance of duties, the professional diligence and skill required, and the result of the services performed. Metcalf v. Hartford Acc. & Ind. Co., 176 Neb. 468, 126 N. W. 2d 471. It would serve no purpose in this opinion to review the record with respect to each one of these elements. Suffice it to say that we have carefully reviewed the record and, considering the different elements involved, have come to the conclusion that there has been no abuse of discretion by the trial court in the allowance of the attorney's fees under all the circumstances. The statute further provides for attorney's fees for services in this court, and a further fee is allowed counsel for the plaintiff in this case in the sum of $500.

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

AFFIRMED.

GUY F. PENSYL, APPELLANT, V. BERNARD N. GIBB ET AL., APPELLEES.

156 N. W. 2d 27

Filed February 2, 1968. No. 36660.

1. **Appeal and Error: Trial.** It is prejudicial error to submit to

the jury an essential issue of fact for which there is no proof.

2. ———: ———. An instruction should not assume as established a disputed issue of fact.
3. ———: ———. It is the duty of the court on its own motion to instruct as to all issues of fact that are pleaded and upon which there is evidence to support them.
4. **Public Officers and Employees.** A police officer stationed on a public highway for the purpose of directing traffic in the proper performance of his duties is required to assume a position, which, in view of the close proximity of approaching traffic, is necessarily a place of danger.
5. ———. A police officer, under such circumstances, is not required to keep a constant lookout for the approach of cars from any and all directions.
6. ———. A police officer properly directing traffic on a public highway is required to keep a reasonable lookout and to exercise care in the circumstances commensurate with the dangers and consistent with the faithful performance of the duties of his employment.

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

William H. Mecham and Jack L. Spence, for appellant.

Fraser, Stryker, Marshall & Veach and Herbert M. Fitle, for appellees.

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

WHITE, C. J.

The intersection of Fifty-second and Dodge Streets in Omaha, Nebraska, was partially blocked, on a rainy, misty night, by an automobile accident. To the west, the south side of Dodge Street was blocked by barricades and parked emergency vehicles. Plaintiff police officer, with a baton flashlight, was standing near the center of Dodge Street intermittently stopping and funneling to the left the two lanes of eastbound traffic into one lane to the north across the intersection. Plaintiff, receiving a signal from his partner officer to the east, waved the eastbound traffic forward, looked again to the east to make sure the traffic could continue and as he turned

around, not changing his position in the street, was hit by the defendant's eastbound automobile in the first lane north of the south curb lane on Dodge Street. Defendant had been stopped behind several parked vehicles waiting for the officer's signal, followed the one ahead of him at about 4 miles per hour, and the first time he saw plaintiff was when he observed his hands on the hood of the automobile.

The jury returned a verdict for defendant and plaintiff appeals. We reverse the judgment and remand the cause for a new trial.

The court in instruction No. 17, said: "The plaintiff herein as a police officer has a right to be in the street in the performance of his duties as a police officer, but, in this connection, *you are instructed that he cannot by virtue of that right be heedless of the rights of others who have a lawful right to use the streets and highways.* He had the legal right to assume that his rights in the use of the street would be respected by other users of the street, but one having the right to be in the street may not on that account proceed *serenely unconscious of the surrounding circumstances.*" (Emphasis supplied.)

The giving of the underlined portions of the above instruction was prejudicial error. As a matter of law the plaintiff, as a police officer, had a right to be where he was. Anderson v. Nincehelser, 152 Neb. 857, 43 N. W. 2d 182. There is no pleading or evidence to support these statements in the instruction. The plaintiff's evidence is uncontradicted that he turned in the same position on the street where he was and faced the west when he was hit. The defendant's evidence was that the first time he saw plaintiff was when he observed his hands on the hood of the car. Obviously, there was no evidence of heedlessness or proceeding "serenely unconscious of the surrounding circumstances." The evidence in the record is to the contrary. It is prejudicial error to submit to the jury an essential issue of fact for which there is no proof. Colton v. Benes, 176 Neb. 483, 126 N. W.

2d 652. These statements in the instruction are without qualification and, in context, constitute prejudicial comments on the evidence and are therefore forbidden. Even assuming there was such evidence, this instruction, by reasonable construction assumes as established a disputed issue of fact and therefore is erroneous. Schrage v. Miller, 123 Neb. 266, 242 N. W. 649; Terry v. Beatrice Starch Co., 43 Neb. 866, 62 N. W. 255; Jessup v. Davis, 115 Neb. 1, 211 N. W. 190, 56 A. L. R. 1403. In the last part of instruction No. 17, too lengthy to repeat here, the court instructed the jury fully on the duty of the plaintiff to not move from a place of safety into the path of danger. Steel v. Nordin, 175 Neb. 900, 124 N. W. 2d 921. Again the defendant did not plead this act of contributory negligence and there is no evidence to support a finding that the plaintiff moved from his position into the path of defendant's vehicle. The evidence is that he remained in a stationary position where he had a right to be. Instruction No. 17 was prejudicially erroneous and should not have been given.

The giving of instruction No. 16 relating to and defining reasonable control was correct. We have examined this instruction and find no error in it.

The plaintiff pleaded that he was a police officer on street duty directing traffic and that the defendant failed to keep a proper lookout for him. It was therefore the trial court's duty on its own motion to instruct on this issue. Carlson v. Chambers, 173 Neb. 166, 112 N. W. 2d 729. The proper discharge of a policeman's duty, under these circumstances, requires him to assume a position on the highway, which, in view of the close proximity of approaching traffic, is necessarily a place of danger. In order to perform these duties the law does not require him to keep a constant lookout for the approach of cars from any and all directions. When stationed at his post in a proper place and attending his duties he is entitled to assume that an oncoming motorist will observe him. His duty is to keep a reasonable look-

out and to exercise care in the circumstances commensurate with the dangers and consistent with the faithful performance of the duties of his employment. Anderson v. Nincehelser, *supra;* 4 Blashfield, Automobile Law and Practice (3d Ed.), §§ 144.5 to 144.9, pp. 155 to 167; 7 Am. Jur. 2d, Automobiles and Highway Traffic, § 386, p. 937.

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

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. EUGENE PAUL OZIAH, APPELLANT.

STATE OF NEBRASKA. APPELLEE, V. EUGENE PAUL OZIAH, APPELLANT.

156 N. W. 2d 31

Filed February 2, 1968. Nos. 36661, 36662.

Criminal Law. Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender.

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

John S. Elliott, Jr., for appellant.

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

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

MCCOWN, J.

The defendant, Eugene Paul Oziah, was convicted on two counts of robbery and sentenced to 15 years on each count, sentences to run concurrently.

On January 22, 1967, Mr. and Mrs. Arlin F. Blome and their daughter were at their farm home near Clatonia, Nebraska. An automobile was driven into the

farm yard. Mrs. Blome answered the doorbell and was confronted by three men, one of whom was the defendant, who thrust a gun into her face. She attempted to close the door, but the men forced their way into the house and forced Mrs. Blome into a chair in the living room. One of the men caught the daughter when she attempted to run and forced her to sit on her mother's lap. Mr. Blome, who had been outside, entered the house and was attacked by the defendant. One of the other men then held a knife at the back of Mr. Blome's neck and forced him to sit in a corner of the room. The men asked the Blomes where their money was and whether there were any guns. The Blomes told them that the guns were in a son's room; that Mr. Blome's billfold was in the desk drawer; and that Mrs. Blome's money was in a bedroom in a jewelry box and in her purse. The men started ransacking the house. The defendant held a gun on the Blomes in the living room and opened some drawers in the living room buffet and threw things on the floor. The Blomes saw one of the other men take $2 from Mr. Blome's billfold. Thereafter, one of the men tied the Blomes with clothesline rope and told them to lie on the floor. The three men then left the Blome farm. The Blomes managed to release themselves and discovered a number of items were missing. They included Mr. Blome's watch and ring, bolts from guns, a revolver, a flashlight, 30 shells, Mrs. Blome's diamond and watch, and $45 in money.

The defendant's position is that the evidence did not establish that he personally committed the acts which constitute the essential elements of robbery.

The above summary of the evidence establishes beyond any question that the defendant was an active participant with the two other men in the commission of the crime. It would be difficult to find a case in which a common purpose could be more clearly established. See, Miller v. State, 173 Neb. 268, 113 N. W. 2d 118; State v. Knecht, 181 Neb. 149, 147 N. W. 2d 167. The jury

was properly instructed that one aiding and abetting in the commission of an offense is liable as a principal under section 28-201, R. R. S. 1943. The evidence was more than sufficient to establish all the essential elements of the crime, and fully supports the conviction of the defendant.

The judgment is affirmed.

AFFIRMED.

DONALD VAN EPEREN, APPELLEE, V. BETTY JANE VAN EPEREN, APPELLANT.
156 N. W. 2d 147

Filed February 2, 1968. No. 36673.

Parent and Child. The remarriage of a mother, previously denied custody of children, is not alone sufficient evidence of changed circumstances to warrant a change in custody in the absence of clear and convincing evidence that the custodial parent is failing to provide proper and reasonable care for the children; that the best interests and welfare of the children are adversely affected; and that the present noncustodial parent can and will better perform the duties of a custodial parent in the best interests of the children.

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

Chambers, Holland & Dudgeon, for appellant.

Everson, Wullschleger & Sutter, for appellee.

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

MCCOWN, J.

This case involves an application for change of custody of minor children under a divorce decree.

September 1, 1965, the plaintiff, Donald Van Eperen, filed his petition for a divorce from Betty Jane Van Eperen, the defendant. In October, the court entered an order granting temporary custody of the children to the

defendant and fixing temporary allowances. On November 12, 1965, the defendant filed an answer and cross-petition in which she prayed for custody of the two minor children. December 13, 1965, the plaintiff and defendant, both represented by counsel, executed a stipulation and contract which was later filed with the district court. Insofar as is directly material here, the stipulation provided that if a divorce was granted, the plaintiff, Donald Van Eperen should have the custody, care, and maintenance of the two children, Lucinda Lucille Van Eperen, born July 5, 1961, and Jeffrey Orval Van Eperen, born January 21, 1963, until the further order of any court which had jurisdiction. It also provided that the defendant should have the right to take said children with her on Saturdays and to have custody for 2 weeks during the summer vacation months, and that plaintiff would pay specified amounts for support and maintenance for that summer period. The stipulation also provided that it would be submitted to the district court for his approval or rejection.

The divorce decree was entered December 20, 1965. Both plaintiff and defendant were represented at the hearing by counsel. The decree granted a divorce to the plaintiff and denied the defendant's cross-petition. The decree awarded plaintiff sole custody of the two minor children and contained visitation and support provisions as provided in the stipulation, although the decree made no reference to the stipulation.

The defendant, Betty Jane Van Eperen, moved to Lincoln, Nebraska, in February 1966. Both parties have remarried. Defendant filed her application for modification in November 1966. After hearing, the decree was modified to provide that the defendant should be entitled to control and possession of the children on the final weekend of each month so long as defendant resides in Lincoln, Nebraska, and should have temporary control and care of the children from June 15 to August 1 of each year, with the plaintiff to have visitation rights

during that period, and adjusted support amounts for the increased summer vacation period. Motion for new trial was overruled and the defendant, Betty Jane Van Eperen, has appealed.

The evidence at the hearing on the application for modification established that the children have been living with the plaintiff and his present wife since their marriage, and it is virtually uncontradicted that the children are and have been well cared for in all respects. There is no evidence whatever that the best interests and welfare of the children have been or will be adversely affected by plaintiff's custody. There is also no evidence whatever that the best interests and welfare of the children would be better served by granting custody to the mother, unless it be assumed that the fact that she is their natural mother overrides all other considerations. The basic ground for the original divorce was the defendant's misconduct. Such former misconduct by the defendant was tacitly admitted at the hearing on this application not only by defendant's mother and her sister, but by the defendant herself.

Although there was no specific finding of unfitness here, we believe the rule expressed in Goodman v. Goodman, 180 Neb. 83, 141 N. W. 2d 445, applies. "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 clear and convincing evidence that the custodial parent is failing to provide proper and reasonable care for the children; that the best interests and welfare of the children are adversely affected; and that the formerly unfit parent can and will better perform the duties of a custodial parent in the best interests of the child." The remarriage of a mother, previously denied custody of children, is not alone sufficient evidence of changed circumstances to warrant a change in custody, but requires the same clear and convincing evidence.

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

AFFIRMED.

STANLEY E. KASPAREK ET AL., APPELLANTS, V. GEORGE E. MAY ET AL., APPELLEES.
156 N. W. 2d 144

Filed February 2, 1968. No. 36681.

1. **Appeal and Error.** It is no part of the duty of this court to search a record for the purpose of ascertaining if there is error in it. On the other hand, every reasonable presumption will be indulged in favor of the correctness of the judgment of a district court, and any ruling of that court, alleged to be erroneous, must be specifically pointed out to be reviewed here.
2. **Courts: Evidence.** The general rule is that, while the court will take judicial notice of its records, it will not in one case take such notice of the record in another case.
3. ———: ———. The opinion of the appellate court may not be introduced in evidence for any purpose. If material, it is the judgment therein which is admissible.
4. **Contempt: Damages.** Civil contempt is available to enforce a previous decree, but not to afford a remedy for the recovery of subsequent damages.
5. ———: ———. Finding defendants in contempt does not ipso facto determine plaintiffs had actually been damaged, or the amount of such damages if any had been sustained.

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

Baumfalk, Dalke & Dowding, for appellants.

Herman Ginsburg, Warren K. Urbom, Ginsburg, Rosenberg, Ginsburg & Krivosha, R. P. Cathcart, and Baylor, Evnen, Baylor & Urbom, for appellees.

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

SPENCER, J.

This is an action for damages. Judgment was entered

in favor of defendants, pursuant to a jury verdict. Plaintiffs perfected an appeal to this court. They set out three assignments of error: "1. The verdict is contrary to law. 2. The verdict is not sustained by sufficient evidence. 3. That the court erred in failing to instruct the jury on the decision previously rendered between the parties, with reference to the enforcement of the decree, and the findings of the court in said previous action."

Plaintiffs do not discuss or argue either of their first two assignments of error in their brief. Neither do they point out anything in the record which would tend to substantiate them.

Rule 8a2(3), Revised Rules of the Supreme Court, 1967, provides in part: "* * * consideration of the cause will be limited to errors assigned *and discussed.*" (Italics supplied.)

The rule enunciated in Minick v. Huff, 41 Neb. 516, 59 N. W. 795, is pertinent herein: "It is no part of the duty of this court to search a record for the purpose of ascertaining if there is error in it. On the other hand, every reasonable presumption will be indulged in favor of the correctness of the judgment of a district court, and any ruling of that court, alleged to be erroneous, must be specifically pointed out to be reviewed here."

Plaintiffs' theory is that they were damaged because the defendants failed to entirely remove a dike in strict accordance with a decree in a 1956 action between the same parties. The evidence is undisputed that the plaintiffs' land is a natural flood plane of the Little Blue River, and when the river reaches 11½ feet it will flood the plaintiffs' land before reaching the land of the defendants. Plaintiffs sought to recover all damages sustained by virtue of floods since 1960, but made no attempt to apportion damages between what would have naturally resulted and what may have been caused by defendants' dereliction, if any. It was plaintiffs' theory that the failure of the defendants to entirely remove the

dike in accordance with the 1956 decree resulted in certain crop losses and caused sand to be deposited on their land, decreasing its value. Plaintiffs testified that no sand would have been deposited except for the obstruction caused by the remains of the dike. The overwhelming weight of the evidence is to the contrary. The jury also could have determined that the wrongful construction by plaintiffs of a fence across a drainage ditch provided by the 1956 decree held back debris which was a major factor in the deposit of sand on plaintiffs' land.

Assignment of error No. 3 refers to a request made by plaintiffs that the jury be instructed on the previous judgment between the parties with reference to the enforcement of the decree entered in 1956. The decree of 1956, which is plaintiffs' exhibit 1 herein, was stipulated into the record, read to the jury, and the jury was instructed that said decree was in full force and effect. In addition thereto, the jury was told that defendants had failed to fully remove the dike in accordance with that decree.

Plaintiffs, in their brief in support of assignment of error No. 3, do not point out what they expected the court to tell the jury about the previous action. Their argument is confined to two propositions. The first is: "The general rule is that, while the court will take judicial notice of its records, it will not in one case take such notice of the record in another case.

"The doctrine that the court will take judicial notice of a final order made by it in another case which is so interwoven and interdependent with the pending case as to justify the application of it is an exception to the general rule, recognized by the necessity of giving effect to a former holding which finally decided questions of fact and law." This is a correct statement of the law as set out in Anderson v. Anderson, 155 Neb. 1, 50 N. W. 2d 224. The difficulty is that the rule is not applicable herein.

Plaintiffs are seeking to have the court instruct the

jury on the decision reached in Kasparek v. May, 174 Neb. 732, 119 N. W. 2d 512, which was an action for civil contempt brought on the decree in the original case. Plaintiffs sought to read the opinion in that case to the jury. The trial court correctly refused to permit them to do so. The opinion of the appellate court may not be introduced in evidence for any purpose. If material, it is the judment therein which is admissible. See Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551.

In Kasparek v. May, 174 Neb. 732, 119 N. W. 2d 512, we held that civil contempt was available to enforce the previous decree, but not to afford a remedy for the recovery of subsequent damages. Finding defendants in contempt did not ipso facto determine plaintiffs had actually been damaged, or the amount of such damages if any had been sustained. The present action is one to recover for any damages allegedly sustained by the failure of the defendants to fully comply with the June 29, 1956, decree.

The trial court permitted the introduction herein of plaintiffs' exhibit 19, which was an order entered July 9, 1963, interpreting the judgment of this court in the contempt case, as well as plaintiffs' exhibit 20, which is the judgment on the mandate therein. The trial court further permitted the introduction of plaintiffs' exhibit 21, a journal entry filed December 4, 1963, on the final determination on compliance with the mandate in said case. These exhibits were read by the trial judge to the jury.

We fail to see what more plaintiffs could expect. The judgments rendered herein were in evidence, and the jury was told that the defendants had failed to comply with the 1956 decree. The effect thereof, and the extent of the damages plaintiffs may have sustained because of that failure, were matters which plaintiffs were required to prove in order to recover herein. To meet this burden, plaintiffs adduced evidence as to the extent of the flood damage sustained. Unless the jury was willing to accept the testimony of the plaintiffs that all of their

damage was the result of the failure of the defendants to fully comply with the decree of June 29, 1956, there was no criteria by which the jury could apportion the damages.

Plaintiffs' second proposition is as follows: "The court should instruct the jury on all issues which had been decided by the court in a previous action or case between the parties." It is of course obvious that the court could only instruct the jury on the issues actually involved in the current case. This it did. Plaintiffs tendered no instructions on the point they now urge. If they desired more specific instructions, they should have done so. The point the plaintiffs do not seem to realize is that it was possible for the defendants to be in contempt of court for their failure to fully conform with the 1956 decree, and still not be liable for damages to the plaintiffs.

For the reasons given, the judgment herein must be affirmed.

AFFIRMED.

LEO J. DEREMER ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.

156 N. W. 2d 6

Filed February 2, 1968. No. 36688.

1. **Streets.** The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances.
2. **Eminent Domain: Damages.** Impairment of reasonable access to an abutting owner's property is not an independent element of damage but may be considered as one of the circumstances bearing upon the diminution of the value of his remaining property at the time of the taking.
3. **Appeal and Error: Trial.** A refusal of a requested instruction, substantially covered by the charge given, is not error.
4. ———: ———. An assignment of error asserting excessive

damages may not be considered by this court if it is not properly raised in the trial court on motion for new trial or argued in the appellant's brief in this court.

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

Clarence A. H. Meyer, Attorney General, Harold S. Salter, Warren D. Lichty, Jr., Thomas H. Dorwart, and John P. Regan, for appellant.

Ivan A. Blevens, for appellees.

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

WHITE, C. J.

This is an eminent domain proceeding. Plaintiffs, condemnee owners of four commercially zoned lots abutting U. S. Highway No. 34, sought damages for the State's taking of a strip of land on the north end of the property and for restriction of access to the remaining property. The highway was widened and medians installed, the work being completed prior to trial of this case. Plaintiffs received a verdict and judgment for $31,000 and the State appeals. We affirm the judgment.

The court refused the State's request to give the following instruction (requested instruction No. 5), the pertinent part of which is as follows: "In this case, evidence has been offered and received relating to certain structures, called 'islands' or 'medians' which were erected and are maintained in the highway and opposite to the property belonging to the plaintiff. You are instructed and cautioned that evidence relating thereto was offered and received not as an independent item to be considered by you in determining damages, but for the sole and only purpose of assisting you in determining whether or not the plaintiff has been denied reasonable access; that is, ingress or egress to and from their property, under all the circumstances as set forth and explained in the following instruction."

The State argues with considerable force that this instruction should have been given because a change in the flow of traffic by placing medians in the center of a street is noncompensable as incidental to the doing of a lawful act under the police power, and that medians, as such, are wholly unrelated to the taking of the land for the purpose of the widening of the street and constitute no element of damage to the land remaining after the taking. Painter v. State, 177 Neb. 905, 131 N. W. 2d 587; W.E.W. Truck Lines, Inc. v. State, 178 Neb. 218, 132 N. W. 2d 782. But the instruction requested, by its terms, told the jury that it could consider the installation of medians as a circmstance affecting ("determining whether") the issue of denial of reasonable access to the plaintiffs. The purport of the instruction therefore was to caution the jury that such evidence could not be considered as an independent item of damage. The requested instruction, then, by way of summary states, "* * * that is, *ingress or egress to and from their property, under all the circumstances as set forth and explained in the following instruction.*" (Emphasis supplied.)

The next following requested instruction (No. 6) was given to the jury verbatim as instruction No. 5A. In pertinent part, it states: "The measure of the right of the property owner is reasonable ingress and egress under all the circumstances. If you find, from a consideration of the evidence that the proposed access at the locations indicated are reasonable *under all the circumstances* as shown by the evidence, then plaintiff is not entitled to damages for loss of access. On the other hand, if you find from a preponderance of the evidence that the means of ingress and egress have been substantially interfered with; that is, is not reasonable *under all the circumstances*, then if you so find, the plaintiff is entitled to damages it may have sustained for loss of access. *But you are instructed that this element of damage is not an independent element of damage.*

Evidence relative thereto has been offered and received for your consideration in determining the amount of damages the owner may have sustained as 'consequential damages' as set forth and explained in these instructions." (Emphasis supplied.) This instruction is an accurate statement of the law. Balog v. State, 177 Neb. 826, 131 N. W. 2d 402; American Oil Co. v. City of Omaha, *ante* p. 532, 155 N. W. 2d 805.

It is therefore quite clear that the jury was told, at the State's request, that the interference with access (ingress and egress) and *all of the circumstances reasonably relating thereto, could not be considered as an independent item of damages.* The requested instruction did not prohibit the consideration of the medians as a circumstance, but rather, permitted consideration and asked for limitation of such consideration. The instruction given at the State's request covered the matter and therefore it was unnecessary to give requested instruction No. 5. Refusal of instructions, substantially covered by the charge given, is not error. Countryman v. Ronspies, 180 Neb. 76, 141 N. W. 2d 425; Hansen v. Strohschein, 178 Neb. 367, 133 N. W. 2d 598; Kopplekom v. Huffman, 12 Neb. 95, 10 N. W. 577.

An overlapping and perhaps repetitive contention of the State is that the evidence as to the medians was inadmissible under the doctrine of Painter v. State, *supra.* There are two answers to this contention. First, the State itself, in its requested instruction, permitted consideration, asking for limitation of such consideration. Second, and more important, the State, at the time it rested, specifically requested that the jury be permitted to view the premises, and the jurors observed the premises (with the highway and the medians completed), by stipulation of the parties. The court instructed the jury, to which no objection is made, that it could "take into account the results of your observations." Therefore the claimed error of the court in overruling an objection to a question which inferentially established the

existence of medians, is without merit. See, Reller v. Ankeny, 160 Neb. 47, 68 N. W. 2d 686; Gruntorad v. Hughes Bros., Inc., 161 Neb. 358, 73 N. W. 2d 700.

The assignment of error asserting excessive damages may not be considered. It was not raised in the trial court on motion for new trial and is not argued in the appellant's brief herein. Rule 8a2(3), Revised Rules of the Supreme Court, 1967; Arla Cattle Co. v. Knight, 174 Neb. 360, 118 N. W. 2d 1; Volker v. First Nat. Bank, 26 Neb. 602, 42 N. W. 732; Beavers v. Missouri P. Ry. Co., 47 Neb. 761, 66 N. W. 821; Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

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

AFFIRMED.

MID STATES ENGINEERING, APPELLEE, V. VERNON ROHDE, APPELLANT.

156 N. W. 2d 149

Filed February 2, 1968. No. 36716.

1. **Appeal and Error: Evidence.** The parol evidence rule is not merely one of evidence but is a rule of substantive law which declares that certain kinds of facts are legally ineffective and forbids them to be proved.
2. **Contracts: Evidence.** If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce the 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.
3. **Contracts.** If a written contract contains a complete obligation without ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included therein.
4. ———. A written contract expressed in unambiguous language is not subject to interpretation or construction and the intention of the parties to such a contract must be determined from its contents.
5. **Interest.** In order to be liquidated so as to bear interest, a claim must be fixed and determined or readily determinable;

but it is sufficient for this purpose if it is ascertainable by computation or a recognized standard.

6. ———. The general rule is that, in the absence of agreement to the contrary, liquidated demands bear interest whereas unliquidated demands do not.

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

H. L. Blackledge, for appellant.

Kelly & Kelly, for appellee.

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

NEWTON, J.

Plaintiff Mid States Engineering is a copartnership and brought the present action to recover money due under a written contract with the defendant Vernon Rohde. On June 2, 1965, the defendant, an earth contractor, entered into a contract with the Dry Creek South Watershed Conservancy District for the construction of two earth dams and on the same date, defendant entered into a contract with plaintiff as a subcontractor for the performance of a portion of the work required on said dams. The contract provided for the following work to be done by plaintiff: "Prewatering Foundation & Borrow Area at $2.50 per M galloan (sic) for 1st 2288 M gallons & 2.25 for remainder M gallons as required and accepted by construction Engineer * * *." Both the primary and the subcontract were to be performed in accordance with the plans, specifications, and requirements of the Soil Conservation Service which are set out in exhibit 2 and were duly received in evidence. A portion of this exhibit entitled "SUPPLEMENTAL SPECIFICATION N-527" provides as follows: "The Contractor will not be paid for water or for sprinkling the fill material to obtain proper moisture content as the cost of this work shall be included in the contract price per cubic yard for that class of fill," a provision with

which defendant must be presumed to have been familiar and to have taken into account in bidding for the contracts to be let in connection with the dams mentioned, since, by his own testimony, he had done this type of work before. In addition thereto, his contract with the plaintiff specifies that in connection with his primary contract "plans, specifications, work schedules, addenda and incidental instruments, are known to and understood by the undersigned parties; and made part hereof by reference." Plaintiff, as subcontractor, performed prewatering services on the foundations and borrow areas as provided by its contract, as required by the Soil Conservation Service specifications, and to the satisfaction of the Soil Conservation Service engineer in charge of the project. He supplied 2,860,000 gallons of water on the project foundations and 5,778,400 gallons of water in the borrow pit areas. Defendant does not dispute that the work was done by plaintiff in compliance with the plans, specifications, and requirements of the contract. Neither does he dispute the amount of water supplied or the rate to be paid therefor. His only contention is that he was to pay only for water used on the foundations and was not to pay for the water used in the borrow pit areas, apparently basing this contention on the fact that he was not paid as a separate item for the water used in the borrow pit areas. This expense, as heretofore pointed out, was required to be included in the contract price per cubic yard of fill. Defendant's contention is a direct contradiction of the terms of the contract entered into between plaintiff and defendant.

The district court found generally for plaintiff and entered judgment for plaintiff in the sum of $20,008.40, with interest thereon at 6 percent per annum from January 1, 1966, and costs. The undisputed evidence discloses that plaintiff completed work under the contract on July 5 or 7, 1965, and final inspection was had on July 22, 1965. Both parties question the date fixed by the

court as the time from which interest should start to run. Defendant has appealed.

Defendant contends that the contract between the parties is ambiguous and that he, therefore, should have been permitted to introduce parol evidence to explain and vary the terms of the contract. We are unable to discern any ambiguities in this contract, but on the contrary, find it to be clear and unambiguous and find that the following precepts set forth in Reorganized Church of Jesus Christ v. Universal Surety Co., 177 Neb. 60, 128 N. W. 2d 361, are applicable: "The parol evidence rule is not merely one of evidence but is a rule of substantive law which declares that certain kinds of facts are legally ineffective and forbids them to be proved. * * * If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce the 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. * * * If a written contract contains a complete obligation without ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included therein. * * * A written contract expressed in unambiguous language is not subject to interpretation or construction and the intention of the parties to such a contract must be determined from its contents." The trial court was correct in assessing the amount due from defendant to plaintiff under and in accordance with the terms of the contract and in the principal sum of $20,008.40.

Regarding interest to be allowed, it is apparent that immediately upon completion of the subcontract by plaintiff, ascertainment of the amount of water furnished under the contract was possible, the amount due plaintiff was readily determinable by multiplying the gallonage by the contract price and the amount due plaintiff became fixed and was no longer an unliquidated claim. "In order to be liquidated so as to bear

interest, a claim must be fixed and determined or readily determinable; but it is sufficient for this purpose if it is ascertainable by computation or a recognized standard." 47 C. J. S., Interest, § 19 b, p. 30. "The general rule is that, in the absence of agreement to the contrary, liquidated demands bear interest whereas unliquidated demands do not; * * *." 47 C. J. S., Interest, § 19 a, p. 28. It is true that this court has held upon occasion that where a reasonable controversy exists as to plaintiff's right to recover and the amount of such recovery, a claim is generally considered to be unliquidated and interest is not allowed. See Lundt v. Parsons Constr. Co., 181 Neb. 609, 150 N. W. 2d 108. This situation is not applicable to the present case where as a matter of law, contrary to the only ground upon which it is contested, the contract is found to be clear and unambiguous and the defense untenable. Plaintiff is entitled to interest on the amount due at the legal rate from date of the completion of the contract on July 22, 1965.

This judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT NEWELL PILGRIM, APPELLANT.

156 N. W. 2d 171

Filed February 9, 1968. No. 36679.

1. **Criminal Law: Trial.** An instruction to the jury to disregard exhibits ordinarily protects defendant from unfair prejudice in management of the exhibits before the jury.
2. **Trial: Constitutional Law.** The standard relating to federal and Nebraska constitutional guarantees of a speedy trial is reasonableness.
3. **Criminal Law: Trial.** Failure of defendant or his counsel to move for discharge prior to trial or entry of plea of guilty constitutes a waiver of the right to a speedy trial.
4. **Criminal Law: Bail.** All persons shall be bailable by sufficient

sureties, except for treason and murder, where the proof is evident or the presumption great.

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

Leamer & Graham and Richard K. Spencer, for appellant.

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

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

SMITH, J.

This appeal follows a second degree murder conviction by a jury and a sentence of imprisonment for 16 years. Defendant asserts insufficiency of circumstantial evidence, misconduct of the prosecuting attorney, denial of a speedy trial, deprivation of his right to bail, and excessiveness of the sentence.

Shortly after 7 p.m., on July 30, 1966, defendant professed anxiety over the health of his wife, Lucile. Standing in a road near the Metz farm 2½ miles southeast of Jackson, Nebraska, he signaled a passing motorist. When the motorist, Ernest Wood, accompanied by his wife, stopped, defendant said to them: " 'I will give you $2.00 if you will take me to town to get a doctor for my wife. She is awful sick.' " To the suggestion that his wife ride in the Wood automobile, defendant replied: " 'No. * * * She won't talk to you and she won't talk to me.' " After pointing out the Metz farm as his residence, defendant strolled away while Ernest drove to the farmyard.

Failing to arouse a response, the Woods entered the farmhouse. A match supplied enough light for Ernest to see a stained shirt and a form behind a chair. The Woods then hastened to a neighboring farm for help. Upon their return 30 minutes later Ernest parked in the road and close to the Metz driveway. While they were

waiting, Luce Metz appeared. Informed that he should not enter, Metz nevertheless drove into the farmyard; but he remained in his automobile until a rescue squad arrived at 8 or 8:20 p.m. The form behind the chair was Lucile, and she had no pulse. The physician who examined the body in the farmhouse was called at 11 p.m. The interval between death and his examination was ½ hour, possibly 1½ hours or longer.

After the conversation with the Woods, defendant had proceeded to a barroom in Jackson. There he informed a friend that he had stabbed Lucile to death because " 'he * * * couldn't stand her any longer.' " Prior to his arrest at 9 p.m. defendant informed persons who were not law enforcement officers that he had killed his wife. The autopsy revealed multiple stab wounds on the posterior chest wall and the cause of death to be "multiple stab wounds of the anterior chest wall, with penetration of the left upper lobe of the lung, and with exsanguinating hemorrhage from stab wounds." Blood on a floor of the farmhouse had been smeared, and a mop wet with blood was found.

The argument concerning insufficiency of circumstantial evidence overlooks defendant's statements. The argument that venue is unproved because of possible removal of the body from outside the county to the farmhouse disregards the record. The evidence supports the verdict.

The prosecuting attorney is said to have mismanaged knives, bloody clothing, and other items. They were identified and visible to the jury. Although the State attempted to authenticate those 27 exhibits, none were admitted into evidence, and few indeed were offered. Defendant failed to move for mistrial, but he requested a cautionary instruction that is identical with the court's instruction No. 18 as follows: "* * * exhibits were identified but not offered in evidence, or were rejected as evidence by the ruling of the Court. Such evidence is to be treated as though you had never heard of it."

Defendant raised no seasonable objection to the mismanagement—a circumstance at least relevant. See Hopperton v. State, 110 Neb. 660, 194 N. W. 789. The prosecuting attorney acted, we think, in good faith; and his conduct had no inflamatory effect. An instruction to the jury to disregard exhibits ordinarily protects the defendant from unfair prejudice in management of the exhibits before the jury. Cf. Young v. State, 133 Neb. 644, 276 N. W. 387; Maddox v. State, 108 Neb. 809, 189 N. W. 398; Argabright v. State, 62 Neb. 402, 87 N. W. 146.

Defendant was held in custody 9 months between accusation and trial. Filing of the complaint and appointment of defense counsel occurred early in August 1966. Defendant first registered dissatisfaction with the delay on April 10, 1967, during the arraignment hearing, but no motion for discharge was presented. Trial was held from May 8 to 11. Defendant has not asserted a right to discharge under section 29-1202, R. R. S. 1943.

The federal guarantee of a speedy trial is applicable to the states. Klopfer v. North Carolina, 386 U. S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1. The standard relating to federal and Nebraska constitutional guarantees is reasonableness. United States v. Ewell, 383 U. S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627; State v. Warner, 181 Neb. 874, 152 N. W. 2d 30; State v. Bruns, 181 Neb. 67, 146 N. W. 2d 786. Since defendant failed to move for discharge in the district court, the State had no opportunity to show cause; and the record may be insufficient. Failure of defendant or his counsel to move for discharge prior to trial or entry of plea of guilty constitutes a waiver of the right to a speedy trial. See A. B. A. Project, Standards Relating to Speedy Trial, Tent. Dr., § 4.1, p. 40.

The information charged defendant with first degree murder for which the sentence is life imprisonment or death. He argues a right to bail during the pretrial period. The right is not absolute under the Constitution of Nebraska, Art. I, § 9: "All persons shall be bailable by sufficient sureties, except for treason and murder,

where the proof is evident or the presumption great." The federal prohibition against excessive bail is applicable to the states. See, Mastrian v. Hedman, 326 F. 2d 708; Hanson v. Gladden (Or.), 426 P. 2d 465. The history of bail systems and contemporary reforms are persuasive that one accused of a capital crime may possess no right to bail. See, Foote, "The Coming Constitutional Crisis in Bail," 113 U. of Pa. L. Rev., 959, 1125; Note, 53 Iowa L. Rev. 170, 183; 20 Vand. L. Rev. 948. Denial of bail was not erroneous under the circumstances.

The transcript shows prior convictions of defendant for bootlegging and breaking and entering. The 16-year sentence is not excessive.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HERBERT B. DUNCAN, III, ALSO KNOWN AS WALTER E. DOWLER, APPELLANT.
156 N. W. 2d 165

Filed February 9, 1968. No. 36680.

Post Conviction Evidentiary Hearing. If the motion of a prisoner and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief under the Post Conviction Act, the court may overrule the motion without a hearing. § 29-3001, R. S. Supp., 1965.

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

Herbert B. Duncan, III, pro se.

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

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

MCCOWN, J.

The defendant pleaded guilty to a charge of forgery.

After presentence investigation and report, sentence was pronounced. A subsequent letter from the defendant to the district judge was treated as a motion to vacate sentence under the Post Conviction Act, and the State ordered to show cause why relief should not be granted. After return to the show cause order, the court found that the defendant's motion, and the files and records of the court showed to the satisfaction of the court that the defendant was entitled to no relief; denied an evidentiary hearing; and overruled the motion. Counsel was not appointed in this proceeding.

The defendant's motion, pleadings, and briefs, do not even indicate any facts whatever which could conceivably constitute any denial or infringement of his constitutional rights in any respect. The defendant's motion and the files and records of the case conclusively establish that the defendant was entitled to no relief. The appeal has no merit. See State v. Ronzzo, 181 Neb. 16, 146 N. W. 2d 576.

The judgment is affirmed.

AFFIRMED.

DAVID A. BAXTER AND SONS, A PARTNERSHIP, APPELLANT, V. ANTHONY R. SOFIO ET AL., APPELLEES.
156 N. W. 2d 141

Filed February 9, 1968. No. 36692.

1. **Principal and Agent: Contracts.** An agent who fails to disclose the fact of his agency and represents himself as principal inducing another to deal with him as such is liable and may be treated as principal for all purposes, unless and until the fact of his agency is known or made known by him to the contractor.
2. ———: ———. An agent purporting to act upon his own account, but in fact making a contract on account of an undisclosed principal, is a party to the contract.
3. **Contracts.** The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of their true intent and ordinarily should be enforced by the court.

4. ———. A contract or agreement is a manifestation of mutual assent by two or more persons to one another.
5. **Evidence: Trial.** The proper rule is that a verdict should be directed if the evidence is undisputed or if the evidence, although conflicting, is so conclusive that it is insufficient to justify a verdict or sustain the judgment.

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

Leary & Leary, for appellant.

Webb, Kelley, Green & Byam, for appellees.

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

WHITE, C. J.

This is a suit on a contract for material furnished and for labor and services performed. The broad question presented is whether the plaintiff, a subcontractor, in orally contracting for extras on a motel construction contract was dealing with the defendant personally or as an agent in a representative capacity for the owner contractor.

An agent who fails to disclose the fact of his agency and represents himself as principal inducing another to deal with him as such is liable and may be treated as principal for all purposes, unless and until the fact of his agency is known or made known by him to the contractor. An agent purporting to act upon his own account, but in fact making a contract on account of an undisclosed principal, is a party to the contract. Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315; Restatement (2d Ed.), Agency, § 322, p. 72.

Defendants Sofio owned the land. They executed a 99-year lease to Westgate Manor, Inc. It is not contended that there is any evidence to establish any liability on the part of Agnes Sofio and, therefore, reference herein will be made to Dr. Anthony R. Sofio solely as defendant. Westgate Manor, Inc., contracted with American

Construction Company of Texas for building the motel. American Construction Company subcontracted the electrical work to plaintiff in April 1962 (exhibits 2 and 36). By the terms of the contract, Westgate Manor, Inc., was defined as the owner and the evidence shows that Westgate Manor, Inc., operated under the trade name of "Lamplighter Motor Inn." The subcontract with American Construction Company prohibited extras unless by written order of the owner, countersigned by the architect, or by a written order of the architect stating that the owner authorized it. The subcontract with the plaintiff also provided that nothing therein could create any contractual relationship with the owner (Westgate Manor, Inc.). The defendant Sofio was president of Westgate Manor, Inc., although plaintiff denies any knowledge of this until after the termination of the transactions involved herein.

By October 1963 plaintiff had almost completed its subcontract and electrical work. Defendant came to plaintiff and asked plaintiff to do additional work. Plaintiff's own testimony is that Sofio told him (David Baxter, Jr.) *"that he would authorize payment of additional work"* and designated R. J. Boutte as his representative to take orders.

A series of job orders, signed by Boutte, Miller, Jones, Lynch, and others, followed. The extra work was done and invoices sent beginning February 28, 1964, and through April 1964, for a total amount of $1,310.85. A few of these invoices were addressed to Sofio personally but almost all of them were captioned and sent to "Lamplighter Motor Inn" (or "Hotel").

We pause at this point. The evidence established that the plaintiff knew the identity of the owner, Westgate Manor, Inc., and Lamplighter Motor Inn (or Hotel). The plaintiff states in its brief that the original contract documents described the owner as "Westgate Motor Hotel," "Westgate (Lamplighter) Motor Hotel," and "Westgate Manor, Inc." The evidence shows that these

names were used loosely and interchangeably to designate one entity. As early as December 1962, almost a year before the transactions in question, plaintiff wrote a letter designating the contract as "Westgate (Lamplighter) Motor Hotel." The defendant stated he would "authorize" payment. This word, separately or in context, does not import personal obligation, but rather exactly what it says, authority to perform and pay for the work. Webster's New Twentieth Century Dictionary (2d Ed.), Unabridged, p. 126, says: "Authorize. 1. To give official approval or legal power to; * * *." And defendant Sofio ordered no work himself. He authorized Boutte, Miller, Jones, and others to specify the work wanted on the job orders. These men were all employees of Lamplighter Motor Inn (or Hotel) and known as such to the plaintiff. Most of the job orders were countersigned by one of these men, including Miller, but none were countersigned by defendant Sofio. Further, Miller was the "executive director" of Lamplighter Motor Inn (or Hotel) and was recognized and addressed as such in mutual correspondence. All of this alone conclusively shows that plaintiff was dealing with Sofio and all the others as agents of and in their representative capacity for the "owner," Westgate Manor, Inc., Westgate (Lamplighter) Motor Hotel, and Westgate Motor Hotel.

But there is more. Almost all of these invoices which plaintiff prepared were sent to the Lamplighter Motor Inn (or Hotel), the same owner and entity it had been dealing with or known about in the year and a half (from April 1962) it had been working on the job. Plaintiff knew the "owner" was a corporation and, therefore, could only act through agents, and the plaintiff regarded it as such in all of its transactions and dealings herein. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of their true intent and ordinarily should be enforced by the court. Lortscher v. Winchell,

178 Neb. 302, 133 N. W. 2d 448; Muller Enterprises, Inc., v. Gerber, 178 Neb. 463, 133 N. W. 2d 913.

We go now to the summer of 1964 after the bill for $1,310.85 was presented to Lamplighter Motor Inn (or Hotel) and was not paid. The lamp posts were weak and unstable. In a series of letters, Miller, as "executive director," on Lamplighter Motor Inn stationary, complained to the plaintiff. Not only was agency identification brought home to the plaintiff by these letters, but the face of the letters indicated that copies were being sent to Sofio and other representatives of Lamplighter Motor Inn. Plaintiff in answering these letters recognized this by addressing them to "Mr. Pat Miller, Executive Director, Lamplighter Motor Inn," and also indicated on the face of the letters that copies were being sent to Sofio, Boutte, and others. In one of these letters to Miller, as executive director, on September 28, 1964 (exhibit 28), arranging a meeting to discuss the problem, the plaintiff says, "* * * we believe it would be necessary for Dr. Sofio to be present so that he will be *aware* of the solution to *our mutual problems.*" (Emphasis supplied.) A meeting was held and the dispute resolved because plaintiff had complied with specifications. Further work was contracted for to remedy the sagging lamp posts in the sum of $779.43. Plaintiff complained about not being paid the $1,310.85. Plaintiff's own testimony is that, with Miller and Sofio present, Sofio said, "You know, why, *we* can get all this resolved and *we* will get you your money." (Emphasis supplied.) Neither by context of the circumstances or express words did defendant ever assume personal liability. We shall not labor a further intricate analysis of the further evidence. The evidence overwhelmingly establishes that plaintiff dealt with the defendant and many others as to these specific transactions, in their representative capacity, and after all of these transactions were consummated plaintiff filed a mechanic's lien (exhibit 35) which included and designated Westgate Manor, Inc., a corporation, as an owner.

Not irrelevant is the fact that plaintiff is an experienced contractor having been in business since 1932. A contract or agreement is a manifestation of mutual assent by two or more persons to one another. Restatement, Contracts, § 3, p. 5. The evidence wholly fails to establish this essential relation.

This is a law action and the court directed a verdict for the defendant. Plaintiff argues strongly that since there is a conflict in the evidence, it must be submitted to the jury. Broadly speaking, the purported conflicting evidence herein is, in effect, in the nature of conclusions and is contrary to the undisputed documentary evidence and to plaintiff's own evidence as to the defendant's oral statements. But the proper rule in the posture of this particular case is that a verdict should be directed if the evidence is undisputed or if the evidence, although conflicting, is so conclusive that it is insuffiicent to justify a verdict or sustain the judgment. Cover v. Platte Valley Public Power & Irr. Dist., 167 Neb. 788, 95 N. W. 2d 117; Pueppka v. Iowa Mutual Ins. Co., 165 Neb. 781, 87 N. W. 2d 410; Michelsen v. Upton, 175 Neb. 743, 123 N. W. 2d 850; Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254. We hold that reasonable minds could not differ on the issue of the capacity in which the plaintiff dealt and contracted with the defendant.

The able trial judge succinctly summarized this case in this finding: "* * * Sofio said he would authorize payment of these obligations, which is not a statement assuming an obligation. It is, I think, a statement then indicating that a person is engaged in a representative capacity. On that basis, and on the basis of a failure of proof in that general area, the motion is sustained."

The judgment of the district court directing a verdict is correct and is affirmed.

AFFIRMED.

BILL W. ABEL, APPELLEE, V. SOUTHWEST CASUALTY INSURANCE COMPANY, A CORPORATION, APPELLANT.
DUANE C. MILLER ET AL., APPELLEES, V. SOUTHWEST CASUALTY INSURANCE COMPANY, A CORPORATION, APPELLANT.

156 N. W. 2d 166

Filed February 9, 1968. Nos. 36714, 36715.

1. **Pleading.** An appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction.
2. **Statutes: Insurance.** Under section 44-137.01, R. R. S. 1943, the statutorily declared public policy of this state is that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while such insurers are not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to the distant forums for the purpose of asserting legal rights under such policies.
3. **Appeal and Error: Evidence.** It is presumed on appeal that a trial court in trying a case without a jury did not consider incompetent evidence.
4. **Contracts.** The contract of a surety, acting for compensation, is construed most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect.

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

Sidner, Gunderson, Svoboda & Schilke, for appellant.

Kerrigan, Line & Martin, for appellees.

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

WHITE, C. J.

Two houseowners, plaintiffs, sue the defendant on the guaranty or surety bond contract of two basement waterproofing contracts allegedly breached by the contractor. This is a law action, tried by the court without a jury, in which the damages were stipulated. The district court

entered judgment for the plaintiffs. We affirm the judgment.

Vulcan (Vulcan Waterproofing of K. C., Inc., a Missouri corporation) in an instrument captioned in large deep black print, "SURETY BONDED WATERPROOFING GUARANTY," issued to and contracted with plaintiffs as follows: "YOUR GUARANTEE: In consideration of sums received by us for applying our waterproofing treatment to the above premises for the elimination of water seepage, we guarantee, subject to the Bond reproduced on the reverse side hereof, to apply our waterproofing treatment using the exclusive Vulcan Patented Pressure Pumping Process, as described in our Contract bearing the above stated number. In addition to our patented pressure pumping process, *the contractor, if ever necessary,* will supply all waterproofing materials he deems necessary *in the event further waterproofing is required. This agreement does not include dampness, or condensation of walls and/or floors treated by this Company, if such conditions are caused by humidity either from within or outside the walls and/or floors.* It shall not be construed that this guarantee covers any walls and/or floors other than those treated by this Company, or water leaks due to electrical or plumbing failure. The liability of this Company under any one Guaranty for such waterproofing treatment shall in no event exceed $5,000.00." (Emphasis supplied.)

The guaranty was for a 5-year period. On the reverse side of this instrument the defendant guarantees as follows: "* * * Guaranties when duly authorized and properly issued by Vulcan Waterproofing of K. C., Inc., (a Missouri Corporation) * * * Surety Bonded Waterproof-(i)ng Guaranty (Series WP-1), that said Principal will discharge its obligations in accordance with the terms and conditions of said Guaranty during the period that such issued Guaranty is in full force and effect, * * *."

Defendant, an Arkansas insurance company, executed one general guaranty bond to Vulcan, and under its

authorization, Vulcan included it in the individual contracts, as here. Vulcan, incorporated in Missouri, entered into 33 Nebraska contracts, 2 of which were with plaintiffs. Defendant was unauthorized to do business in Nebraska and, except to the extent indicated, did no business in Nebraska.

We go to the question raised as to jurisdiction over the defendant. Plaintffis secured service on defendant under the Unauthorized Insurers Process Act (44-137.01 to 44-137.10, R. R. S. 1943). Defendant filed a special appearance objecting to jurisdiction because it did no business in the state and on the ground that the obligations were not insurance contracts under the act. There are two answers which dispose of this contention.

(1) After filing the special appearance which was overruled, defendant filed a motion to make the petition more definite and certain and attempted to preserve the special appearance, answered attempting to preserve special appearance, requested relief on the pretrial order, moved for dismissal of plaintiffs' cases, and moved for a new trial without attempting to preserve the special appearance. This constituted a general appearance and the jurisdictional objection is without merit. The rule has long since been settled: "An appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction." Ivaldy v. Ivaldy, 157 Neb. 204, 59 N. W. 2d 373. See, also, O'Hara v. Frederickson Building Corp., 166 Neb. 206, 88 N. W. 2d 643; Graff v. Graff, 179 Neb. 345, 138 N. W. 2d 644; South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank, 45 Neb. 29, 63 N. W. 128; Behr v. Duling, 128 Neb. 860, 260 N. W. 281; Bankers Life Ins. Co. v. Robbins, 59 Neb. 170, 80 N. W. 484; McKillip v. Harvey, 80 Neb. 264, 114 N. W. 155; Maxwell v. Maxwell, 106 Neb. 689, 184 N. W. 227; Troyer Furniture Co. v. Orchard & Wilhelm Co., 121 Neb. 301, 237 N. W. 144.

Defendant's only answer in its reply brief is the case of Behr v. Duling, *supra*. But this case, in haec verba, specifically reaffirms the above rule and holds that an answer, by way of general denial, preserving the objection to jurisdiction is not a request for affirmative relief and therefore not a general appearance. But that is not the case here, especially the motion for new trial without any preservation of the objection to jurisdiction. An interesting discussion reconciling the proper relationship of these rules is found in Ivaldy v. Ivaldy, *supra,* but further discussion is unnecessary here.

(2) Jurisdiction was secured under the Unauthorized Insurers Process Act. The defendant, an Arkansas insurance company, collected premiums on 33 guaranties authorized to be issued and actually issued by Vulcan to Nebraska residents. Section 44-137.02, R. R. S. 1943, says that such acts "effected by mail or *otherwise,*" authorize process under the act. And considering the terms of this guaranty, the inducing purpose of this insurance, and under the provisions of section 44-359, R. R. S. 1943, the guaranty was an insurance contract in any meaningful sense of the term. See Sun Ins. Co. v. Aetna Ins. Co., 169 Neb. 94, 98 N. W. 2d 692. Under section 44-137.01, R. R. S. 1943, the statutorily declared public policy of this state is: "* * * that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while such insurers are not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies." The enforcement of such a purpose by an Unauthorized Insurers Process Act is constitutionally proper. Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U. S. 407, 25 S. Ct. 483, 49 L. Ed. 810. We also observe, from the self-designated name of the defendant, that apparently its contention herein is that it was acting ultra vires. There is no merit to these jurisdictional objections.

The assignments of error as to the inadmissibility of certain evidence and its sufficiency will be considered together. This was a trial to the court and the undisputed evidence is that Vulcan performed the work; that subsequently the basements and the floor leaked; and that Vulcan did not and could not comply with the guaranty apparently because it went out of business. Consequently any error in the admission of evidence as to representation by Vulcan that if the plaintiffs' houses were sitting in the middle of a lake, it would make them dry, is not prejudicial because the case was tried to the court alone. Assuming it was inadmissible, the presumption on appeal is that the trial court did not consider incompetent evidence. Miller v. Banner County, 127 Neb. 690, 256 N. W. 639; Terry Carpenter, Inc. v. Nebraska Liquor Control Com., 175 Neb. 26, 120 N. W. 2d 374; Duffy v. State ex rel. Edson, 60 Neb. 812, 84 N. W. 264. Moreover, we fail to understand how the defendant can contend the term "waterproofing" is ambiguous and yet at the same time argue the inadmissibility of parol testimony to resolve such ambiguity. Giving maximum range to its argument it contends that the words "waterproof" and "waterproofing" as used in the Vulcan's guaranty were not "intended to mean to guarantee elimination of all water" but that when "waterproof" is used it is in a "qualified phrase to avoid a concept of fully guaranteeing elimination of all water." We will not repeat the guaranty, set out in full hereinbefore. The only exclusion is dampness or condensation on the walls and floors and nothing else. The instrument in bold type says, "Surety Bonded Waterproofing Guaranty" and after stating that the purpose is to eliminate water seepage, states that in addition to applying their special process, "the contractor, if ever necessary, will supply all waterproofing materials he deems necessary in the event further waterproofing is required." Webster's International Dictionary (2d Ed.), Unabridged, p. 2886, defines "waterproof" as follows: "Impervious to water; specif.;

a. Covered or coated with a material, as a solution of rubber, to prevent permeation by water. b. Pert. to or characterizing a * * * structure so constructed that a stream of water may be directed on it under specified conditions without the water entering. * * * To make waterproof, esp. by application of some material, as rubber solution, impervious to water, - v.i. To be, or to be made, waterproof." "Waterproofing" is defined in the same work: "a. Act or process of applying a coating which will render something, as a roof or a fabric, waterproof; also, the state of being waterproof. b. Material applied to something else to make it waterproof."

It seems unnecessary to belabor the matter further. By circuitous and ingenious reasoning the defendant would have us come to the conclusion that waterproofing means "water resistant" or "water repellant" as commonly designated, for example, in a watch or coat. Humidity excepted, the guaranty was to "waterproof" and that conclusively includes protection against water seepage, the undisputed condition continuing after Vulcan performed its work. The guaranty is clear and unambiguous and requires no construction. It may be that the burden assumed is onerous, but we know of no rule protecting an insurance company from assuming such obligation, especially in light of the payment of a premium and the clear inclusion of the guaranty as an inducement to the plaintiffs. The contract of a surety, acting for compensation, is construed most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect. Sun Ins. Co. v. Aetna Ins. Co., *supra.*

Defendant argues that Vulcan performed the work that it agreed to and therefore the obligation is discharged. But the obligation was to perform the work necessary to "waterproof" (humidity excepted) the basements and this is conclusively demonstrated by the 5-year guaranty. The guaranty was not that the work could be performed in 5 years but that the basements would be waterproof

5 years after the work was performed (structural changes excepted). Defendant would have us believe that if Vulcan performed the work in 5 years the obligation would be discharged, a contention patently absurd.

The evidence is undisputed as to the breach and the damages were stipulated. The representative of Vulcan saw the cracks in the floors and the water seepage before the contract was entered into. After Vulcan's treatment, water seeped up through the crack radiating from the center seam in Abel's floor. The Vulcan process made no difference. The same situation was present as to Miller.

The court had jurisdiction, the guaranty and its breach were clear, and the judgment of the district court is correct and is affirmed. Plaintiffs are allowed $500 attorneys' fees for services in this court.

AFFIRMED.

HARTMANN VACKINER, APPELLANT, V. MUTUAL OF OMAHA, INSURANCE COMPANY, APPELLEE.
156 N. W. 2d 163

Filed February 16, 1968. No. 36697.

Insurance. A set of circumstances in which an insurer possesses a conditional power to avoid its contract is the following: A misrepresentation in the application for policy was made knowingly by the insured with intent to deceive. The misrepresentation deceived the insurer to its injury.

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

Homer L. Hurt, Jr., for appellant.

Sidner, Gunderson, Svoboda & Schilke, for appellee.

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

SMITH, J.

This claim on an insurance policy with provisions for hospitalization, surgical, and medical benefits was dismissed at the close of all the evidence. The question is whether the evidence establishes as a matter of law that the policy was voidable for fraud.

Plaintiff, then age 71 but now deceased, signed the application form on March 18, 1963. An ink "No" appears opposite every question relating to health, the questions reading in part: "Have you * * * ever had, or been told you had, or received advice or treatment for: * * * heart * * * trouble, * * * bladder trouble, prostate trouble, * * * Mental or nervous trouble * * *? Have you * * * ever had, or been told you had, or received advice or treatment for: (a) any physical conditions * * * not mentioned above, or (b) any symptoms of ill health? (Give details below)."

The claim is based on the transurethral prostatic resection and the perineal biopsy performed on plaintiff July 19, 1963. After discovery of an adverse medical history defendant on August 29, 1963, notified plaintiff of cancellation, tender of refund accompanying notification.

The medical history discovered by defendant begins with two hospitalizations of plaintiff in 1958. The diagnoses were angina pectoris secondary to myocardial ischemia and involutional psychiatric reaction for which plaintiff received many electric shock treatments. He recovered fully. At the trial in 1967 he remembered so little that his counsel said: "The testimony shows that Mr. Vackiner agrees that if the medical records show that he was treated or * * * hospitalized, he is agreeing that they are correct."

On physical examination in 1953 plaintiff's prostate had been found small and smooth. A medical report in 1958 reads: "Hypertrophy Lateral Lobes of Prostate—Smooth No Nodules. * * * The patient is in very good condition for a man of 67." On June 21, 1963, a physician noted the following complaint: "Slowing of stream

* * * - up 3 or 4 times a night." Six days later plaintiff was seen by Dr. Henry Kammandel, a urologist. Plaintiff "had a slowing of the stream two years prior but didn't pay any attention to it until the three or four months before he saw me when it became aggravated." Such symptoms which are referable to diseases of bladder and prostate are insufficient for diagnosis. Plaintiff testified by deposition in 1963 as follows: "Q- Why were you interested in this kind of insurance then? A- Well, I can't - I had some water trouble from a long time * * *. And it was already getting slower and slower and slower and I figured—." Interrupted by counsel, plaintiff did not say what he had "figured."

Defendant's agent Edward F Gabrukiewicz had solicited the application at plaintiff's home. He was given no information about prior hospitalizations or symptoms of bladder or prostate disease. The extent of his investigation at the time is in dispute. Plaintiff's deposition shows that Gabrukiewicz inquired about prior hospitalizations. In the record of plaintiff's testimony at the trial admissions of no recollection are conspicuous. Other parts are as follows: Gabrukiewicz asked some health questions but not those printed in the application. Plaintiff read part of the application but not the questions. The answers were written before or after plaintiff signed. Gabrukiewicz filled in the answers subsequent to his departure. Plaintiff, a German emigrant with an eighth-grade education, did not testify fluently. His difficulty at the trial was mainly ascribable to complex questions, impaired hearing, and faulty memory.

Gabrukiewicz, according to his testimony, had read all the printed questions to plaintiff, who had answered, "No," to every one. Gabrukiewicz wrote the answers at the time. Plaintiff's wife, according to her testimony, was present in the room part of the time and within hearing distance all the time. She did not hear any such questions.

Gabrukiewicz delivered the policy which included a

facsimile of the application. Plaintiff intended to consult his son, a bank employee and former insurance agent. When the son examined the policy in March 1963, he did not read the application. Defendant's form letter, exhibit 31, reads in part: "Please review the photostatic copy of your application which is attached to and made a part of your new policy. When we insured you, our decision was based on information shown in your application. * * * if your personal health history * * * has not been included, please send us the correct or missing information within 10 days." The parties stipulated: "in the ordinary course of business" exhibit 31 would have been "mailed by the defendant but if said letter was received by the plaintiff its contents were not noted and plaintiff denies any knowledge of having received said letter."

A set of circumstances in which an insurer possesses a conditional power to avoid its contract is the following: A misrepresentation in the application for policy was made knowingly by the insured with intent to deceive. The misrepresentation deceived the insurer to its injury. See, § 44-358, R. R. S. 1943; Zimmerman v. Continental Cas. Co., 181 Neb. 654, 150 N. W. 2d 268; Vackiner v. Mutual of Omaha, 179 Neb. 300, 137 N. W. 2d 859.

We limit the misrepresentation issue to the prostate condition. When plaintiff signed the application, he knew that the slowing of his urinary stream was an aggravated condition. He had "figured." Some treatment was indicated, and prostate surgery is not uncommon. Other circumstances relevant to knowledege and intent are the nondisclosure of prior hospitalizations, the nature of the testimony concerning execution of the application, defendant's form letter, and the review of the policy by plaintiff's son. The evidence establishes as a matter of law that defendant was deceived to its injury by this misrepresentation which was made knowingly by plaintiff with intent to deceive.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD LEE GREEN, APPELLANT.

156 N. W. 2d 724

Filed February 16, 1968. No. 36699.

1. **Criminal Law: Statutes.** 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.
2. ———: ———. It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite.
3. ———: ———. A municipal ordinance may constitute reckless driving and willful reckless driving separate offenses and provide separate minimum penalties for each offense.

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

Bertrand V. Tibbels, for appellant.

Marvin L. Holscher, for appellee.

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

BOSLAUGH, J.

Donald Lee Green, the defendant, was convicted of willful reckless driving in violation of an ordinance of the city of Scottsbluff, Nebraska, and sentenced to pay a fine of $100. The defendant's motion for new trial was overruled and he has appealed.

The sole issue upon the appeal is the validity of the ordinance involved. The constitutionality of the ordinance was challenged in the trial court by demurrer and a motion to quash.

The ordinance in question, section 20-295, provides as follows: "No vehicle shall be driven, used, operated,

parked, or stopped in a negligent, careless, reckless, or willful reckless manner, or in such manner as to endanger or interfere with the lawful traffic or use of the streets, or in such a manner that the vehicle shall not be under the complete control of the driver."

The defendant contends that the ordinance purports to create six separate offenses and that the terms used are so vague and ambiguous that the offenses created are not clearly defined.

In this case the defendant was charged with willful reckless driving. The question here is whether "willful reckless driving" can be prohibited and a penalty imposed for that offense. In disposing of this appeal it is not necessary to determine whether all of the other five separate offenses created by the ordinance are valid and effective.

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. It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. State v. Adams, 180 Neb. 542, 143 N. W. 2d 920.

In a number of decisions, statutes prohibiting reckless driving have been held valid. See, State v. Andrews, 108 Conn. 209, 142 A. 840; State v. Hamilton, 133 W. Va. 394, 56 S. E. 2d 544, 12 A. L. R. 2d 573; 7 Am. Jur. 2d, Automobiles and Highway Traffic, § 263, p. 815; 61 C. J. S., Motor Vehicles, § 609, p. 698; Annotation, 12 A. L. R. 2d 580.

Reckless driving has been prohibited by statute in Nebraska since 1935. Laws 1935, c. 134, § 3, p. 485. The 1935 Act defined the offense as driving "in such a manner as to indicate either a wilful or wanton disregard for the safety of persons or property." In 1947, the statute was amended, and driving in such a manner as to indicate "an indifferent or wanton disregard for the safety of persons or property" was constituted reckless driving.

Willful reckless driving was defined as driving in such a manner as to indicate "a willful disregard for the safety of persons or property." Laws 1947, c. 148, § 3, p. 410. The pertinent portion of the statute now appears as sections 39-7,107 and 39-7,107.02, R. R. S. 1943.

Reckless driving is defined in Webster's Third New International Dictionary, at p. 1896, as driving that evidences "a deliberate or culpably negligent disregard of life and property and creates an unreasonable risk of harm to others." The deliberate or wanton disregard for the safety of others or their property is the fundamental characteristic of reckless driving. Willful reckless driving is characterized by a deliberate, as distinguished from an indifferent, disregard for the safety of others or their property.

Reckless driving and willful reckless driving are terms which have a general recognized and understood meaning. Reckless driving and willful reckless driving may be prohibited by legislative enactments and separate penalties imposed for their violation.

The penalty provided for a violation of the ordinance involved in this case is contained in a later section, section 20-701. That section provides for a fine of not less than $1 nor more than $100. In 1959 the section was amended to prescribe minimum fines for certain violations. The minimum fines prescribed by the 1959 amendment for violating section 20-295 are as follows: "Section 20-295 as amended—negligent driving: Five Dollars ($5.00), careless driving: Fifteen Dollars ($15.00), reckless driving: Twenty-five Dollars ($25.00), willful reckless driving: Fifty Dollars ($50.00), other provisions of such Section: Five Dollars ($5.00)."

The defendant contends that the minimum fines provision in section 20-701 is invalid because it permits the police to control the minimum fine to be imposed by designating the offense which is to be charged.

The fact that the prosecuting authority may have some discretion in deciding what the appropriate charge should

be in a particular case cannot restrict the legislative determination as to what the minimum penalty should be for a particular offense. To the extent that identical offenses should carry identical penalties, the argument may have merit, but a distinction exists between reckless driving and willful reckless driving. The contention has no merit so far as this case is concerned.

The judgment of the district court is affirmed.

AFFIRMED.

SMITH, J., participating on briefs.

MCCOWN, J., dissenting.

I concur in the holding of the majority opinion that a proper municipal ordinance may constitute reckless and willful reckless driving separate offenses. However, I cannot concur in the conclusion that the particular ordinance here involved can properly be severed into portions. Unless it can be, the ordinance is clearly unconstitutional.

The definition sections of the traffic code of the City of Scottsbluff in themselves contain no definitions relevant here. The original provisions of section 20-295 carried the blackface type heading, "Reckless driving; prohibited." That section provided: "No vehicle shall be driven, used, operated, parked or stopped in a careless, reckless, or negligent manner, or in such manner as to endanger or interfere with the lawful traffic or use of the streets, nor in such a manner that such motor vehicle so driven shall not be under the complete control of the driver." The 1959 amendment merely added the words "willful reckless" and changed the order of the words to "* * * negligent, careless, reckless, or willful reckless manner, * * *." All other portions of the section remained substantially unchanged.

Section 20-701 of the original traffic code, as indicated in the majority opinion, was a general penalty section providing for a fine of not less than $1 nor more than $100 for a violation of any provision of the entire traffic code not otherwise specified. No fines were specified anywhere else in the code. The 1959 amendments to sec-

tion 20-701 left the overall penalty provisions intact, but added to them. The additions established minimum fines for violations of section 20-295 as amended. These were: negligent driving, $5; careless driving, $15; reckless driving, $25; willful reckless driving, $50; and other provisions of such section, $5. The 1959 amendment of section 20-701 also provided minimum fines of $10 for violations of five separately designated sections involving speeding; provided a $10 minimum fine for violation of section 20-297 involving unnecessary noise; and provided for a minimum fine of $5 for a moving violation under any other provisions of the entire traffic code.

It is significant that section 20-295 was the only section of the entire traffic code for which more than one minimum fine was provided and for that section, five separate minimum fines were provided.

The majority opinion adopts the position that the 1959 amendments to the penalty section, section 20-701, are sufficient to split up, separate, and constitutionally divide section 20-295 into five or more separate and distinct traffic offenses, even though the whole section is all one sentence. That section is interpreted as though it prohibited driving or operating a vehicle in a reckless or willful reckless manner and nothing more. It also draws on the state statutes and the definitions contained in them to determine a definition of willful reckless driving. Even assuming that a proper and specific distinction may be drawn and has been drawn by state statutes between reckless driving and willful reckless driving, there is no state statute defining negligent driving, nor careless driving, nor differentiating between them. There is certainly no statute or interpretation that incorporates stopping or parking as being involved in any such definitions.

Treating the ordinance as constituting five or more separate offenses requires obliterating different words for different charges, even though they are all in one continuous sentence, and that sentence constitutes the

entire section. The portions of the ordinance which prohibit driving, operating, parking, or stopping a vehicle "in such manner as to endanger or interfere with the lawful traffic or use of the streets, or in such a manner that the vehicle shall not be under the complete control of the driver," certainly run afoul of the decision in State v. Adams, 180 Neb. 542, 143 N. W. 2d 920. This is glaringly apparent where the ordinance covers not only driving or operating a vehicle, but using, parking, or stopping it as well. It should be noted that 39 sections of the Scottsbluff traffic code deal with parking, and at least 16 of them make various types of parking unlawful. There are literally dozens of sections of the code specifically defining various moving traffic violations and making them unlawful.

It would be virtually impossible to hold that section 20-295, viewed as a whole, is sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to penalty. See State v. Adams, *supra.*

It seems a strained construction indeed to lift out the words of the ordinance "reckless, or willful reckless," limit them to driving or operation of a vehicle, and then ignore the rest of the sentence and section. This treatment makes the words "negligent" and "careless" disappear, as well as the words "used," "parked," and "stopped." The clauses which deal with endangering or interfering with lawful traffic or use of the streets and not having the vehicle under complete control likewise disappear like magic. Yet, it is only by such wrenching that it can be said that it is not necessary to determine whether the other offenses apparently specified in the ordinance in the same section and in the same sentence, are valid and effective. Under such a construction, the particular offense charged determines which words of the sentence and section shall be ignored and which shall be applied.

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. Heywood v. Brainard, 181 Neb. 294, 147 N. W. 2d 772.

The issue here was the constitutionality of the specific ordinance as it existed and not whether a properly drawn municipal ordinance might constitutionally distinguish between reckless driving and willful reckless driving and constitute them separate offenses. Section 20-295 should be construed as a whole, and should be declared unconstitutional.

IN RE VALUATION AND EQUALIZATION.
COUNTY OF OTOE, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
COUNTY OF BROWN, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
AUGUSTINE J. RHODES, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
COUNTY OF RICHARDSON, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
COUNTY OF LOUP ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
156 N. W. 2d 728

Filed February 16, 1968. Nos. 36763, 36776, 36780, 36785, 36764, 36765, 36768, 36770, 36771, 36772, 36773, 36775, 36778, 36786.

1. **Statutes: Constitutional Law.** The general test of constitutionality with respect to prohibitions against special legislation is reasonableness of classification and uniformity of operation.
2. **Statutes: Courts.** A statute fixing a time for appeal to a court regulates the practice of courts of justice.
3. **Statutes: Constitutional Law.** The provision enlarging the time for appeal from valuation decisions entered by the State Board of Equalization and Assessment in the year 1966, Laws 1967, c. 506, § 3, p. 1706, is special legislation prohibited by the Constitution of Nebraska, Art. III, § 18.

Appeals from the State Board of Equalization and As-

sessment. On motion of appellee to dismiss appeals. Appeals dismissed.

Richard H. Hoch, Samuel C. Ely, C. Russell Mattson, W. H. Kirwin, Harold L. Gurske, J. Clark Noble, Jack H. Hendrix, William W. Griffin, Vernon F. Duncan, Cecil W. Orton, Henry F. Reimer, T. L. Grady, Francis R. O'Brien, A. F. Alder, Robert C. Bosley, and McGrath, North, Nelson & Shkolnick, for appellants.

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

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

SMITH, J.

The Legislature enlarged the time for appeal from valuation orders made by the State Board of Equalization and Assessment in the year 1966. In August 1967, 13 counties and a taxpayer of another county appealed from a board decision entered in August 1966. Constitutional objection to the statutory provision has been raised by motions to dismiss the appeals. The motions are based on the prohibition against special legislation regulating the practice of courts of justice. Art. III, § 18, Constitution of Nebraska.

Since 1921 the period fixed for appeal from a decision of the board has been 10 days. § 77-510, R. R. S. 1943. The provision for enlargement which was enacted in July 1967 reads in part: "Notwithstanding * * * section 77-510, any person, county or municipality affected by any final decision of the State Board * * * made in the year 1966 with respect to the valuation of * * * property may prosecute an appeal to the Supreme Court by giving notice * * * on or before thirty days after the effective date of this act." Laws 1967, c. 506, § 3, p. 1706.

The board met in 1966 for the purpose of equalizing statewide the assessed valuations of real property which was divided into four classes. Officials of the 93 counties

of the state were notified, and 12 counties named in the present appeals were among 90 that appeared at the hearing. Evidence was taken, and the valuations returned by each county assessor were reviewed. The board then ordered 84 counties to increase their valuations of one or more classes. On appeals taken within 10 days the order was reversed as to 14 counties that are not named in the present appeals. Our opinions were released in May 1967. In re Valuation & Equalization of Real Property in the State of Nebraska for 1966, 181 Neb. 725-757, 150 N. W. 2d 878-900.

The general test of constitutionality with respect to prohibitions against special legislation is reasonableness of classification and uniformity of operation. A statute fixing a time for appeal to a court regulates the practice of courts of justice. The Legislature is of course under no duty to prescribe a single limitation. It possesses a wide discretion. See, Bachus v. Swanson, 179 Neb. 1, 136 N. W. 2d 189; City of Mitchell v. Western Public Service Co., 124 Neb. 248, 246 N. W. 484. See, also, Cohen v. City of Alameda, 168 Cal. 265, 142 P. 885; Board of Education v. County Board of School Trustees, 28 Ill. 2d 15, 191 N. E. 2d 65.

We are told that the extension of time is justified by amendments of a refund statute. In 1965 the section provided for refund of illegal taxes and penalties. Former § 77-1736.04, R. R. S. 1943, as amended by Laws 1965, c. 494, § 1, p. 1581. By an amendment effective June 14, 1966, illegal penalties alone were recoverable. Laws 1966 (Spec. Sess.), c. 2, § 1, p. 60. In July 1967, the Legislature provided for refund of that portion of a tax based upon a valuation increase subsequently determined invalid. Laws 1967, c. 506, §§ 1 and 2, pp. 1704 and 1705. Appellants emphasize the amendments in argument along these lines: No provision for tax refunds existing in May, our decisions effected a preference for individuals whose taxes in the 14 counties were unpaid. The Legislature therefore authorized tax refunds. Because our

opinions implied that every increase was arbitrary, the Legislature in section 3 of the 1967 act extended the time for appeal. The argument has force, but we should consider also the nature of this function of the board, the distribution of political power, and the necessity for efficient operation of the administrative machinery.

Statewide equalization of assessments, like appropriations for expenses of government, increases the burden of some taxpayers. The consequence is, however, so indirect that private complaint about overassessment must be heard in other proceedings. In that sense statewide equalization is far removed from individual assessment; the functions are entirely dissimilar and distinct. Scotts Bluff County v. State Board of Equalization & Assessment, 143 Neb. 837, 11 N. W. 2d 453; County of Howard v. State Board of Equalization & Assessment, 158 Neb. 339, 63 N. W. 2d 441.

In reviewing the distribution of political power, we said that the board had no power or authority other than that specifically conferred by statute. County of Antelope v. State Board of Equalization & Assessment, 146 Neb. 661, 21 N. W. 2d 416. The sweeping restriction is inconsistent with the following constitutional provision: "(The) Tax Commissioner * * * together with the Governor, Secretary of State, State Auditor and State Treasurer shall have power to review and equalize assessments of property for taxation within the state." Art. IV, § 28, Constitution of Nebraska. In statewide equalization, the board exercises constitutional power instead of authority delegated by the Legislature.

Upon reversal of the equalization order the board is not required to reinstate valuations returned by the county assessor. For present purposes we need not mark off the precise limits upon its authority in those situations. It is enough that fractionation of board reconsideration because of appellate decisions a year apart would strain the administrative machinery.

All counties were notified of the hearing in 1966.

When the board entered its orders, every county and every taxpayer had an equal opportunity to appeal. Whatever action the board may have taken after the reversals, no one then complained. The provision extending appeal time singles out the year 1966 for reasons remote from statewide equalizaiton. It is a device for shifting tax burdens in that its sole purpose is ultimately to effect refunds for some taxpayers. The issue is equalization, not individual refunds. If the Legislature in 1967 constitutionally extended the time for appeals from the 1966 decisions, it would perhaps be able to do likewise in 1969 and subsequent years. Should the board readjust the 1966 valuations for these 14 counties, other counties would be in a position to complain of resulting inequality in their own assessments and deprivation of their right to appeal. Such controversies must come to an end if efficiency and economy are worthwhile objectives of government. The enlargement of time for appeal is special legislation prohibited by the Constitution.

APPEALS DISIMSSED.

NEWTON, J., concurring in result.

I am not entirely convinced that Laws 1967, c. 506, § 3, p. 1706, mentioned in the opinion of Smith, J., is unconstitutional as special legislation. I do agree with the result arrived at. This section appears to be in violation of Article 3, section 14, of the Constitution of the State of Nebraska. See Chicago, B. & Q. R.R. Co. v. County of Box Butte, 166 Neb. 603, 90 N. W. 2d 72.

AUSTIN JORDAN, APPELLEE, V. DUANE BUTLER, APPELLANT, IMPLEADED WITH JACK L. BUTLER ET AL., APPELLEES, IMPLEADED WITH NEBRASKA SECURITIES COMPANY, A CORPORATION, APPELLANT.

156 N. W. 2d 778

Filed February 23, 1968. No. 36623.

1. **Trial: Continuance.** A motion for a continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the court. Unless an abuse of such discretion is shown, the ruling on the motion will not be disturbed.
2. ———: ———. Where a continuance is sought on the ground that defendant is ill and is a material witness in his own behalf, the showing in support of the motion is insufficient if it fails to disclose the material facts to which defendant would testify, if present.
3. **Sales: Contracts.** Under section 2-401, U. C. C., title to goods passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods and, if the contract requires delivery at destination, title passes on delivery or tender there, unless the contract of sale provides otherwise.
4. ———: ———. The foregoing section of the Uniform Commercial Code does not provide for a revesting of title for the nonpayment of the purchase price alone except where the contract so provides.
5. **Sales: Fraud.** Under section 2-403, U. C. C., a person with a voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though the delivery was in exchange for a check later dishonored, that the sale was for cash by agreement, or delivery was procured through fraud punishable as larcenous under the criminal law.
6. ———: ———. A fraudulent purchase of personal property accompanied with delivery is not void, but voidable only, at the election of the vendor, and until it is avoided the vendee has the power to make a valid mortgage or sale of the goods to a bona fide purchaser having no notice of the fraud.
7. ———: ———. When goods obtained by fraud have been mortgaged by the fraudulent vendee to secure a present indebtedness, to a mortgagee in good faith without notice of the fraud, the latter stands in the position of an innocent purchaser of the property for value to the extent of the mortgage debt.

8. **Fraud: Equity.** Where one of two innocent persons must suffer by the acts of a third, the one whose conduct, act, or omission enabled such third person to occasion the loss must sustain it if the other party acted in good faith without knowledge of the facts, and altered his position to his detriment.
9. ———: ———. Where a party obtains a loan on personal property and secures the loan with a lien on the property, and by fraud substitutes other property for that covered by the lien, a court of equity may treat the proceeds of the substituted property in the nature of a trust for the benefit of the defrauded lienor and direct its distribution in accordance with the priorities of the parties.

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

McGinley, Lane, Mueller & Shanahan, for appellant Duane Butler.

W. H. Kirwin and Neal D. Youmans, Jr., for appellant Nebraska Securities Co.

Wright, Simmons & Hancock, for appellee Jordan.

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

CARTER, J.

This is an action in equity by a seller of cattle against a purchaser who accepted delivery but refused to pay for same, and subsequent purchasers who had purchased and accepted delivery of the cattle from the initial buyer. The trial court decreed that plaintiff had the title and right of possession of the cattle and that he had a lien and is entitled to the proceeds of the sale of the cattle; and that Nebraska Securities Company has judgment against Duane Butler, the possessor of the cattle at the time of trial, for the principal sum of $17,000 plus interest and that it has a first lien on the proceeds resulting from the sale of the cattle found that were covered by its security agreement in the amount of $166.49. Duane Butler and Nebraska Securities Company have appealed to this court. For convenience, we shall refer to the

plaintiff, Austin Jordan, as Jordan; to Duane Butler, a defendant, as Duane; to Jack L. Butler, a defendant, as Jack; to the Nebraska Securities Company, a corporation, a defendant, as Securities Company; to the J. L. Butler Construction Company, Inc., a defendant, as Construction Company; and Ronald Licht, a defendant, as Licht.

Jordan is a livestock dealer and truckline operator in Montgomery, Alabama. He had been acquainted with Jack and the Construction Company, both of which were located at Fremont, Nebraska. His acquaintance with Jack and the Construction Company had existed since 1959, during which period he had sold cattle to Jack or the Construction Company, Jack being the owner and sole stockholder of the Construction Company. In 8 or 10 previous cattle dealings, Jordan had sold and delivered cattle to Jack or the Construction Company, drawing drafts on the purchaser for the cattle and trucking charges which had been promptly paid on all previous occasions. Sometime between March 18 and March 20, 1966, Jack called Jordan by telephone and contracted to purchase 400 heifers to weigh approximately 400 pounds each. The number was subsequently reduced to 300 by agreement. Jordan agreed to sell at $24 per cwt. for the heifers, was to receive an additional 25 cents per cwt. as his commission, and was to receive an additional $1.50 per cwt. for trucking charges to Fremont or Omaha and $1.75 per cwt. if trucked to Gering. Before shipping any of the cattle, Jordan received instructions from Jack to deliver the cattle to Duane at Gering. On March 23, 1966, Jordan shipped 100 head to Gering and delivered them to Duane's feedlot. Jack was present when this first truckload was delivered although they were receipted for by Duane's wife. Jack subsequently called Jordan and informed him not to ship any more cattle because of their poor quality. Jordan told him that a second load of 100 was enroute. The second load was shipped on March 26, 1966, and delivered on March 28, 1966. They likewise were delivered to Duane's feedlot

and receipted for by Duane. Jack had left Gering before the arrival of the second load. Jordan did not ship more than 200 head which Duane received. On March 26, 1966, Jordan drew a sight draft on the Construction Company for the first load of cattle in the amount of $10,583.06 for the cost of the cattle, his commission, and the trucking charges. On the same day, he drew a similar sight draft in the amount of $10,484.87 for the second 100 head. Jordan was informed by wire on April 5, 1966, that the sight drafts were dishonored and on April 13, 1966, he received the formal notices of the nonpayment of the drafts. On April 8, 1966, Jordan came to Gering, saw the cattle in Duane's feedlot, and on April 12, 1966, filed the present action claiming title to the cattle.

The evidence shows that on or about March 18, 1966, Duane came to the Securities Company and informed Harvey L. Sams, Jr., an officer of the company, that he was expecting to purchase 250 head of southern heifers and wanted to know if a loan could be had to help meet the purchase price. He was informed that the Securities Company would go to the extent of $17,000 on 250 head. On March 28, 1966, Duane informed Sams the cattle were delivered and Sams went to Duane's feedlot and inspected the cattle which he found to be in order. Duane came in and presented a bill of sale for 250 head of cattle signed by Licht. Licht testified that he was an employee of the Construction Company and Jack, that he had no interest in the transaction, that he merely followed the directions of his employer, and that his only interest in the transaction was as the representative of Jack and the Construction Company. Pursuant to Jack's instructions, Jack being in New York on a business trip, Licht went to Gering and delivered to Duane a bill of sale for 250 head of cattle, 50 more than the 200 delivered by Jordan. Duane testified that he subsequently paid amounts of $17,000, its origin being the loan from the Securities Company, a sum of $3,000 in cash, and a further sum of $3,250, by the check of a business asso-

ciate, the total of which, in the sum of $23,250, constituted full payment for the cattle. All of the $23,250 was alleged to have been delivered to Jack by Licht which Jack does not deny. Sams, the agent of the Securities Company, testified that he saw the cattle several times during the next 3 or 4 months in Duane's feedlots near Gering.

Duane testified that the cattle in his feedlots at the time of trial were the same cattle purchased through Licht on which the Securities Company had its $17,000 security agreement. On April 12, 1966, Jordan, Sams, Duane, and two others inspected the cattle and counted 228 head. Duane said some of them had died and that others of the 250 head had not been found after all had escaped from the feedlots. Licht testified that 50 head of cattle were purchased to complete the 250 head transferred to Duane by the contract and bill of sale, some of which were bought locally and some in Denver, Colorado, from the Greeley Sales Barn. These 50 head were delivered to Duane at Gering by truck on March 27, 1966.

The evidence will not sustain a finding that the 250 head of cattle subject to the lien of the Securities Company were in Duane's feedlots after October 31, 1966. Glenn Blalock, the sole owner of the Blalock Livestock Company of Greeley, Colorado, testified that he looked at 230 southern heifers, weighing about 600 pounds each, at Duane's feedlot south of Gering in September 1966. He purchased 215 head on or about September 24, 1966, for $23.50 per cwt., plus 30 cents per cwt. for trucking. They were delivered to Blalock in late September and early October 1966. These cattle were delivered to one Domke, a cattle feeder near Loveland, Colorado. The cost of these cattle was $32,398. Duane purchased 198 head of 400-pound southern heifers from Blalock who purchased them from Quinn Brothers, in Jackson, Mississippi, and caused them to be delivered to Duane at Gering at a cost of $21,098.26. The difference was $11,299.74 which was paid to Duane by Blalock by check

on October 8, 1966. It is clear that the 215 head of cattle were removed and sold by Duane without the consent of the Securities Company and in violation of a restraining order issued by the district court for Scotts Bluff County on April 12, 1966, and were replaced with 198 400-pound southern heifers purchased from Quinn Brothers in Jackson, Mississippi. Of the 215 head sold by Duane to Blalock, 70 head were transported from Gering to Goshen County, Wyoming, by Blalock's trucker and unloaded at a ranch in that county. Duane obtained a Goshen County clearance and ordered the cattle reloaded and transported on into Colorado to the point of destination. The additional 145 head do not appear to have been inspected, which Blalock was unable to account for. The proof is conclusive that the 215 head covered by the Securities Company lien were sold to Blalock by Duane and delivered to buyers in Colorado pursuant to Blalock's instructions.

The foregoing summarizes the facts as disclosed at the final hearing of the case commencing on February 8, 1967.

Defendant Duane Butler asserts error by the trial court in denying him a continuance. Duane's application for a continuance alleged his inability to attend the trial because of his illness which was supported by the affidavit of his physician to the effect that it would be harmful to the health and well-being of Duane to participate in the trial of the case. We accept these facts as showing the physical inability of Duane to attend the trial.

A party to a civil action ordinarily has a right to be present at the trial, but his inability to be present does not necessarily warrant a continuance of the trial. The trial judge has a very wide measure of discretion when ruling on an application for a continuance. The grant of a continuance, with or without a written application, will not ordinarily be reviewed in the absence of a showing that it materially injured the adverse party. A grant

of a continuance because of the illness of a defendant is not necessarily required. In such a case, such application must contain a showing that defendant is a material witness with a recitation of the material facts to which he would testify, if present. Ofttimes such stated facts can be admitted as true or a stipulation made that the absent witness would so testify, if present, and a continuance be thereby avoided. Waldron v. Lapidus, 121 Neb. 54, 236 N. W. 139; Good v. Bonacum, 78 Neb. 792, 111 N. W. 796. But in the instant case, the record shows that the absent defendant had appeared and testified at a previous portion of the trial. It also shows that his deposition had been taken which was on file and used in the final stage of the trial. Nothing is pointed out that indicates that defendant was prejudiced by the denial of the continuance. We fail to see how the defendant was prejudiced, particularly in a trial to the court, by the use of his deposition in his absence. The court did not abuse its discretion in denying a continuance.

Jordan contends that title never passed to Jack and that he is still the owner of the cattle. He relies on section 2-401, U. C. C., which states in part: "(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, * * * (b) if the contract requires delivery at destination, title passes on tender there. * * * (4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a 'sale'." The title to the cattle passed to Jack on delivery of the cattle to Duane as provided in subsection (2) (b) of the above-quoted section of the statute. There was no revesting of title in Jordan under subsection (4) of the above-quoted section of the statute for the reason there was no rejection or other refusal by the buyer to

receive or retain the goods, or a justified revocation of acceptance. The quoted section does not provide for a revesting of title for nonpayment of the purchase price alone, unless the contract of sale so provides. It is true that Jordan demanded and was refused possession of the cattle by Duane on April 9, 1966. But this is after Duane's voidable title had vested and the rights of the Securities Company as a good faith purchaser for value to the extent of its lien had attached.

The evidence shows that Jack accepted and retained the possession of the cattle after their delivery to him at Gering. On March 25, 1966, he entered into a contract of sale of the cattle and delivered a bill of sale to Duane through Licht as his agent. In fact, he received the sale price before he dishonored the sight drafts drawn on him by Jordan. Under these circumstances his actions have all the appearances of a fraudulent transaction subjecting him to the penalties of the criminal law and the statutory provisions of the Uniform Commercial Code, section 2-403. That provision states in part: "A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though * * * (b) the delivery was in exchange for a check which is later dishonored, or (c) it was agreed that the transaction was to be a 'cash sale', or (d) the delivery was procured through fraud punishable as larcenous under the criminal law." Under these provisions, Jack conveyed at least a voidable title to Duane.

On the strength of Jack's contract to sell and his bill of sale of the cattle, handled through his employee Licht, the Securities Company loaned Duane $17,000 and took a lien on the cattle for this amount. The Securities Company had no notice of any defect in the title to the cattle. Its security agreement was filed for public record on March 30, 1966. It had the cattle inspected in Duane's feedlots in Scotts Bluff County. It clearly

qualified as a good faith purchaser for value from a purported owner holding a voidable title. § 2-403, U. C. C. The validity of the Securities Company lien on the 200 head of cattle obtained from Jordan and the additional 50 head purchased in Denver is beyond question.

It is the contention of Jordan that Duane is not a bona fide purchaser for value in that he is a party to the fraud perpetrated on Jordan. Duane, on the other hand, contends that he is a bona fide purchaser for value for the cattle Jack purchased from Jordan and that he had no notice or knowledge of any fraud on the part of Jack. It will be noted at the outset that Jack and Duane Butler are brothers. The record shows that Duane visited with Sams about his desire for a loan to buy 250 head of 400-pound southern heifers on March 18, 1966. On the same day that Duane expressed this desire to Sams, Jack called Jordan and purchased the cattle as heretofore stated and directed them to be delivered to Duane at Gering, Nebraska. The cost of the cattle, commission, and transportation charges was $21,067.93. Before Jordan's sight drafts for this amount were dishonored by Jack, Jack had sold the cattle to Duane for $23,250, indicating a profit of $2,182.07. After this transaction was allegedly completed, Jack notified Jordan that he was dishonoring the sight drafts because of the poor quality of the cattle. The good faith of the refusal of Jack to pay is questionable in view of the fact that he had sold and received payment for the cattle and put himself beyond his power to rescind the contract. It would appear that the objection to the quality of the cattle was not made in good faith and is evidence that Jack never did intend to pay Jordan for the cattle.

There is other evidence which supports the foregoing conclusion. Duane and Licht both testify and Jack admits that Jack received the $17,000 which originated from the loan made by the Securities Company to Duane. The $17,000 check given by Duane to Licht was cashed at a North Bend bank for some unknown reason. It is

a peculiar circumstance that the North Bend bank did not send the check through regular banking channels. Instead, Mr. Wolf of that bank came to Scottsbluff to get cash for the $17,000 check. The necessity for a speedy cashing of this check can only be surmised by an inference that Jack desired to have the check cashed before he refused to pay Jordan. Duane testifies that he paid $3,000 of the balance due to Jack on March 29, 1966. He says he paid it in cash to Licht downtown in Cheyenne, Wyoming. He first said he paid the balance of $6,250 in cash and later stated that Robert Nedbalek of Loveland, Colorado, made the payment of $3,250 for him. He was interrogated as to the source of these funds. His answer was he kept the money in a personal place he did not care to disclose; that he just "had it." Jack testified that if Licht testified he received the $3,000 he got it, "but I don't think he did." Jack denies receiving the $3,250, which Licht says he gave him, after once admitting its receipt. We think the evidence of these alleged cash payments is incredible and affords a method of establishing their stories without being verified by checks and bank deposit slips. Jack was unable to show with any certainty that he ever received the $3,000 in cash. He comes up with the story that he returned the $3,000 in cash to Nedbalek because he owed him money. Here again there was no check or deposit slip to verify his statement, although he produces a receipt for the amount signed by Nedbalek whom Duane describes as a business associate. There is a check in the record signed by Nedbalek in favor of Jack for $11,000, bearing the date of March 17, 1966, which Jack testifies was never paid. Yet Jack testifies that he gave the $3,000 in cash to Nedbalek for money that he owed him for 100 head of cattle. The testimony that the $3,000 was given to Nedbalek for cattle does not appear consistent under the circumstances. The stories of paying out items of $3,000 and $3,250 in cash at casual meetings on the street and the differences in the testi-

mony of Jack, Duane, and Licht lead us to the conclusion that the two cash payments were never made and that the testimony to the contrary was false.

Duane testifies that the 198 cattle on hand at the time of trial were the cattle delivered to him by Jordan the previous March. This evidence is conclusively established as wholly false. The cattle delivered by Jordan were sold to Blalock and delivered in Colorado as instructed by Blalock. Duane bought the 198 head of 400-pound heifers and substituted them for the cattle bought from Jordan. It is evident that Duane substituted the light cattle for the heavier cattle in order that he could convert the difference in value into cash to the extent of $11,299.74, which he did. The substituted cattle were purchased to satisfy the lien of the Security Company which appeared necessary to avoid criminal prosecution for selling and moving the Jordan cattle without the consent of the lienor. His fear that Jordan's institution of suit might have resulted in the taking of his whole interest in the cattle for payment of his liabilities seems to have motivated the unlawful sale of the Jordan cattle in violation of the district court injunction. It is evident also that Duane did not feel that his claim that he was a good faith purchaser for value was free of his own doubt to the extent that he could safely rely on it.

After a consideration of all the facts and circumstances, including the testimony proven to be false and that which is so incredible as to be beyond belief, we can come to no other conclusion than that the transaction reeks with fraud. It is true that the direct evidence of fraud is fragmentary, but this is generally true in fraud cases of this kind. When the evidence, fragmentary as it is, is considered with the inferences reasonably to be drawn from the actions of the parties, it fits together like the pieces of a jig-saw puzzle. It was clarly the intention of Jack and Duane Butler that Jack would buy the cattle, turn them over to Duane through Licht for the amount

that they could be mortgaged, and then refuse to pay for the cattle. Jack got $17,000 in cash and Duane got cattle of the value of $23,250 for the amount of the lien at Jordan's expense. The actions and conduct of the parties speak so loud that it is most difficult to hear their excuses and claims of good faith.

The record shows that Duane stipulated that the cattle in his possession at time of trial were to be sold and the net proceeds thereof paid into court. The sale was had and the returns of the sale paid into court in the amount of $19,982.02 on November 8, 1966. The trial court found that the Securities Company had a lien on the proceeds for $166.49, the sale price of two cows identified as being within the Securities Company lien. The Securities Company asserts this is error.

The $19,982.02 was paid into court in lieu of the cattle in Duane's possession. These cattle, other than the two cows previously mentioned, are not cattle that were sold by Jordan, nor are they cattle on which the Securities Company took a security agreement. The fund standing in place of the cattle stands in the nature of a constructive trust to be distributed in accordance with the priorities of the parties. The Securities Company as a good faith purchaser for value without notice of any title defect is entitled to have its $17,000 lien, with interest, paid first from the fund. Any amount remaining should be allowed on the judgment procured by Jordan. Jordan has no lien on the cattle for the reason that the conditions for the revesting of title do not exist under the Uniform Commercial Code as we have heretofore explained. It must be pointed out that it is a rule of long standing that where one of two innocent persons must suffer by the acts of a third, the one whose conduct, act, or omission enables such third person to occasion the loss must sustain it if the other party acted in good faith without knowledge of the facts and altered his position to his detriment. Terry Bros. & Meves v. National Auto Ins. Co., 160 Neb. 110, 69 N. W. 2d 361. It was Jordan who

delivered the cattle without collecting the purchase price that made it possible for Jack and Duane Butler to perpetrate the fraud on the Securities Company as a good faith purchaser for value without notice.

We hold that the Securities Company has a first lien on the $19,982.02 fund in the hands of the court to the extent of its lien and the balance, if any, should be applied on the judgment of Jordan. We hold also that Jordan is entitled to judgment against Jack and Duane Butler for the amount of the sale price of the cattle sold to Jack, together with interest and costs. We hold further that the Securities Company is entitled to judgment against Duane Butler for the amount of its security agreement which is to operate as a lien on the fund in the hands of the court. The costs of this appeal are taxed to Jack and Duane Butler.

REVERSED AND REMANDED.

BOSLAUGH, SMITH, and MCCOWN, JJ., dissenting in part.

Concurring with the result in respect to the interest of Securities, we dissent otherwise. Two problems are: (1) Denial of continuance, and (2) the appellate holding "that Jordan is entitled to judgment against * * * Duane * * * for the * * * price of the cattle sold to Jack." The record is significant.

Jordan's pleadings do not state that Duane committed fraud. Jordan freely admits that Securities in good faith gave value. His theory is this: The law permits the immediate transferee of the original purchaser, but not a subsequent transferee, to qualify as a good faith purchaser for value. Licht of course did not qualify. The theory, we think, eventually affected trial rulings.

At the trial one continuance was ordered because of Duane's hospitalization. No reason was given for denial of his motion for a second continuance. The court found the bills of sale void, but it made no other finding relevant to good faith purchase for value. Securities as well as Duane was denied relief. Yet not a shred of evidence hinted that Securities failed to qualify. The trial court

surely adopted Jordan's theory. Licht's status being conceded, the court probably concluded that Duane would not be a material witness.

Duane may be unable to overcome the strong evidence against him, but his complaint about denial of continuance should not be brushed aside. His position is supported not only by circumstances but by precedent also. See, Horr v. Easton, 114 Neb. 829, 211 N. W. 172; Juckniess v. Howard, 120 Neb. 213, 231 N. W. 843; Annotation, 68 A. L. R. 2d 470. No affidavit was necessary to show that he was a material witness. Furthermore an ample substitute for the affidavit is the majority opinion itself.

The district court found that Jordan had a first lien on the proceeds of sale. It rendered judgment accordingly. Jordan has not cross-appealed. There is neither pleading nor argument that Duane should be held personally liable for the contract price in the Jordan-Jack transaction. No such issue was decided by the district court. It should not be decided now.

STATE OF NEBRASKA, APPELLEE, V. FLOYD R. MORGAN, APPELLANT.

156 N. W. 2d 799

Filed March 1, 1968. No. 36576.

1. **Forgery: Evidence.** In a prosecution for uttering a forged check, testimony of a proper officer of the drawee bank that the drawer has no account in the bank and is unknown to the bank is admissible to show that the drawer is a fictitious person.
2. **Evidence.** A return slip bearing a notation "No Acct" attached to the check by an employee of the drawee bank is hearsay and not admissible in the absence of other and sufficient foundation evidence.

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

Adolph Q. Wolf and Thomas D. Carey, for appellant.

Clarence A. H. Meyer, Attorney General, and Chauncey C. Sheldon, for appellee.

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

BOSLAUGH, J.

The defendant, Floyd R. Morgan, was convicted of uttering a forged check. His motion for new trial was overruled and he has appealed.

The check which was the basis for the charge was in the amount of $30, payable to "Baker's food Mart," drawn on The Omaha National Bank, and purportedly signed by "J. B. McConnell, 10608 Saratoga St., Omaha, Nebr." The evidence shows that the check was written by Harold Nichols and cashed by Ronald Ray Rogers at the Baker store. There was evidence from which the jury could find that the defendant participated in the transaction as an aider and abettor.

The State attempted to show that the check was a forgery by proof that the drawer, "J. B. McConnell," was a fictitious person. A return slip, which had been attached to the check by an employee of the bank, bearing the notation "No Acct" was received in evidence over the objection of the defendant. The ruling on this objection is assigned as error.

The foundation for the admission of the return slip consisted of testimony by police officers that the check had been presented to an official in the customer's service department of the Omaha National Bank with a request that the bank determine whether the check was forged or a no-account check, and that the return slip was attached to the check at the bank. No officer or employee of the bank testified concerning the check and there was no additional foundational evidence concerning the return slip.

It is generally held that testimony of a proper officer of the drawee bank that the drawer has no account in the bank and is unknown to the bank is prima facie evi-

dence that the drawer is a fictitious person. State v. Phillips, 256 N. C. 445,124 S. E. 2d 146; People v. Gutkowsky, 219 Cal. App. 2d 223, 33 Cal. Rptr. 79; Annotation, 49 A. L. R. 2d 852. The return slip produced by the State in this case is not an adequate substitute for the testimony of a proper officer of the drawee bank.

The defendant's objection that the return slip was hearsay and that there was no proper and sufficient foundation for its admission should have been sustained. Farrington v. State, 10 Ohio 354; Rogers v. State, 97 Neb. 180, 149 N. W. 318, L. R. A. 1915 B 1125; Bedford v. State, 36 Neb. 702, 55 N. W. 263. The error requires that the judgment be reversed.

There is another matter in the record which requires comment. In a hearing conducted out of the presence of the jury the State attempted to establish a foundation for the admission of a statement which the police had obtained from the defendant. The evidence showed that there had not been compliance with the *Miranda* rules and the trial court held, properly, that the statement could not be used. The State, however, subsequently examined a police detective in the presence of the jury concerning advice and admonitions which he had given to the defendant.

In State v. Whited, *ante* p. 282, 154 N. W. 2d 508, we noted that such evidence is not relevant or material, where the statement or confession is not offered or received, and may be prejudicial to the defendant. Under the circumstances in this case, the questioning was improper and should not have occurred.

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

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. LEONARD WYMER WALLE, JR., APPELLANT.

156 N. W. 2d 810

Filed March 1, 1968. No. 36631.

1. **Criminal Law: Homicide.** Malice and a purpose to kill are essential elements of murder in the second degree.
2. **Homicide: Evidence.** A photograph of a homicide victim which tends to illustrate a controverted issue is admissible where there is proper foundational evidence.
3. **Right to Counsel.** Where an indigent defendant elects to defend himself, it is within the discretion of the trial court to appoint the public defender as his technical adviser.
4. **Criminal Law.** Such a defendant has no absolute right to be placed in a private cell, given access to a typewriter, carbon paper, legal pads, and a law library, or to be furnished with a daily transcript of the testimony.

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

Adolph Q. Wolf and Bennett G. Hornstein, for appellant.

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

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

BOSLAUGH, J.

Leonard Wymer Walle, Jr., was convicted of second degree murder and sentenced to life imprisonment. His motion for new trial was overruled and he has appealed.

The record shows that Marilyn April Walle, the defendant's wife, was shot to death in their apartment in the Hamilton Hotel in Omaha, Nebraska, on September 1, 1966. Mrs. Walle was a dancer employed at the Roam Inn. She had given two performances on the evening preceding the murder and had returned to the hotel with the defendant at about 1:40 a.m.

Leona Forsberg, an employee of the Roam Inn and

a friend of the deceased, testified that the defendant called her at about 3 a.m. on September 1, 1966, and asked her to come to the hotel. When she arrived at the hotel, the defendant told her that his wife was dead; that " 'I shot her' "; and that " '* * * it wasn't one shot; it was lots and lots of shots.' " Miss Forsberg then called the police and the defendant was arrested.

The defendant denied that he had shot his wife, but offered no explanation for the murder other than it must have occurred while he was absent from the apartment, for about 5 minutes, or while he was bathing. The jury had the right to accept the testimony of Miss Forsberg and reject that of the defendant. The evidence sustains the verdict.

The State produced photographs of the deceased taken at the hotel and at the county morgue, six of which were received in evidence over the objection of the defendant. Later, one photograph was withdrawn. The admission of the five exhibits is assigned as error.

Malice and a purpose to kill are essential elements of murder in the second degree. § 28-402, R. R. S. 1943; State v. Marion, 174 Neb. 698, 119 N. W. 2d 164. The burden was upon the State to prove both of these elements beyond a reasonable doubt.

A photograph of a homicide victim which tends to illustrate a controverted issue is admissible where there is proper foundational evidence. Washington v. State, 160 Neb. 385, 70 N. W. 2d 378.

The evidence shows that eight bullets entered the body of the deceased causing eight primary entrance wounds, seven primary exit wounds, and four secondary entrance wounds. The hotel photographs served to illustrate testimony concerning the scene of the crime. The pathologist used the morgue photographs to illustrate his testimony, and this enabled the jury to visualize the wounds. The photographs were relevant and material to the issues concerning the cause and manner of death of the victim and were properly admitted.

The defendant's other assignment of error relates to the ruling on a pretrial motion for necessary aids to defense. The motion was made and overruled just before the trial commenced.

The defendant was represented by the public defender at the preliminary hearing and at his arraignment in district court. On January 17, 1967, the defendant filed a motion requesting appointment of defense counsel from outside the public defender's office. This motion was overruled on January 19, 1967.

On January 30, 1967, the defendant, in open court, elected to defend himself, and the public defender was appointed as his "technical adviser." This was within the discretion of the trial court. People v. Mattson, 51 Cal. 2d 777, 336 P. 2d 937. At this hearing the defendant inquired as to whether he would have access "to any kind of court rules on courtroom procedure and to any books." The trial court explained that the public defender would supply advice of a technical nature to the defendant upon his request. The case was then set for trial on February 14, 1967.

On February 14, 1967, there was a further hearing in chambers before the trial began. The defendant made an oral motion that he be granted a private cell for purposes of research and study; that he have access to a typewriter, carbon paper, and legal pads; and that he receive a transcript of all testimony for each and every court session by the day. This motion was overruled but the court requested that the sheriff place the defendant in a private cell if one was available. The court also directed the public defender, as technical adviser to the defendant, to supply the other things requested to the best of his ability.

The defendant argues that an indigent defendant is entitled to collateral aids in addition to trial counsel. He cites cases which hold that an indigent defendant is entitled to the services of an expert witness, such as a handwriting expert or a phychiatrist.

We think the trial court adopted the best solution possible for the problems that were presented in this case. The services of the public defender, as a technical adviser, are of much greater value to a defendant untrained in the law than access to a fully equipped law library.

Ordinarily, a daily transcript of testimony is not available to either party. Where no special arrangements have been made and such a transcript is not available to the State, the trial court is not required to furnish such a transcript to the defendant at the expense of the county.

The judgment of the district court is affirmed.

AFFIRMED.

DEPARTMENT OF BANKING OF THE STATE OF NEBRASKA, AS RECEIVER OF NEBRASKA STATE BANK OF VALENTINE, VALENTINE, NEBRASKA, INSOLVENT, APPELLEE, V. EUGENE P. KEELEY, APPELLANT.

156 N. W. 2d 803

Filed March 1, 1968. No. 36665.

1. **Evidence: Trial.** A motion for a directed verdict or its equivalent must for the purpose of decision thereon be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Banks and Banking.** The president of a bank has no authority, springing from his official position, to make an agreement that the liability of a party on commercial paper payable to the bank shall never be enforced.
3. **Fraud.** A defrauded party must be diligent and prudent in his effort to detect the fraud, and means of knowledge thereof are equivalent to knowledge.
4. **Bills and Notes.** The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt.
5. ———. As between the original parties and as against transferees who are not bona fide purchasers for value, a renewal

note is open to all defenses which might have been made against the original note.

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

Fitzgerald, Brown, Leahy, McGill & Strom, for appellant.

Murphy, Pederson & Piccolo and Smith Brothers, for appellee.

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

SPENCER, J.

This is an action by appellee against appellant, as guarantor of a note. The defense is fraud and partial failure of consideration. After both parties had rested, the trial court directed a verdict for appellee, and appellant perfected this appeal.

The note, in the amount of $25,220, dated October 19, 1964, due November 5, 1964, is signed "Valentine Hearts Per E. P. Keeley President," and on the back thereof bears the following endorsement and guaranty: "I hereby endorse this note with full personal recourse and unconditionally guaranty the payment of same for the principal amount and any and all interest that becomes due and payable
"E P KEELEY (Sgd.)
"E. P. Keeley
"Valentine, Nebraska
"October 19, 1964."

The baseball team which has represented Valentine in the league embracing teams in the area for several years has been nicknamed "Valentine Hearts."

On April 7, 1956, Valentine Baseball Association, Inc., was formed for the purpose of organizing and maintaining a baseball club. Appellant was its president, one of its directors, and the resident agent. The baseball club was operated under appellant's direction through the

1959 season. On June 28, 1960, a new corporation was organized, under the name of "Valentine-Winner Baseball Club, Inc.," to operate a baseball club. Appellant had no connection with this corporation or with the ball club. On May 11, 1963, a new corporation was formed, with the name "Valentine Hearts, Inc." The incorporators were the appellant and Dwight E. Dam, both residents of Valentine, Nebraska. The initial directors were the two incorporators and R. L. Davenport, the president of the Nebraska State Bank of Valentine. Appellant was its registered agent.

Prior to the incorporation of Valentine Hearts, Inc., a meeting had been held at an inn in Valentine, to decide whether to have baseball for another year. Fifteen or twenty citizens of the area, including Davenport, Dam, and appellant were present. The talk centered around financing the team and who was to run it. Dam testified that the concensus of the meeting was that a document should be prepared to be signed by those interested in underwriting the operation of the baseball team for 1963. Dam was to get the agreement prepared, and Davenport was supposed to circulate it. Appellant consented to "carry the ball," as he had done previously. Dam had the agreement drawn but did not deliver it to Davenport. He understood the attorney who drew it did so. Dam never saw the agreement, but testified he talked to Davenport about it a short time subsequently, and was told about 40 signatures had been obtained. Dam relayed this information to appellant. Dam had not signed the agreement and knew of some others who were interested who had not done so, but never visited with Davenport about it again.

Appellant, who had wide experience in business and financial affairs, was the implement dealer in Valentine. He had transacted his personal and business banking with the Nebraska State Bank of Valentine for several years before Davenport, who was a close personal friend, became its president. During the period from 1956 to

1959, as the active manager of the ball club, appellant accumulated a debt of $14,000. This was evidenced by a promissory note dated September 27, 1958, for that amount. On the record, we determine this note was personally guaranteed by appellant. The history of this transaction from September 27, 1958, to January 5, 1963, is as follows: The note was renewed March 28, 1959, and October 15, 1959. It was renewed January 30, 1960, at which time interest in the amount of $247.33 was paid by a check of the Keeley Implement Company. It was renewed again on the following dates, and the amount indicated is the interest which was paid by a check of the Keeley Implement Company: August 26, 1960, $487.67; January 9, 1961, $317.33; June 15, 1961, $366.33; January 6, 1962, $478.33; and July 11, 1962, $434. On January 5, 1963, appellant paid $1,000 on principal, and interest in the amount of $21, with his personal check.

Between May and July 16, 1963, the Nebraska State Bank of Valentine advanced $2,000, $5,000, and $6,000 to the ball club on three separate notes. Appellant does not remember whether he personally guaranteed these notes, and the bank records would indicate that they were delivered to him when they were subsequently renewed. Davenport testified the notes were guaranteed by appellant. On July 16, 1963, the three notes were consolidated into one for $13,000, and this note was guaranteed by appellant. Appellant testified that he had a conversation with Davenport about the indemnity agreement, as follows: "A On that occasion he told me he had around 42 names on it. I says, 'Dick, I haven't signed it. I would like to get on it.' And he said, 'It's at home, and it's not in the bank at the present time.' " Appellant did not discuss the agreement with Davenport again until December 1963, when Davenport suggested the combining of the old note with the current one. Appellant testified that on that occasion when he asked Davenport to see the agreement Davenport told him it was in the glove compartment of his pickup out at the trout farm.

On December 18, 1963, appellant paid $2,000 on the current note, and interest on both notes, from the baseball account and signed and guaranteed a new note for $24,000, which consolidated the old and the current indebtedness. This $24,000 note, which was due June 18, 1964, was renewed on October 19, 1964, by the execution of a new note for $25,220, which included the interest on the indebtedness to that date. This note, which is the one on which the present action is founded, was due and payable on November 5, 1964, a little more than 2 weeks thereafter.

Preceding this transaction, a clerk at the bank had called appellant's office and requested a financial statement. Appellant called Davenport and visited with him about it. This was on Saturday afternoon, October 17, 1964, and Davenport suggested that appellant come into the bank the 19th. Appellant did so, and noticed that the bank was in the process of being examined by either the state or national examiners. His report of the transaction on that occasion is as follows: " 'Mr. Davenport told me on a Saturday, which I believe was the 17th of October, to come to his office. He wanted to get a combined property statement. I called him back and told him I would be down in a few minutes. Mr. Davenport said, "It's about a quarter till three now, why don't we make it ten o'clock on Monday morning." I appeared at the bank approximately ten o'clock on Monday morning on the 19th. At the time I got to the bank Mr. Davenport was not present. I asked Betty Porath—or Mrs. Porath where Dick was, and she said he was out getting coffee. He wants to see you, will you please wait. I waited for approximately 15 minutes, when Mr. Davenport returned, with whom I presumed was the bank examiners. He had four or five other people with him. I waited for maybe another five or six minutes, until somebody in Mr. Davenport's office, and I presume it was the bank examiner, left the room. He called me in, and we had a little general conversation about difference (differ-

ent) things. And he says, "Mr. Keeley," he says, "I would like to get a financial statement from you. A good financial statement." Those were his words. I says, "Dick, you have. What is this all about? You have Keeley Implement Company, Incorporated." He says, "No, I want a good financial statement to support the baseball note." And there was some other conversation that went on. I figured he had enough financial statements to back up the baseball note. He says, "Well, help me out on this one particular instance here." And I says "Well, if a financial statement—a combined financial statement of E. P. Keeley Company and Keeley Implement Company will help you," I says, "well, I will give you a financial statement." And so he takes a piece of paper in longhand, and he starts writing down different figures. And he says, "What do you think your accounts are?" And we went through the Keeley Implement Company, and I gave him some figures. He was inclined to raise them all. We come over to the other property, and he would raise them. He says, "What is your house worth?" I says, "$10,000.00." He says, "We'll put her down at $20,000.00." I think or some other figure, and we kidded around about the financial statement. And he handed it to Mrs. Porath to type up. I looked at it, and we kidded around a little bit, and I said, "Dick, I will sell you the joint for that." So Mrs. Porath went out and she brought in the note. Now, he says, "I need a renewal on this note." I says, "Dick, you know the story on this note. You and Mr. Dam was to take full financial responsibility. You tell me that you have guarantors to back up the note. Responsible people. The agreement was delivered to you." Well, Dick says, "We know about that, but I need a little more time." He says, "Will you give me two weeks to clean up this mess?" So I says, "Well, two weeks won't be bad, but," I says, "I want the mess cleaned up. I want you to live up to your promise to come up with the agreement. Call these people to a meeting and we will pay off the note as

agreed." He says, "Thats okay with me. You set the meeting. You set the date." So at that time Mr. Ferris, Sr., was interested in and had operated the nonincorporated Valentine Hearts in 1964, and when I walked out of the bank he was standing at the curb. I said to Fud, "It looks like we are going to get the note mess cleaned up. Dick has promised to appear at a meeting and bring the list of guarantors." I said, "Fud, I'll leave it up to you to call the meeting, because you're active in baseball at the present time." Fud, Sr., says, "When do you want it?" And I said, "It has to be within two weeks. How about a week from tomorrow night, which would be a Tuesday?" Fud says, "I will let you know. I will check with the local calendar." In those days we didn't call a meeting if there was a basketball game or something like that. He says, "I'll set up the meeting." And to the best of my recollection the meeting never got called. The bank closed within the two-week period. The bank closed within that two weeks. This was the 19th, and it closed the night of the 29th.' "

Davenport, whose testimony was adduced by deposition, testified that all of the previous baseball notes were guaranteed by appellant. When a note was renewed, the old one was given to appellant. No representation was ever made to appellant that he would not have to pay the debt or that others would help him pay it. Davenport remembered some discussion about an indemnity agreement, but if one existed he did not know what became of it. He testified to a conversation he had with appellant and appellant's attorney to the effect that appellant would just as soon pay the note and be done with it but he would like to get it deducted from his income tax and the attorney said the Internal Revenue people were objecting. Appellant does not deny this conversation. His attorney in rebuttal did not deny it, but fixed the date of it as September 13, 1960. At that time, it would have referred only to the $14,000 note, which was

later reduced to $13,000 and then consolidated into the present indebtedness.

Appellant does not question the execution of the note nor contend that he misunderstood what he was doing when he signed the guaranty. He does not deny that the bank actually advanced the money represented by the note, nor is there any dispute that said funds were used for the exclusive benefit of the baseball club known as "Valentine Hearts." His position is that he was fraudulently misled by Davenport when he signed as guarantor on the note dated July 16, 1963, and its subsequent renewals. On the affirmative issues raised herein, appellant had the burden of proof. Verdict was directed against him at the close of all of the evidence.

"A motion for directed verdict or its equivalent must for the purpose of decision thereon be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Presho v. J. M. McDonald Co., 181 Neb. 840, 151 N. W. 2d 451.

To give the appellant the benefit of the presumptions and inferences to which he is entitled, we assume that Davenport reported to appellant that an indemnity agreement with about 40 or 42 signatures was in existence on July 16, 1963, when the $13,000 note to cover the three small notes was executed; when the 1956-1959 indebtedness was consolidated with it; and at the time the note involved herein was last renewed. In this connection, however, it is difficult to understand what defense appellant had to the $13,000 indebtedness remaining from the 1956-1959 operation which he had been renewing and paying and which is now included as a part of the present obligation. Even if the indemnity agreement was in existence, it would not cover that indebtedness.

It is appellant's position that Davenport was the chief

executive officer of the bank, and that the bank is bound by his actions in deceiving appellant into believing that an indemnity agreement with 40 signers was in existence when he executed the guaranty of July 16, 1963. It is also true that Davenport, along with Dam and appellant, was a director of Valentine Hearts, Inc. It is appellant's position that Davenport and Dam were to handle the securing of the finances for the current year by the indemnity agreement, and that he was to handle the operation of the club, "carry the ball" as he phrased it.

Appellant at all times knew that he was guaranteeing the debt when he signed the guaranty. He was an experienced businessman and must have known that he could be called upon to make the guaranty good. His experience with the previous indebtedness, and the conversation which his own counsel concedes took place September 13, 1960, compels this conclusion. Without reference to its materiality herein, it is of more than passing interest that appellant testifies to knowingly executing and subscribing a false financial statement to support his guaranty of the note involved.

The existence of an indemnity agreement would not prevent the bank from collecting in full on appellant's guaranty. The agreement was never intended to protect the bank. The bank was relying upon appellant's credit and not that of anyone who may have signed an agreement to indemnify him. The effect of the agreement would only be to provide appellant with a method of retrieving some of his money by an action against the indemnitors after he had paid the bank. The president of a bank has no authority, springing from his official position, to make an agreement that the liability of a party on commercial paper payable to the bank shall never be enforced. Security Savings Bank v. Rhodes, 107 Neb. 223, 185 N. W. 421, 20 A. L. R. 412.

In securing signatures on an indemnity agreement, would Davenport be acting as agent for the bank or for the benefit of appellant and Valentine Hearts, Inc., of

which, with appellant, he was a director? While not an analogous situation, the following from Farmers Nat. Bank v. Ohman, 112 Neb. 491, 199 N. W. 802, is of interest herein: "In an action on a promissory note by the payee against the maker, the latter set up as a defense that at the time he made the note he was orally promised by the president and the cashier of the bank that he was not to be liable thereon. The making of such a promise, if it could be proved, was not, under the facts disclosed, within the apparent scope of these officers' authority, and is not binding on the bank, unless specially authorized, or with knowledge of the fact, approved by the bank's directors.

"An agreement pleaded as a defense to an action on a promissory note, brought by the payee bank, that at the time of its execution and delivery it was agreed between the payor and the payee that the note was to be used for the sole purpose of enabling the payee bank to satisfy the demands of the national banking authorities then being made upon it, does not constitute a defense; the fraud, if any, being in this agreement, and not in the note, nor in the consideration for it."

It would appear to us that the bank is the innocent party in this transaction. While appellant's negligence is not an issue, he did know that he and other interested individuals had never seen or signed any indemnity agreement. A defrauded party must be diligent and prudent in his effort to detect the fraud, and means of knowledge thereof are equivalent to knowledge. Abels v. Bennett, 158 Neb. 699, 64 N. W. 2d 481. Any diligence on appellant's part before the end of the 1963 baseball season would undoubtedly have resulted in some signers on the agreement. Why a businessman of appellant's apparent stature would execute guarantees over a period of more than 18 months without insisting upon the production of the indemnity agreement under the circumstances, if it was the moving consideration for him, is hard to comprehend.

Appellant predicates his defense on the theory that there was fraud in the inception of the indebtedness herein. The parties devote much of their briefs to a discussion of whether the bank was a holder in due course. Suffice it to say the bank is not a holder in due course, but that issue is immaterial herein. A renewal note in the hands of the original payee is subject to all the defenses which could be made against the original note. In Nebraska State Bank v. Walker, 111 Neb. 203, 196 N. W. 128, we held: " 'The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt. As between the original parties and as against transferees who are not bona fide purchasers for value, a renewal note is open to all defenses which might have been made against the original note.' "

Appellant places the inception of the fraud as July 16, 1963, the day he executed the note for $13,000 to consolidate the three previous notes of $2,000, $5,000, and $6,000. July 16, 1963, was not the inception of the indebtedness. It began with the execution of the first note of $2,000. If that note was guaranteed by appellant, there would be no fraud in the inception of the transaction. Appellant's testimony is that *he does not remember* whether he guaranteed these three notes. Davenport's testimony is that the notes were guaranteed. Appellant had the burden of proof on that issue. His failure to remember does not meet that burden. On the record herein, we must conclude that those notes were guaranteed by the appellant. Davenport also testified that it was an invariable custom of the bank when a note was renewed to deliver the old note to the maker. Appellant concedes that this was done with his personal and business notes, but has no recollection that the baseball notes were returned to him. On the record herein, we assume that they were.

The appellant had the burden of proof herein. He did

not meet that burden. The trial court correctly directed a verdict herein, and the judgment is affirmed.

AFFIRMED.

BERIGAN BROS., A COPARTNERSHIP, APPELLANT, V. GROWERS CATTLE CREDIT CORPORATION OF OMAHA, A NEBRASKA CORPORATIION, ET AL., APPELLEES.

156 N. W. 2d 794

Filed March 1, 1968. No. 36674.

1. **Judgments: Actions.** A declaratory judgment action will not be entertained if there is pending, at the time of its commencement, another action or proceeding to which the same persons are parties, and in which are involved, and may be adjudicated, the same issues that are involved in the declaratory judgment action.
2. ———: ———. A declaratory judgment action is not a substitute for nor may it be used to supersede proper proceedings already pending in a court having jurisdiction of the parties and the subject matter. But where a pending proceeding does not afford an adequate remedy for the causes pleaded in a petition for declaratory relief, it is not a bar to such relief.
3. **Pleading.** When actual contested issues of law and fact are presented with a definite assertion of legal rights and a positive denial thereof, the requirement of a justiciable issue is met.
4. **Judgments.** The Uniform Declaratory Judgments Act is applicable only where there is a present, actual controversy, and only where justiciable issues are presented and all interested persons are made parties to the proceedings.
5. ———. The law favors a remedy which avoids a multiplicity of suits. It also favors a remedy which will speedily determine and settle the diverse rights and obligations of all the parties to a transaction requiring judicial determination.
6. ———. The requisite conditions for obtaining declaratory relief under the Uniform Declaratory Judgments Act are: That a controversy exists in which a claim is asserted against one who has an interest in contesting it; that the controversy is between persons whose interests are adverse; that the parties seeking declaratory relief must have a legally protectible interest or right in the controversy; and that the issue involved is capable of present judicial determination.

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

Haney, Walsh & Walentine, for appellant.

Jack W. Marer, Michael L. Lazer, Maupin, Dent, Kay & Satterfield, and Young, Holm, McEachen & Hamann, for appellees.

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

CARTER, J.

This is an action for a declaratory judgment under the provisions of sections 25-21,149 through 25-21,164, R. R. S. 1943. The trial court sustained demurrers to the petition and dismissed the action. The plaintiff has appealed.

The plaintiff, Berigan Bros., a copartnership, is a livestock commission firm in Omaha, Nebraska, and will hereafter be referred to as Berigan Bros. The defendant, Richardson Ranch Company, is a copartnership engaged in the business of raising cattle and related activities with its principal place of business in North Platte, Nebraska, and will hereafter be designated as Richardson Ranch. The defendant W & S Cattle Company is a copartnership engaged in raising and feeding cattle in Cuming County, Nebraska, and will be hereafter designated as W & S Cattle. The defendants William Wisnieski, Patricia Wisnieski, and Margaret Svoboda are partners in W & S Cattle and will be designated as W & S Cattle except when referred to personally. The defendant Growers Cattle Credit Corporation of Omaha is engaged in the business of financing agriculture, including the raising and feeding of cattle, and will hereafter be referred to as Growers Corporation.

In October 1964, the Growers Corporation filed an action against Berigan Bros., Richardson Ranch, W & S Cattle, William Wisnieski, Patricia Wisnieski, and Margaret Svoboda in which it was alleged: On January 19,

1963, W & S Cattle drew its draft in the amount of $2,111.50 on Growers Corporation which was honored, the proceeds being used by W & S Cattle to purchase 17 head of mixed steers. On January 21, 1963, W & S Cattle drew its draft in the amount of $14,284.45 on Growers Corporation which was honored, the proceeds being used by W & S Cattle to purchase 93 head of steers and heifers. On the back of each draft was a bill of sale of the cattle from the seller to Growers Corporation, the possession of the cattle being placed in W & S Cattle by the endorsements on the drafts. On January 22, 1963, W & S Cattle delivered 110 head of cattle to Berigan Bros. for sale. They were sold for $15,866.94. Of this amount $15,005.60 was paid to Richardson Ranch and $388.12 to W & S Cattle. The remaining balance was used for sale expenses. Growers Corporation claims ownership of the cattle and sues for the conversion of the cattle by Richardson Ranch, W & S Cattle, and Berigan Bros. It is asserted by Growers Corporation that the 110 head of cattle were never removed to Cuming County in the possession of W & S Cattle. This seems to be borne out by the allegation of the petition that the cattle were sold the day after the 93 head of cattle were purchased, to wit, January 22, 1963.

Defendants W & S Cattle, William Wisnieski, Patricia Wisnieski, and Margaret Svoboda filed a general denial. Berigan Bros. filed an answer in which it asserted that the receipts of the sale were paid out on the written directions of William Wisnieski and the insistence of a Mr. Richardson of Richardson Ranch, and that Berigan Bros. had no interest in the cattle other than its commission for selling the cattle. Berigan Bros. further alleged that W & S Cattle has made payments to Growers Corporation in amounts unknown to it and that by reason of the conduct of Growers Corporation the latter has waived what other rights of action it might otherwise have had. Berigan Bros. prayed for an accounting between Growers Corporation, Richardson Ranch, and W

& S Cattle, and such other orders necessary to effect equity and justice.

Defendant Richardson Ranch filed an answer in which it asserted that W & S Cattle had established a line of credit with Growers Corporation by which W & S Cattle was authorized to draw drafts on it for cattle purchased and subsequently execute chattel mortgages on the cattle for the amount of such drafts. It is further alleged that Growers Corporation did in fact take a mortgage on the 17 head of steers purchased on January 19, 1963, and other cattle, and caused the same to be recorded in Cuming County. It is alleged that the language printed on the reverse side of the draft is of no force and effect and was not intended as a conveyance of title or a transfer of the cattle to the Growers Corporation. It is also alleged that W & S Cattle negotiated with Growers Corporation for the payment for the 17 steers and made payments thereon which resulted in Growers Corporation estopping itself from recovering on the theory of a conversion of the cattle. Richardson Ranch further alleged that it sold 180 head of cattle to W & S Cattle on August 4, 1962, for $14,600, taking a note therefor secured by a chattel mortgage duly recorded. It is asserted that on January 14, 1963, W & S Cattle sold 167 head of said cattle through Berigan Bros., for $17,-262.26 which was paid over to Growers Corporation by W & S Cattle and is entitled to have credit therefor as against any money received by Richardson Ranch claimed by Growers Corporation. It is also asserted that after the sale of the 93 head of steers and heifers, Growers Corporation negotiated with W & S Cattle to obtain payment of its outstanding notes, that partial payments were received from time to time, and it has thereby precluded itself from denying the authority of W & S Cattle to sell the cattle or to sue for their conversion. Richardson Ranch also counterclaimed for $15,005.60 against Growers Corporation in the event the court ren-

dered a judgment for Growers Corporation against Richardson Ranch.

Growers Corporation moved to strike those parts of the answers of Richardson Ranch and Berigan Bros. dealing with transactions outside the question of the ownership of the proceeds of the sale amounting to $15,866.94, including the cross-petition of Richardson Ranch. Pending the disposition of the motion to strike and on April 11, 1966, the present action for a declaratory judgment was filed. The foregoing is the factual situation existing when Berigan Bros. sought relief by declaratory judgment.

On April 12, 1967, an amended petition for a declaratory judgment was filed in which it was alleged that the motion to strike in the pending conversion case was sustained by the trial court. The sustaining of the motion indicates, of course, that the conversion case was limited to the cause of action therein pleaded and that other possible causes of action would not be determined in that case.

The amended petition for a declaratory judgment recites the facts of the conversion case before the motion to strike was sustained. The prayer of the petition for declaratory judgment prays for a judgment determining the rights and obligations of each party with regard to the proceeds of the transactions of January 14, 1963, and January 22, 1963, and all agreements between any of the parties to the action, including an accounting between the parties and such further relief as may be deemed just and equitable. It is argued that such a declaratory judgment action would prevent a multiplicity of suits and eliminate the possible intervention of the statute of limitations. It is asserted that Berigan Bros. has no adequate remedy at law, or any means of obtaining a speedy determination of its rights and obligations. The trial court sustained the demurrers to the petition on the ground that no cause of action was stated, in other words, that the petition did not state facts to bring the action

within the Uniform Declaratory Judgments Act.

Defendants contend that the case is controlled by Strawn v. County of Sarpy, 146 Neb. 783, 21 N. W. 2d 597. We think not. In that case, a declaratory judgment action was filed to determine the rights of the parties to a contract between the County of Sarpy and two attorneys employed to bring tax foreclosure actions for the statutory fees therefor. The attorneys had completed 12 separate foreclosure actions in which attorneys' fees were taxed as costs and collected. A legal question arose as to the payment of the attorneys' fees which was common to each of the 12 actions. The trial of one case would decide the legal question involved as to all. This court held that a declaratory judgment action will not be entertained where another remedy is provided where the issue can be as well and speedily determined in ordinary proceedings open to the parties. We think the case was correctly decided but does not apply to a factual situation such as we have before us.

In the pending case of Growers Cattle Credit Corp. v. Berigan Bros., an action for conversion, the issues were narrowed to a single issue arising under a single transaction by the sustaining of the motion to strike. The rights of all other parties in the commingled transactions were eliminated from the case, and correctly so. But it does not remain a case where the parties and issues are the same as those alleged in the declaratory judgment action. The rule that a declaratory judgment action cannot be used to supersede pending proceedings in which the rights of the parties can be determined, as stated in Phelps County v. City of Holdrege, 133 Neb. 139, 274 N. W. 483, and Scudder v. County of Buffalo, 170 Neb. 293, 102 N. W. 2d 447, has no controlling application to the present case.

It is asserted by the defendants that the petition for a declaratory judgment presents no actual controversy or justiciable issue. A general demurrer admits the truth of all well-pleaded allegations of fact to which it is di-

rected but not mere conclusions of the pleader. Weiner v. Morgan, 175 Neb. 656, 122 N. W. 2d 871. The petition for a declaratory judgment raises issues as to the source of the funds involved, the validity of the claimed liens and their priorities, and the authority of Berigan Bros. to distribute the proceeds of the sales of January 14, 1963, and January 22, 1963, as it did. It is quite evident here that the rights of the parties are so interwoven that a suit awarding judgment against one defendant would have the effect of making him a potential plaintiff in a subsequent action. Berigan Bros., for example, is in the position of a stakeholder charged with paying the funds to the wrong claimant. A judgment against Berigan Bros. is certain to result in an action against the party who wrongfully received the proceeds of the sale or sales. The language contained in Finzer v. Peter, 120 Neb. 389, 232 N. W. 762, 73 A. L. R. 1170, seems pertinent here wherein it states: "As each grantee becomes in turn a grantor he also becomes a potential plaintiff without losing the role of a potential defendant. By a series of lawsuits beginning with the first and ending with the last grantor, the last grantee, the person who last owned the land, is compelled to pay. By compelling him to pay in the first instance, all the obligations of former grantees to their respective grantors are satisfied. Why pursue the circuit in lawsuits when through equity a just result may be obtained in one suit, when other rights between the parties, if any exist, may all be determined and settled, for equity, having once taken charge, will do complete justice between the parties?" The same question could well be asked in the instant case. There are several claims in the instant case in which the evidence is in conflict. The claims are justiciable. They are intermingled. The petition for a declaratory judgment would avoid a multiplicity of suits that would be time consuming and costly.

The Uniform Declaratory Judgments Act provides that it is to be remedial; that its purpose is to settle and

afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and that it is to be liberally construed and administered. § 25-21,160, R. R. S. 1943. Viewed in the light of the foregoing declarations, we think Berigan Bros.' petition alleges facts entitling it to the remedy prayed for. Berigan Bros. has no adequate remedy at law. The rights of all the parties cannot be determined in Growers Cattle Credit Corp. v. Berigan Bros. They can be determined in a single action such as is set out in Berigan Bros.' petition. We fail to see any logical reason for trying the cases one by one until the full cycle has been completed and the consequent delay has denied a speedy determination of the rights and obligations of the parties.

The requisite precedent conditions for obtaining relief by an action for declaratory judgment have been stated by this court as follows: That a controversy exists in which a claim is asserted against one who has an interest in contesting it; that the controversy is between persons whose interests are adverse; that the parties seeking declaratory relief must have a legally protectible interest or right in the controversy; and that the issue involved is capable of present judicial determination. Nebraska Seedsmen Assn. v. Department of Agriculture & Inspection, 162 Neb. 781, 77 N. W. 2d 464. The petition in the instant case alleges facts that bring it within the foregoing requirements. We think the trial court was in error in sustaining the demurrers to Bergian Bros.' petition.

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

REVERSED AND REMANDED.

BOSLAUGH, J., dissenting in part.

If it is possible to determine the rights of all of the parties in one action, then they should not be allowed to maintain two or more actions at the same time involving the same controversy or parts thereof. They should not be allowed to pursue separate remedies with

the possibility of conflicting judgments. At the minimum, the proceedings in the declaratory judgment action should be coordinated with the conversion action by consolidation or other similar means.

ALTHA M. HANSEN, APPELLANT AND CROSS-APPELLEE, V. FIRST WESTSIDE BANK, APPELLEE AND CROSS-APPELLANT.

156 N. W. 2d 790

Filed March 1, 1968. No. 36698.

1. **Buildings: Negligence.** A proprietor must take reasonable precautions to protect invitees from foreseeable dangers in arrangement and use of his premises. His duty does not ordinarily encompass dangers either known to the invitee or so obvious that the invitee may be reasonably expected to discover them.
2. **Appeal and Error: Trial.** Errors in instructions not prejudicial to the complaining party are not a ground for reversal of a judgment otherwise correct.

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

Eisensatt, Morrison, Higgins, Miller, Kinnamon & Morrison, for appellant.

Crossman, Barton & Norris, for appellee.

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

SMITH, J.

Plaintiff fell over a slideway of a retractable grille or barrier maintained by defendant bank. In this personal injury action the jury awarded her $253.50, the amount of her medical expenses. Defendant, cross-appellant, argues insufficiency of evidence to sustain the finding for plaintiff. Plaintiff argues that erroneous instructions on liability caused the jury to assess inadequate damages under the comparative negligence rule.

The grille was used during nonbusiness hours to block

the south entrance to defendant's office located in the Crossroads Shopping Center, Omaha, Nebraska. The entrance floor, white vinyl with dark speckles, was flush with the off-white vinyl floor of the adjoining arcade. Legs supported the slideway with the top 4 inches off the floor, the two 12½-foot sections of the grille retracting from the center. During business hours both grille and slideway were stored out of sight. At the close of the business day and within the interval of 1 minute an employee moved them into place at the entrance.

Plaintiff, age 77, had no difficulty in walking, seeing, or hearing. On August 3, 1965, at 8:29 p.m., 1 minute before closing time, she entered the bank from the south to transact business. She knew nothing about the grille or slideway both of which were out of sight. Arriving at a teller's window located 12 feet north and east of the entrance, plaintiff faced east in transacting her business. When she turned 3 minutes later to depart, the grille was in place and almost closed. Tom Horeis, a bank teller, was standing there under instructions to warn of the slideway and to assist people through the exit.

When plaintiff was 3 feet away, Tom opened the grille. He offered her no assistance, but in a voice loud enough to be heard, he said, "Watch your step, please." Plaintiff did not hear the warning, and unaware of danger, she walked into the opening. Both feet caught under the slideway, and she pitched forward on her knees. The fall left her breathless, dazed, and sore.

Plaintiff was seen on August 31, 1965, by Dr. Robert J. Fitzgibbons, her physician. She complained of pain in the left knee, and examination revealed swelling and tenderness in the front part of the kneecap. The doctor found some relaxation of the medial collateral ligament which supports the inside of the knee. X-ray photographs indicated a bone chip in the superior region of

the patella, but the photographs might show only an arthritic deposit.

The injury responded slowly to treatment, Dr. Fitzgibbons seeing plaintiff on 13 occasions up to May 1966. On January 6, 1967, she complained of pain associated with cold weather. Examination revealed minimal swelling, some tenderness, and normal flexion, extension, and stability. The fall had aggravated dormant osteoarthritis in the knee, but permanent damage was minimal, less than 5 percent.

A proprietor must take reasonable precautions to protect invitees from foreseeable dangers in arrangement and use of his premises. His duty does not ordinarily encompass dangers either known to the invitee or so obvious that the invitee may be reasonably expected to discover them. Beck v. Ideal Super Markets of Nebraska, Inc., 181 Neb. 381, 148 N. W. 2d 839; Cook v. Lowe, 180 Neb. 39, 141 N. W. 2d 430; Brown v. Slack, 159 Neb. 142, 65 N. W. 2d 382; Prosser, Law of Torts (3d Ed.), § 61, p. 402.

Defendant says that as a matter of law a reasonable man would have expected plaintiff to discover the danger. When she approached the grille, it was almost closed. A reasonable man would not have necessarily expected her to discover that the slideway did not retract with the grille. Tom's instructions demonstrate that defendant itself anticipated substantial risk of harm. The evidence sustains the finding on liability.

Plaintiff requested unsuccessfully an instruction intended to state that defendant had known of the dangerous condition. See, Rankin v. J. L. Brandeis & Sons, 135 Neb. 86, 280 N. W. 260; Rogers v. Penney Co., 127 Neb. 885, 257 N. W. 252. The court in instruction No. 5 submitted correctly the issues upon which the verdict was to turn. The court's instruction No. 12 reads: "A business inviter owes the duty to exercise ordinary care to keep his premises in a reasonably safe condition. * * * liability * * * is predicated on proof * * * of his

superior knowledge, actual or constructive, of dangers to which an invitee is subjected and of which the invitee is unaware. Proof of knowledge, * * * may not be predicated upon conjecture * * *." Lingering over the theme in a paragraph of instruction No. 14, the court concentrated on notice of defects and reasonable opportunity for repair. The instructions are noticeably overbalanced against plaintiff, but no part of the evidence is emphasized directly or indirectly.

If contributory negligence is not in issue, the line separating liability from damages is ordinarily distinct. In a comparative negligence case a plaintiff's verdict may obscure the line. The rule concerning cure of error by verdict for the complaining party is therefore often inapplicable. Compare Prell v. Murphy, 178 Neb. 278, 133 N. W. 2d 5, with Siedlik v. Schneider, 122 Neb. 763, 241 N. W. 535, and Gross v. Johnson, 174 Neb. 273, 117 N. W. 2d 534 (semble). A misstatement of issues in an instruction tending to mislead the jury is erroneous. Zimmerman v. Continental Cas. Co., 181 Neb. 654, 150 N. W. 2d 268. The finding of negligence implicit in a plaintiff's verdict should be considered in connection with the question of prejudice. Errors in instructions not prejudicial to the complaining party are not a ground for reversal of a judgment otherwise correct. Markey v. Hunter, 170 Neb. 472, 103 N. W. 2d 221.

The evidence is undisputed that defendant created the condition and that it recognized the risk. The jury found negligence. Rules concerning superior knowledge had no tendency to confuse or mislead the jury in assessment of damages. The overbalance of instructions against plaintiff was nonprejudicial error. See Kraft v. Fundum, 175 Neb. 821, 124 N. W. 2d 225.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD WOODS, APPELLANT.

156 N. W. 2d 786

Filed March 1, 1968. No. 36709.

1. **Witnesses: Trial.** A trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice to the rights of the defendant.
2. **Continuance: Criminal Law.** An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby.
3. **Criminal Law: Right to Counsel.** If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the State to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.
4. ———: ———. An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver.

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

Adolph Q. Wolf and Lynn R. Carey, Jr., for appellant.

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

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

NEWTON, J.

This is a criminal action in which defendant was charged with the robbery of the Goodrich Dairy in Omaha, Nebraska, on February 18, 1967. Trial was had to a jury commencing April 24, 1967, a verdict of guilty returned, and judgment entered in conformity therewith. Defendant appeals.

The only assignments of error urged deal with two propositions. First, the endorsement of the names of additional witnesses on the information at the commencement of and during the trial, the giving of testimony by

such witnesses, and the denial of the defendant's motion for a continuance. Second, the admission into evidence of an alleged confession of the defendant, designated as exhibit 12.

The practice of some prosecuting officers of failing to prepare a case for trial in such manner as to familiarize themselves with the witnesses required for trial, resulting in a failure to endorse the names of such witnesses on the information at the time it is filed, must be condemned but is not ordinarily fatal. The record, insofar as it pertains to the first assignment of error mentioned, reflects that the names of two witnesses who were police officers and who testified as to foundational matters with reference to the confession of defendant were endorsed on the information at the commencement of the trial. A notice of intention to apply for permission to endorse such names on the information had been filed and served on defendant's attorney 11 days prior to the commencement of the trial and no objection was made thereto until the morning of the trial when the motion was made. Defendant moved for a continuance on the ground of surprise. During the course of the trial, the State was permitted to endorse the name of another police officer on the information. Defendant had been arrested shortly after the time of the robbery and when apprehended was in his automobile. The automobile was subsequently towed to the police garage, a search warrant obtained, and certain exhibits introduced at the trial were found therein. During the course of the trial, it was discovered that the evidence of the State failed to reflect surveillance of the automobile and noninterference therewith during the time it was towed to the garage, and a police officer, whose name was endorsed on the information during the course of the trial, was called to supply this missing link in such foundational evidence.

It would seem clear that the endorsement at the commencement of the trial of the names of the officers who

took defendant's confession could not have taken the defendant by surprise, or in any way have constituted an abuse of discretion, as the defendant was apprised of the names of the witnesses and of the intention to call them, as well as the endorsement of their names on the information, 11 days prior to trial, and had ample opportunity to ascertain the purpose for which they would be called and to obtain any available testimony in rebuttal thereof. Regarding the endorsement of the name of the officer who helped to tow the defendant's car to the police garage, his evidence was in the nature of a simple foundational matter linking the automobile with the defendant, and showing that it was in the same conditon on arrival at the police garage as it was at the time of defendant's arrest. Certainly evidence along this line connecting the defendant with the automobile and the exhibits found therein, and showing no change in the car or its contents prior to its search, would have been anticipated by any competent defense attorney. It is difficult to see how defendant could have been surprised and thereby prejudiced by such evidence. "A trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice to the rights of the defendant." Waite v. State, 169 Neb. 113, 98 N. W. 2d 688. See, also, Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649; Phillips v. State, 157 Neb. 419, 59 N. W. 2d 598, 58 A. L. R. 2d 1141. "An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby." Svehla v. State, *supra*. In support thereof, see Phillips v. State, *supra*.

With reference to the second assignment of error, defendant contends that his confession was admitted in violation of the rules laid down in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974. On this question, evidence was first heard

by the court in the absence of the jury. At that time defendant testified that on the evening of February 18, 1967, shortly after his arrest, he was briefly interrogated by two police officers who gave him the Miranda warnings and that on such occasion defendant had demanded an attorney to represent him. Defendant further states that on the following day, February 19, when questioned by officer Foxall, he again, following the giving of the Miranda warnings, demanded an attorney but does not maintain that when officer Foxall again talked to him on February 20 at which time the statement was given, after he had again received the Miranda warnings, he again demanded an attorney. The defendant's evidence as to his request for an attorney on the evening of February 18 stands unrebutted as the State negligently failed to call the officers who had talked to him at that time, but defendant's testimony as to such request having been made on the following day of officer Foxall was definitely rebutted by the testimony of this officer. Defendant's written statement which he does not deny having read and signed, sets out the Miranda warnings and defendant's answers thereto. With reference to the point now raised by defendant regarding his demand for legal representation, the following is pertinent: "Q. You have the right to consult with a lawyer and have the lawyer with you during the questioning. Do you understand that? A. YES. Q. If you cannot afford a lawyer, the court will appoint one to represent you. Do you fully understand that? A. YES. Q. Knowing your rights in this matter, are you willing to make a statement to me now? A. YES. Q. Do you willingly waive and do without the services of an attorney at this time? A. YES." The questions presented relate to whether or not after defendant first requested an attorney on February 18 in accordance with the undenied evidence in this case, the court was within its discretion in finding, as it obviously did, that no such request had been made of officer Foxall on either the 19th or 20th of February, and

whether defendant's failure at that time to renew his request for legal representation, together with the unconditional waiver thereof found in the statement given by him, meets the requirements of Miranda regarding waiver and justifies the receipt in evidence of exhibit 12. The following excerpts from Miranda bear upon this point: "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. * * *

"An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver." It would appear that defendant, having failed to renew his first request for an attorney and subsequently having explicitly and voluntarily stated that he did not want an attorney after which he proceeded to give the statement in question waived this constitutional right under the rules laid down in Miranda.

Defendant mentions, but apparently does not seriously contend, that his giving of the statement in question was influenced by the fact that a woman acquaintance, who was with him at the time of his arrest, was also being held in custody. Defendant concedes that this woman was not a relative, was not a girl friend, but on the contrary, was a person with whom he had been casually acquainted for less than a week This factor cannot be considered sufficient standing alone to constitute coercion and render his confession invalid.

The judgment of the district court is affirmed.

AFFIRMED.

DORIS S. JOHNSON, APPELLANT, V. PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION, ET AL., APPELLEES.

156 N. W. 2d 812

Filed March 1, 1968. No. 36741.

1. **Insurance: United States.** The Servicemen's Group Life Insurance policy provided by Title 38 U. S. C. A., §§ 765 to 776, is a contract between the government of the United States and the insurers for the benefit of those insured.
2. ———: ———. The Servicemen's Group Life Insurance Act is the supreme law of the land and controls over conflicting state law with respect to the disposition of proceeds of policies issued thereunder.
3. **Insurance.** Under the Servicemen's Group Life Insurance Act, the minority of the insured at the time of the designation of beneficiary in the insurance policy is not a bar to his designation of a beneficiary and such a designation will be enforced in accordance with its terms.

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

Gerald B. Buechler, for appellant.

Mason, Knudsen, Berkheimer & Endacott, for appellee Prudential Ins. Co.

Sampson & Armatys, for appellee Power.

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

CARTER, J.

This is an appeal from a judgment of the district court for Hall County rendered in favor of the defendant Evelyn R. Power as guardian of Deniece Power, her minor daughter, and against the plaintiff, Doris S. Johnson, the mother of William LeRoy Stubbe, deceased, on a Servicemen's Group Life Insurance policy for $10,000. The plaintiff has appealed to this court.

The record discloses that Stubbe was born on April 25, 1945, and entered the military service of the United States on April 27, 1965, at which latter time he was

20 years and 2 days of age. From the effective date of Title 38 U. S. C. A., §§ 765 and 776, on September 29, 1965, he was insured under a Servicemen's Group Life Insurance policy for $10,000. On October 29, 1965, while still a minor, Stubbe executed and delivered through army channels a designation of beneficiary form, DA 3054, on which he designated Deniece Power as beneficiary of the insurance policy. Stubbe was killed in action in Viet Nam on October 1, 1966, leaving neither widow nor children surviving him; his mother, the plaintiff, being his only heir at law surviving him. The designation of beneficiary on October 29, 1965, is the only designation of beneficiary made by Stubbe. It is stipulated that in the absence of a designation of beneficiary, Stubbe's mother, the plaintiff, would be entitled to the proceeds of the insurance policy.

It is the contention of the plaintiff, in part at least, that the state law governs while the defendant contends that the decision rests solely on the federal acts of Congress, Title 38 U. S. C. A., §§ 765 to 776. We think that Servicemen's Group Life Insurance is a contract between the United States government and approved insurers for the benefit of the insureds, the same being those entering the military service of the United States. The designation of insurers by the federal government under regulations prescribed by the federal act amounts to a preemption of the field of servicemen's life insurance and it is therefore subject to the rules and regulations provided in the federal acts. It is true that Title 38 U. S. C. A., §§ 765 to 776, is so recent of enactment that precedent is not available that is specifically applicable to the situation before us. Previous cases under former federal statutes, however, point the way.

In Barton v. United States, 75 F. Supp. 703, it was held: "Whether state law can control disposition of proceeds of policies issued pursuant to the National Life Insurance Act of 1940, 38 U. S. C. A. §§ 801-818, depends upon the intent of Congress; for it is clear that the Act, being

a constitutional exercise of powers granted to Congress * * * is 'Supreme Law of the Land' * * * if Congress so willed (citing cases). Federal control of title to the proceeds of service insurance, both before and after payment by the Government, has been consistently recognized and enforced (citing cases)." See, also, Taylor v. United States, 113 F. Supp. 143.

In United States v. Williams, 302 U. S. 46, 58 S. Ct. 81, 82 L. Ed. 39, it is said: "Enlistment is more than a contract; it effects a change of status. It operates to emancipate minors at least to the extent that by enlistment they become bound to serve subject to rules governing enlisted men and entitled to have and freely to dispose of their pay. Upon enlistment of plaintiff's son and until his death, he became entirely subject to the control of the United States in respect of all things pertaining to or affecting his service. * * * War risk insurance was made available to those in active military service for the greater protection of themselves and their dependents. By the insurance contract, of which applicable provisions of statutes and regulations constitute a part, the insured minor was authorized to allot a part of his pay for the payment of premiums, to change beneficiaries without their consent and to cancel the insurance in whole or in part."

The change in beneficiary in the instant case had the effect of making his fiancee instead of his mother the beneficiary of his servicemen's group insurance policy. Plaintiff contends that he could not do this in view of his minority.

The federal statute provides that the policy will be paid upon the insured's death and the establishment of a valid claim, first, to the beneficiary as the insured may have designated by a writing received in the uniformed services prior to his death, and then, if there be no such beneficiary, to his widow, to his child or children, to his parents, to his executor or administrator, and to his next of kin in the order stated. Title 38 U. S. C. A., § 770.

There are no restrictions placed upon the right of the insured to designate his beneficiary. The right of the insured to designate or change the beneficiary of his Servicemen's Group Life Insurance policy at his sole instance is in no manner limited and is, in fact, absolute. The Congress well knew that minors would be called into military service. It was the province of Congress to include limitations on minors if such was desired. This it did not do and the right of a minor to designate his beneficiary was therefore granted. The fact that the insured was a minor when the designation of beneficiary was made does not deprive him of the right to do that which the controlling federal statute authorized him to do.

The trial court came to the same conclusion and it is correct. The judgment of the district court must therefore be affirmed.

AFFIRMED.

COUNTY OF HALL, APPELLANT, V. EDWIN E. ENGLEMAN ET AL., APPELLEES.

COUNTY OF HALL, APPELLANT, V. DANIEL W. FISHBURN ET AL., APPELLEES.

COUNTY OF HALL, APPELLANT, V. GAIUS M. BURMOOD ET AL., APPELLEES.

156 N. W. 2d 801

Filed March 1, 1968. Nos. 36867, 36868, 36869.

1. **Taxation: Statutes.** A plaintiff who brings suit on multiple tax sale certificates or tax liens in a single action in accordance with section 77-1904, R. R. S. 1943, may appeal from a decree resolving the issues in one or more of his causes of action by filing a single notice of appeal and depositing a single docket fee as required by section 25-1912, R. R. S. 1943. Upon filing such notice of appeal and depositing such docket fee, the Supreme Court acquires jurisdiction of the appeal.
2. **Appeal and Error: Statutes.** Where a party appealing from the district court to the Supreme Court fails to file a cost bond

in accordance with section 25-1914, R. R. S. 1943, within 1 month after the rendition of the judgment or final order appealed from or within the time extended by this court on a showing of good cause, such appeal will be dismissed.

Appeals from the district court for Hall County: DONALD H. WEAVER, Judge. On motions to dismiss appeals. Appeals dismissed.

Gerald B. Buechler, Richard L. Huber, and Robert E. Paulick, for appellant.

Franklin L. Pierce, for appellees Engleman et al.

Franklin L. Pierce, for appellees Fishburn et al.

Herbert F. Mayer, Jr., and Clinton E. Cronin, for appellees Burmood et al.

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

CARTER, J.

This opinion deals with motions to dismiss three appeals in three cases decided adversely to the County of Hall by the district court for Hall County. The defendants have moved this court to dismiss the appeals for failure of the County of Hall to comply with sections 25-1912 and 25-1914, R. R. S. 1943.

We shall consider the factual situation in County of Hall v. Engleman, the facts in all three cases being substantially the same. On March 7, 1967, the County of Hall filed its suit in which it set out as separate causes of action its prayer for the foreclosure of 10 tax sale certificates on 10 separate and distinct pieces of real estate owned by 10 separate owners. The City of Grand Island filed its cross-petition to each of the tracts set out in the 1st to 9th causes of action asserting a special tax lien alleged to be superior to the claimed liens of the County of Hall. On May 2, 1967, the trial court appointed guardians ad litem for defendants in military or naval service, incompetent defendants, minor defendants, and

unknown defendants. On June 1, 1967, the 9th cause of action was dismissed as having been redeemed by payment of the taxes and costs. On July 18, 1967, the guardians ad litem answered, alleging that the tax certificates in the remaining 9 causes of action were void because of material alterations by interlineations and deletions appearing upon their face. The County of Hall filed its reply denying the allegations of defendants' answers. On October 23, 1967, after hearing, the trial court filed its decree holding the tax liens void as having been prejudicially altered and severally dismissed the pending causes of action. The County of Hall filed a motion for a new trial which defendants moved to strike for the reason that it was directed against the decision as to all causes of action rather than to each separately. The trial court overruled the motion to strike and then overruled the motion for a new trial on November 3, 1967. The trial court, on November 13, 1967, allowed a guardian ad litem's fee to Franklin L. Pierce in the amount of $432, other guardians ad litem having waived an allowance of fees in favor of Pierce who had performed the work for all. On November 30, 1967, the County of Hall filed a single notice of appeal and paid a single $20 docket fee in each of the three cases, 36867, 36868, and 36869. No supersedeas bond was filed in any of the cases, nor was a cost bond, or cash in lieu thereof, filed in the three appeals.

The inclusion of the 10 tax lien certificates in one petition, even though they involve different lands and parties, is authorized by section 77-1904, R. R. S. 1943, which provides in part: "In all foreclosure proceedings, the plaintiff may include in one petition as many tax sale certificates, tax deeds or tax liens as the plaintiff may hold, regardless of whether they are upon the same or different tracts of real estate and whether the land covered by them is owned by the same or different persons."

It is plain that the purpose of the foregoing statute was

to reduce the costs in the foreclosure of tax liens and tax sale certificates when more than one is held by the same party. We think this purpose was intended to apply to appeals the same as to the action in the district court. Where more than one tax sale certificate or tax lien is disposed of in a single decree, a single notice of appeal and docket fee is all that is required to lodge jurisdiction of the case in the Supreme Court. Where, however, such certificates and liens are tried separately and result in separate decrees, each requires a separate notice of appeal and docket fee to lodge jurisdiction of the appeal in this court. If a defendant in one cause of action appeals, he must file a notice of appeal and pay the docket fee to perfect his appeal. We conclude therefore that this court obtained jurisdiction of the three appeals on the filing of a notice of appeal and the payment of the docket fee in each case in accordance with section 25-1912, R. R. S. 1943, which was done in these cases.

In these cases the appellant failed to file a cost bond, cash deposit, or supersedeas bond within 1 month as required by section 25-1914, R. R. S. 1943. Such section provides that the appeal may be dismissed on motion and notice in the Supreme Court if no bond has been given within the prescribed time and certified in the transcript. The County of Hall contends that the giving of a cost bond is a vain thing as to it and that it should not be required to comply. The statute requires that on an appeal from the district court to the Supreme Court the appellant or appellants shall within 1 month, or within a properly extended period, file a sufficient bond and no exceptions are contained in the statute. We think a single cost bond in each case would have been sufficient. But here we have no bond at all. It is true that the giving of a cost bond is not a jurisdictional requirement and, on a showing of good cause, the time for filing could have been extended by this court. But there is neither an application nor a showing. Under such circumstances

the appeals must be dismissed. The motions to dismiss the appeals in cases numbered 36867, 36868, and 36869 are sustained for failure to comply with section 25-1914, R. R. S. 1943.

APPEALS DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. OCTAVIANO JOSEPH PEREZ, APPELLANT.

157 N. W. 2d 162

Filed March 8, 1968. No. 36531.

1. **Criminal Law.** Participation and criminal intent may be inferred from presence, companionship, and conduct before and immediately after the offense.
2. **Arrest: Probable Cause.** When an arrest is made without a warrant, it therefore must be based upon probable cause which exists from facts and circumstances within the officers' knowledge or of which they had reasonably trustworthy information which was sufficient to warrant men of reasonable caution in the belief that an offense has been, or is, being committed.
3. **Criminal Law: Evidence.** Evidence that a burglary has been committed together with evidence that some of the property taken in the burglary was discovered in the possession of the defendant, coupled with other incriminating circumstances or conduct, is sufficient to sustain a conviction for burglary.
4. **Criminal Law: Right to Counsel.** An individual subjected to in-custody interrogation for the purposes of eliciting incriminating statements may knowingly and intelligently waive the right to counsel being present during the course of the interrogation.

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

J. William Gallup and Richard J. Bruckner, for appellant.

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

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

WHITE, C. J.

This is a companion case to State v. Watson, reported *post* p. 692, 157 N. W. 2d 156, and State v. Cook, reported *post* p. 684, 157 N. W. 2d 151. Here Perez was tried jointly with Cook for the possession of burglary tools and burglary. Upon a jury verdict of guilty of both offenses, he was sentenced to a total of 5 years' imprisonment. He appeals. We affirm the judgment and sentence of the district court.

Perez says his arrest was illegal. We will not burden this opinion with a further description of the minutiae of the evidence. The essential facts are recited in State v. Watson, *supra*. The arrest of Perez was legal, and the flashlight, unrusted pry bars, and tools which Perez stooped and deposited in the bent-over grass were admissible. State v. Watson, *supra*. As to the armory of tools observed and found in the Missouri car close by, in which Cook was reading a newspaper looking for a "job" at 5 a.m. on the Sunday before Memorial Day, Perez eliminated any speculative doubt as to the conspiracy and their admissibility when he told Cook at the scene, "So they got you, too."

In the successively filed briefs on these cases, all counsel, in a point-counterpoint argument commensurate with the increasing depth of their search, wax the length of their argument into a comprehensive review of all the recent cases involving illegal arrest and search and seizure. By an ingenious method of subdividing the facts and then color matching similar facts in other cases, the unity and cohesive meaning of the circumstances are destroyed. Walking on the street, changing course suddenly, depositing tools, reading a newspaper at 5 a.m. in a car with Missouri license plates, etc., may be innocent acts in themselves, but tied together they may form a series of events which, in the frame of refrences of human experience, forge a chain of criminal purpose. Such a combination was present here. We refuse to analyze the facts of these cases in terms of separate

logic tight compartments. There was probable cause for the arrest in this case prior to the detention and the detention was legal under the statute (section 29-829, R. S. Supp., 1965), and therefore the information secured as the result of the legal detention further established probable cause for the arrest. Each case must be decided on its own facts but the evidence in this case overwhelmingly establishes probable cause for Perez' arrest. State v. Huffman, 181 Neb. 356, 148 N. W. 2d 321; State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129; State v. O'Kelly, 175 Neb. 798, 124 N. W. 2d 211; Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726; § 29-829, R. S. Supp., 1965. Perez says the evidence was insufficient to sustain the conviction. On the possession of burglary tools charge, it was sufficient. State v. Watson, *supra*. The evidence is stronger here because Perez deposited the tools in the weeds and also told Cook, "So they got you, too."

As to the burglary charge, defendant had in his possession a key to room 3 of the Eddington Hotel, admitted he had registered at the hotel on the day previous to his arrest under the name of Quiroz, and the room had been rented to no one subsequently. In the room were found many items (including a container of drugs and a money bag), identical to those taken in the burglary. It is not disputed that the Kubat Center Street Pharmacy was burglarized. And then we have the exclamation of Perez to Cook, "So they got you, too," together with the other evidence as to burglary tools. The evidence establishes recent unexplained possession and other incriminating circumstances amply sufficient to support a conviction. State v. Solano, 181 Neb. 716, 150 N. W. 2d 585; State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265; Phillips v. State, 157 Neb. 419, 59 N. W. 2d 598, 58 A. L. R. 2d 1141.

Defendant Perez assigns as error the admission into evidence of certain inculpatory and exculpatory statements given to police officer Putnam at the police station subsequent to his arrest. Prior to the giving of the oral

admission or statements the following colloquy took place between officer Putnam and defendant: "A. Immediately on determining the correct spelling of his name and his address I advised him that he had certain rights under the Constitution of the United States and the State of Nebraska; that he did not have to make any statement to me if he did not want to and that if he did the statement could be used against him in court, and about this time—well, I was starting to tell him that he had the right to consult an attorney prior to talking to me if he wished and about this time he cut me off, saying, *'You don't have to advise me of my rights, I know more about them than you. I have been picked up and advised many times before.'*" (Emphasis supplied.)

It is now insisted, under the holding in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, even though the basic warnings were given, that the failure to advise of the right to counsel to be present during interrogation renders the admissions and statements inadmissible. This position is taken despite the undenied refusal of defendant to listen to any further advice or warnings from the police officer.

The basic question, under the Miranda holding, is whether the defendant, knowing his rights, voluntarily and intelligently waived them. This, as the cases indicate, depends on the circumstances of the particular case. We feel, as the trial court did, that the defendant made the statements with full knowledge of his rights under the Miranda holding. Not only was the effect of his statement to refuse to be further advised, but he expressly gave as the reason that he already knew them because he had been advised of them many times before. Perez, by his own admission, was a man of extensive college education, specializing in chemistry, and claimed the equivalent of a degree (short 3 credit hours). The evidence establishes without dispute that no coercion, physical or psychological, was practiced on the defendant. The statements made were completely voluntary in na-

ture and most of them were exculpatory in nature. The defendant Perez testified at the hearing on admissibility, outside the presence of the jury, after police officer Putnam had testified. He never denied that he knew he was entitled to a lawyer and his own evidence is conclusive that he knew he was entitled to a lawyer from the time of his arrest. The qualified statement of Putnam, recited above, lends support to its truth. A calculated fabrication would not lend itself to the admission of failure to give the requisite warnings. A police officer is not required to give a ritualistic warning of a right the defendant already knew of and which he refused to hear the repetition of. Both the trial court and the jury (under a comprehensive instruction covering the Miranda requirements) found that the defendant knowingly and intelligently waived his rights and thereafter gave voluntary statements, both inculpatory and exculpatory. The evidence not only supports these findings, but it would be difficult to come to any other conclusion. There is no merit to this contention.

We have examined the objections to the admissibility of two photographs of various items found in the defendant's hotel room (room 3, Eddington Hotel), and find them to be without merit.

The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROY E. COOK, APPELLANT.
157 N. W. 2d 151

Filed March 8, 1968. No. 36544.

1. **Arrest: Probable Cause.** The existence of probable cause must be determined by a practical and not by any technical standard.
2. **Criminal Law.** Participation and criminal intent may be inferred from presence, companionship, and conduct before and immediately after the offense.

3. **Arrest: Probable Cause.** When an arrest is made without a warrant, it therefore must be based upon probable cause which exists from facts and circumstances within the officers' knowledge or of which they had reasonably trustworthy information which was sufficient to warrant men of reasonable caution in the belief that an offense has been, or is, being committed.
4. **Criminal Law: Evidence.** Where there is evidence that several persons participated in a criminal act, the acts and declarations of any one of them, while so participating, are admissible against all of the others.
5. **Criminal Law: Trial.** A motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such a motion will not be disturbed in the absence of a showing of an abuse of discretion.
6. ———: ———. There is some danger of prejudice in any trial involving multiple defendants but severance should be denied in the absence of a showing of prejudice against which the trial court will not be able to afford protection.
7. **Appeal and Error: Criminal Law.** Error may not be predicated on the reception of inadmissible evidence where there has been no objection made to the offer thereof, or where a party has stated he has no objection to such evidence, or where he agrees or stipulates that such evidence should be admitted.

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

Roy E. Cook, Adolph Q. Wolf, Richard J. Bruckner, Michael McCormack, and Fred J. Montag, for appellant.

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

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

WHITE, C. J.

This is a companion case to State v. Watson, *post* p. 692, 157 N. W. 2d 156, and State v. Perez, *ante* p. 680, 157 N. W. 2d 162. Defendant Cook was tried jointly with Perez, and was convicted on both counts of burglary and the possession of burglary tools and sentenced thereon. He now appeals. We affirm the judgment and sentence of the district court.

The defendant's main contention is that his arrest was illegal and that therefore the tools and other items of equipment in the evidence secured as a result thereof are inadmissible. Most of the pertinent facts in this respect are recited in State v. Watson, *supra,* and State v. Perez, *supra,* and will not be repeated here. Perez and Watson were arrested after they were observed changing directions, walking rapidly, and dropping or depositing some tools in the weeds or grass nearby. Two crow bars, a screw driver, and a flashlight were discovered as a result of this arrest. These actions, and others, recited in the companion opinions, were ample grounds for the establishment of probable cause and the arrest of Watson and Perez. But the police officers then, and we believe reasonably so, made observations and conducted searches in the near vicinity of these two arrests. The defendant was observed nearby sitting in an automobile with out-of-state license plates and reading a newspaper at 5 o'clock in the morning on the day before Memorial Day. The police officer approached the car and observed through the window of the automobile the handle of a screw driver and what appeared to be a pry bar sticking out underneath a pillow on the passenger side of the front seat. On inquiry the defendant gave his name and explained that he was reading a want-ad section of the newspaper because he was looking for a job. The time was 5 o'clock on a Sunday morning and the following day was Memorial Day. The defendant accompanied the police officer to the area where Perez and Watson were being held. As they reached the area, Perez said, "So they got you, too." At this point the defendant was arrested.

It seems to us almost self-evident that the officers had reasonable grounds to believe that a crime had been committed and that the defendant's presence in the near vicinity under the circumstances described, together with their observation of the tools inside the car in which he was sitting, and the subsequent statement by Perez

to Cook in the officers' presence furnished ample grounds for probable cause for the arrest of Cook. The evidence further, when considered as a whole, establishes probable cause that Perez, Watson, and the defendant Cook were engaged in a conspiracy to commit the crimes that they were charged with. As we have mentioned, each case must be decided upon its own particular facts and circumstances in order to determine the existence of probable cause. The facts in the present case are much stronger than those in State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129. In that case, which is in many respects parallel to the present one, this court said as follows: "The existence of probable cause must be determined by a practical and not by any technical standard. The sight of what appeared to be burglary tools in the car, under the circumstances, was at the very least an exceptional circumstance, and was justification for investigation. By doing as they did, the officers were giving the defendant a chance to exculpate himself if no cause for arrest existed. The defendant was requested to drive to the police station where his companion was identified as a known burglar. This, in the light of the other circumstances, was sufficient for any police officer of reasonable caution to believe probable cause existed for an arrest for the possession of burglary tools. The arrest was then made." In the present case the police officers already had probable cause to think that the crime of possessing burglary tools had been committed, they were reasonably searching in the near vicinity for further evidence, tools suitable for burglary purposes were observed in the defendant's car, and he gave an improbable explanation of the circumstances under which he was found. The defendant's arrest was legal and there is no merit to his contentions.

No question is raised in this case as to the sufficiency of the evidence to support the conviction and will not be further discussed herein.

Defendant Cook next argues that the trial court should

have ordered a severance of trial and that he was prejudiced by being tried with Perez. The record does not show that the defendant either before or during the trial made an appropriate motion for severance. The first appearance of defendant's motion is after both the State and the defendant had rested their cases. Nor does the record disclose any attempt on the part of the defendant during the trial to establish any prejudicial effect which could result from the joint trial. This was obviously too late. To permit a defendant to proceed to trial without making a motion for severance and to take his chances on a favorable result in the absence of extraordinary circumstances or surprise would permit a defendant to defeat the orderly processes of justice and defeat the expeditious and constitutional purpose embodied in our severance statute, section 29-2002, R. R. S. 1943. Even under our old statute, which was amended in 1957, persons who were charged jointly with the commission of a felony were entitled to separate trials as a matter of right if a timely application was made to the court for that purpose. Under our present statute, section 29-2002, R. R. S. 1943, amended in 1957, jointly charged defendants are not entitled to a separate trial as a matter of right but are entitled to a separate trial if it appears that the defendant or the State would be prejudiced by the joining of the offenses or the defendants in a joint trial. The proper rule is stated in State v. Brown, 174 Neb. 387, 118 N. W. 2d 328, wherein the court said: "The right to a separate trial now depends upon a showing that prejudice will result from a joint trial. A motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such a motion will not be disturbed in the absence of a showing of an abuse of discretion. Opper v. United States, 348 U. S. 84, 75 S. Ct. 158, 99 L. Ed. 101, 45 A. L. R. 2d 1308; 53 Am. Jur., Trial, § 56, p. 65; 23 C. J. S., Criminal Law, § 933, p. 696.

"The fact that one of several defendants had made an admission which may be received in evidence against him

is not a conclusive ground for ordering the defendants tried separately even though the admission incriminates the other defendants. United States v. Caron, 266 F. 2d 49; Costello v. United States, 255 F. 389. There is some danger of prejudice in any trial involving multiple defendants but severance should be denied in the absence of a showing of prejudice against which the trial court will not be able to afford protection. United States v. Lev, 22 F. R. D. 490, 276 F. 2d 605. The record in this case does not establish that the trial court abused its discretion in overruling the motion of the defendants for separate trials."

In the case at bar no motion for separate trial was made prior to the trial or during the trial until after all of the evidence was introduced. No showing was made to the trial court or contention made that there was any prejudice. Further, the evidence and the instructions reveal that the trial court carefully protected the rights of the individual defendants. There is an absence of a showing of an abuse of discretion and this contention is without merit.

Defendant objects to the introduction of evidence of statements and admissions made by the defendant to police officer Chamberlin while in custody at the police station after his arrest. These statements were elicited under substantially the same circumstances as those of Perez. See State v. Perez, *supra*. The defendant advised the police officer that he knew all of his rights and then, after a partial warning, proceeded to give the statements and admissions in question. However, it is not necessary to reach the issue presented in the Perez case. The defendant at trial failed to object to the statements and admissions of this evidence on the ground of voluntariness, or on the ground that he had been illegally arrested, or on the ground that he had not been properly advised of his constitutional rights. Both he personally and his trial counsel stated to the court that they wanted these statements to go to the jury, and that

they did not want the trial court to reach any preliminary determinations of voluntariness. The record reveals that the counsel for the defendant stipulated in open court that these statements now challenged be admitted into evidence. The record reveals extraordinary precautions on the part of the trial court to assure that there was a knowing and intelligent waiver of any objections to the admissibility of these statements. After defendant's counsel made the statement that he had no objection to the introduction of this testimony, the record reveals that he made this decision after consultation with the defendant. The record reveals the following colloquy between defendant and his counsel in front of the bench: "MR. McCORMACK: Do you want to come up here for a minute? (Mr. Cook approached the bench) MR. McCORMACK: Mr. Cook, you and I have conferred and you agree with my decision to waive the voluntariness of these statements and have them go to the jury? DEFENDANT COOK: Yes." After this transpired the trial recessed until the following Monday, and then the following occurred in open court: "THE COURT: Do you want your client up here to make a record? MR. McCORMACK: Yes. Mr. Cook, come up here, please. (Defendant Cook approached the bench) MR. McCORMACK: Mr. Cook, just for the record, you agree with me that you and I have consulted and have agreed that we would like the statement given to Officer Chamberlin to be read to the jury with the qualification that there be no mention of penitentiary or con or anything referring to your past record, is that correct? DEFENDANT COOK: Yes, Sir. And there is a footnote on that there, that was not testified to by him the other day about at a later date after I sat and thought it over I might talk to him some more, I never—." The statements introduced in evidence were almost entirely exculpatory in nature which, of course, makes the position taken by the defendant and his counsel understandable. Subsequent to the above proceedings the stipulation was en-

tered into by which the now challenged statements were admitted into evidence. It follows, therefore, that not only was there no objection to this evidence but that there was a wholly voluntary and intelligent waiver in open court, and a desire on the part of the defendant that the statements and evidence challenged be admitted into evidence. There is no merit to this contention. See, State v. Homan, 180 Neb. 7, 141 N. W. 2d 30; State v. Bundy, 181 Neb. 160, 147 N. W. 2d 500.

The defendant complains of the court giving an instruction in which he advised the jury that the defendant was not legally required to testify, that his failure to do so could not be considered by the jury in any manner, and that the jury was not to draw any inference from or speculate on his failure to testify. We have examined this instruction and it correctly states the law. Ferguson v. State, 52 Neb. 432, 72 N. W. 590, 66 Am. S. R. 512; United States v. Heithaus, 377 F. 2d 484; State v. Boscia, 93 N. J. Super. 586, 226 A. 2d 643; Blakely v. State, 43 Ala. App. 654, 198 So. 2d 803. No authority is cited by the defendant for his position with reference to this instruction and we can find none. The instruction was not a comment on the defendant's failure to testify. His failure to be sworn and testify, of course, at the trial was obvious and the jury could not help but be aware of it. Under these circumstances the admonitions by the court that it was not to consider this fact against him and that the law does not require that he take the stand was not only a proper instruction but was commendable as properly protecting the defendant's rights in this situation. See Blakely v. State, *supra*. We have carefully reviewed the record and the evidence in this case. It reveals that there was ample evidence to sustain the conviction and that each defendant's rights were carefully protected at every stage of the proceeding. It may be and should be said that the trial court carefully and conscientiously tried this case and we can find no prejudicial error. The

judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE L. WATSON, APPELLANT.

157 N. W. 2d 156

Filed March 8, 1968. No. 36579.

1. **Criminal Law.** Participation and criminal intent may be inferred from presence, companionship, and conduct before and immediately after the offense.
2. ———. It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.
3. **Criminal Law: Evidence.** The general rule is that it is prejudicial error to admit incriminating, inculpatory, extrajudicial declarations of a coconspirator made in the absence of or without the knowledge of the accused, after the conspiracy has come to an end through withdrawal or arrest of the participants, or termination of the plan in success or failure, to prove the guilt of one other than the declarants.
4. ———: ———. Statements made by a coconspirator immediately after, or close in time to, the accomplishment of the criminal purpose of the conspiracy, have been held admissible in evidence to characterize the action of the parties as res gestae of the crime charged, even though made out of the presence of the nondeclarant.
5. **Arrest: Probable Cause.** When an arrest is made without a warrant, it therefore must be based upon probable cause which exists from facts and circumstances within the officers' knowledge or of which they had reasonably trustworthy information which was sufficient to warrant a man of reasonable caution in the belief that an offense has been, or is, being committed.
6. **Criminal Law: Evidence.** Where there is evidence that several persons participated in a criminal act, the acts and declarations of any one of them, while so participating, are admissible against all of the others.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed in part, and in part reversed and remanded.

Richard J. Bruckner, for appellant.

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

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

WHITE, C. J.

This is a criminal prosecution for possession of burglary tools. Following a jury verdict of guilty, defendant was sentenced to 5 years in the Nebraska Penal and Correctional Complex and also sentenced by the court to an additional consecutive term of 6 months for contempt of court. Defendant appeals.

The evidence, direct and circumstantial, and the reasonable inferences to be drawn therefrom, will first be reviewed as far as pertinent to this appeal.

At 5 o'clock, a.m., May 29, 1966, on the Sunday immediately preceding Memorial Day, police officer John Sobeski and his partner were driving in a police cruiser in an easterly direction in the vicinity of Twenty-fourth and Harney Streets in the downtown business section of Omaha, Nebraska. Motor vehicle and pedestrian traffic were very light at this time. Just east of Twenty-fourth and Harney Streets, and at the west end of the block, is a liquor store. North of the liquor store is a parking lot, and east of the store is a driveway. Immediately beyond the driveway is the Omaha Auto Glass building. The police officers, while driving slowly past the Omaha Auto Glass building, noticed two men walking from the east of the building and to the south. They were about 30 feet distant. They observed the two men walk south out to the front end of the Omaha Auto Glass building, then walk west past the building, and turn and walk north again. The defendant was one of the

two men. As the two men turned the corner, both bent down as if pulling something from their clothing. Sobeski saw something in one man's hand, but that man obscured the officer's vision as to the second man. This behavior occurred at the west end of the building. Sobeski parked the cruiser car, and at this time the two suspects were walking quite rapidly to the north. The two men were stopped and searched. The officers found no weapons, but a flashlight was found on the man who had been walking with the defendant. Sobeski then returned to the point where he had seen the two suspects bend over. Here, in a patch of weeds close to the building, the officer found two crowbars and a screwdriver. The tools were lying unrusted in the pushed-over grass, and appeared to have been placed there recently. The defendant and his companion, one Octaviano Perez, were arrested at this point. Sobeski searched the nearby buildings and found no evidence of a burglary. In making this search, Sobeski observed a man sitting in a 1960 Rambler station wagon, reading a newspaper. The station wagon had Missouri license plates. Sobeski asked the man, one Roy Cook, for identification, and observing through the window, he noticed two tools sticking out from the passenger side of the front seat. At Sobeski's request, Cook went with him to the area where the defendant and Perez were being held, and here, Perez said to Cook, "So they got you, too." At this point Cook was also placed under arrest. Sobeski returned to the Rambler station wagon and searched it. He found a pry bar and a screwdriver under the passenger side of the front seat and a 30-inch pry bar under a pillow on the back seat. The first two items had been seen by Sobeski from outside the car, before Cook had been arrested. Further search of the spare tire well and glove compartment revealed a pry bar, a tire iron, two screwdrivers, three pairs of pliers, two punches, and a brake-adjusting spoon.

The defendant and his companion Perez were taken

to the police station. At the police station Perez was interrogated and gave a Missouri address. He stated that he had come to Omaha with Cook and Watson; that he did not commit burglaries himself but that he planned them for other persons; that he considered Omaha an easy place to burglarize; and that he had come to Omaha to decide which places to "hit." Perez had in his possession various gasoline slips dated May 28, 1966, showing charges at stations between Kansas City and Omaha. He had in his possession a key to room 3 of the Eddington Hotel in Omaha, Nebraska, and admitted registering at the hotel on Saturday, May 28, 1966.

Cook was also interrogated and gave a Kansas address. He stated that he knew Perez and the defendant and that the three had traveled from Overland Park, Kansas, on May 27 and 28 to look for work in Omaha. He described his own activities of the previous day and denied that he had been with Perez and the defendant during most of the evening preceding his arrest.

A great deal of other evidence was introduced in this trial, chiefly with reference to the burglary of a certain drugstore which was broken and entered into during the evening of May 28, 1966, which offense the defendant in this case was charged with but found not guilty by the jury. Most of this evidence is irrelevant to the issues herein and will not be reviewed herein.

The first question presented is the sufficiency of the evidence. Participation and criminal intent may be inferred from presence, companionship, and conduct before and after the offense. Miller v. State, 173 Neb. 268, 113 N. W. 2d 118; Callies v. State, 157 Neb. 640, 61 N. W. 2d 370. The evidence clearly establishes that the two men were walking together, and that in stooping and starting to leave the scene of the dropping of the tools, the two had acted in concert. Clearly a jury could draw a reasonable, if not conclusive, inference that the crowbars and screwdriver, unrusted and lying in the pushed-over grass, were the same ones that were dropped by

them when drawn from their clothing. Additionally, Perez was in the possession of a flashlight. Besides the direct evidence on this point, it is apparent from their nature that the tools and instruments found were suitable for use as burglary tools. Besides, the nature and purpose of these tools can be inferred from the fact that two men were walking on an early Sunday morning (the day before Memorial Day) and suddenly stopped to throw away two crowbars and a screwdriver while police officers were 30 feet away in a slowly moving police cruiser.

It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. Rimpley v. State, 169 Neb. 171, 98 N. W. 2d 868; Morgan v. State, 51 Neb. 672, 71 N. W. 788; Kitts v. State, 153 Neb. 784, 46 N. W. 2d 158; Hoffman v. State, 162 Neb. 806, 77 N. W. 2d 592.

The evidence was amply sufficient to sustain the verdict and there is no merit to this contention.

A more serious question is next presented. After the arrest and at the police station, Cook and Perez made certain statements concerning their activities with the defendant on the previous day and prior to the arrest on the morning of May 29, 1966. At the trial, over the objection of the defendant, the police officers were allowed to testify as to these statements by Perez and Cook. This was prejudicial error. The general rule is that it is prejudicial error to admit incriminating, inculpatory, extrajudicial declarations of a coconspirator made in the absence of or without the knowledge of the accused, after the conspiracy has come to an end through withdrawal or arrest of the participants, or termination of the plan in success or failure, to prove the guilt of one other than the declarants. Zediker v. State, 114 Neb.

292, 207 N. W. 168; Logan v. United States (1891), 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429; Krulewitch v. United States (1949), 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 790; State v. Hobbs (1961), 252 Iowa 439, 107 N. W. 2d 242; People v. Olson (1965), 232 Cal. App. 2d 480, 42 Cal. Rptr. 760. An extensive annotation in 4 A. L. R. 3d 678, states the rule as anounced above with seven pages of supporting citations. As the State concedes, it is conclusive that the statements were made after arrest, in the police station, and after the termination of the conspiracy.

The district court, in two lengthy instructions, after admitting this evidence, submitted the admissibility of it to the jury. This does not save the error. To admit evidence for the purpose of determining its admissibilty is self-defeating. Carbo v. United States (1963), 314 F. 2d 718. The State argues that although error, it is nonprejudicial under section 29-2308, R. R. S. 1943, being our statute requiring affirmance unless we find that there has been a substantial miscarriage of justice.

The argument is persuasive that the evidence was nonprejudicial, but the overwhelming weight of authority in jurisdictions where they have a substantially similar prejudicial error statute is to the effect that it constitutes prejudicial error, and we do not feel that we can depart from this holding in this case. It therefore was prejudicial error requiring a reversal and a new trial in this case.

We shall discuss the further questions raised which may reappear on retrial. The defendant and Perez were arrested together. A few minutes later Cook was apprehended nearby in the car and then brought to the area where the defendant and Perez were being held. Here Perez said to Cook, "So they got you, too." Although not citing any authority to support this position, defendant assigns error in the admission of this testimony. As usual, there is no admission or direct evidence that the defendant heard this statement. However, we feel that

the circumstances shown lend themselves to a reasonable inference that it was made in his presence and hearing, and therefore admissible. If Sobeski and Cook heard it, it is reasonably inferable that defendant heard it too. We further feel that this evidence is admissible as res gestae. Collins v. State, 46 Neb. 37, 64 N. W. 432; Sullivan v. State, 58 Neb. 796, 79 N. W. 721. The general rule in this situation is stated in Annotation, 4 A. L. R. 3d 737, as follows: "Statements made by a coconspirator immediately after, or close in time to, the accomplishment of the criminal purpose of the conspiracy, have been held admissible in evidence to characterize the action of the parties as res gestae of the crime charged, even though made out of the presence of the nondeclarant * * * ." The spontaneous nature of the statement is quite apparent.

Defendant objects to the admission of a photograph in evidence which contained items in it which had been previously excluded by the court. These items of evidence, found in the Eddington Hotel on May 31, 1966, the hotel where the defendant stayed, were offered as being material to the charge of the burglary of a drugstore at a different time and place than that involved on the charge herein. The defendant was acquitted on this charge. Therefore, on retrial, it is unnecessary to discuss the merits of this issue.

Defendant argues the inadmissibility of the tools found in the patch of weeds at the scene of the incident and in the Cook car. We will assume, as defendant contends, that this question boils down to a determination of whether the arrest of the defendant was illegal. The arrest was without warrant and therefore must be based upon probable cause which exists from facts and circumstances within the officers' knowledge or of which they had reasonably trustworthy information which was sufficient to warrant a man of reasonable caution in the belief that an offense has been, or is, being committed. State v. O'Kelley, 175 Neb. 798, 124 N. W. 2d 211; Ker

v. California (1963), 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726; Halsey v. Phillips, 104 Neb. 648, 178 N. W. 218.

The evidence establishes that the defendant and another man were walking down the street, stooped, and deposited certain tools in weeds nearby, and then reversed their course of walking. The police officers were cruising slowly in the vicinity. The two suspects were walking rapidly to the north. The men were stopped, and the tools, heretofore described, were observed in the patch of grass close to the building. The brief detention of the two men before the investigation was completed would not be unlawful, even without probable cause for actual arrest. State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129; State v. Huffman, 181 Neb. 356, 148 N. W. 2d 321.

The crime charged here was the possession of burglary tools. A natural, reasonable inference to be drawn from all of these facts and circumstances is that these tools were intended to be used in the commission of a burglary, that they had been in the possession of the defendant and his companion, and therefore furnished probable cause for the subsequent arrest without warrant for a crime committed in the presence of the arresting officers.

Cook's arrest was legal, and the tools found in the car in which he was sitting were admissible. State v. Carpenter, *supra;* State v. Huffman, *supra.* This case is much stronger than the facts establishing probable cause and a legal arrest in the Carpenter case. In the case here the car was already stopped, and besides a visual observation of the burglary tools in the car, the officers were possessed of the preceding information secured from the observation of Perez and the defendant, and the discovery of the tools in the grass, all occurring a short distance away. The officers' actions were not only reasonable and legal but it appears that they would

have been remiss in their duty if they had not conducted the search and arrested Cook.

As we noted in the Carpenter case, time was of the essence if the officers were to perform their duty in the prevention and discovery of crime. The argument that the officers would be required to get a warrant in this kind of a situation, would "emasculate crime prevention and render peace officers impotent and useless." State v. Carpenter, *supra.*

The tools found in the possession of Cook were admissible against defendant. The evidence, heretofore reviewed in detail, reasonably establishes that Cook's possession of the burglary tools in the car was a part of a concerted effort and plan or conspiracy and thus the evidence of the possession by Cook is admissible to establish possession by all of the coconspirators. Close proximity, the time it occurred, and Perez' statement in Watson's presence, "So they got you, too," are particularly significant. Where there is evidence that several persons participate in a criminal act, the acts and declarations of any one of them, while so participating, are admissible against all of the others. Shepperd v. State, 168 Neb. 464, 96 N. W. 2d 261; Phillips v. State, 157 Neb. 419, 59 N. W. 2d 598, 58 A. L. R. 2d 1141; 22A C. J. S., Criminal Law, § 777, p. 1181.

We have carefully examined the other assignments of error with reference to the trial for the possession of burglary tools, and they are either without merit or unnecessary to discuss in the light of the granting of a new trial in this case.

Defendant attacks his 6-month sentence for contempt of court. We will not repeat the evidence in this respect. Suffice it to say that the defendant by a series of repetitive obscenities, in and out of the presence of the jury, assaulted the able trial judge's character, his mother, his religion, and his professional ability and behavior. The trial court exhibited and maintained a remarkable restraint in this situation during the course

of the trial. The defendant now takes the absurd and untenable position that the defendant having committed such acts, the trial judge should have disqualified himself and ordered a mistrial. To hold that such conduct requires disqualification would permit a defendant to control a criminal trial himself and effectively destroy the orderly processes of justice. The separate sentence for 6 months for contempt of court was amply warranted by the evidence and is affirmed.

The judgment and sentence of the court for contempt is affirmed, and the judgment and sentence of the court on the charge of possession of burglary tools is reversed and the cause remanded for new trial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. FRANCIS TUNENDER, APPELLANT.

157 N. W. 2d 165

Filed March 8, 1968. No. 36621.

1. **Criminal Law.** It is recommended that upon tender of a guilty plea the court inquire about plea discussions and any plea agreement between counsel.
2. **Post Conviction: Attorney and Client.** Post conviction relief on the ground of ineffective assistance of counsel will not be granted unless counsel's assistance was so grossly inept as to shock the conscience of the court.

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

McFadden, Kirby & Swoboda, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

SMITH, J.

In this post conviction proceeding defendant has appealed from denial of his motion stating that his counsel had rendered ineffective assistance. John R. Gallagher had been appointed defense counsel in March 1966. In May defendant pleaded not guilty to charges of motor vehicle homicide and leaving the scene of the accident. Gallagher and the county attorney, William W. Griffin, at times discussed plea and probation. On October 10 defendant changed his plea to guilty to the homicide charge, and the State then dismissed the second count. On October 24 defendant was sentenced to 18 months' imprisonment. He filed this post conviction motion on December 22, 1966.

Evidence of the intellectual functioning of defendant, age 27, is meager, no psychological tests having been performed. His grade level of educational achievement is probably 10, although he informed court and counsel that he was a high school graduate. Gallagher had the following opinion: "A. * * * I thought he was a little better than a moron. Q. How much better? A. Not very much better. * * * Q. Isn't it true you found out subsequently that one of his principals in the school * * * has stated that this individual had less than the usual intelligence ordinarily required to get through the third or fourth grade? * * * A. I have found it out now * * *." By prearrangement defendant had looked at Gallagher for answers to questions asked at the second arraignment hearing.

Defendant testified that he had changed his plea to guilty only because Gallagher had promised him probation outright. Gallagher's versions of the odds stated to defendant climbed from possibility to strong chance to probability.

Other circumstances are summarized from Gallagher's testimony. Upon his appointment he asked defendant and defendant's relatives to advance $200 for expenses. The sum was paid. Gallagher's compensation would have

been the same whether the case was tried or not, but that thought did not affect the plea decision. Gallagher was "quite certain" that probation would be granted. Griffin said that upon a plea of guilty to the homicide charge he would "probably" dismiss the second count. There was, Griffin continued, a "strong chance" or probability of probation, and he would not resist. The judge had disclosed to him that probation "might" be entertained. The guilty plea was not induced by the discussions with Griffin.

Two weeks after entry of the guilty plea and a few minutes before commencement of the October 24th hearing, Gallagher met the judge. Their conversation caused Gallagher's concern to mount sharply: "Judge Smith said something about this being a very difficult matter, and * * * he said * * * he was in a quandry himself as to just what to do in this case. * * * a few minutes later, I met Mr. Griffin * * *, and I told Mr. Griffin of the judge's remark, which had disturbed me quite a little. * * *I may have mentioned * * * it sounded to me like the judge was a little antagonistic to any probation in this case. * * * (Griffin) went into the judge's chambers, and I thought well, I better stay out of there."

Statements bearing on the true situation had been made at the October 10th hearing: "THE COURT: The statutes * * * provide * * * do you understand what the possible penalties are? DEFENDANT: Possible penalties, yes. * * * (Guilty plea received). * * * MR. GALLAGHER: * * * I could say a few words on behalf of my client. * * * We presume there will be a sentence imposed of some nature here, * * *."

Other excerpts from Gallagher's testimony are noteworthy: "A. * * * I informed Mr. Tunender that if the judge would put him on probation it would probably be for at least about three years. * * * I informed * * * (defendant) that if he were convicted in court * * * he would be sent to the penitentiary. * * * Q. Do you remember what your answer was to my question (asked

in a street conversation), did you tell him he would be put on probation? Did you, or did you not, say it was all cut and dried? Did you make that statement in those * * * particular words? * * * A. I may have probably said something to that effect; of course your words of 'Cut and dried' are more or less strong talk."

We recommend that upon tender of a guilty plea the court inquire about plea discussions and any plea agreement between counsel. "Such inquiry will disclose whether there is reason for the court to caution the defendant of the court's independence from the prosecutor. * * * See People v. Baldridge, 19 Ill. 2d 616, 169 N. E. 2d 353 * * *." A. B. A. Project, Standards Relating to Pleas of Guilty, Tent. Dr. § 1.5, p. 30.

Post conviction relief on the ground of ineffective assistance of counsel will not be granted unless counsel's assistance was so grossly inept as to shock the conscience of the court. State v. Moss, *ante* p. 502, 155 N. W. 2d 435.

A prisoner's hindsight may twist prudent advice and words of caution into intentional misrepresentation. That case is not this one. Gallagher breached his duty of loyalty, and the breach misled defendant to plead guilty. Gallagher's assistance was ineffective.

The judgment is reversed and the cause remanded with directions to vacate the judgment of conviction and sentence.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., dissenting.

I respectfully dissent from the holdings of this opinion. Defendant was charged on two counts, motor vehicle homicide and leaving the scene of an accident. With the advice of his court appointed counsel, defendant entered a plea of guilty to motor vehicle homicide and was sentenced to imprisonment for 18 months. With the consent of the court, the charge of leaving the scene of the accident was dismissed by the county attorney.

At the time defendant appeared for the purpose of

changing his plea from not guilty to guilty, the court interrogated defendant at length with his counsel present. The court elicited the following facts: Defendant understood that he was entitled to a jury trial if he pleaded not guilty. He said he had received a copy of the information and fully understood the charge and its possible penalities. He acknowledged that his attorney had represented him in all proceedings beginning with the preliminary hearing. He had discussed the matter many times with his counsel and had revealed all the facts to him as he knew them. He stated that no promises had been made to him to secure his guilty plea and that his plea of guilty was voluntary on his part. His counsel made a plea for parole to the court in which many extenuating circumstances, which will be included in a subsequent part of this dissent, were called to the court's attention. The county attorney stated that he would make no recommendation to the court, but did say that he did not oppose or disagree with any leniency the court might see fit to grant. The trial court proceeded to impose the sentence of 18 months' imprisonment and the second count was dismissed with the consent of the court.

This post conviction proceeding was filed on December 22, 1966. It is contended by the defendant that he was furnished ineffective counsel and that his plea of guilty was induced by fraud and mistake and that such plea was not understandingly made. The primary question is whether or not defendant's counsel, in advising a plea of guilty under the facts and circumstances he had before him, was so derelict in his professional duty, or, as the majority opinion says, so breached his duty of loyalty, as to require a finding that he was an "ineffective counsel" within the meaning of the law. In other words, the majority opinion holds that defendant's counsel was so derelict in his professional duty in advising the defendant to enter his plea of guilty as to require a reversal of the judgment.

The testimony of defendant's counsel may be summarized as follows: Defendant was a married man, 27 years of age, with two small children and a third expected. He was a high school graduate and not as "sharp" as his counsel would expect him to be. On or about March 16, 1966, he drove his automobile down the main street of the village of Emmet and struck and killed an elderly lady who was angling across the street. Crossing the street in this locality in this manner was a common practice by adults and children alike. Defendant stated that he did not know he had struck anyone, did not stop, and was found at home in bed shortly thereafter. Defendant's automobile had a shattered windshield, had its radio antenna broken off which was found under the body of the deceased, and the fender and hood showed that it had been struck by a heavy object. The skull of the deceased was completely crushed and she never regained consciousness. Defendant's statement that he did not know he struck a person does not appear very plausible under these circumstances. Defendant never admitted that he struck any person, but his attorney states that he had a very unclear description of what occurred at the scene of the accident. After his appointment by the court to represent the defendant, he appeared at the preliminary hearing, heard the witnesses and cross-examined them, but decided to put on no evidence. The evidence shows that he interrogated the sheriff, visited the scene of the accident, and visited several witnesses in the village of Emmet. This produced evidence that defendant had been drinking immediately before the accident and that he was a habitual drinker, although not a drunkard, but did not hold his liquor well. Defendant consulted with him numerous times and with defendant's wife, parents, and brothers at other times. He told them that there was a very good chance of a parole if defendant entered a plea of guilty. He visited with the county attorney concerning a possible parole and was told by him that he thought defendant

had a good chance to be paroled, a matter that would not be resisted by him. He pointed out that paroles had been granted in two similar cases and that he thought the same result would be followed here. He denied that defendant or members of his family were ever assured by him that a parole would be granted or that he ever made any such statement to induce a plea of guilty. The contention that he stated that a parole was "all cut and dried" were the words of defendant's present attorney and not his, although he was of the opinion that a parole would be granted. It is asserted by defendant that a second automobile was involved in this accident. This was a statement of one or more of defendant's relatives who admitted they did not see the accident. He visited with the sheriff about a second car and was told that there was no indication that a second car was involved in the accident. He mentioned the matter to the county attorney who said he had also heard this rumor, had checked it out, and that there was nothing to indicate the participation of a second car. He insisted that the matter of a guilty plea was left entirely to defendant although he advised that in his judgment it was the best thing to do. He asserted that he stood ready to try the case if defendant desired that such a course be followed. He summarized the basis of his recommendation to plead guilty as follows: Defendant had been previously convicted of leaving the scene of an accident. The shattered windshield, the broken antenna found under the deceased, the damaged fender and hood, and the serious injuries inflicted on deceased was evidence of a great impact and excessive speed. The previous drinking and defendant's failure to stop were difficult to overcome in securing an acquittal. The evidence of a second car participating was of little substance and supported only by the remote evidence of defendant's close relatives. The defendant's record was good since the incident. He had worked steadily to support his wife and family. The county attorney agreed

that defendant's conduct was good and he knew of nothing to militate against a parole. He knew that paroles had been granted by the same judge in two other similar cases. Considering all these pertinent factors and the difficulty in securing an acquittal, he advised the defendant to enter his plea of guilty. This, he believed to be to the best interests of defendant and would be preferable to a conviction by a jury which he felt could not be avoided.

I submit that the foregoing facts do not show ineffective counsel or any want of loyalty. I disagree with the holding that defendant's counsel intentionally misrepresented the defendant. Certainly in the proper representation of a client, an attorney may exercise his best judgment as to trial tactics, strategy, or a plea of guilty if it is deemed to the best interests of the defendant. True, in this case, his opinion that defendant would be paroled proved wrong, but this is no basis for a holding that he so misrepresented his client or breached his duty of loyalty. The exercise of judgment in this case was reasonable in that it was grounded on considerations that justified the advice given. In Busby v. Holman, 356 F. 2d 75 (1966), it is stated: "In considering this contention of the appellant we must bear in mind that the constitutional requirement of effective assistance of counsel does not require or permit the court upon a subsequent review to analyze counsel's mental processes in order to determine whether every conceivable avenue of evidence has been totally explored and every possible theory of defense has been pursued. United States ex rel. Boucher v. Reincke, 2 Cir. 1965, 341 F. 2d 977, 981. It is not counsel who is on trial. There can be held to be a lack of the effective assistance of counsel only when it appears that counsel's assistance was so grossly inept as to shock the conscience of the court and make the proceedings a farce and a mockery of justice. (Citing cases.)" In United States ex rel. Feeley v. Ragen (7th Cir. 1948), 166 F. 2d 976, it is stated: "The best of coun-

sel make mistakes. His mistakes, although indicative of lack of skill or even incompetency, will not vitiate the trial unless on the whole the representation is of such low caliber as to amount to no representation and to reduce the trial to a farce." The record in this case does not approach a finding of ineffective counsel under the foregoing rule.

Legal counsel are expected to accept appointments to represent indigent defendants. But if matters of professional judgment are to be reviewed on appeal and considered as a matter of hindsight rather than on the facts and circumstances facing him at the time of decision, the fear of a tarnished professional reputation may become more compelling than the best interests of the indigent defendant. The members of the legal profession should not and must not be restricted in the exercise of their professional judgment in representing the best interests of the defendant as it appears to them.

The majority opinion recommends that upon the tender of a guilty plea that the court inquire into plea discussions and plea agreements between counsel. It is urged that this is only a recommendation and not a compulsory practice. But such gratuitous advice is intended for some purpose or the trial court would not be invited into the offers, counteroffers, misunderstandings, and general confusion arising therefrom. It involves a matter not binding on the court, but it infers that the trial court is to be influenced in some way by injecting itself in such arguments and discussions. I submit that the recommendation is an unwarranted limitation of the trial judge's judicial discretion and an undue extension of modern thinking on plea bargaining now making its appearance in our criminal procedure. I cannot bring myself to support the proposed recommendation for the reasons stated.

NEWTON, J., dissenting.

I concur in the dissent of Carter, J. There were two counts in the information filed against this defendant.

An examination of the record now before the court reveals that the State was in position to adduce sufficient evidence of defendant's guilt as to render his conviction on one or both counts not only probable, but practically a foregone conclusion.

Under such circumstances, even the most experienced practitioners of criminal law generally concede that the wisest counsel they can give their clients is that of entering a plea of guilty and throwing themselves upon the mercy of the court. Such was the case here. One count of the information was dismissed and the defendant got off with a comparatively light sentence.

In accordance with the majority opinion, this case must be remanded and new trial granted. In all likelihood defendant will again be convicted and sentenced. He may well find himself in the same position as the defendant in the case of State v. King, 180 Neb. 631, 144 N. W. 2d 438, where following the second trial and conviction defendant found he would be confined for a longer period than he was subject to on his original sentence. The language contained therein is applicable here. One who secures a new trial by pursuit of a post conviction remedy may be doing himself more harm than good. For him the bright rainbow and the hopes engendered may turn out to be illusory with only a pot of fool's gold at the end of the rainbow.

In view of this situation, the same criticism made against the original attorney who, in the exercise of his best judgment, succeeded in getting his client off with only a light sentence, may well be made of the second attorney who, after much effort, succeeds in getting the original judgment of conviction set aside, and upon a retrial not only sees his client again convicted but also facing a longer period of incarceration than he was subject to in the first instance.

In my judgment, neither criticism is justified.

WHITE, C. J., dissenting.

I concur in the dissents of Judges Carter and Newton.

Further, in a post conviction case a petitioner has the burden of establishing a basis of relief. State v. Snyder, 180 Neb. 787, 146 N. W. 2d 67; State v. Sagaser, 181 Neb. 329, 148 N. W. 2d 206. Assuming the evidence is conflicting, the trial court, after hearing all of the evidence, found that the defendant's plea of guilty was voluntarily made and not the result of any promises on the part of his attorney. How we are justified in accepting the unsupported testimony of this defendant that his attorney promised him probation as against the testimony of the attorney and the finding of the trial judge who saw and heard the witnesses, I do not understand. And if he had constitutionally effective counsel it would be his duty to explore the possibilities of probation, advise his client thereof and give him his best judgment and recommendation. Once aware of the opportunity to upset the conviction and sentence, the defendant's conversion of a recommendation or a hope into a promise is readily understandable.

I do not believe that the constitutional right to a lawyer and his advice should so easily be turned into a weapon endangering the opportunity to receive the free unfettered advice and services of a lawyer. With the door so easily open to an attack upon the confidential disclosures between attorney and client, I do not see how a lawyer can adequately protect himself. Does he have a sword at his throat when he talks to his client?

The evidence shows this defendant freely and voluntarily pleaded guilty in open court with his counsel, father, brothers, and other members of his family present. The record furthermore presents overwhelming evidence of guilt. The other charge, a serious one, which the evidence also strongly supports, was dismissed. The judgment of the trial court who knew the attorney, who heard the evidence, who presided when the plea was entered, is correct and should be affirmed.

IN RE STERILIZATION OF GLORIA CAVITT.
STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. GLORIA CAVITT ET AL., APPELLEES AND CROSS-APPELLANTS.

157 N. W. 2d 171

Filed March 8, 1968. No. 36648.

1. **Mentally Deficients, Sterilization of: Constitutional Law.** Sections 83-501 to 83-508, R. R. S. 1943, relating to the sterilization of mentally deficient persons as a condition prerequisite to parole or discharge, constitutes a valid exercise of the police power.
2. ———: ———. Such sterilization statute providing for the sterilization of mentally defective persons as a prerequisite to parole or discharge from the state institution for mentally defective persons, does not deny the equal protection of the law as class legislation.
3. ———: ———. The term "mentally deficient" when applied to persons is not so vague and indefinite as to make the sterilization statute unconstitutional.
4. ———: ———. The sterilization statute is not unconstitutional in that quasi-judicial powers are unlawfully delegated to the board of examiners of mental deficient by the terms of the act.
5. ———: ———. The fact standards and guidelines provided by the act for the guidance of the board of examiners of mental deficient, in administering the act in accordance with the legislative purpose, are sufficient, and do not constitute an unlawful delegation of legislative power.
6. ———: ———. The hearing provided by section 83-505, R. R. S. 1943, before the board of examiners of mental deficient composed of competent physicians, with the right of appeal to the courts, affords constitutional procedural due process.
7. **Mentally Deficients, Sterilization of.** The surgical operations of vasectomy on mentally defective male persons and of salpingectomy on mentally defective females are not inhuman, unreasonable, or oppressive, and in no sense of the word do they constitute punishment for crime.
8. **Mentally Deficients, Sterlilization of: Constitutional Law.** Sections 83-501 to 83-508, R. R. S. 1943, are in all respects constitutional and enforcible.
9. **Costs.** Under the provisions of section 7-113, R. R. S. 1943, an attorney serving as guardian ad litem is entitled to reasonable compensation to be fixed by the court and chargeable as costs in the action.

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

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

Vincent L. Dowding and Luebs, Tracy & Huebner, for appellees.

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

CARTER, J.

This is an appeal by the State of Nebraska from a judgment of the district court for Gage County reversing an order of the Board of Examiners of Mental Deficient directing the sterilization of Gloria Cavitt.

The county court of Dawson County, after a hearing, committed Gloria to the Beatrice State Home on October 1, 1962, and she was admitted to the home on October 10, 1962, where she has remained to the time of trial in the district court, so far as the record shows. On August 23, 1966, the superintendent filed his petition with the board praying for a hearing before the board to determine whether Gloria should be sterilized as a condition prerequisite to her release from the home as provided by Chapter 83, article 5, R. R. S. 1943, as amended. Notice of the hearing was given, a hearing held, and the order of the board entered that Gloria should not be paroled or discharged from the home unless sterilized. No contention is made that statutory procedures were not followed. Gloria was represented by Vincent L. Dowding, her guardian and a member of the bar. An appeal was taken to the district court for Gage County which determined that the evidence was insufficient to sustain the order of the board and that the controlling statutes authorizing Gloria's sterilization were unconstitutional and void. The State thereupon appealed to this court.

The primary question before this court is the consti-

tutionality of sections 83-501 to 83-508, R. R. S. 1943, particularly section 83-504, R. R. S. 1943, which states: "It shall be the duty of the board of examiners to make a psychiatric and physical examination of these patients and, if after a careful examination, such board of examiners finds that such patient is mentally deficient, in the opinion of the board of examiners, is apparently capable of bearing or begetting offspring and, based on their psychiatric and medical findings as a result of this examination, it is the opinion of the board of examiners that such patient should be sterilized, as a condition prerequisite to the parole or discharge, then such patient shall not be paroled or discharged, as the case may be, unless said patient be made sterile, and that such operation be performed for the prevention of procreation as in the judgment of the board of examiners would be most appropriate to each individual case."

It will be noted that the findings of the board of examiners necessary to make an order for the sexual sterilization of a mentally defective patient are: (1) That the patient is mentally deficient, (2) that the patient is apparently capable of bearing or begetting offspring, and (3) that in its opinion such patient should be sterilized as a condition to parole or discharge. It is the contention of Gloria that the power to sexually sterilize a mentally deficient patient exists only when it is determined that the mental deficiency is such that it will be inherited by offspring. The statute does not require any such finding by the board nor does the evidence support any such finding. Under such circumstances it is asserted that the applicable statute does not contain adequate standards for the guidance of the board of examiners and by its terms permits arbitrary action by such board in such degree as to render the act unconstitutional as an unlawful delegation of legislative power.

It is generally the law that the police power of the state is broad enough to permit the sexual sterilization of mentally deficient inmates of the Beatrice State Home

where such mental deficiency is hereditary and would probably be inherited by children born to such inmate. In re Clayton, 120 Neb. 680, 234 N. W. 630; Buck v. Bell, 274 U. S. 200, 47 S. Ct. 584, 71 L. Ed. 1000.

The Clayton case was decided by this court in 1931 under the sterilization law then in effect, which provided in part: "* * * if after a careful examination and investigation, such board of examiners find that such inmate is feeble-minded or insane * * *, that such inmate is capable of bearing or begetting offspring, that children born or begotten by such inmate would inherit a tendency to feeble-mindedness, insanity, or degeneracy * * *, that such children would probably become a social menace and that procreation by such inmate would be harmful to society and that such inmate should not be paroled or discharged, as the case may be, unless sterilized, * * *." Laws 1929, c. 163, § 4, p. 565. In 1957, the foregoing statute was repealed and the present law heretofore quoted was enacted in its stead. It is plain that the holdings in the Clayton case do not control the disposition of the present controversy.

It can hardly be disputed that the right of a woman to bear and the right of a man to beget children is a natural and constitutional right, nor can it be successfully disputed that no citizen has any rights that are superior to the common welfare. Acting for the public good, the state, in the exercise of its police power, may impose reasonable restrictions upon the natural and constitutional rights of its citizens. Measured by its injurious effect upon society, the state may limit a class of citizens in its right to bear or beget children with an inherited tendency to mental deficiency, including feeble-mindedness, idiocy, or imbecility. It is the function of the Legislature, and its duty as well, to enact appropriate legislation to protect the public and preserve the race from the known effects of the procreation of mentally deficient children by the mentally deficient. But in the delegation of this legislative power to an administra-

tive board, the question immediately arises, from the constitutional viewpoint, as to whether or not adequate standards and guidelines have been provided the administrative board to insure that the purpose of the statute disclosed by the act will be carried out.

In the present act, only two standards have been provided, first, that the patient is mentally deficient, and, second, that the patient is apparently capable of bearing offspring. After these findings have been made, the determination as to whether or not the patient will be sterilized is left entirely to the professional judgment of the board. It is a fundamental rule that the constitutionality of a legislative act is determined, not from what has been done under it, but from what may be done under it. It is apparent here that the board could order the sterilization of a patient who had suffered mental deficiency from an accident or disease, or some form of mental deficiency entirely unrelated to the transmission to offspring of a tendency to mental deficiency.

Gloria was 35 years of age at the time of trial in the district court and had been a patient in the Beatrice State Home since October 10, 1962. That she is mentally deficient is not disputed. The cause of her mental deficiency is not known. Before entering the home she had lived with one William Cavitt for some 14 years in what she called a common law relationship. After breaking up her relationship with Cavitt, she had much difficulty in caring for her eight children resulting from this association and after her commitment they were cared for by her parents. She came from a low social and economic group. Both she and the children were provided for largely by public aid. Four of the doctors on the board who heard the petition of the superintendent of the home to determine if she should be sterilized as a condition precedent to her release from the home testified at the hearing in district court. None of these doctors had investigated the mental condition of her parents or of her children.

The testimony of the two psychiatrists, the psychologist, and the general medical practitioner, all members of the board, can be summarized as follows: Gloria has an I.Q. of 71 and is in the lower two or three percent of the population in intelligence. All agreed that she was mentally deficient and probably capable of bearing children. After a review of Gloria's record and the observation of her, plus the I.Q. test, it was determined that she lacked the mental stability to handle social adjustment problems. Her attitude and personal feelings were considered. Consideration was given to the probable effect upon her of having more children, her minimal capacity to handle the responsibilities of parenthood, the possibility of producing mentally defective children, and the probability that added responsibilities of parenthood would in all likelihood handicap her potential rehabilitation.

The legislative authorization for the sterilization of mental defectives is a proper exercise of the police power, if constitutional requirements are met. In re Clayton, *supra;* Smith v. Command, 231 Mich. 409, 204 N. W. 140, 40 A. L. R. 515; Buck v. Bell, *supra.* The sterilization of a mentally defective female by salpingectomy is not a cruel and unusual punishment and in no sense is it a punishment for crime. In re Clayton, *supra;* State v. Troutman, 50 Idaho 673, 299 P. 668. The fact that the sterilization statute is limited to mental defectives in the Beatrice State Home, the only state institution of its kind in the state, does not deny the equal protection of the law as class legislation. Buck v. Bell, *supra.* But the contention is here made that in Buck v. Bell, *supra,* persons in state institutions properly constitute a class for the purposes of this type of legislation, while in the instant case, the legislation is applicable only to one named state institution and the door is not left open for future institutions to enter the same class.

The history of the legislation and the consideration of statutes in pari materia become material in the resolu-

tion of the problem. The method and basis of admission of mentally deficient persons to the Beatrice State Home are uniform throughout the state. It is provided that the Nebraska institution for feeble-minded youth shall be known as the Beatrice State Home. § 83-217, R. R. S. 1943. It is also provided by section 83-218, R. R. S. 1943, that the Beatrice State Home shall provide custodial care and humane treatment for those persons who are feeble-minded. Feeble-minded persons are defined by section 83-219, R. R. S. 1943, as: "* * * any person afflicted with mental defectiveness from birth or from early age, so pronounced that he is incapable of managing himself and his affairs and of subsisting by his own efforts, or of being taught to do so, or that he requires supervision, control and care for his own welfare, or for the welfare of others, or for the welfare of the community, and who cannot be classified as an insane person." The Beatrice State Home is the only institution to which such mentally defective persons may be committed under section 83-220, R. R. S. 1943, et seq. It is plain under the comprehensive plan adopted by the Legislature that but one such institution shall exist in this state and that the sterilization statutes are to apply only to the inmates of such institution. If the comprehensive plan of the Legislature be changed by the establishment of a second institution for the care of the mentally deficient, it would be necessary to change the classification of the institutions to which the sterilization statutes apply in order to avoid a denial of the equal protection of the law as class legislation. But the Legislature need not anticipate such a change that rests only within its power to bring about. We think the sterilization statutes are not unconstitutional as class legislation or as denying equal protection of the law under the peculiar facts and circumstances of this case.

It is contended that the words "mentally deficient" when applied to persons is so vague and indefinite as to make the sterilization statutes unconstitutional. The

terms mentally deficient and mentally retarded are generally considered as synonymous terms having a generally accepted meaning. A statutory definition can be drawn from section 83-219, R. R. S. 1943, which meets all constitutional requirements. It is further contended that the sterilization statutes are void in that quasi-judicial powers have been unlawfully delegated to the board of examiners of mental deficient. There is no basis for this contention under our holding in Hadden v. Aitken, 156 Neb. 215, 55 N. W. 2d 620, 35 A. L. R. 2d 1003. See, also, In re Main, 162 Okl. 65, 19 P. 2d 153.

It is contended here that the standards and guidelines under which the professional board of physicians is to act do not meet constitutional requirements. Two findings are essential before the board may act, a finding of mental deficiency of the patient and that in its opinion the patient is capable of bearing children. The statute then provides that if, in its opinion, on its psychiatric and medical findings, such patient should be sterilized as a condition for release, the board has authority to make such an order. But it is here contended that the statute is deficient in not requiring a finding that any children born to the patient would inherit a tendency to mental deficiency. Many of the earlier cases on the subject seem to have adopted that theory. But the advances in medical science have dispelled the theory that all mental defectives produce mental defectives and all normal persons do not. Such is not the case for unexplainable reasons which has brought about a change of thinking in the medical profession.

It is now the settled law that the Legislature, in the exercise of the police power, may make reasonable regulations consonant with the public welfare in dealing with mentally defective people. Heredity is not always the cause of mental deficiency. Environment is a factor that must be considered. It is an established fact that mental deficiency accelerates sexual impulses and any tendencies toward crime to a harmful degree. Many

states have sterilization laws which have been upheld that are applied to certain types of crimes such as rape and incest. They have been applied to habitual criminals. They have been applied to mental defectives where transmission of mental weakness to offspring is not possible. The effect of mental deficiency upon the patient, children born to him, the community, and the general welfare, as well as the conditions leading to his commitment, are pertinent considerations in the area of sterilization. The question is a legislative one which is valid if constitutional due process is afforded and the rights of the patient protected. We point out that the sterilization statute before us is compulsory only when required before release from the Beatrice State Home. It is not compulsory in the sense that the patient is to be sterilized under all circumstances, since it is applicable only as a prerequisite to discharge or parole from the home. Remaining in the home makes the statute inapplicable. The fundamental issue is the reasonableness of the statute as an exercise of the police power. We think it reasonable.

In upholding a similar act, the Supreme Court of Kansas said: "The legislature provided a tribunal eminently competent to deal with the peculiar interests involved, and the procedure is adapted to the nature of the subject. * * * The judicial tribunals are open to the inmate to test the validity of the law and the thirty-day period gives him reasonable time in which to institute proceedings to that end." State ex rel. Smith v. Schaffer, 126 Kan. 607, 270 P. 604. See, also, State v. Noll, 171 Neb. 831, 108 N. W. 2d 108; State v. Madary, 178 Neb. 383, 133 N. W. 2d 583.

Sterilization is a much misunderstood subject when applied to the mentally deficient. The public has a natural revulsion of feeling against sterilization of mental defectives even when it is clear that the public welfare requires it. Mental deficiency with its alarming results presents a social and economic problem of grave im-

portance which gives rise to the exercise of the police power by the Legislature. The Beatrice State Home is full to overflowing with these unfortunates as is evidenced by the fact that Gloria was compelled to wait 10 days after commitment before being admitted to the home because of a lack of room. Thus far we have been endeavoring to demonstrate that the statute under consideration, measured by the purpose for which it was enacted and the conditions which warranted it, and justified by the findings of experts in biological science, is a proper and reasonable exercise of the police power. The opposition to such a statute as we have before us is largely based on the assumption that the operation is inhuman, unreasonable, and oppressive. The surgical operation of vasectomy on mentally defective males and salpingectomy on mentally defective females is a simple operation without pain or discomfort to the patient. It does not reduce his sex impulses nor limit his capacity to engage in sexual relations. It does no harm to the patient other than to eliminate his capacity to procreate.

We limit our holding to the facts of this case and the statute we have before us. We have here a case where the patient has not been cured, but who is eligible for release from the home if she is sterilized. She can remain in the home without being sterilized. Sterilization is only a condition for parole or discharge. It is compulsory only if she insists upon her release. We fail to see how the statute is in any manner unconstitutional on any grounds under these precise circumstances. It constitutes a reasonable invocation of the police power for the public welfare. We therefore hold sections 83-501 to 83-508, R. R. S. 1943, are constitutional. The evidence in this case is sufficient to sustain the findings of the board of examiners of mental deficient under the act if it be constitutional as we have found it to be.

The guardian of Gloria Cavitt has filed a cross-appeal in her behalf, asserting that the trial court erred in failing to appoint a guardian ad litem for her to carry

on this litigation. The State contends that section 83-505, R. R. S. 1943, allows a fee of $25 to the guardian for the hearing before the board of examiners of mental deficient and that no other legal fees or expenses are provided for or allowable. We agree that the $25 allowance is for the appearance before the board at the hearing provided for in section 83-505, R. R. S. 1943.

The record shows that Gloria through her guardian applied to the district court for the appointment of a guardian ad litem which was denied. The record shows, however, that her guardian, a lawyer, represented her in the district court and in this court. She was ably represented and the failure of the trial court to appoint a guardian ad litem was without prejudice to the rights of Gloria, since the guardian carried out the functions of a guardian ad litem. The trial court denied the guardian's claim for the allowance of a guardian ad litem fee for legal services.

It is provided by section 7-113, R. R. S. 1943, that an attorney appointed as a guardian ad litem for an incompetent person shall be entitled to such compensation as the court shall deem reasonable. We think the trial court should have allowed a reasonable attorney's fee to the guardian for services rendered while acting in the capacity of guardian ad litem to be taxed as other costs. We can find no authority, and none has been cited, which authorizes the legal fees to be taxed against the State except as a part of the costs. The fact that Gloria appears to have no property out of which the fees of the de facto guardian ad litem can be paid in a noncriminal proceeding does not furnish any reason for imposing the liability on the State. We allow the guardian $500 legal fees for services rendered in this court to be taxed as costs. We remand this portion of the cause to the district court for the fixing of the guardian ad litem's fee in that court.

The judgment of the district court holding sections 83-504 and 83-505, R. R. S. 1943, unconstitutional is re-

versed. The cause is remanded for the purpose of the fixing of legal fees for services rendered by the guardian in the district court. The costs are taxed to the appellee, Gloria Cavitt.

REVERSED AND REMANDED.

SMITH, J., dissenting.

The critical issue is whether the sterilization law denies substantive due process of law guaranteed by the Constitution of Nebraska. I too believe that the right of man to procreate is not absolute, that a balance must be struck between the private right and the police power. Two considerations are the statutory interpretation made by the court and the strength of reliable scientific opinion about involuntary sterilization.

The law applies, according to the court, to voluntary sterilization alone—an interpretation with which I do not concur. The court supplies, however, little guidance to anyone in solving problems of effective consent by the mentally retarded and of substitute consent. More important, the coercive feature is hardly masked by the fictive option of sterilization or life imprisonment.

The factual approach to constitutionality begins with the record. The board members concluded that heredity, environment, or both produce mental retardation, and their conclusion is obviously undeniable. Some also found a probability that future offspring of Gloria would be mentally retarded, but nothing in the record shows the competence of anyone to make that judgment.

Outside the record, but within the ambit of judicial notice, a 1963 report on the mentally retarded in the Beatrice State Home reads: "The Director * * * made an extensive survey of all people admitted for the years 1940 through 1960 to determine changes as to age and level of retardation at time of admission * * *. Briefly, the findings (which are in line with the trends in the United States) are: people are coming to the Beatrice State Home at an increasingly earlier age; they are more retarded; and they are evenly distributed in pro-

portion to population, with no apparent variation because of race, geography, or families' social classes or level of intelligence. * * * more staff and services are needed * * * to study the cause of their mental retardation in order to be able to prevent damage to children yet unborn." First Biennial Report, Department of Public Institutions of Nebraska, pp. 81-82.

The State itself cites an article that reads: "* * * Dr. Leo Kanner has written, 'In my 20 years of psychiatric work with thousands of children and their parents, I have seen percentually at least as many "intelligent" adults unfit to rear their offspring as I have seen such "feeble-minded" adults. I have—and many others have—come to the conclusion that, to a large extent independent of the I.Q., fitness for parenthood is determined by emotional involvements and relationships.' Kanner, A Miniature Textbook of Feeble-Mindedness, p. 5." Bligh "Sterilization and Mental Retardation," 51 A. B. A. J., 1059.

The preceding quotations correspond with expert opinions cited by Elyce Ferster in 1966: "Concerning the claim of eugenicists that the efforts of society to help the unfit works against the welfare of the race the Committee (of the American Neurological Association) said: 'It is precisely in those communities where social care is good that we find the evidence of the finest culture and, on the whole, the best biology. It is in those communities where social care is poor that the population presents an appalling spectacle of degradation.' * * *

"A recent opinion * * * (was) expressed by the Mental Health Committee of the South Dakota Medical Association * * *: 'Medical science has by no means established that heredity is a factor in the development of mental disease with the possible exception of a very few and rare disorders. The Committee holds that the decision to sterilize for whatever reason, should be left up to the free decision reached by patient and family

physician mutually and that the State has no good reason to trespass in this area.'

"The scientific arguments against sterilization were ably summarized in 1960 by Dr. Bernard L. Diamond when he served as a special consultant to the American Psychiatric Association for its report on mental health legislation in British Columbia: '* * * In short, the present state in our scientific knowledge does not justify the widespread use of the sterilization procedures in mentally ill or mentally deficient persons. . . . It is sometimes proposed that sterilization is demanded, irrespective of the uncertainties of our knowledge of heredity, in that a mentally ill or feebleminded person is incapable of providing the emotional and material environment required to raise a normal child. Perhaps this is so, but it raises issues of a sociological and political nature of a very uncertain character and it may be most dangerous to apply such sociological concepts under the guise of a genetic thesis that is far from proven and highly uncertain in its application.' " Ferster, "Eliminating the Unfit—Is Sterilization the Answer?," 27 Ohio St. L. J., 591, 603-604.

Reviewing genetic aspects of intelligent behavior, Irving G. Gottesman warned: "The issues involved in eugenics are only partly based on a knowledge of genetics, the others being social, axiological, moral, economic, and political. * * * the preservation and improvement of these genetic attributes of man that have resulted in his favored evolutionary position are important but * * * premature attempts to apply our fragmentary knowledge in any dogmatic fashion would be extremely complex." Ellis (Ed.), Handbook of Mental Deficiency, p. 291.

Neither the court nor the board specifies the elements of environment to mediate a significant judgment concerning sterilization. Lack of knowledge is inferable. Environmental deprivation was appraised in a 1964 comment on terms proposed to differentiate remediable from irremediable mental retardation:

"A central problem * * * is the lack of reliable, valid, and precise measurement techniques; for a differential diagnosis * * *, the problem of adequate measurement is crucial. For example, if the term mental retardation denotes remediable cases in which environmental or emotional factors are the primary causes of lowered functioning, the precise measurement of such factors would be sine qua non of accurate diagnosis. However, current measures of emotional disturbance and environmental deprivation are, at best, gross and relatively unreliable. * * * For a large proportion of the mentally retarded, particularly those functioning at a higher intellectual level, knowledge of etiology and prognosis hardly seems sufficient at the present time to warrant a clear-cut differentiation between remediable and irremediable." Davitz, Davitz & Lorge, Terminology and Concepts in Mental Retardation, p. 11.

In determining the reasonableness of the sterilization law, we consider private deprivation, societal benefits, and possibilities of the state realizing those benefits at a lower cost. Appraisal of goals and remedies is difficult at best and impossible without identification of the environmental elements. I cannot imagine a causality vaguer than that of heredity, environment, or both; and that very vagueness warns of menacing power over bodily integrity. Judicial review is an empty safeguard when legislative, administrative, and judicial standards of protection are as deficient as those in this case. The sterilization law denies substantive due process of law guaranteed by the Constitution of Nebraska.

McCOWN, J., joins in this dissent.

NEWTON, J., dissenting.

The judgment of the district court must be reversed as a result of the provision in Article V, section 2, of the Constitution of the State of Nebraska which is as follows: "No legislative act shall be held unconstitutional except by the concurrence of five judges." The

act in question is composed of sections 83-501 to 83-508, R. R. S. 1943.

The opinion of Carter, J. correctly points out that under our present statutes the only findings required by the board of examiners are: "(1) That the patient is mentally deficient, (2) that the patient is apparently capable of bearing or begetting offspring, and (3) that *in its opinion* such patient should be sterilized as a condition to parole or discharge." (Emphasis supplied.) The former Nebraska statute which was held to be constitutional in In re Clayton, 120 Neb. 680, 234 N. W. 630, required one additional finding, namely that any children born or begotten by such feeble-minded person would inherit a tendency to feeble-mindedness, insanity, or degeneracy, that such children would probably become a social menace, and that such procreation would be harmful to society. Both the present and the former acts constitute an exercise of the police power. In the case of Golden v. Bartholomew, 140 Neb. 65, 299 N. W. 356, this court stated: " 'The legislature cannot, under the guise of police regulation, arbitrarily invade private property or personal rights. The test when such regulations are called in question is whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained.' " The court also said: " 'In order that a statute may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals or general welfare; that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof; and that the latter do in some plain, appreciable and appropriate manner tend toward the accomplishment of the object for which the power is exercised. * * * Measures adopted by the legislature to protect the public health and secure the public safety and welfare must have some relation to

those proposed ends. If it is apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety or welfare, it is unconstitutional, * * *.' " See, also, Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227. Under the former Nebraska act, it is obvious that the Legislature felt that feeble-mindedness was an inheritable condition which could be transmitted from generation to generation and that procreation by feeble-minded persons was detrimental to the public welfare. This provision has been deleted from our present statute and the statute fails to make clear in what manner, if any, the Legislature now considers procreation by a feeble-minded person to be detrimental to society and it clearly does not require the finding of any facts whatsoever that point in that direction. It may be noted that in the great majority of cases, and perhaps without exception, where other jurisdictions have held sterilization statutes to be constitutional, the thinking of the Legislature on the question of public welfare was incorporated in the statute in the same manner as it may be found in the old Nebraska act now repealed. I know of no instance where a statute such as the present Nebraska statute has been upheld.

As a general rule: "Purely legislative power, which can never be delegated, has been described as the authority to make a complete law—complete as to the time when it shall take effect *and as to whom it shall be applicable*—and to determine the expediency of its enactment." (Emphasis supplied.) 16 Am. Jur. 2d, Constitutional Law, § 242, p. 493. "The legislature may not delegate to administrative agencies the determination of what the law shall be, *to whom it may be applied,* or what acts are necessary to effectuate the law." (Emphasis supplied.) 1 Am. Jur. 2d, Administrative Law, § 104, p. 902. "The exercise of undefined general power legislative in character must be denied to administrative officers whether that power is to be exercised in the making of general rules or the making of case-by-

case determinations, and the legislature may offend against the Constitution when it confers unlimited discretion upon administrative agencies. A statute or ordinance which in effect reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative powers. The presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion. The legislature cannot vest in an administrative agency the power, in its absolute or unguided discretion, to apply or withhold the application of the law or to say to whom a law shall or shall not be applicable." 1 Am. Jur. 2d, Administrative Law, § 108, p. 907. "In order to avoid an unlawful delegation of power, the legislative authority must declare the policy or purpose of the law and, as a general rule, must also fix the legal principles which are to control in given cases by setting up standards or guides to indicate the extent, and prescribe the limits, of the discretion which may be exercised under the statute or ordinance by the administrative agency." 1 Am. Jur. 2d, Administrative Law, § 113, p. 913. "The standard or limit governing the authority and discretion of the agency in effecting the policy of the legislature must be found in the law itself, since only the legislature can create such standards and limits." 1 Am. Jur. 2d, Administrative Law, § 116, p. 919. "The personal judgment of the agency, where unrestrained, is not a standard or a sufficient standard, and even where broad standards are laid down it has been held that such standards are not sufficient if the statute or ordinance expressly adds *'in the opinion' of the agency,* or expressly confers policy-making power upon the agency." (Emphasis supplied.) 1 Am. Jur. 2d, Administrative Law, § 122, p. 929.

Law fails to meet requirements of due process clause if it is so vague and standardless that it leaves public uncertain as to conduct it prohibits or leaves judges and

jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. Giaccio v. Pennsylvania, 382 U. S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966). See, also, State v. Cota, 99 Ariz. 233, 408 P. 2d 23; People v. Grubb, 63 Cal. 2d 614, 47 Cal. Rptr. 772, 408 P. 2d 100.

The present statute authorizes the board of examiners to order sterilization as a condition to the release of the patient when required or proper "in the opinion of the board of examiners." As noted above, the personal judgment of the executive agency where unrestrained, as in the present instance, does not comprise a sufficient standard. See, Abelson's, Inc. v. New Jersey State Board of Optometrists, 5 N. J. 412, 75 A. 2d 867, 22 A. L. R. 2d 929; Thompson v. Smith, 155 Va. 367, 154 S. E. 579, 71 A. L. R. 604; State ex rel. Makris v. Superior Court, 113 Wash. 296, 193 P. 845, 12 A. L. R. 1428. In the present case, the standard set by the Legislature as the basis for sterilization of an inmate of the Beatrice State Home is so general in nature that there is no way to determine in what particular situation or under what set of facts the Legislature intended to authorize sterilization. In substance, the act simply leaves it up to the board of examiners to determine in any given case whether the act should or should not be enforced and no rules whatsoever are laid down as a guideline for such determination. It is obvious that the board may arbitrarily, depending upon the particular thinking or philosophy of its individual members, exercise such authority as to one inmate and not as to another. The act may not be uniformly applied because as membership on the board of examiners changes through the years and new individuals with varying philosophies become members thereof, the circumstances under which the act is enforced may well vary with the change in thinking occurring with the change in membership. The fact that provision is made for an appeal to the district court does not remedy this situation as judges also change and one

judge may interpret the statute one way and another in a different manner.

"An unconstitutional delegation of power is not brought within the limits of permissible delegation by the establishment of procedural safeguards, *the right to judicial review,* or by the assumption that the officer acts and will act for the public good." (Emphasis supplied.) 1 Am. Jur. 2d, Administrative Law, § 101, p. 898. "Apart from certain exceptions, it is almost universally held that arbitrary powers may not be conferred on administrative agencies, *even though the courts are authorized to review the exercise of such power.*" (Emphasis supplied.) 1 Am. Jur. 2d, Administrative Law, § 108, p. 907.

The broad powers conferred by the present act upon the board of examiners due to the lack of incorporation of adequate standards in the act are beyond the power of the Legislature to confer. In Golden v. Bartholomew, *supra,* this court stated: " 'Due process of law, as a limitation upon the police power, requires that it be exercised in such a manner that it is not arbitrary and unreasonable.' " In McGraw Electric Co. v. Lewis & Smith Drug Co., Inc., 159 Neb. 703, 68 N. W. 2d 608, it was said: "The Legislature may not constitutionally, under the guise of public interest, grant power without control or check, which may be exercised at will, with or without reason, arbitrarily or capriciously." The same general theme was followed in the case of Lincoln Dairy Co. v. Finigan, *supra,* wherein the court stated: "The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated in the authorizing act." Finally, in the case of State ex rel. Woolridge v. Morehead, 100 Neb. 864, 161 N. W. 569, L. R. A. 1917D 310, the following language may be found: "Police regulations with no other guide than the uncontrolled discretion of a board are discriminatory, and when so applied

that all persons may not engage in legitimate callings upon equal terms, are void."

In Bulova Watch Co., Inc. v. Robinson Wholesale Co., 252 Iowa 740, 108 N. W. 2d 365, it is stated: "A purely fact-finding authority may be vested in a nonlegislative body, but a discretionary power involving matters of policy is legislative in nature and may not be delegated." In O'Brien v. State Highway Commissioner, 375 Mich. 545, 134 N. W. 2d 700, it is stated: "Provisions of statute conferring upon a highway commissioner having jurisdiction of a highway power to approve or remove unauthorized roadside signs and advertising devices at will without having declared them a nuisance and without prescribing reasonably precise standards for guidance are constitutionally invalid." In Lewis v. Florida State Board of Health (Fla.), 143 So. 2d 867, it was said: "Legislature may not delegate power to enact law, to declare what law shall be, or to exercise unrestricted discretion in applying the law." That Nebraska subscribes to the principles set forth in the foregoing cases is apparent. The following language may be found in De Jonge v. School Dist. of Bloomington, 179 Neb. 539, 139 N. W. 2d 296: "The fixing of boundaries of school districts is exclusively a legislative function, but it may properly be delegated provided the Legislature prescribes the manner and the standards under which the power may be exercised." In Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451, it was stated: "The legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend."

The following language may be found in Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, 100 A. L. R. 686: " 'Plaintiff earnestly contends that the above sections of the statute are void because they vest in an administrative board absolute, unregulated, and undefined discre-

tion to grant or withhold its certificate of approval under general statutory language, which fixes no standards or tests to which an applicant may knowingly conform, and from which it can be determined whether corporations, transacting precisely the same kind and character of business, have been or may be dealt with equally; that the statute attempts to vest in an administrative board absolute and arbitrary power to say which, if any, of two or more companies, proposing to transact the same kind of business in the same manner and under like conditions, may be permitted so to do in the state of Nebraska.

" 'If the statutes, when properly construed, grant or attempt to grant to an administrative board such unrestricted and arbitrary discretion as plaintiff contends they do, then we will be compelled to hold that they are void because violative of both state and federal constitutional provisions. They would deny the equal protection of the law and violate the due process provisions of the Fourteenth Amendment to the federal Constitution. * * *'

"Clearly, in the case at bar, the purposes, for which the fund of $4,000,000 was to be expended, were to be determined by the state assistance committee and the board of educational lands and funds. * * *

"In the Nebraska acts, there are no limitations, standards, rules of guidance or criterion for the guidance of the state assistance committee and the board of educational lands and funds in allocating funds for old age assistance, unemployment relief, mothers' health, unemployment insurance, and other forms of relief therein enumerated. There is no requirement that the administrators of the acts find certain facts in determining for which of the various purposes allocations should be made and no basis for determining the amount to be allocated to each or any of the purposes therein set forth. This is all left to the discretion of the state assistance committee. Under the authorities hereinbefore cited, this con-

stitutes a delegation of legislative functions to an administrative board."

In School District No. 39 v. Decker, 159 Neb. 693, 68 N. W. 2d 354, may be found the following: " 'It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus. This principle ought not to be surrendered for convenience, or in effect nullified for the sake of expediency. However, it is impossible for the legislature to deal directly with the host of details in the complex conditions on which it legislates, and when the legislature states the purpose of the law and sets up standards to guide the agency which is to administer it, there is no constitutional objection to vesting discretion as to its execution in the administrators. * * * A statute which in effect reposes an absolute, unregulated, and undefined discretion in an administrative body bestows arbitrary powers and is an unlawful delegation of legislative powers. The presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion.' * * *

" '* * * the method and manner of enforcing a law must of necessity be left to the reasonable discretion of administrative officers, but an act of the Legislature which vests in such officers the discretion to determine what the law is, or to apply it to one and refuse its application to another in like circumstances, is void as an unwarranted delegation of legislative authority.' "

As heretofore pointed out, the policy of the Legislature has not been made clear in the act in question. It appears that it is left for the board of examiners to adopt some kind of policy for the administration of this act. In other words, the board must decide as a matter of policy in what particular type of cases the act shall or shall not be applied. In so doing, it is acting in a legislative capacity not as a mere fact-finding board and it

again becomes apparent that the Legislature has failed to set out adequate standards for the administration of the act.

It is contended that a constitutional statute along the lines mentioned cannot be adopted. This is not correct. Indeed, it would appear that if some of the major findings found by the board of examiners in this case were to be incorporated in the act as standards for guidance of the board, a different picture would be presented.

The act in question is unconstitutional and the judgment of the district court should be affirmed.

BOSLAUGH, J., dissenting.

I dissent for the reasons stated in the opinion of Judge Newton. The costs of the proceeding, including the fees of the guardian ad litem, should be taxed to the appellant.

STATE OF NEBRASKA, APPELLEE, V. ROBERT B. RAUE, APPELLANT.

157 N. W. 2d 380

Filed March 15, 1968. No. 36683.

Post Conviction Evidentiary Hearing. In a post conviction proceeding, petitioner has the burden of establishing a basis for relief.

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

Robert B. Raue and Donald R. Prinz, for appellant.

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

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

MCCOWN, J.

This is a proceeding under the Post Conviction Act.

The district court ordered an evidentiary hearing on the issue of whether the defendant's plea of guilty to an amended information charging the offense of second degree murder was voluntarily made. Thereafter the defendant's motion to vacate sentence was overruled and the defendant has appealed.

On October 10, 1961, the defendant was charged with first degree murder committed on October 9, 1961. He was arraigned in the municipal court on October 10, 1961, pleaded not guilty, and waived preliminary examination. On October 17, 1961, an information charging defendant with first degree murder was filed in the district court. Some time in October 1961, counsel was retained for the defendant by his family. On December 19, 1961, an amended information charging the defendant with second degree murder was filed. On that same date, the defendant appeared before the district court with his counsel, entered a plea of guilty to the charge of second degree murder, and was sentenced to life imprisonment.

The defendant's principal complaint is that the plea of guilty on December 19, 1961, was not a voluntary plea on his part, but was the result of pressure exerted by his own attorney, and was made while he was befuddled, unaware of his constitutional rights, the consequences of his plea, and the penalties involved. The defendant's testimony is in direct conflict with the testimony of his former attorney. The defendant's testimony is also in direct conflict with the docket entry of the trial judge who accepted the plea of guilty from the defendant.

The trial court, after an extensive and thorough review of the evidence, found that the defendant's plea of guilty was voluntarily made and not the result of any coercion or promises on the part of his attorney. In a post conviction proceeding, petitioner has the burden of establishing a basis for relief. State v. Snyder, 180 Neb. 787, 146 N. W. 2d 67; State v. Sagaser, 181 Neb. 329, 148 N. W. 2d 206.

The trial court concluded that neither the evidence nor the law supports defendant's allegations of deprivation of constitutional rights. That determination was correct. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLEON MONTGOMERY, APPELLANT.

157 N. W. 2d 196

Filed March 15, 1968. No. 36713.

1. **Criminal Law: Trial.** The right to a separate trial depends upon a showing that prejudice will result from a joint trial.
2. ———: ———. A motion for a separate trial is addressed to the sound discretion of the trial court and its ruling on such motion will not be disturbed in the absence of a showing of an abuse of discretion.
3. ———: ———. There is some danger of prejudice in any trial involving multiple defendants, but severance should be denied in the absence of a showing of prejudice against which the trial court will not be able to afford protection.
4. **Criminal Law: Right to Counsel.** Where one attorney represents two codefendants, conflict of interests which denies one or both defendants effective assistance of counsel is a distinct possibility, and when such conflict exists, the conviction cannot stand.
5. **Right to Counsel: Constitutional Law.** Assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.
6. **Criminal Law: Constitutional Law.** The court's jurisdiction at the commencement of a trial may be lost during the course of the proceedings if it develops that defendant's constitutional rights have been abridged.
7. **Criminal Law: Trial.** A motion for severance must be made before trial if a defendant is aware of a ground for severance.
8. ———: ———. Where a defendant has been unable to obtain information on the nature of a confession of a codefendant until the day of trial, the motion for severance may be made

when the confession is offered in evidence if there is a conflict of interests.

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

Daniel G. Dolan, for appellant.

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

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

SPENCER, J.

Defendant-appellant was found guilty by a jury of the crime of robbery. The sole issue presented by this appeal involves the question of a denial of appellant's constitutional right to counsel by reason of the fact that his motion for severance was overruled.

Appellant's motion was predicated on a claim of conflict of interest on the part of his counsel, an assistant public defender, in attempting to represent both the appellant and a codefendant, Foster, after the admission of an alleged confession made by Foster. The motion to delete the appellant's name from the statement or in the alternative to grant severance or a mistrial was made at the time the alleged confession was offered in evidence. Appellant's attorney had been unable to obtain a copy of it until the commencement of the trial. This confession, which was inculpatory in nature, puts the entire responsibility on appellant. It states he suggested the idea as a way to obtain money and drugs, picked the spot, and when Foster and two other companions rebelled, appellant forced them to participate in the burglary at the point of a gun. At the trial Foster repudiated this confession and denied any participation in the robbery. Foster testified he signed the confession at the urging of the police, without reading it, and on the promise that it would go easier for him if he did, and that he would get probation or "a break in court."

Before an amendment in 1957, persons who were charged jointly with the commission of a felony were entitled to separate trials as a matter of right if timely application was made to the court for that purpose. Section 29-2002, R. R. S. 1943, now provides so far as material here: "(2) Two or more defendants may be charged in the same indictment, information, or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count. * * *

"(4) If it appears that a defendant or the state would be prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder of offenses in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires."

The right to a separate trial depends upon a showing that prejudice will result from a joint trial. A motion for a separate trial is addressed to the sound discretion of the trial court and its ruling on such motion will not be disturbed in the absence of a showing of an abuse of discretion. State v. Hall, 176 Neb. 295, 125 N. W. 2d 918.

There is some danger of prejudice in any trial involving multiple defendants, but severance should be denied in the absence of a showing of prejudice against which the trial court will not be able to afford protection. State v. Brown, 174 Neb. 387, 118 N. W. 2d 328.

In the instant case, the trial court gave the jury the customary admonition that Foster's statement could be used only against Foster and was in no way to be considered as evidence against appellant. This is the procedure which has been approved by this court and is not challenged by appellant except as to its ultimate effect.

Appellant's thrust is that the statement created a conflict of interest which made it impossible for the same attorney to represent both appellant and Foster, and that the failure to exclude appellant's name from the statement or to grant severance or declare a mistrial denied appellant effective assistance of counsel.

On this phase of severance, we note that the minimum standards for criminal justice promulgated by the American Bar Association's Advisory Committee on the Criminal Trial, is as follows: "2.3 Severance of defendants. (a) When a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court should determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court should require the prosecuting attorney to elect one of the following courses:

"(i) a joint trial at which the statement is not admitted into evidence;

"(ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted; or

"(iii) severance of the moving defendant."

In the absence of a retraction by Foster, it must be conceded appellant and Foster had conflicting interests and it would have been impossible for the assistant public defender to have effectively served those conflicting interests.

An analogous situation is presented in the case of Sawyer v. Brough (1966), 358 F. 2d 70, in which the Fourth Circuit Court of Appeals, where one Sawyer and Espin were convicted of robbery, stated: "An obvious divergence of interest exists between a defendant who denies his guilt and a codefendant who not only confesses his own complicity but also accuses the other of participation in the crime. The conflict is even more crucial in the instant case by reason of the fact that Espin's confession attempts to cast most of the blame for

the robbery onto the 'other party.' In such a situation the parties are placed in adversary and combative positions. The interest of Sawyer would lie in discrediting Espin's statement of confession, particularly that portion which incriminated Sawyer, while Espin would necessarily be concerned with pursuing his attempt to appear less culpable than the other participant, who is indirectly identified as Sawyer. We conclude that it would be utterly impossible for one attorney to effectively serve both of these conflicting interests. He would be rendered impotent to effectively assist one by the necessity of protecting the other."

Does the attempted retraction in the instant case remove this defect? We believe not. If anything, it increases the problem of meeting the issue. It is true Foster did not testify against appellant, but Foster's statement was admitted into evidence and appellant's attorney, who was also Foster's attorney, could not effectively examine Foster about it without prejudicing appellant's rights. As a result, appellant's counsel is rendered impotent on the most damaging evidence presented in the trial. By this conflict appellant was denied effective assistance of counsel. Counsel, recognizing the problem, before its offer moved to strike all reference to appellant from the statement, or in the alternative to grant a severance. This motion should have been sustained.

In Commonwealth ex rel. Whitling v. Russell, 406 Pa. 45, 176 A. 2d 641, the Pennsylvania court held: "If, in the representation of more than one defendant, a conflict of interest arises, the mere existence of such a conflict vitiates the proceedings, even though no actual harm results."

Where one attorney repesents two codefendants, conflict of interest which denies one or both defendants effective assistance of counsel is a distinct possibility, and when such conflict exists, the conviction cannot stand.

Lugo v. United States (Ninth Circuit, 1965), 350 F. 2d 858.

The following from Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680, is pertinent herein: "Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, Powell v. Alabama, 287 U. S. 45, so are we clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired."

The instant case differs from any previously considered by this court under section 29-2002, R. R. S. 1943. It is difficult to see how appellant could not be prejudiced under the facts of this case. The poison is injected when the statement is admitted against Foster. It attempts to excuse Foster and to crucify appellant. Because of its nature, no instruction can entirely remove its effect from the consideration of the jury. To so find would be to embrace a myth and to ignore the realities of the situation.

The State argues that the motion for severance was properly overruled, because not timely made. A court's jurisdiction at the commencement of a trial may be lost during the course of the proceedings if it develops that defendant's constitutional rights have been abridged. Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A. L. R. 357. The State argues that neither appellant nor his attorney was taken by surprise by Foster's statement. The cases were consolidated on May

4, 1967, on the oral motion of the county attorney, and were set for trial on May 9, 1967, at 9:30 a.m. The record indicates that appellant's counsel did not receive the statement until the day the trial commenced, although the prosecution suggests it could have been available the day before. While counsel might have made a motion for severance immediately upon receipt of the statement, he waited until it was produced in evidence. As soon as it was offered, appellant's attorney, by motion, called the court's attention to the situation. Receipt of the statement on the day of the trial does not afford sufficient time to investigate the circumstances of the statement. Absent a reasonable opportunity to make such an investigation, we cannot say that the motion herein was untimely made. A motion for severance must be made before trial if a defendant is aware of a ground for severance. Where, however, a defendant had been unable to obtain information on the nature of a confession of a codefendant until the day of trial, the motion for severance may be made when the confession is offered in evidence if there is a conflict of interests.

For the reason given, the judgment herein is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

CARTER, J., dissenting.

I would affirm the conviction. Defendant's counsel received a copy of Foster's confession before the commencement of the trial. He then knew its adverse effect upon Montgomery's case. His failure to move for a severance before the commencement of the trial and afford the trial court an opportunity to rule on the issue at that time amounts to a waiver of the right of severance based on the contents of the confession.

ERMIN C. BENES, APPELLEE, V. EUGENE MATULKA, APPELLANT.

157 N. W. 2d 382

Filed March 15, 1968. No. 36720.

1. **Malicious Prosecution: Conversion.** A claim for damages for slander and malicious prosecution may not be pleaded as a counterclaim in an action for conversion even though the slander and malicious prosecution relate to the alleged conversion.
2. **Motions, Rules, and Orders: Appeal and Error.** An order striking a counterclaim is not a final order which may be reviewed upon appeal while the main action is otherwise pending in the district court.

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

Lyle Q. Hills, for appellant.

Johnston, Grossman & Johnston and Vogeltanz & Kubitschek, for appellee.

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

BOSLAUGH, J.

This is an action to recover damages for the alleged conversion by the defendant of seven steers owned by the plaintiff. The petition originally contained two causes of action, but the first cause of action was dismissed by the plaintiff.

The defendant filed an amended answer and cross-petition which denied the conversion and alleged that the plaintiff had slandered the defendant and maliciously had caused him to be prosecuted. The slander consisted of statements that the defendant had taken and stolen the plaintiff's cattle. The prosecution was a charge of selling branded cattle without a bill of sale and was based on the plaintiff's complaint that the defendant had stolen the plaintiff's cattle.

Upon the motion of the plaintiff, the amended cross-petition was stricken from the files. The defendant

filed a motion for new trial, alleging that the order sustaining the plaintiff's motion to strike the amended cross-petition was erroneous. The motion for new trial was overruled and the defendant has appealed.

The defendant contends that the plaintiff's motion to strike should have been overruled because defendant's claim for damages for slander and malicious prosecution arose out of the same transaction as the plaintiff's claim, the alleged conversion of steers, or is connected with the subject of the action and may be pleaded as a counterclaim under section 25-813, R. R. S. 1943.

In Watts v. Gantt, 42 Neb. 869, 61 N. W. 104, the plaintiff commenced an action to foreclose a real estate mortgage and requested that a receiver be appointed. Service was had by publication and a notice of application for the appointment of a receiver was published. The defendant's answer included a counterclaim which alleged that the defendant had been damaged by a libelous statement in the notice of application for a receiver. This court held that the action for libel could not be pleaded as a counterclaim in the foreclosure action and stated as follows: "In the case of Rothschild v. Whitman, 30 N. E. Rep. [N.Y.], 858, we find the following statement: 'Where a seller of goods on credit causes the arrest of the buyer for inducing the sale by deceit, and the buyer, after discharge, sues for malicious prosecution, a claim by the seller for damages for the deceit is not a valid counterclaim, since it does not arise out of the same transaction, and is not connected with the subject-matter of the action as required by Code of Civil Procedure, section 501. * * * On the contrary, the effort is here made to set up one tort committed in January against another committed in September; the one being for an injury to property, and the other for an injury to the person. The circumstance that the deceit which constituted the former was the pretext or excuse for perpetrating the latter, establishes no such connection as to satisfy the statute, any more than if A slanders B on the 4th of July, and B thrashes

him for it at Christmas.'" See, also, Barr v. Post, 56 Neb. 698, 77 N. W. 123; President & Directors of Ins. Co. of North America v. Parker, 64 Neb. 411, 89 N. W. 1040; 20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff, §§ 39, 41, 42, 45, pp. 261, 263, 264, 265; Annotation, 10 A. L. R. 2d 1167.

The claim for slander and malicious prosecution could not be pleaded as a counterclaim in the conversion action. The motion to strike the amended cross-petition was properly sustained.

The plaintiff suggests that the appeal should be dismissed because there has been no final order. The record does not show any further proceedings in the district court after the order overruling the motion for new trial directed at the order striking the amended cross-petition. The question presented is whether the order striking the amended cross-petition is a final order which can be reviewed on appeal while the conversion action is otherwise pending in the district court.

A similar question was presented in Yager v. Lemp, 39 Neb. 93, 58 N. W. 285. In that case a demurrer to a counterclaim was sustained, and a motion for leave to docket the counterclaim as a separate action was overruled. The court held that the order sustaining the demurrer to the counterclaim and the order overruling the motion to docket the counterclaim as a separate action were not final orders, and dismissed the error proceeding. See, also, Barry v. Wolf, 148 Neb. 27, 26 N. W. 2d 303; State ex rel. Sorensen v. State Bank of Omaha, 131 Neb. 223, 267 N. W. 532; Whitney v. Spearman, 50 Neb. 617, 70 N. W. 240; Welch v. Calhoun, 22 Neb. 166, 34 N. W. 348.

There has been no final order in this case and the appeal must be dismissed.

APPEAL DISMISSED.

RUSSELL LEMBURG ET AL., APPELLANTS, V. RICHARD D. NIELSEN, COUNTY SUPERINTENDENT OF HOWARD COUNTY, NEBRASKA, ET AL., APPELLEES.

157 N.W. 2d 381

Filed March 15, 1968. No. 36730.

Appeal and Error. In an error proceeding, under sections 25-1901 et seq., R. R. S. 1943, it is mandatory that the transcript be properly authenticated and timely filed to vest the appellate court with jurisdiction of the subject matter.

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

Mingus & Mingus and Dier & Ross, for appellants.

Shaughnessy & Shaughnessy, Charles E. Taylor, Jr., Paul Dobry, and Perry, Perry, Sweet & Witthoff, for appellees.

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

MCCOWN, J.

The district court sustained a motion to dismiss error proceedings in which appellants attempted to appeal an order of the county superintendent of schools of Howard County, Nebraska, dissolving one school district and attaching its territory to another under the provisions of section 79-402, R. S. Supp., 1965.

Both appeal and proceedings in error are available under section 79-402, R. S. Supp., 1965. See Languis v. De Boer, 181 Neb. 32, 146 N. W. 2d 750. Appellants elected proceedings in error under section 25-1901 et seq., R. R. S. 1943. The basic question involved is whether or not a purported transcript, not certified to or authenticated by the county superintendent of schools of Howard County, vests jurisdiction in the district court. The purported transcript consisted of photo copies of various documents which indicate that the county superintendent's order was entered on March 16, 1967. The petition in error

indicates the correct date was March 28, 1967. The petition in error was filed in the district court on April 24, 1967, and on May 25, 1967, the defendants and appellees filed a motion to dismiss the error proceedings upon the ground that the plaintiffs and appellants had failed to comply with various jurisdictional and statutory prerequisites.

Section 25-1905, R. R. S. 1943, provides in part: "The plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated or modified."

Section 25-1931, R. R. S. 1943, provides in part: "No proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one calendar month after the rendition of the judgment or making of the final order complained of; * * *."

In an error proceeding, under sections 25-1901 et seq., R. R. S. 1943, it is mandatory that the transcript be properly authenticated and timely filed to vest the appellate court with jurisdiction of the subject matter. Frankforter v. Turner, 175 Neb. 252, 121 N. W. 2d 377. See, also, Anania v. City of Omaha, 170 Neb. 160, 102 N. W. 2d 49.

The appellants urge that we apply the rule that where a duty is placed on a public official in connection with acts necessary to perfect appeal, his failure to perform cannot be charged to the litigant nor operate to defeat the appeal. In order to apply this rule, we would first have to assume from a photo copy appearing in a purported but uncertified transcript, that a request for a transcript was delivered to the county superintendent and he failed or refused to furnish it. There is no bill of exceptions here from which such facts can be determined. It should also be noted that section 25-1906, R. R. S. 1943, requires the county superintendent, upon request and being paid the lawful fees therefor, to furnish an authenticated transcript of the proceedings "to either of the parties * * *or to any person interested in procuring

such transcript." The county superintendent is not required to file a transcript anywhere. The responsibility for filing a proper transcript within time is placed directly on a plaintiff in error by section 25-1905, R. R. S. 1943.

What has been said makes it unnecessary to discuss other issues raised. The action of the district court in sustaining the motion to dismiss the error proceedings was correct and is affirmed.

AFFIRMED.

OCTA ROBBINS, APPELLANT, V. THE NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY, A CORPORATION, ET AL., APPELLEES.

157 N. W. 2d 188

Filed March 15, 1968. No. 36734.

1. **Insurance: Fraud and Deceit.** Where a question in an application for reinstatement of an insurance policy calls for an answer peculiarly within the knowledge of the applicant, an untrue answer relating to a matter material to the risk and relied upon by the insurer to his injury, if timely advantage is taken thereof by the insurer, will void the policy.
2. **Insurance: Notice.** Notice to the agent is notice to the principal, where such notice is received by the agent while acting within the scope of his authority.
3. **Insurance: Principal and Agent.** An insurance agent, empowered to solicit applications for insurance and to receive payments of the premiums, binds the company by knowledge acquired in and about the preparation of the application and by representations made to the insured in so doing. The same rule applies where the agent obtains an application for reinstatement.
4. ———: ———. Information coming to a soliciting agent or a premium collector after the issuance of a policy or a reinstatement of a lapsed policy for nonpayment of premiums, in which he participated, is not imputable to his principal.
5. **Estoppel: Pleading.** Ordinarily an estoppel or waiver must be pleaded by the party invoking it, but when the facts showing an estoppel or waiver are within the issues made by the plead-

ings and the evidence thereof is admissible for any purpose, it is not necessary that the estoppel or waiver shall be specifically pleaded.

6. **Estoppel: Insurance.** An estoppel to assert a lapse of a policy of insurance for nonpayment of premiums cannot be successfully asserted unless an established custom by the insurer inconsistent with the policy is shown, upon which the insured relied to his injury, and that it would be inequitable under the circumstances to enforce the provisions of the contract providing for the lapse of the policy for nonpayment of the premium.
7. **Insurance: Fraud and Deceit.** Applications for reinstatement of a policy of insurance after a lapse of the policy for nonpayment of premiums are not required to be attached to the original policy, unless so provided by the policy, in order to constitute a basis for fraud in procuring a reinstatement.

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

Leslie D. Carter and Edward A. Mullery, for appellant.

Crossman, Barton & Norris, for appellee National Life & Acc. Ins. Co.

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

CARTER, J.

This is an action to reform a policy of life insurance together with certain applications for reinstatement and an application for a change in the type of the policy. The action having been brought subsequent to the death of the insured, the plaintiff, in addition to reformation, seeks a money judgment for the amount due thereunder after reformation together with costs and attorney's fees. The trial court found for the defendant and dismissed the action. The plaintiff has appealed.

On November 1, 1963, the defendant, The National Life and Accident Insurance Company, issued a policy of life insurance to Nathelee R. Morgan in which the plaintiff, Octa R. Robbins, the mother of the insured, was the named beneficiary. Nathelee died on February 27, 1966, a claim for the proceeds of the policy was duly

made, and payment declined on the basis of the fraud of the insured in obtaining reinstatements after the policy had lapsed for nonpayment of premiums and in an application for a change in the type of the policy. The evidence shows that the policy was reinstated three times, July 11, 1964, September 19, 1964, and October 26, 1964, after it had lapsed for nonpayment of premiums. The application for the change in the type of policy was also filed on October 26, 1964, and a supplemental agreement, pursuant thereto, was issued by the insurance company and attached to the original policy.

The insurance company filed its amended answer and cross-petition, alleging that the insurance policy lapsed on the three occasions mentioned for nonpayment of premiums; that Nathelee filled out and signed applications for reinstatement on each of the three occasions; that certain answers as to her condition of health contained in the applications for reinstatement were false; that Nathelee knew such answers were false; that the answers were relied on by the insurance company; and that the insurance company would not have reinstated the policy if the questions had been truly answered. The insurance company alleged that it tendered a refund of premiums paid on the policy, which tender was refused. The insurance company prayed for a judgment that the policy was never reinstated, that the reinstatements were void, and that the policy be canceled and held to be of no force and effect.

It is contended by the plaintiff that the agent of the insurance company had knowledge of the physical condition of the insured at the time the applications for reinstatement and the application for a different type of policy were taken, that the knowledge of the agent constituted knowledge by the insurance company, and that the insurance company is estopped to assert a lack of knowledge of the alleged fraud. The following rule is relied upon it in support of this theory: " '* * * It being within the scope of his agency to collect premiums, it

must be held that his knowledge was the knowledge of his principal, and hence, when he collected premiums, and paid them to appellant, with knowledge of the facts, such knowledge must be imputed to it.' " Arendt v. North American Life Ins. Co., 107 Neb. 716, 187 N. W. 65. See, also, 3 Couch on Insurance 2d, § 25:132, p. 655; Waters v. Nebraska Mut. Ins. Co., 108 Neb. 1, 187 N. W. 125; Ross v. First American Ins. Co., 125 Neb. 329, 250 N. W. 75. But information coming to a soliciting agent or a premium collector after the issuance of a policy or a reinstatement of a lapsed policy for nonpayment of premiums, in which he participated, is not imputable to his principal. Krug Park Amusement Co. v. New York Underwriters Ins. Co., 129 Neb. 239, 261 N. W. 364. See, also, 3 Couch on Insurance 2d, § 26:132, p. 655.

Plaintiff testified that from November 1, 1963, the date of the policy, to March 1964, Fred Fox, an insurance salesman and collection agent for the insurance company, called at her home on numerous occasions. She testified that he came there to collect premiums on insurance policies held by Nathelee, herself, and a grandson. Nathelee was residing with her during the period involved in this litigation. Nathelee was employed as a waitress and was not always there. She said that his frequent visitations were made to collect premiums and to solicit additional insurance from her and her relatives. These visitations continued into March 1964. She informed Fox that Nathelee was in the hospital in January 1964 and that Fox visited her in the hospital at that time. She said that Fox visited her both as an insurance agent and as a friend before and after Nathelee's death. She said, also, that Fox said that if Nathelee was unable to pay the premiums, he would pay it for her. Plaintiff said that she saw Fox four times from April 1 to July 11, 1964, and that he was visiting just as a friend. Premiums were paid by Nathelee until June 1964, when the policy lapsed for the first time. One Julian Riviera came to plaintiff's home in July 1964, about a reinstatement of the policy.

Riviera handled all the reinstatements. She did not inform Riviera that Nathelee had had an operation, nor did she inform him that the operation was a hysterectomy induced by a malignant tumor, known to the medical profession as a squamous cell intraepithelial carcinoma of the cervix of the uterus, which we shall hereafter refer to as a cancer.

Fox testified that he was a staff manager for the insurance company on November 1, 1963, and that he sold the original insurance policy to Nathelee on that date. As staff manager he had supervision over several specific areas. He or the agent assigned to the area in which Nathelee resided collected the monthly premiums. He testified that he did not know of the lapse in premium payments or the reinstatement on July 11, 1964. He said he did not know of the subsequent lapses or reinstatements, or the application for change of policy. He denied that he ever offered or agreed to pay any default in the payment of premiums for Nathelee. He said he did not visit plaintiff or Nathelee very often. He testified that he did visit Nathelee in the hospital in January 1964, but did not discover the reason for the hospitalization. He made no inquiry because the policy was in force and had never been in default of premium payments to that time. He said that prior to the time of the first default and application for reinstatement, he was succeeded as staff manager for the area by Riviera and that the latter had the sole handling of the collections, reinstatements, and the change in policy terms without any knowledge on his part.

Riviera testified that he was employed by the insurance company in 1958 and had continued in its employ until March 18, 1966. He first met Nathelee and plaintiff in June 1964. At that time he called in reference to Nathelee's insurance policy which was about to lapse for nonpayment of the premium. He handled the three reinstatements here involved, the first under date of July 11, 1964. He testified that in each instance he asked Nathelee each of the health questions contained on rein-

statement application blanks, correctly checked her answers to the questions thereon, and handed the application to her which she then signed. There is no evidence in the record disputing this evidence and no contention is made that the answers of Nathelee were not correctly recorded on the application. The purport of her answers on the applications was that she was then in good health, that since the policy was issued she had not consulted or been treated by a doctor, or had any injury, illness, or operation, or been confined to a hospital or other institution for any reason. It is not here disputed that she had consulted a doctor on many occasions, that she had been confined to a hospital, and that she had had a serious operation for the removal of a cancer. Riviera had visited plaintiff and Nathelee at their home in collecting premiums. He stated that he never heard anything in conflict with the answers given by Nathelee in her applications and, while he knew Fox, he was never told anything concerning the health of Nathelee by him.

There is no evidence in this record that Fox gained any knowledge inconsistent with the statements made by Nathelee in her signed applications for reinstatement. At the time the applications were made he had been transferred from the area and said that he had nothing whatever to do with the applications for reinstatement. He said that while he was working the area before any policy lapse occurred he gained no information contrary to the fraudulent statements made in the applications. It is true that Fox knew that Nathelee was hospitalized at a time when the policy was in force and before any default in premium payments had occurred. This evidence will not sustain a finding that Fox obtained knowledge imputable to the insurance company that would estop it from asserting the fraud of Nathelee in falsely answering the health questions set out in the applications for reinstatement. The testimony of Riviera indicates that he had no such imputable knowledge, nor is it claimed by the plaintiff that he did. We

necessarily hold that the record fails to establish that any agent of the insurance company had any knowledge obtained within the scope of his agency to collect premiums and therefore imputable to his principal which would estop the insurance company from asserting the fraud contained in the applications for reinstatement.

The plaintiff contends that the insurance company is estopped to assert the nonpayment of the premium as a defense for the reason that the lapse of the insurance policy was the fault of the collection agent of the insurance company and not the insured. There are cases which hold, under certain circumstances, that an insurance company may be estopped to assert the nonpayment of a premium as a defense. Such a rule has been applied where it was customary to have a collector call for the premium which was relied on by the insured and he failed to call at the direction of the company to encourage a lapse. Carey v. John Hancock Mut. Life Ins. Co., 114 App. Div. 769, 100 N. Y. S. 289. Where a notice of annual premium was sent for 10 years and the company, desiring a lapse, failed to send a notice for the eleventh year, believing the insured relied on it, the company was held to be estopped. Pierce v. Massachusetts Accident Co., 303 Mass. 506, 22 N. E. 2d 78. A past course of conduct of acceptance of premiums after the grace period may establish a waiver by the insurer to declare a forfeiture for failure to pay premiums on the stipulated date. McCary v. John Hancock Mut. Life Ins. Co., 236 Cal. App. 2d 501, 46 Cal. Rptr. 121.

In the instant case we find no facts to sustain an estoppel. The general rule is: An estoppel to assert a lapse of a policy of insurance for nonpayment of premiums cannot be successfully asserted unless an established custom by the insurer inconsistent with the policy is shown, upon which the insured relied to his injury, and that it would be inequitable under the circumstances to enforce the provisions of the contract providing for the lapse of the policy for nonpayment of the premium.

There is no evidence of a custom by the insurance company to collect premiums upon which the insured relied. For ought this record shows the insurance company's collection agent sought without success to collect the unpaid premiums. There is no evidence of any kind to show that the nonpayment of the premiums was the fault of the agent of the insurance company and not the insured. Facts are not pleaded or proven that would support an estoppel. It is fundamental that a party alleging an estoppel must plead and prove the facts upon which the estoppel is based. U. S. Tire Dealers Mut. Corp. v. Laune, 139 Neb. 26, 296 N. W. 333; Bors v. McGowan, 159 Neb. 790, 68 N. W. 2d 596. The cases cited by the plaintiff are clearly distinguishable. The defense of the estoppel of the insurance company to show the lapse of the policy for nonpayment of premium and its subsequent fraudulent reinstatement is without merit.

In the policy involved here is a provision providing that the policy and the application therefor constitute the entire contract. It is provided by section 44-502, R. R. S. 1943, that the policy shall constitute the entire contract between the parties, but if the company desires to make the application a part of the contract it may do so, provided a copy of the application is attached to the policy when issued and the policy shall contain a provision that the policy and the application constitute the entire contract between the parties. The provisions of the statute were complied with in the instant case. It is the contention of the plaintiff that the insurance company cannot defend on the fraud of the insured contained in an application for reinstatement which is not attached to the policy under the provisions of this statute. The applications were not attached to the original policy. There are two reasons why there is no merit to this contention. In the first place, a reinstatement may be made in writing within 5 years from such default upon evidence of insurability satisfactory to the company and payment of arrears of premiums with interest

and the payment or reinstatement of any other indebtedness to the company on the policy. There is no requirement in the statute or in the policy that the application for reinstatement be attached to the policy. In the second place, section 44-502, R. R. S. 1943, is in terms made inapplicable to policies of industrial insurance or where the premiums are payable monthly or oftener. The premiums in this case were payable monthly and are not subject to the requirements of section 44-502, R. R. S. 1943, even if otherwise it came within its terms.

Dr. John Allely, a general medical practitioner, was Nathelee's personal physician. He testified that Nathelee had consulted him on several occasions before and after the date of the policy. On December 30, 1963, she consulted him about irregular menstrual periods and he eventually thought she had a female infection in the pelvic region. He referred her to Dr. Boelter, an obstetric-gynecologist specialist. After a consultation between the two doctors, they suspected a malignancy and on January 3, 1964, she was placed in the hospital for further tests. It was determined that she had a squamous cell intraepithelial carcinoma of the cervix of the uterus and on January 10, 1964, she was operated upon, the operation being a hysterectomy which included the removal of the malignancy. Dr. Allely states that the malignant tissue was wholly removed and a complete cure of the cancer effected. She was under the care of Dr. Allely for several months after the operation and until after one or more of the applications for reinstatement were made out. Dr. Allely testified that the hysterectomy completely removed and cured the malignancy and, in his opinion, Nathelee was in good health thereafter. This conclusion, he said, is irrespective of the general medical view that a lapse of 5 years without evidence of recurrence is necessary to make such a determination. Dr. Allely stated that Nathelee suffered a ruptured aneurysm of the brain on September 24, 1965. On February 26, 1966, she again suffered a ruptured aneurysm

from which she died on February 27, 1966.

Dr. J. P. Glover, Jr., associate medical director of the defendant insurance company testified that applications for reinstatement submitted to the company which indicate no health problems are handled by lay underwriters, but when there is health information given or inferred they are referred to the medical department for evaluation. Where the answers to the questions on the application for reinstatement indicate a standard risk, but such answers are false, no method of evaluation or the securing of additional information exists, and the insurability of the applicant cannot be determined. Under the medical rules adopted by the company, the type of cancer here involved would require a postponement for insurance for 3 years, in other words that the applicant was not insurable for 3 years. He testified that true answers on applications for reinstatement are material to the risk and, if the true facts had been known, the lapsed policy would not have been reinstated.

The evidence conclusively establishes the falsity of the answers to health questions contained in the applications for reinstatement. Where questions in an application for the reinstatement of a lapsed insurance policy for the nonpayment of premiums calls for answers peculiarly within the knowledge of the applicant, untrue answers relating to a matter material to the risk and relied on by the insurer, if timely advantage is taken thereof by the insurer, will void the policy. Gillan v. Equitable Life Assurance Soc., 143 Neb. 647, 10 N. W. 2d 693, 148 A. L. R. 496. The proof of waiver of the fraud, or estoppel to assert it by the company, is clearly insufficient and the policy of insurance is void because of the fraud of the insured contained in the applications for reinstatement. No basis for the reformation of the policy or the applications for reinstatement is shown and the trial court properly dismissed the action.

AFFIRMED.

LAWRENCE W. MCNEILL, APPELLEE, V. NORMA JEAN MCNEILL, APPELLANT.

157 N. W. 2d 185

Filed March 15, 1968. No. 36746.

1. **Parent and Child.** 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.
2. ———. Ordinarily the superior right of a parent who does not appear to be unfit to have custody of his or her minor child and who has not forfeited such right will prevail as against a party other than a parent in an original proceeding; but where custody has previously been awarded to one who is not one of the parents by a prior final order of the court, a change in custody will not be decreed in favor of a parent who previously forfeited custody or was found unfit to have such custody in the absence of a showing of such a change in circumstances that a modification of the original order is required in the best interests of the child.
3. ———. The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

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

Lyons & Carroll, for appellant.

Bosley & Bosley, for appellee.

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

NEWTON, J.

This action is one for a change in custody of two minor children.

On June 21, 1966, the plaintiff Lawrence W. McNeill obtained a decree of divorce from Norma Jean McNeill, defendant, since which time defendant has become the

wife of Curtis Meyer. The parties had two minor children, Patrick, who was born on May 11, 1956, and Brenda, who was born on August 1, 1962. The decree entered in the divorce action found that plaintiff was a fit and suitable person to have the care and custody of Patrick and awarded custody of Patrick to the plaintiff until the further order of the court. The decree also provided that: "* * * by reason of defendant's disregard for her marital obligations, she has forfeited her right to have the care and custody of the parties' minor child, Brenda Lynette McNeill, * * *" and awarded custody of Brenda to plaintiff's sister, Mrs. John Sines, with a provision that plaintiff pay $35 per month for Brenda's support. Defendant was given certain visitation rights permitting her to take the two minor children into her custody on the first Sunday or Monday of each month between the hours of 9 a.m. and 8 p.m.

On May 15, 1967, defendant filed an application requesting that she be given custody of the two minor children and that plaintiff be required to pay $35 per month for the support of each child. Hearing was had thereon on May 25, 1967, at which time the court ruled: "* * * that the circumstances of the parties have not changed so as to warrant a change in the Decree as to custody * * *" and defendant appeals.

The evidence may be summarized. Defendant and her present husband now rent a home consisting of two bedrooms, a living room, and a kitchen. The home is adequately furnished. Although defendant had been, during her former marriage and up to the time she remarried, employed in various restaurants, she is no longer working but spends her time in the home. Her present husband is a construction worker, earning $120 per week, and out of his earnings they pay rent of $55 per month, have one or two payments left to make on their car, owe $70 on a sofa, and $700 to a finance company. Monthly payments on the latter two items amount to $7.50 and $28 respectively. Defendant, since her remar-

riage, neither drinks nor smokes, gets along fine with her present husband, and he is willing to accept the children into his home. He is well acquainted with Brenda but knows Patrick only by sight. Mr. Meyer had had some drinking problems in the past and had been arrested on two occasions, but since his marriage has been reasonably abstemious. Mr. Meyer was 28 years of age at the time of hearing and defendant, nearing 31 years of age. Defendant's present home is an average home, maintained in reasonable condition, but she concedes were she to get both children, she would need a larger home. She has taken full advantage of her visitation rights so far as Brenda is concerned, but has not been able to do so with the boy as he avoids her and does not wish to go with her. Patrick appears to have been very emotionally disturbed over the separation of his parents, resents his mother's having left, and is further disturbed by her attempts to see him.

Mrs. John Sines is 43 years of age, a former school teacher who attended McCook Junior College, and who resides with her husband. They have three boys, the oldest of which is in college and the youngest, 14 years of age. Her husband, John Sines, is on his church board and active in local Boy Scout affairs and other youth activities. They have an adequate home where Brenda is happy and well cared for, with other children her own age in the neighborhood to play with. Brenda is a well-behaved child normally, but occasionally needs correction after having visited in the home of her mother. Without going into details, the evidence definitely indicates that owing to her visits in the mother's home, she has become extremely precocious for a 4-year-old girl in some sexual aspects.

Patrick appears to be well cared for in his father's home and is happy there.

It would appear that under the circumstances, the trial court arrived at a wise decision, particularly in view of the fact that some question of defendant's fit-

ness to have the minor children still remains, but aside from this question, this record would not justify a change in custody. Insofar as Patrick is concerned, the following rule is applicable: "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, 180 Neb. 83, 141 N. W. 2d 445.

Regarding Brenda, ordinarily the superior right of a parent who does not appear to be unfit to have custody of his or her minor child and who has not forfeited such right will prevail as against a party other than a parent in an original proceeding; but where custody has previously been awarded to one who is not one of the parents by a prior final order of the court, a change in custody will not be decreed in favor of a parent who previously forfeited custody or was found unfit to have such custody in the absence of a showing of such a change in circumstances that a modification of the original order is required in the best interests of the child. Raymond v. Cotner, 175 Neb. 158, 120 N. W. 2d 892. See, also, Pollard v. Galley, 178 Neb. 587, 134 N. W. 2d 261.

The trial court is generally in a much better position to determine questions pertaining to the custody of minor children and where necessary can make use of its power to make an independent investigation of surrounding circumstances. Its discretionary action in this regard should not be lightly considered. "The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence." State ex rel. Speal

v. Eggers, 181 Neb. 558, 149 N. W. 2d 522.
The judgment is affirmed.

AFFIRMED.

CLARA M. WYMORE, ADMINISTRATRIX OF THE ESTATE OF MAX E. WYMORE, DECEASED, APPELLEE, V. FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, A CORPORATION, APPELLANT.

157 N. W. 2d 194

Filed March 15, 1968. No. 36753.

Insurance: Contractors. For medical payments coverage, accidental bodily injury to an independent contractor in the repair of a family home, without other circumstances, is not excluded by the following clause: The policy "Does Not Apply * * * to bodily injury to * * * any person * * * if such person * * * is on the premises because of a business conducted thereon, or is injured by an accident arising out of such business."

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

Ray C. Simmons, for appellant.

Kerrigan, Line & Martin, for appellee.

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

SMITH, J.

Plaintiff claimed benefits under medical payment provisions of an insurance policy issued by defendant to homeowners. Plaintiff recovered judgment, and defendant has appealed. The parties disagree on the meaning of an exclusion clause.

The claim was based on accidental injury to Max E. Wymore at the home of the policyholders, Darrell D. and B. L. DeVoe. Wymore had fallen off a ladder while performing an independent contract to repair the roof of

the DeVoe home. Resultant injuries caused his death on June 22, 1966, 2 days after the fall.

Insuring agreements in Section II of the policy covered the accidental injury unless the event fell within exclusion clause (g) (3) which reads: "Section II * * * Does Not Apply: * * * (g) * * * to bodily injury to * * * (3) any person * * * if such person * * * is on the premises because of a business conducted thereon, or is injured by an accident arising out of such business."

Wymore was not on the DeVoe premises because of a business conducted there. "Because of" means "by reason of: on account of." Webster's Third New International Dictionary (Unabr. Ed. 1961), p. 194. See, also, Random House Dictionary (Unabr. Ed. 1966), "because," p. 132. The phrase does not signify that the relation between "person * * * on the premises'" and "a business conducted thereon" is casual or secondary. The relation is primary in ordinary understanding. For example, the customer buying a product in a store is on the premises because of a business conducted there. On the other hand, the newsboy collecting at a subscriber's door is not on the premises because of a business conducted there. The relation between the activity and the premises in the one case is primary whereas the relation in the other case is secondary. The interpretation holds for the remainder of clause (g) (3) which applies to "such business."

The above interpretation is said to reduce clause (g) (3) to surplusage. The policy contains the following definitions: " 'Business' includes trade, profession or occupation. * * * 5. Premises * * * Defined: (a) * * * residence * * * except business property * * *. 'Business property' includes (1) property on which a business is conducted * * *. The Insured's property shall not constitute 'business property' because of * * * rental of space in the Insured's residence for incidental office, school or studio occupancy * * *." An exclusion clause reads:

"Section II * * * Does Not Apply: (a) (1) to any business pursuits of an Insured * * *."

Exclusion clauses (a) (1) and (g) (3) are not literally coextensive; clause (g) (3) includes a business conducted by a tenant within the definition of nonbusiness property. Overlap of course exists, but it seems unavoidable in the process of interpretation.

The accidental injury to Wymore was an insured event under the insuring agreements, and it was not excluded from coverage. The judgment is affirmed. For services of her attorney in this court plaintiff is allowed $750 to be taxed as costs. See § 44-359, R. R. S. 1943.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. IRVIN LEON COOPER, APPELLANT.

157 N. W. 2d 412

Filed March 22, 1968. No. 36603.

1. **Criminal Law: Guilty Plea.** When a defendant voluntarily and understandingly pleads guilty with full knowledge of his constitutional rights and has been informed of the consequences of his guilty plea, said plea is conclusive and it is immaterial whether or not he gave a prior confession or statement without being advised of his right to remain silent; that his statements could be used against him, and of his right to counsel; and this is particularly true where the alleged coerced confession was not used against him.
2. **Criminal Law: Evidence.** There must be proof that a confession, admission, or statement was used in evidence against the defendant.
3. **Criminal Law: Constitutional Law.** Where the record shows that a defendant had counsel who appeared with him in open court when he entered his plea of guilty, that when sentenced he was advised of the effect thereof and the penalty attached, and after being cautioned, elected to stand on his plea of guilty, he cannot be heard to complain that he was deprived of his constitutional right to a warning of the consequences of his plea of guilty.

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

Michael J. Dugan, for appellant.

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

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

WHITE, C. J.

The defendant, pleading guilty, was sentenced to 10 years for robbery and now, in this post conviction proceeding, asserts he was entitled to an evidentiary hearing on his allegations that the guilty plea was coerced because he had previously given a confession obtained in violation of his Fifth Amendment rights promulgated in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974. He also asserts he was not advised of the consequences of his plea and the penalty involved.

The record conclusively refutes these contentions. The defendant was arraigned in the Omaha municipal court on May 2, 1966, and by his own admission in his motion, his constitutional rights were explained to him. On May 4, 1966, he was represented by counsel at his arraignment in district court, his constitutional rights were explained to him, and he pleaded guilty. The record shows an exhaustive and cautionary interrogation by the district judge at this time. On May 24, 1966, represented by counsel, defendant appeared for sentencing. As a further precaution the district judge informed the defendant, "* * * 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." No confession or statements of the defendant of any nature whatsoever were used against him at any time. The record stands

undenied and uncontradicted. It requires no further elaboration.

When a defendant voluntarily and understandingly pleads guilty with full knowledge of his constitutional rights and has been informed of the consequences of his guilty plea, said plea is conclusive and it is immaterial whether or not he gave a prior confession or statement without being advised of his right to remain silent, of his right to counsel, and that his statements could be used against him; and this is particularly true where the alleged coerced confession was not used against him. State v. Fowler, *ante* p. 333, 154 N. W. 2d 766; State v. Losieau, 180 Neb. 671, 144 N. W. 2d 406; State v. Snyder, 180 Neb. 787, 146 N. W. 2d 67; United States v. French, 274 F. 2d 297; Jones v. State of Florida (Fla. App.), 165 So. 2d 191; Williams v. State of Florida (Fla. App.), 186 So. 2d 279; Waley v. Johnston, 316 U. S. 101, 62 S. Ct. 964, 86 L. Ed. 1302; United States ex rel. Perpiglia v. Rundle, 221 F. Supp. 1003; Harding v. State of Montana (Mont.), 424 P. 2d 130. There must be proof that a confession, admission, or statement was used in evidence against him. State v. Fowler, *supra*.

And where the record shows, as here, that a defendant had counsel who appeared with him in open court when he entered his plea of guilty, that when sentenced, he was advised of the effect thereof and the penalty attached, and after being cautioned, elected to stand on his plea of guilty, he cannot be heard to complain that he was deprived of his constitutional right to a warning of the consequences of his plea of guilty. State v. Losieau, *supra*.

We note that the plea entered herein was prior to the effective date of Miranda v. Arizona, *supra*. However, since we are disposing of this case on the record we assume that the maximum reach of defendant's allegations invoked his pre-Miranda rights with respect to the alleged coerced confession. And we also note the absence of an allegation that he was not guilty. In the absence

of such an allegation, defendant's claim becomes a mere ritualistic contention. See United States v. French, *supra*. After representation by at least two attorneys, and after a repeated and exhaustive warning of all of his rights on two occasions, the defendant pleaded guilty, and then after being cautioned again, elected to stand on his plea. There is utterly no merit to his petition as the record conclusively demonstrates.

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

AFFIRMED.

JOSEPHINE EDEN, INDIVIDUALLY, AND JOSEPHINE EDEN, SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM F. EDEN, DECEASED, APPELLEE AND CROSS-APPELLANT, V. WILLIAM JOHN EDEN ET AL., APPELLANTS AND CROSS-APPELLEES, IMPLEADED WITH COMMERCIAL SAVINGS AND LOAN ASSOCIATION, A CORPORATION, ET AL., APPELLEES AND CROSS-APPELLEES, MARGARET EDEN ET AL., INTERVENERS-APPELLEES AND CROSS-APPELLEES.

157 N. W. 2d 543

Filed March 22, 1968. No. 36649.

1. **Trusts: Joint Tenancy.** The form and nature of a joint deposit in the name of two persons in a bank or a savings and loan association is not, upon the death of one of the coowners, conclusive as to the ownership of the deposit by the surviving coowner as between him and a third person who claims that the surviving coowner holds a legal title to the funds in trust for the third party.
2. **Trusts: Evidence.** Parol evidence is admissible in an action by strangers to establish an oral trust in a joint bank or savings account.
3. ———: ———. Evidence must be clear, satisfactory, and convincing in character to establish an express oral trust.
4. **Evidence: Appeal and Error.** If conflicting evidence is specially resolved by the trial court according to the demeanor of the witnesses, the resultant findings will be considered correct on de novo review in this court.

5. **Evidence.** In weighing the evidence, particular significance may be given to the fact that a man remains silent when confronted with serious and responsible evidence against himself which is within his power to contradict.

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

Marchetti & Samson and Joseph J. Vance, for appellants.

Martin A. Cannon and Matthews, Kelley & Cannon for appellees and interveners-appellees.

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

WHITE, C. J.

Plaintiff, widow of the deceased, sues personally and as administratrix for the recovery from two defendant sons of a jointly held savings account. The two daughters intervene. The principal question involved is the determination of whether an oral trust has been established in two jointly held savings accounts in the sum of $17,000 that had been deposited by the deceased in the name of himself and the defendant son, William John Eden. The district court held that an oral trust in the accounts had been established and it rendered judgment accordingly. The two savings and loan associations, being stakeholders in the case, did not actively participate and do not appeal. The two defendant sons appeal. We affirm the judgment.

Plaintiff in her action asserts that the joint savings accounts were the common property of herself and the deceased and were deposited without her consent; and second, claims that the interest of her deceased husband in the accounts with the son, William John Eden, were subject to administration as an asset of the deceased's estate. It is undisputed that the funds in the joint deposit were held jointly by the deceased and the defendant, William John Eden, at the time of the death of the de-

ceased, but after his death the defendant, William John Eden, withdrew them and redeposited them to the joint account of himself and his brother, Albert Eden, and for that reason Albert Eden is a party defendant. The interveners, the two daughters of the deceased, joined in the prayers of the plaintiff's petition and prayed that in the event that such relief was not granted to the plaintiff, the defendants be found to be trustees of the fund for the benefit of four children of the deceased.

The evidence shows that the deceased during his lifetime deposited some $17,000 in two joint accounts with the defendant son, William John Eden. Defendants contend first that the statute, section 8-317, R. R. S. 1943, controls the disposition and ownership of joint deposits in savings and loan associations and that parol evidence cannot be used to establish a trust in the funds involved. This first contention involves the effect of section 8-317, R. R. S. 1943. This statute, insofar as is material here, provides: "Wherever any such certificates are made to the joint account of two or more persons, the shares represented thereby shall be payable to any one of them or to the survivor or to any one of the survivors of them." Section 8-136, R. S. Supp., 1965, formerly section 8-167, R. R. S. 1943, is a similar statutory provision relating to commercial banks. These two statutes have been construed as providing for the same disposition of property. Rose v. Hooper, 175 Neb. 645, 122 N. W. 2d 753. In Tobas v. Mutual Building & Loan Assn., 147 Neb. 676, 24 N. W. 2d 870, this court said that the language of section 8-317, R. R. S. 1943, meant it was: "* * * intended for the protection of the building and loan association and, in addition *thereto, fixes the property rights of the persons named,* unless a contrary intent affirmatively appears from the terms used in the stock certificate." (Emphasis supplied.) The contention, therefore, is made that this is a rule of property as between joint depositors and controls the instant case. The case here, of course, involves third parties, the widow and inter-

vener heirs of the deceased. The argument in the briefs in this case overlooks the direct holding of this court in Nelson v. Rasmussen, 164 Neb. 274, 82 N. W. 2d 418, where this court said, at page 290, in construing former section 8-167, R. R. S. 1943, now section 8-136, R. S. Supp., 1965, as follows: "The form and nature of a joint deposit in the name of two persons in a bank is not, upon the death of one of the co-owners, conclusive as to the ownership of the deposit by the surviving co-owner as between him and a third person who claims that the surviving co-owner holds the legal title to the funds in trust for the third party." To hold otherwise would permit a trustee or trustees to defeat a trust by the simple expedient of depositing the money in a joint account in a bank or savings and loan association account. There is no merit to this contention.

Parol evidence is admissible in an action of this nature to establish an oral trust. Minahan v. Waldo, 161 Neb. 78, 71 N. W. 2d 723. There is no attempt in this case to vary the terms or the conditions of the deposit contract, but rather parol evidence is being used here in an action by strangers to the contract seeking to establish a trust agreement with reference to the disposition of the funds and inconsistent with the terms of the joint tenancy deposit. Section 8-317, R. R. S. 1943, only fixes the "property rights of the persons named." See Tobas v. Mutual Building & Loan Assn., *supra.*

Defendants' next contention is that the evidence is insufficient to establish the existence of an oral trust. The rule is that the evidence must be clear, satisfactory, and convincing in character to establish an express oral trust. Halsted v. Halsted, 169 Neb. 325, 99 N. W. 2d 384. All deposits in the joint accounts were made in the name of the deceased. The intervener sister testified that while driving them back to their home from the cemetery, the defendant, William John Eden, advised the intervener sisters that their father had $17,000 in two savings and loan associations and that their father had told the de-

fendant to pay the bills with the money and to divide the remainder between the four children (the two defendants and the two intervener sisters). The interveners also testified that on the Sunday following the funeral, while at the home of the defendant, William John Eden, there was a discussion of the funds in the account. This discussion involved the payment of the deceased's bills and the mechanics of the distribution of the funds according to the trust agreement. This testimony stands uncontradicted and undisputed in the record. The defendant William John Eden remained silent and it stands uncontradicted and undisputed in spite of the fact that he was present at the trial and testified. Cross-examination of the interveners left this oral testimony unshaken and stronger. The evaluation by the trial court of the oral testimony of these witnesses under these circumstances is a persuasive if not controlling consideration on an examination de novo on appeal in this court. This court in determining the weight of the evidence will consider the fact that the trial court observed the witnesses and their manner of testifying. And if conflicting evidence is specially resolved by the trial court according to the demeanor of the witnesses, the resultant findings will be considered correct on de novo review in this court. Meadows v. Skinner Manuf. Co., 178 Neb. 856, 136 N. W. 2d 184; Schoenrock v. School Dist. of Nebraska City, 179 Neb. 621, 139 N. W. 2d 547. The application of the rule is stronger here because the evidence is undisputed and is particularly significant in determining whether the weight of the evidence reaches the point of being clear and convincing.

Beyond this we examine the circumstances. The record shows that the defendant, William John Eden, after the conversation with the interveners withdrew the funds from the joint accounts and placed them in the name of himself and Alfred Eden, his brother. It further appears that after this, the defendant, William John Eden explained to the interveners that Albert's name

was placed on the accounts "In case something happened to him, someone could get the money out." It seems odd that he would transfer the funds to a joint account with his brother if he claimed sole ownership as he does now. And it seems rather unusual, considering the age of this defendant and the lack of any evidence as to his poor health and the fact that he was a married man, that he would transfer these funds into a joint deposit with his brother during the short period of time that it would take to dispose of the funds either in the estate or by distribution according to the terms of the oral trust. The reasonable inference is that he felt a compulsion to remove the funds from the reach of the estate proceedings. And we observe that there is no evidence in this record concerning the family circumstances or the relationship of the deceased to his sons and daughters which would warrant a belief that the deceased intended to make a disposition of these funds disinheriting his two daughters. In fact, the evidence shows that one of them was suffering from a disability. We return to the fact of the silence of this defendant and the undenied testimony of the interveners. In weighing the evidence, particular significance may be given to the fact that a man remains silent when confronted with serious and responsible evidence against himself which is within his power to contradict. See, Adamson v. California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903, 171 A. L. R. 1223; 31A C. J. S., Evidence, § 295, p. 755. In conclusion, we hold, as the trial court did, that the evidence is clear and convincing that the interveners have met the burden of proof in establishing an oral trust in the $17,000 joint deposit.

Overlapping their previous contention, the defendants' next position is that $5,500 of the funds in the joint accounts were deposited from the earnings of William John Eden and his wife. He does not plead this but first asserts this on his cross-examination, having been called as a witness by the interveners. This testimony, of

course, is contrary to the undisputed testimony of the interveners that the defendant, William J. Eden, told them the amount of the trust was in the sum of $17,000. The evidence shows that the deceased was a frugal man and that out of his earnings alone he would have been able to deposit the amount involved in the joint deposits. Defendant, William John Eden, testified that he would slip $25 to $50 in cash in the deceased's deposit book and then his father would deposit it in the account. But in reviewing the deposit slips he was able to identify only one deposit of cash of some $270 as being his. We note that his wife did not testify and that in the transfer, after the death of his father, to the joint account with his brother he left his wife out even though he testified that she was one of the contributors to the account. Every deposit was made in the name of the deceased father. Generally the defendant's testimony was vague and inconclusive. He agreed that he never signed a single deposit slip. He kept no records and the deceased reported for income tax purposes all of the interest on these accounts. The defendant, William John Eden, had his own account in the same savings and loan associations. It is strange that he would put his own funds in his father's account and not in his own, especially in light of his testimony that the funds were contributed to by his wife. And he never withdrew any of the money from the accounts. We will not elaborate further. In weighing this testimony we apply the same considerations previously observed concerning the trial court's observation of the demeanor and manner of testifying in evaluating this defendant's testimony. Although no objection was made to this testimony under the dead man's statute, section 25-1202, R. R. S. 1943, the principle underlying that rule seems to be peculiarly applicable here. The deceased's lips are closed and the equivocal and uncertain nature of this testimony, tied together with the temptation present, points quite heavily to its credibility. We hold, quite beyond any question of where the burden of proof

rests, that the evidence shows that the $17,000 in joint accounts was wholly owned by the deceased as this defendant implied in his undisputed oral testimony establishing the trust. There is no merit to this contention.

We now dispose of the contention of the widow plaintiff in her cross-appeal. She does not contend here in this case that she has proved her allegation of partial personal ownership of the funds. In her second cause of action she asserts that the funds were those of the deceased and passed to the plaintiff as special administratrix. She asserts that the creation of the trust destroyed the joint tenancy purported to have been created and, in effect, asserts that the property was held as a tenancy in common and that the funds, therefore, passed to the estate of the deceased. We have no doubt that the creation of a trust was inconsistent with the joint tenancy and destroyed the right of survivorship incidental to a joint estate as the plaintiff contends. Anson v. Murphy, 149 Neb. 716, 32 N. W. 2d 271; White v. Ogier, 175 Neb. 883, 125 N. W. 2d 68. But the creation of the trust was inconsistent with both a joint tenancy and a tenancy in common. The application of the rule here is obviously irrelevant. The plaintiff's rights are derivative in nature. She takes no greater interest than the deceased had in the property. This was personal property of the deceased. Undisputedly he created a valid oral trust payable to his four children on his death. Whatever tenancies were theoretically created or destroyed become irrelevant because of the conversion into an oral trust of the whole deposit. We also observe that plaintiff's assertion that an oral trust was established is self-defeating of this contention. There is no merit to this contention.

The judgment of the district court is correct in all respects and is affirmed.

AFFIRMED.

SMITH, J., participating on briefs.

CHARLES D. FLANAGIN, APPELLEE, V. JOHN S. DEPRIEST, APPELLANT.

157 N. W. 2d 389

Filed March 22, 1968. No. 36702.

1. **Automobiles: Evidence.** When a dispute exists with reference to right-of-way at an open intersection and there is a conflict in the evidence regarding the facts pertaining thereto, it generally presents a question for the jury.
2. **Trial.** It is not error to refuse a requested instruction if the legal principles therein announced are either incorrectly stated or inapplicable to the issues involved.
3. **Automobiles: Negligence.** When a person enters an intersection of two streets or highways he is obligated to look for approaching automobiles and to see those within that radius which denotes the limit of danger. If he fails to see an automobile which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question.
4. ———: ———. Before a verdict can be directed against a motorist for failing to see an approaching automobile at a nonprotected intersection, the position of the approaching automobile must be *undisputedly located* in a favored position.
5. **Evidence: Negligence.** In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury.
6. **Trial: Highways.** A failure or refusal to define the word "forfeit" as used in an instruction regarding right-of-way at an open intersection is not error when the instructions as a whole were adequate to clearly convey the sense in which the word was used.
7. ———: ———. The words "approaching," "entering," and "reaching" as used in an instruction defining the statutory right-of-way at an open intersection are generally synonymous and interchangeable.

8. **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.
9. ———. The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of the instruction is reasonably clear.

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

Kier, Cobb & Luedtke and William A. Wieland, for appellant.

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

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

NEWTON, J.

This case involves an automobile accident occurring at the asphalt-paved intersection of Cleveland and Fortieth Streets in Lincoln, Nebraska, at about 6:40 a.m. on April 15, 1966. It is an open intersection without stop signs or traffic signals. Plaintiff Charles D. Flanagin was traveling south on Fortieth Street and defendant John S. DePriest was traveling east on Cleveland Street. On trial to a jury, plaintiff received a verdict for $8,000. Defendant appeals.

The evidence discloses that the area lying northwest of the intersection was level and open without obstructions except for a building about 75 feet north from the corner. The front end of defendant's car struck the right side of plaintiff's car at or behind the doors. The only skidmarks were those made by the cars sliding sidewise after the impact and measuring from the point where the skidmarks appeared, it was 16 feet to the east curbline and 13 feet to the north curbline. Measuring from the same point, it was 45 feet to where plaintiff's car rested against a tree straddling the east curbline south of the

intersection facing east by southeast, and 67 feet to where defendant's car rested over a mailbox straddling the south curb east of the intersection. The entire front end of defendant's car was damaged and the right rear of plaintiff's car was damaged, the fuel tank was ruptured, and the car had then burned. Debris was scattered about 75 feet to the east and 100 feet to the south.

A police officer, called to the scene, testified that defendant stated he was driving about 25 miles per hour, slowed down some on approaching the intersection, looked both ways, but saw no car until he observed plaintiff's car directly in front of him; he had clear vision, but had no time to apply his brakes.

Plaintiff testified he was traveling south at 20 to 25 miles per hour, that he looked to the east and west on approaching the intersection and saw no cars approaching, that he looked again as he entered the intersection and then saw defendant's car approaching from the west 60 to 80 feet from the intersection. Plaintiff traveled about 25 feet to point of impact from the time he saw defendant's car and defendant traveled about three times that far. Plaintiff sustained a broken femur, a bump on the head, the loss of his car, and certain masonry tools in the trunk. His medical expense, including surgery, amounted to $1,476.25.

Plaintiff was a bricklayer earning $3.75 to $4 per hour, was steadily employed before and after his injury, and lost about 4½ months from his work.

Defendant testified he was traveling east at about 25 miles per hour, slowed on approaching the intersection, looked to the south and to the north and saw no approaching vehicles, started to accelerate, looked again to the north when close to the intersection but failed to see plaintiff until just before the collision, and had no time to slow down.

In his brief, defendant argues four assignments of error.

His first contention is that since he was on the right in approaching the intersection, he had the right-of-way

over another vehicle approaching from the left at approximately the same time and that, therefore, the rule found in Gernandt v. Beckwith, 160 Neb. 719, 71 N. W. 2d 303, is applicable, to wit: That when a collision occurs in the ordinary city intersection, unless there is evidence that one of the vehicles was traveling at a very much greater rate of speed than the other, it is self-evident that the vehicles were reaching the intersection at approximately the same time. A requested instruction on this proposition was denied and we believe correctly so. The giving of this instruction would have practically foreclosed the jury from determining which vehicle reached or entered the intersection first and which had the right-of-way. Section 39-728, R. S. Supp., 1965, provides: "* * * motor vehicles traveling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right, and shall have the right-of-way over those approaching from the left when said vehicles shall reach the intersection at approximately the same time. (2) In all other cases the vehicle reaching the intersection first shall have the right-of-way." The rights of the parties under this statute were carefully set out by the trial court in its instructions. It may be pointed out that the Gernandt case is not applicable in the present instance because there was evidence in this record from which the jury could determine that plaintiff entered the intersection well ahead of defendant and that defendant was traveling at an excessive rate of speed so that he would have forfeited any right-of-way he might have had under the statute. Plaintiff's evidence shows that after he entered the intersection, he observed defendant's car 60 to 80 feet back from the intersection. Other matters which the jury was entitled to consider in regard to the questions presented by this proposition are the manner in which the cars collided, the relative locations, the damage sustained, the distance traveled after the collision, and the area over which debris was scattered. "It is not error to refuse a requested instruc-

tion if the legal principles therein announced are either incorrectly stated or inapplicable to the issues involved." Frazier v. Anderson, 143 Neb. 905, 11 N. W. 2d 764.

As a second assignment of error, defendant insists that his motion for a directed verdict or for dismissal should have been sustained, and calls attention to the rule set out in Kraft v. Wert, 150 Neb. 719, 35 N. W. 2d 786, as follows: "When a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right of way and the question of his contributory negligence in proceeding to cross the intersection is a jury question." It has been frequently held, however, that before the foregoing rule is applicable and: "Before a verdict can be directed against a motorist for failing to see an approaching automobile at a non-protected intersection, the position of the approaching automobile must be *undisputedly located* in a favored position." (Emphasis supplied.) Costanzo v Trustin Manuf. Corp., 176 Neb. 136, 125 N. W. 2d 556. The record here does not undisputably show that defendant was in a favored position, but was sufficiently contradictory to present a jury question on this issue. As pointed out above, the factors in relation to who entered the intersection first, the relative position of the cars and the speed of defendant's car are disputed elements entering into the picture. "In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of

facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury." Costanzo v. Trustin Manuf. Corp., *supra.*

As a third assignment, defendant claims error in the rejection of a requested instruction as follows: "You are instructed that vehicles traveling at an unlawful or excessive rate of speed forfeit the right-of-way, but this does not transfer the right-of-way to the other vehicle approaching from the left, but if proved, only bars from consideration of the jury the question of right-of-way as an element of negligence." The court instructed that: " 'The driver of any vehicle traveling at an unlawful rate of speed shall forfeit any right of way which he might otherwise have hereunder,' " reference being to an ordinance contained in the same instruction setting out, in substance, the same provisions as those contained in section 39-728, R. S. Supp., 1965. It appears that what defendant sought was a further definition of the word "forfeit." The word "forfeit" is a word in common use and generally understood. According to Webster's Third New International Dictionary (Unabridged), p. 891, it means: "lost or alienated for an error, fault, offense, breach of condition, legal duty, or crime." It refers to something lost by the guilty party and not to anything gained by another. In the present instance, it cannot import a "transferal." To give the requested instruction would have been confusing to the jury and erroneous. As indicated by plaintiff's evidence, the plaintiff entered the intersection first and had time to cross had defendant not been driving at an excessive rate of speed. The plaintiff would then have had the right-of-way under the statute irrespective of any transferal of the right-of-way; yet the tendered instruction intimates that before the plaintiff could have had the right-of-way, there would have had to have been such a transferal. It purports to entirely bar consideration of the element of right-of-way by the jury if excessive speed were found. Furthermore, the instructions given by the court covered

every phase of the law pertaining to right-of-way at an open intersection in such manner that the jury would necessarily have received a clear understanding thereof and no prejudice could result from the failure to further define the word "forfeit." See Frazier v. Anderson, *supra.*

As his fourth and last assignment of error, defendant contends that instruction No. 7 given by the court which included the following language: "The driver of a vehicle upon reaching an intersection has the right of way over a vehicle approaching on his left and may ordinarily proceed to cross, and he has a legal right to assume that his right of way will be respected by the other driver; but if the situation is such as to indicate to the mind of an ordinarily prudent person in his position that to proceed would probably result in a collision, then he must exercise ordinary care and caution to prevent an accident even to the extent of waiving and giving up his right of way to cross the intersection first. * * *" was prejudicial in that it used the term "reaching an intersection" rather than "approaching an intersection." This contention is without merit. See Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496.

"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.

"The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of the instruction is reasonably clear." LeMieux v. Sanderson, 180 Neb. 311, 142 N. W. 2d 557.

The judgment of the district court is affirmed.

AFFIRMED.

CITY OF SYRACUSE, A MUNICIPAL CORPORATION, APPELLEE, V. FARMERS ELEVATOR, INC., A CORPORATION, ET AL., APPELLANTS.

157 N. W. 2d 394

Filed March 22, 1968. No. 36718.

1. **Words and Phrases.** "Public assembly" interpreted to mean a company of persons collected together in one place.
2. **Zoning: Municipal Corporations.** Section 17-1001, R. R. S. 1943, is an enabling act empowering cities of the second class and villages to extend existing ordinances to a one-half mile area surrounding municipal limits, but it does more. It authorizes the inclusion of this one-half mile area in all future ordinances.
3. **Zoning.** To obtain a vested interest in a nonconforming use, a person, prior to the effective date of the regulation or ordinance making such use nonconforming and while violating no existing law or regulation, must cause either substantial construction to be made thereon or incur substantial liabilities relating directly thereto, or both.
4. ———. A property owner who claims rights by virtue of a nonconforming use has the burden of proof to establish such nonconforming use.
5. **Nuisances.** Generally, a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact.
6. ———. A legal and proper activity may be a nuisance in fact simply because of its location.
7. **Zoning.** The selection of a place of business is not necessarily left to the owner alone. That subject is often a matter of both public and private concern.
8. **Nuisances.** A legitimate business may become a nuisance by reason of the conditions implicit in and unavoidably resulting from its operation.
9. **Nuisances: Municipal Corporations.** It is not necessary for a city to wait until the operation of an anticipated business demonstrated that its use was a nuisance.
10. **Courts.** A court of equity has jurisdiction to enjoin a threatened injury whenever its nature is such that it could not be adequately compensated in damages and its continuance would occasion a constantly recurring grievance.
11. **Nuisances: Municipal Corporations.** It is not incumbent upon a city of the second class to enact an ordinance prohibiting a nuisance before it has a right to apply to a court of equity for relief.

Appeal from the district court for Otoe County: WALTER H. SMITH, Judge. Affirmed.

Baylor, Evnen, Baylor & Urbom and Donald R. Witt, for appellants.

Matthews, Kelley & Cannon, for appellee.

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

SPENCER, J.

This is an action by the city of Syracuse, Otoe County, Nebraska, a city of the second class, hereinafter called city, for a permanent injunction enjoining Farmers Elevator, Inc., a corporation, and Ervin Gellerman, hereinafter referred to as defendants or separately as corporation or Gellerman, from operating an anhydrous ammonia fertilizer distribution business on property owned by the corporation adjoining the city limits of said city. Gellerman is a director and the manager of defendant corporation.

In August 1966, defendants decided to enter the business of distributing anhydrous ammonia fertilizer in the Syracuse area. Gellerman approached members of the city council to learn their reaction to the operation of such business within the city limits. It became readily apparent that there was opposition to such proposal. Without further discussion with city officials, defendants decided to locate outside the city limits. On December 2, 1966, Gellerman made a contract for the purchase of the property herein, which adjoins other property owned by defendants. This property is 250 feet deep and adjoins the city on the south, directly across the street from a park area in which is located an agricultural exhibit building, a community hall or 4-H building, and an athletic field. On January 10, 1967, a deed for said property was issued to the corporation.

Sometime after Gellerman made his approach, city proceeded to adopt a comprehensive zoning ordinance

and included the one-half mile area surrounding the city. A public hearing was held on the ordinance January 4, 1967, and it was adopted with the emergency clause by a unanimous vote of the city council on January 14, 1967. A certificate of the city clerk attached to a pamphlet copy of the ordinance in evidence herein certifies to its passage, together with an attached zoning map, and the fact that it was published in pamphlet form by the authority of the city council. The city attorney, who took no part in these legal proceedings, was at all times pertinent herein the president of the corporation.

Gellerman, who had been authorized by the corporation to negotiate with wholesale distributors of anhydrous ammonia, eventually made contact with Allied Chemical and Dye Company, LaPlatte, Nebraska, hereinafter referred to as Allied. On January 6, 1967, Allied placed an anhydrous tank on the property in question, and partially filled said tank with anhydrous ammonia on January 9, 1967. The tank, which was purportedly leased from Allied, was merely set on some grader blades 25 feet from the south boundary line of the property. The corporation had given orders for other equipment necessary for the operation of an anhydrous ammonia business, but deliveries were stopped when a restraining order was issued January 19, 1967.

The storage tank was located 200 feet south of the city limits, 250 feet south of a row of trees north of the south city limits, 286 feet from the southeast corner of the agricultural exhibit building, 438 feet from the community hall or 4-H building, and 342 feet from the fence surrounding the athletic field. The bleachers for the athletic field are immediately north of the fence. In addition to the storage tank, when the business is in operation there will be smaller tanks, described as nurse tanks, on the premises. These are the tanks which are used to make delivery to the farms. These will necessarily be located in closer proximity to the areas described.

Exhibit 10, prepared by the Agricultural Ammonia

Institute, is stipulated to be the recognized minimum standards for the storage and handling of anhydrous ammonia. These standards provide that anhydrous ammonia containers should not be less than 400 feet from any school, hospital, or other place of public assembly. While the defendants sought to restrict the meaning of "public assembly," we interpret it to mean a company of persons collected together in one place, which is the definition given in Webster's New International Dictionary (2d Ed., Unabridged), p. 165. While the agricultural exhibit hall is only used by groups of people during an exhibition or fair, the athletic field and the 4-H building are used much more often. In any event, each of said areas on occasion is an area of public assembly.

Ammonia, because it is extremely hard to ignite, is generally considered to be nonflamable. It is, however, considered a dangerous substance, and exhibit 10 states that in the interests of safety it is important that any personnel handling ammonia understand its property and be thoroughly trained in safe practices for its storage and handling. The gas liquifies under pressure, but when pressure is released the liquid is readliy converted into a gas which is colorless but pungent, which pungency serves as a warning agent. Anhydrous ammonia may cause varying degrees of irritation of the skin or mucous membrane, and may severely injure the respiratory mucosa. While there is come conflict in the testimony as to how much if any gas escapes during the loading and unloading procedures, it is evident that there is some on many occasions. Exhibit 10 adequately suggests this possibility. The range of the effect, according to defendants' testimony, is 15 or 20 feet, but could be farther, depending upon the breeze. According to testimony for the city, its effect may range as far as one-eighth of a mile. There is no dispute that the gas will burn trees or crops if it comes in contact with them.

The issues tried herein involve the validity of the

ordinance, whether an anhydrous ammonia fertilizer distribution business in the area involved would create a nuisance, and whether the business was an existing nonconforming use before the zoning ordinance was enacted. After the conclusion of the evidence, the trial court inspected the area involved and subsequently found against the defendants on all three points. Defendants perfected this appeal.

Section 17-1001, R. R. S. 1943, provides, so far as material herein: "Cities of the second class and villages are hereby authorized and empowered to extend and apply by ordinance any existing, *or hereafter enacted,* zoning ordinances, property use regulation ordinances, building ordinances, electrical ordinances, and plumbing ordinances, to an area within one half mile of the corporate limits of such municipalities, with the same force and effect as if such area were within their corporate limits; * * *." (Italics supplied.)

Defendants argue that this section provides that only existing ordinances may be extended to the one-half mile zone. They argue: "The statute assumes that such ordinances are in existence at the time they are extended to the one-half mile zone, because if they are not in existence, they cannot be extended."

In the instant case, the city of Syracuse zoned the city and the one-half mile area in one comprehensive zoning ordinance. Defendants contend that the zoning ordinance in question is therefore invalid, and cite Schlientz v. City of North Platte, 172 Neb. 477, 110 N. W. 2d 58, to support their contention. Defendants quote the following language from that case: "The procedure prescribed by section 16-901, R. S. Supp., 1959, is not the enactment of any new ordinance or ordinances. What it does is to provide for the extension of the effective area of ordinances upon the particular subjects. The persons living in the area affected become subject to those ordinances upon those particular subjects." Section 16-901, R. S. Supp., 1959, now R. R. S. 1943, is an

identical statute applicable to cities of the first class. The first sentence of the statement was unnecessary in that case, and is merely dictum and not controlling herein.

Section 17-1001, R. R. S. 1943, is an enabling act empowering cities of the second class and villages to extend existing ordinances to the one-half mile area surrounding the municipal limits, but it does more. It authorizes the inclusion of this one-half mile area in all future ordinances. The phrase "or hereafter enacted" italicized above, makes this purpose clear. To apply any other construction is to ignore the obvious. So far as Schlientz v. City of North Platte, *supra,* holds otherwise, it is overruled.

Defendants' case is further premised upon the contention that prior to the effective date of the ordinance they had purchased property, installed a storage tank, and made other commitments to such an extent that they acquired a vested interest in a nonconforming use. There is no merit to this contention.

"To obtain a vested interest in a nonconforming use, a person, prior to the effective date of the regulation or ordinance making such use nonconforming and while violating no existing law or regulation, must cause either substantial construction to be made thereon or incur substantial liabilities relating directly thereto, or both.

"A property owner who claims rights by virtue of a nonconforming use has the burden of proof to establish such nonconforming use." County of Saunders v. Moore, *ante* p. 377, 155 N. W. 2d 317.

Defendants have not met this burden. The property purchased adjoins other property owned by the defendants and undoubtedly can be used for other business purposes. Gellerman had considered its purchase 4 or 5 years before the attempt to establish an anhydrous ammonia business. There is no evidence to establish that a business was actually being conducted on the premises. The storage tank was on loan and was set on

grader blades. In this connection, the standards in exhibit 10 provide: "Containers shall be set upon firm foundations or otherwise firmly secured." The tank was partly filled, but the evidence is this was done merely to test it for leaks.

Defendants are not being enjoined from the operation of an anhydrous ammonia business, but solely from its operation on the present site. It will be a simple matter to transfer the tank and any other personal property for which defendants may be liable to a proper location on which they may operate the business. It is evident that defendants were fully informed at all times on the situation. Corporation's president was the city attorney during the discussions on the zoning ordinance. It is also apparent defendants were attempting to acquire a nonconforming use before the ordinance became effective. This they did not do. We suggest that defendants' position is not nearly so meritorious as that of the appellant in County of Saunders v. Moore, *supra,* in which a nonconforming use was denied.

It must be conceded that the business involved is a lawful one and that generally a legitimate business enterprise is not a nuisance per se. This does not mean, however, that it may not become a nuisance in fact. A legal and proper activity may be a nuisance in fact simply because of its location. The selection af a place of business is not necessarily left to the owner alone. That subject is often a matter of both private and public concern. Beisel v. Crosby, 104 Neb. 643, 178 N. W. 272. Also, a legitimate business may become a nuisance by reason of the conditions implicit in and unavoidably resulting from its operation. Sarraillon v. Stevenson, 153 Neb. 182, 43 N. W. 2d 509, 18 A. L. R. 2d 1025. It is on this basis that city contends the anticipated business is a nuisance.

The standards embraced in exhibit 10 are stipulated to be minimal requirements. The testimony indicates that the prevailing winds in the area during the periods

of greatest activity for this type of business are from a southerly direction. This means that any escaping gas would necessarily be carried toward the city area heretofore described. The trial court, who inspected the premises, specifically found that operating an anhydrous ammonia business on the property in question "would produce destructive vapors and noxious odors resulting in material injury to property and the comfort or existence of those in the immediate vicinity and that the pollution or contamination of the air through such odors would be injurious to persons and would materially, unlawfully and injuriously affect the comfort, enjoyment and property rights of others." On the record herein, we cannot say that the trial court erred in reaching this conclusion. Rather, we think it did not.

We further hold that it was not necessary for city to wait until the operation of the anticipated business demonstrated that its use was a nuisance. The rule is well settled that a court of equity has jurisdiction to enjoin a threatened injury whenever its nature is such that it cannot be adequately compensated in damages and its continuance would occasion a constantly recurring grievance. Lowe v. Prospect Hill Cemetery Assn., 58 Neb. 94, 78 N. W. 488, 46 L. R. A. 237. We agree with the trial court that the operation of an anhydrous ammonia installation on the premises in question would constitute a nuisance and should be enjoined.

Defendants question the right of city under section 17-556, R. R. S. 1943, to proceed herein by injunction because the alleged nuisance is located outside the city limits and not in any residential district. Defendants further question the enforceability of the city ordinance on the date of the filing of the action herein. We suggest that section 17-123, R. R. S. 1943, is applicable herein, and makes it unnecessary to discuss either of these points. By this section city is given the power to prevent and remove nuisances. In Village of Kenesaw v. Chicago, B. & Q. R.R. Co., 91 Neb. 619, 136 N. W. 990,

this court held in substance that it was not incumbent upon city to enact an ordinance prohibiting a nuisance before it has a right to apply to a court of equity for relief.

For the reasons given above, the judgment entered by the trial court is correct and is affirmed.

AFFIRMED.

HUGHES FARMS, INC., A CORPORATION, APPELLEE, V. TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., A CORPORATION, APPELLANT.

157 N. W. 2d 384

Filed March 22, 1968. No. 36723.

1. **Eminent Domain: Damages.** The proper measure of damages 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.
2. ———: ———. In a condemnation proceeding, the value of crops growing on the land and injured or destroyed by the taking are properly considered in determining the value of the land.
3. ———: ———. Damages in a condemnation action are peculiarly of a local nature and weight and credibility of valuation testimony are for the jury.
4. ———: ———. Where the condemner alleges in its application for a perpetual easement for an electric transmission line its intention that the landowners retain the use of the land under said line and between said structures, and the applicant obligates itself to pay all future crop damages incident to the construction, maintenance, and reconstruction of said line when and if such damages occur; and such proposal is accepted by the condemnee and the case is presented to the jury on that basis and the jury instructed to disregard all future crop damage, the judgment should contain a provision that the easement acquired is subject to the obligation of the condemner to pay such future crop damages when and if such damages occur.

Appeal from the district court for Chase County: VICTOR WESTERMARK, Judge. Affirmed as modified.

Frederick E. Wanek, for appellant.

William S. Padley, for appellee.

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

MCCOWN, J.

Tri-State Generation and Transmission Association, Inc., a wholesale electrical cooperative, commenced condemnation proceedings against Hughes Farms, Inc., to acquire a perpetual easement for power line purposes. The easement was 100 feet in width and extended approximately 3,942 feet diagonally across the south half of Section 30, Township 8 North, Range 40 West of the 6th P.M., Chase County, Nebraska. As constructed, there are five two-pole structures supporting the 115 kilovolt transmission line on the property involved. The appraisers appointed by the county court returned an award of $9,500. Both the condemner and the condemnee appealed to the district court. The jury returned a verdict of $12,538.40. Tri-State has appealed.

The basic contention is that the amount of the award was excessive, and that the measure of damages and evidence of damage were improper. There was testimony that the condemnee, acting in good faith, had planted approximately 190 acres of corn, a small portion of which was on the easement, and that the acreage was irrigated land. Due to the construction of the transmission line, it was unable to irrigate the entire tract at a critical period of time and as a result, the 190 acres produced 50 bushels per acre less than similar irrigated land nearby. There was also testimony that because of the transmission line, it would be impossible to effectively use a particular sprinkler known as the Valley sprinkler for certain portions of the land off the easement which were not suitable for gravity irrigation, and that wells were improperly located for practical and effective irrigation use after construction of the transmission line.

There was a wide disparity in testimony as to the difference in value of the land before and after the taking.

The appellant's two witnesses placed the damages at $2,500 and $3,000 respectively. The appellee's witnesses placed the damages at amounts varying from $25,000 to $44,500.

The appellant contends that consideration of damages must be limited to that portion of the land whereon use has in fact been restricted and relies upon Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N. W. 833, and, in particular, the following language of that case: "In this case no property was actually appropriated for exclusive use by appellant except the areas upon which the structures were erected. Under these circumstances the only thing to be considered is damage to the land resulting from a restriction of the use. It necessarily follows that consideration must be limited to that portion of the farm whereon use has in fact been restricted."

The proper measure of damages 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. See, Pieper v. City of Scottsbluff, 176 Neb. 561, 126 N. W. 2d 865; Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209.

Article I, section 21, of the Nebraska Constitution, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."

Wahlgren v. Loup River Public Power Dist., *supra,* was not intended to limit consideration or recovery of damages to the portion of the land actually within the boundaries of an electric transmission line easement.

The appellant also contends that because one witness for the appellee placed a separate value upon the crop damage and other witnesses for the appellee indicated that their testimony as to damages did not take into account crop damage during construction, an improper measure of damages was presented to the jury. The ap-

pellant is confusing the legal measure of damages and the admissibility of testimony as to damages. It is almost universally recognized that the value of crops growing on the land and injured or destroyed by the taking are properly considered in determining the value of the land. See, 29A C. J. S., Eminent Domain, § 173, p. 732; IV Nichols, Eminent Domain, § 13.21, p. 404 et seq.; 27 Am. Jur. 2d, Eminent Domain, § 279, p. 69.

Where there is competent evidence of damage to unmatured crops, it may be included in the overall damages for which the condemnee is entitled to judgment. See, State v. Dillon, 175 Neb. 350, 121 N. W. 2d 798; Snyder v. Platte Valley Public Power & Irr. Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154.

Here witnesses for both appellant and appellee testified as to specific dollar amounts of crop damage, but the testimony quite clearly reflects the relationship of the crop damage to the overall damage. The trial court quite properly instructed the jury that the measure of damages was the difference between the fair and reasonable market value of the land immediately before and immediately after the taking, and that in determining the damages, it could take into consideration any damages that were done to the growing crops on the land during the time of the construction of the line if any were proven by the preponderance of the evidence. Under such circumstances, it is clear that the jury was not mislead in any fashion. The line had been constructed prior to the trial in district court, and the jury had viewed the premises. "Damages in a condemnation action are peculiarly of a local nature, and weight and credibility of valuation testimony are for the jury." Frank v. State, 176 Neb. 759, 127 N. W. 2d 300.

In this case, the application for condemnation alleged: "That the easement requested includes the right to enter upon, construct and maintain such transmission lines, and all incidents thereto, and the right to remove trees whenever necessary to avoid interference with said line;

that your applicant does not desire the fee title, but a 100 foot easement, and the owners and the lessees retain the use of the land under said line and between said structures and the applicant obligates itself to pay all future crop damages incident to the construction maintenance and reconstruction of said line when and if such damages occur."

At the commencement of the trial, the attorney for the appellee made the statement out of the hearing of the jury: "Let the record show that the plaintiff, Hughes Farms, Incorporated, herewith accepts the proposal of the Tri-State Generation and Transmission Association, Inc., as set forth in its original application wherein said association reserves for future determination all future crop damages after the time of construction, and said plaintiff tries this case on the question of damages for the taking and the damage incident to construction."

At that time appellant's attorney responded: "To which the defendant objects on the basis of the holding pronounced in Little v. Loup River Public Power District, 150 Neb. 864, 36 N. W. 2d 261, 7 A L R 2d 355."

Some time later, after the testimony of three witnesses had been completed, the statement of appellee's attorney accepting the proposal as above quoted was read to the jury by the court reporter, and appellant's counsel objected upon the ground that it was an improper statement of the law, and a matter to be covered by the court's instructions. This was overruled, and a motion for mistrial was also overruled.

The appellant introduced evidence to establish the method and manner of making inspections and evidence indicating the nature and extent of use which would be available to the appellee, and the expected lifetime of the present transmission line. The jury was specifically instructed that the proposal to pay for the crop damage if, as, and when it occurred had been accepted by the appellee and was also specifically instructed that the appellant would be liable for future crop damage and

that it was not permitted to consider or speculate about any damages that might be done to crops in the future in arriving at its verdict in the case.

The appellant contends that Little v. Loup River Public Power Dist., 150 Neb. 864, 36 N. W. 2d 261, 7 A. L. R. 2d 355, holds that a proposal to pay future crop damage in an application for condemnation is ineffective under all circumstances, cannot change the measure of damages, and that the landowner is required to recover all of his damages, including future crop damages, at the time of the condemnation. We cannot agree. We think it clear that the holding in the Little case was that an unaccepted proposal or promise to do something in the future cannot affect the character or the extent of the right acquired or the amount of the damages to be recovered as just compensation. It clearly held that an unaccepted promissory stipulation could not deny a landowner the right to recover the damages guaranteed by the Constitution and that such an unaccepted proposal could not be read in evidence to the jury nor considered in the court's instructions. We do not believe the court intended to imply that a proposal in an application for condemnation to defer future damages to crops, not yet accrued, could not be voluntarily accepted by the landowner. Neither do we believe the condemner should be permitted to make such proposals in the application for condemnation, have them accepted, and the jury instructed and the trial conducted on that basis, and then assert that all damages present and future are included in the judgment, and the measure of damages has been incorrectly given to the jury.

Although neither party has cited any case other than the Little case, certain principles here involved are summarized in an exhaustive annotation in 7 A. L. R. 2d 364. At page 392, it is stated: "The courts have frequently pointed out the difference in legal effect between mere promissory statements, stipulations, and declarations on the one hand, and (1) reservations of property

rights in the landowner; (2) valid and contractual, hence binding, stipulations; and (3) limited condemnation, properly effected at the proper time. If a particular case involves one of these three matters rather than a promissory matter, the binding stipulation, or the reservation of rights, easements, etc., to the property owner, or the limited condemnation, is properly to be considered in determining the landowner's damages or compensation." See, also, decisions cited in the above annotation in § 6, p. 392, § 7, p. 405; United States v. 213.43 Acres of Land, More or Less, in Foster, Stutsman, Benson & Towner Counties, North Dakota, 108 F. Supp., 446.

It would seem clear that the situation here involves a reservation of property rights in the landowner, binding stipulations to that effect, and a condemnation limited to exclude a damaging of future crops. Where the condemner alleges in its application for a perpetual easement for an electric transmission line its intention that the landowners retain the use of the land under said line and between said structures, and the applicant obligates itself to pay all future crop damages incident to the construction, maintenance, and reconstruction of said line when and if such damages occur; and such proposal is accepted by the condemnee, and the case is presented to the jury on that basis and the jury instructed to disregard all future crop damage, the judgment should contain a provision that the easement acquired is subject to the obligation of the condemner to pay such future crop damages when and if such damages occur. In this case, however, the appellee has filed no cross-appeal nor made any objection to the form or nature of the judgment and, therefore, the judgment should be affirmed as to damages.

The appellant also contends that attorney's fees allowed by the trial court were excessive. Section 76-720, R. R. S. 1943, provides that on appeal to the district court in the situation presented here, "the court may in its discretion award to the condemnee a reasonable sum for

the fees of his attorney." The record is not clear as to the basis upon which attorney's fees were determined. An undisclosed portion of the total time was involved in preparation and presentation of the cause before the board of appraisers. The actual time of trial involved in the district court was 2 days. We believe that all of the elements entering into the determination of the amount of a reasonable fee as set out in Canon 12 of the Canons of Professional Ethics of the American Bar Association should properly be considered. Under the circumstances here, we determine a reasonable fee for the appellee's attorney in the district court to be the sum of $1,500.

For the reasons discussed, the judgment of the district court is modified by awarding to the appellee as fees for its attorney, the sum of $1,500 for services in the district court, and as so modified is affirmed. The sum of $750 is allowed as attorney's fees to the appellee in this court.

AFFIRMED AS MODIFIED.

LINDA ANN BOLLES, APPELLEE, V. DARRELL W. BOLLES, APPELLANT.

157 N. W. 2d 410

Filed March 22, 1968. No. 36726.

1. **Parent and Child.** The court determines which parent is to have custody according to the best interests of the child.
2. **Divorce: Judgments.** A judgment that defendant save plaintiff harmless from all liability for necessaries furnished to plaintiff is erroneously indefinite.

Appeal from the district court for Otoe County: WALTER H. SMITH, Judge. Modified in part, affirmed in part, and in part reversed and remanded.

Beynon, Hecht & Fahrnbruch, for appellant.

Johnston, Grossman & Johnston, for appellee.

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

SMITH, J.

Granting an absolute divorce because of cruelty practiced by Linda Ann Bolles, the district court awarded her custody of the daughter of the parties. Darrell W. Bolles has appealed. He complains of the custody award and the indefiniteness of provisions for support.

Linda, age 18, and Darrell, age 20, were married in June 1963, and the daughter, Tammy Lynn, was born in April 1964. There were lapses of maternal care during infancy. Linda forced Tammy at the age of 6 weeks to sit up and at the age of 8 months to walk. Tammy cried. Her mouth was burned when she was fed hot milk by Linda, and emission of blood was ascribed to the burn. Tammy also had cradle cap, diaper rash, a dehydrated condition that necessitated hospitalization, and diarrhea. To relieve the diarrheal condition Linda dosed Tammy with peppermint candy.

Several circumstances illustrate attitudes of the parties prior to March 1965, toward family life. Linda kept the home dirty and the main floor littered with soiled diapers and baby bottles of sour milk. Darrell, who gained a livelihood as an operator of heavy equipment loaders at quarries, did much of the domestic work. Linda associated with a married man who was not related to her by blood or marriage. Rumors provoked her father, Henry Bennett, to accuse her of adultery. She denied the accusation.

On March 6, 1965, an automobile accident hospitalized Linda with a skull fracture and concussion. On April 29, 1965, her mother, Anna Bennett, and Henry removed Linda to their home where she was to remain. Darrell on advice of physicians intended to place Linda in Douglas County Hospital for rehabilitation. The plan was thwarted by Anna, who had been at one time employed as a practical nurse.

During convalescence at the Bennett home Linda was seen periodically by Dr. John P. Gilligan. At first she had head pain, double vision, faulty memory, speech impediments, and extreme difficulty in moving her limbs. Sometimes she was very tense and irritable. By July 10, 1965, she could walk and raise both arms above her head. On the final visit in September 1966, Dr. Gilligan found improvement of memory, speech, vision, physical strength, and emotional behavior. He considered Linda then unemployable.

Tammy lived at the Bennett home most of the time after April 29, 1965. Conditions were not ideal. The house was dirty. Tammy's hair and clothes were unkempt. Whenever the Bennetts watched a newscast, Tammy's bedtime was past 10 p.m., unless she voluntarily lay down before then. She sustained cuts on lip and tongue, burns on three fingers, sties, a bruise 4 inches long and 1 inch wide across the forehead, and other bruises on the left temple, shoulders, and both buttocks. When she ran the tip of a nail in her foot, only Anna treated Tammy: "I put a poultice of bread and milk on it."

After comencement of suit by Linda in August 1965, Darrell moved into his parents' home where he was living at the time of trial. His conduct was good under trying circumstances. The Bennetts and the Bolleses both desired physical custody of Tammy, and members of the families erupted with bitter words. Darrell himself evinced considerable restraint.

The court determines which parent is to have custody according to the best interests of the child. A child of tender years is usually awarded to the mother unless she is unfit. Smallcomb v. Smallcomb, 165 Neb. 191, 84 N. W. 2d 217. There is persuasive evidence and little dispute that the Bolles' home is suitable for Tammy, and the Bennett home, we think, is less suitable. An award according to the rule of preference for the mother would not be in the best interests of Tammy. Darrell should

have custody subject to Linda's privilege of reasonable visitation.

The district court conditionally assigned to Darrell the personal property then in his possession. The conditions were that Darrell pay "all indebtedness, if any," incurred (1) by the parties prior to March 7, 1965; (2) by Linda "for medical, hospital and drug charges and other necessaries for * * * (Linda and Tammy) from March 6, 1965, to September 1, 1965;" and (3) by Linda "for medical, hospital and drug expense for herself from September 1, 1965 to May 12, 1967," the date of the judgment.

A judgment that defendant save plaintiff harmless from all liability for necessaries furnished to plaintiff is erroneously indefinite. See, Christoffersen v. Christoffersen, 151 Neb. 763, 39 N. W. 2d 535; Yost v. Yost, 143 Neb. 80, 8 N. W. 2d 686. The posture of the present case and the nature of the error necessitate reversal of this part of the judgment and general remand of the cause as to this part.

The judgment is modified as follows: (1) Custody of Tammy is awarded to Darrell. (2) Linda is granted privilege of reasonable visitation. (3) The provision for periodic payment of child support is vacated except for payments due prior to the date of our mandate. That part of the judgment conditionally assigning personal property to Darrell is reversed and the cause as to that part remanded. The remainder of the judgment as modified is affirmed. Costs on appeal are taxed to Darrell.

MODIFIED IN PART, AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. DAROLD FORNEY, APPELLANT.

157 N. W. 2d 403

Filed March 22, 1968. No. 36733.

1. **Searches and Seizures.** Probable cause for a warrantless search must be determined on the particular facts and circumstances of each case.
2. ———. The existence of probable cause must be determined by a practical and not by any technical standard and where time is of the essence it is a highly relevant factor in evaluating the circumstances.
3. ———. Probable cause for searching motor vehicles or other things readily moved may not be treated the same as questions arising out of searches of fixed structures.
4. **Criminal Law: Constitutional Law.** The Miranda procedural requirements for conducting an in-custody interrogation for the purpose of eliciting incriminating statements do not apply to the obtaining of consent to a search under the Fourth Amendment to the Constitution of the United States.
5. **Searches and Seizures: Constitutional Law.** The findings and holdings of a single Judge of the Supreme Court in State v. Forney, 181 Neb. 757, 150 N. W. 2d 915, have been examined and are adhered to.

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

Fisher & Fisher, for appellant.

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

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

WHITE, C. J.

Defendant, tried without a jury by his consent, was convicted and sentenced for burglary. The only question presented here is the admissibility of evidence received as the result of a search of the defendant's automobile. This same question was decided adversely to the defendant by one judge of this court on the State's appeal from an interlocutory order suppressing the evidence. State

v. Forney, 181 Neb. 757, 150 N. W. 2d 915. The case is now before the full court for decision on the merits. We adhere in all respects to Judge Spencer's decision therein.

The facts are not disputed, are fully set out in State v. Forney, *supra,* and will not be recited herein except for convenience in discussion. The State here raises the further contention that, regardless of consent to the search, probable cause under the Fourth Amendment existed for the search of defendant's automobile.

A burglary had occurred at Merriman, Nebraska. The officers were alerted to look for suspects. It was between 3 and 4 a.m. Merriman is to the east of Gordon and a police officer followed the defendant's car coming from the east; when it stopped, he recognized defendant, and on inquiry the defendant said he had been in Rushville, which is west of Gordon. Defendant asked if there was anything wrong and the officer told him there had been a "deal" at Merriman. Defendant and companion went into a cafe for awhile, on leaving defendant started to back from the curb, and when asked by a deputy sheriff, he voluntarily consented to going to the police station where the consent to the search took place. No magistrate was readily available and there was obviously no time available to secure a search warrant as the defendant was backing from the curb and leaving. Probable cause for a warrantless search must be determined on the particular facts and circumstances of each case. The existence of probable cause must be determined by a practical and not by any technical standard and where time is of the essence it is a highly relevant factor in evaluating the circumstances. State v. Carpenter, 181 Neb. 639, 150 N. W. 2d 129. Probable cause for searching motor vehicles cannot be treated the same as searches of fixed structures, like houses. Preston v. United States, 376 U. S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777; Brinegar v. United States, 338 U. S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879; Alston v. State, 30 Wis. 2d 88, 140 N. W. 2d 296. Considering the time that this occurred in a small community,

the knowledge of a recently committed burglary, the probable false statement of the defendant as to where he came from, and the lack of time to procure a warrant, we hold that under the circumstances reasonable and probable cause existed for the search of defendant's automobile, which in turn undisputedly revealed probable cause for his arrest. This case is quite parallel to State v. Carpenter, *supra,* and supports strongly our holding here. It therefore becomes unnecessary in the determination of this issue to consider questions involving an interpretation of the "stop and frisk" statute (section 29-829, R. S. Supp., 1965).

The defendant, on request, voluntarily went to the police station, and there voluntarily consented to the search of his automobile. The facts are set out in full in State v. Forney, *supra,* and we adhere to the reasoning and law found therein. See State v. Forney, *supra,* and cases cited therein.

The fundamental contention of the defendant is that the consent must be preceded by the Miranda required Fifth Amendment warnings. Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974. We reject this contention and adhere to the holding in State v. Forney, *supra,* We implement that decision by pointing out that subsequent thereto the following cases directly hold that the Miranda requirements do not apply to the obtaining of consent to a search under the Fourth Amendment. Lamot v. State, 2 Md. App. 378, 234 A. 2d 615; Morgan v. State, 2 Md. App. 440, 234 A. 2d 762; State v. McCarty, 199 Kan. 116, 427 P. 2d 616; Gorman and Roche v. United States, 380 F. 2d 158 (1st Circuit). We note that in the Gorman and Roche case this was the holding even after the defendant Gorman was arrested and in custody. The "procedural safeguards" of Miranda are designed to protect against the implied coercion of post arrest or in-custody interrogation and thus, by the terms of the Fifth Amendment, prevent a defendant from de facto becoming a witness against himself. There is

no such design or purpose in the Fourth Amendment. It is the unreasonable seizure that it condemned, and not any inherent constitutional evil in a defendant's statements. The consent here is asked for and not "required" from the necessary compulsion implied in an in-custody interrogation. Asking for consent negatives independent authority for a search. In-custody interrogation, without the warnings, implies the authority.

The judgment and sentence of the district court are correct and are affirmed.

AFFIRMED.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, APPELLANT, V. CHARLES W. PIERCE ET AL., APPELLEES.

157 N. W. 2d 399

Filed March 22, 1968. No. 36739.

1. **Automobiles: Insurance.** Section 60-534, R. S. Supp., 1965, sometimes referred to as the omnibus statute, is applicable only to automobile liability insurance policies which have been certified as proof of financial responsibility. § 60-561, R. S. Supp., 1965.
2. **Insurance.** Generally, a renewal contract is subject to the laws in force at the time the contract became effective.
3. **Automobiles: Insurance.** A driver exclusion agreement limiting the coverage of an automobile liability insurance policy as to a particular driver is not void as against public policy.
4. ———: ———. Forbearance of a right of cancellation or termination is sufficient consideration to support an agreement reducing the coverage of an existing automobile liability insurance policy.

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

Fraser, Stryker, Marshall & Veach and James A. Buckley, for appellant.

Story, Carl & Parker, for appellees Pierce.

Sodoro & Meares, for appellee Great Plains Ins. Co.

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

BOSLAUGH, J.

This is an action for a declaratory judgment. The controversy concerns the validity of a driver exclusion agreement executed by the plaintiff, State Farm Mutual Automobile Insurance Company, and its named insureds, Charles W. Pierce and Elsie R. Pierce.

The agreement in question was an endorsement to a liability policy insuring a 1963 Ford automobile. The policy had been issued for a 6-month period commencing December 5, 1960, and had been renewed for successive 6-month periods by payment of renewal premiums. The policy restricted the plaintiff's right of cancellation but provided that the plaintiff could refuse renewal by notifying the named insureds 45 days before expiration of any policy period. The record indicates that the policy was terminated June 5, 1965, and reinstated "Time Out Of Force," June 26, 1965.

Darwin Meredith is the stepson of Charles W. Pierce and the son of Mrs. Pierce. In October 1963, Meredith was convicted of careless driving. In February 1964, he was convicted of negligent driving. On May 12, 1964, the plaintiff wrote to its agent requesting that he obtain the named insureds' signatures to the driver exclusion agreement, stating that if the documents were not executed, the policy would be terminated at the next renewal date.

The driver exclusion agreement was then signed by Mr. and Mrs. Pierce and returned to the plaintiff. The agreement became effective June 1, 1964, and provided that the plaintiff would not be liable under its policy for any loss or damage sustained while the insured automobile was being driven or operated by Darwin Meredith except when accompanied by the named insured or spouse. It further provided that it would be included

in any transfer, reinstatement, or renewal of the policy. The form of the agreement has been approved by the Nebraska Department of Insurance since 1954.

In November 1965, the Great Plains Insurance Company issued a "NON OWNER" automobile liability insurance policy to Darwin R. Meredith.

On December 5, 1965, Darwin Meredith was involved in an automobile accident while operating the 1963 Ford automobile. He was not accompanied by Mr. or Mrs. Pierce at the time of the accident, but was driving the automobile with their permission. Damage actions were brought against Meredith and Mr. and Mrs. Pierce as a result of the accident.

The plaintiff investigated the accident and advised Mr. and Mrs. Pierce that it had determined that there was no liability under its policy. This action was commenced on June 28, 1966.

The trial court found that the driver exclusion agreement was void as against public policy, and for lack of consideration; that the policy of the plaintiff afforded primary coverage; and that the Great Plains policy provided excess coverage. The plaintiff's motion for new trial was overruled and it has appealed.

The controversy here is between an insurance carrier which attempted to contract against the risk of a particular driver as opposed to a carrier who specifically assumed the risk of that driver.

The trial court's finding that the driver exclusion agreement was void as against public policy is based upon an interpretation of section 60-534, R. S. Supp., 1965. This section, which has sometimes been referred to as the omnibus statute, is a part of the Motor Vehicle Safety Responsibility Act. Nebraska has no general omnibus statute. Section 60-534, R. S. Supp., 1965, provides in part: "Such motor vehicle liability policy: * * * (2) shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied

permission of such named insured, * * *." The driver exclusion agreement is in conflict with this provision of the statute. If the statute is applicable to the policy issued by the plaintiff, the agreement is void.

The defendants rely upon Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N. W. 2d 179, decided in 1963, which held that section 60-534, R. R. S. 1943, was controlling over a conflicting policy provision with reference to the use of the insured automobile.

In 1965, the Motor Vehicle Safety Responsibility Act was amended to provide specifically that sections 60-516 to 60-544, R. R. S. 1943, shall not apply to any automobile liability policy which has not been certified as provided by sections 60-528 to 60-531, R. R. S. 1943. § 60-561, R. S. Supp., 1965.

There is no contention in this case that the policy issued by the plaintiff was "certified" as proof of financial responsibility. The question is whether section 60-534, R. S. Supp., 1965, is applicable to the policy issued by the plaintiff in view of the 1965 amendment which restricts its application to policies which have been certified as proof of financial responsibility.

The 1965 amendment to the Motor Vehicle Safety Responsibility Act became effective November 18, 1965. Under the terms of the policy issued by the plaintiff, a new policy period commenced at 12:01 a.m., on December 5, 1965. The accident happened shortly thereafter. It is generally held that a renewal contract is subject to the laws in force at the time it is effected. See, Brady v. Northwestern Ins. Co., 11 Mich. 425; 44 C. J. S., Insurance, § 283, p. 1125; 17 Couch on Insurance 2d, § 68:64, p. 700.

Under the facts and circumstances in this case, section 60-534, R. S. Supp., 1965, had no application to the policy issued by the plaintiff at the time the loss occurred. The finding that the driver exclusion agreement was void as against public policy cannot be sus-

tained. It is unnecessary to discuss the other contentions of the plaintiff in regard to this issue.

At the time the driver exclusion agreement was executed, the plaintiff made no reduction in the premium charged. The defendants argue that an agreement to modify the coverage of an existing insurance policy requires consideration, and contend that the agreement in this case was void for lack of consideration.

The plaintiff contends that forbearance from exercising its right of termination was sufficient consideration to support the agreement. In a similar case, forbearance from exercising a right of cancellation has been held to be sufficient consideration to support a modification. Johnson v. Central Nat. Ins. Co., 210 Tenn. 24, 356 S. W. 2d 277. See, also, Ellis v. Southern Farm Bureau Cas. Ins. Co., 233 Miss. 840, 103 So. 2d 357; Massachusetts Bonding & Ins. Co. v. Florence (Tex. Civ. App.), 216 S. W. 471; Federal Life & Cas. Co. v. Robinson (Ala. App.), 178 So. 549; Casano v. Cook (La. App.), 157 So. 2d 616. Although there is authority to the contrary, we think the better rule is that forbearance from exercising a right of cancellation will support a reduction in coverage. The right of termination involved in this case is similar and the same rule should apply. The finding that the driver exclusion agreement was void for lack of consideration cannot be sustained.

The Great Plains Insurance Company further contends that the plaintiff is estopped to deny coverage. This contention is based upon the fact that the plaintiff made a complete investigation of the accident but did not formally disclaim coverage until June 29, 1966. The trial court made no finding with respect to this issue.

The policy issued by the plaintiff insured the 1963 Ford automobile which was involved in the accident. Until the plaintiff had determined what the facts and circumstances were surrounding the accident, it would not know whether its policy provided coverage or not.

There is no basis here upon which the plaintiff could be held to be estopped to deny coverage.

The judgment of the district court is reversed and the cause remanded with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STEPHEN SCHIMONITZ ET AL., APPELLEES, V. MIDWEST ELECTRIC MEMBERSHIP CORPORATION, APPELLANT.
157 N. W. 2d 548

Filed March 22, 1968. No. 36742.

1. **Appeal and Error: Trial.** Ordinarily, this court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties.
2. **Eminent Domain: Damages.** A condemnee is entitled to recover full compensation for the land actually taken, if any was taken, and for such damages to the residue of the land as are equivalent to the diminution in the value thereof.
3. ———: ———. In a condemnation proceeding under the power of eminent domain where the land is not taken the measure of damages is the difference in the reasonable market value before and after the damaging, taking into consideration the uses to which the land was put and for which it was reasonably suitable.
4. ———: ———. The amount of damages sustained by a landowner for a right-of-way condemned across his land is a question of a local nature, proper to be determined by a jury of the county, and this court ordinarily will not interfere with the verdict if it is based on the evidence in the case.
5. **Trial: Evidence.** When the evidence is conflicting, the verdict of a jury will not be set aside unless it is shown to be clearly wrong.
6. ———: ———. In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
7. ———: ———. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake or that it is clear that the jury disregarded the evidence or controlling rules of law.
8. **Costs.** The reference in section 76-720, R. R. S. 1943, to a rea-

sonable fee does not mean a contingent fee. The fee contemplated is one that is reasonably compensatory for the services rendered.

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

Frederick E. Wanek, for appellant.

Firmin Q. Feltz, for appellees.

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

SPENCER, J.

This is an action by Midwest Electric Membership Corporation, hereinafter referred to as defendant, to acquire by condemnation through the power of eminent domain an easement across Section 1, Township 12 North, Range 35 West of the 6th P.M., in Keith County, Nebraska, owned and farmed as a unit by Stephen Schimonitz and Martha Schimonitz, hereinafter referred to as plaintiffs.

A jury returned a verdict assessing plaintiffs' recovery at $9,840. The district court entered judgment on the verdict in the amount of $12,784.48, which included an allowance of $2,200 for attorney's fees. Defendant has perfected an appeal to this court.

Defendant seeks an easement 100 feet wide diagonally across plaintiffs' section for the erection of a 69,000 volt transmission line embracing 10 H-type structures. These structures are set at distances varying from 540 feet to 770 feet. The power line enters on the north line of Section 1 at a point 1,714.08 feet east of the northwest corner thereof, and runs diagonally across said section for 6,336.8 feet to a point on the east line 125 feet from the southeast corner. The power line actually crosses three quarter sections, the northwest quarter, the northeast quarter, and the southeast quarter. The H-type structures consist of two wooden poles 55 feet in height, set on 10 feet 6 inch centers, cross-braced. There is a

wooden crossarm 24 feet in length supporting three electric conductors composed of 26 strands of aluminum and 7 strands of steel. The minimum clearance of this line will be 21 feet.

Testimony indicates that the area taken out of production because of the poles would approximate 225 square feet per structure. The entire easement area involves 14.55 acres. The easement requested is for a perpetual right-of-way for the erection, construction, reconstruction, replacement, removal, maintenance, repair, and operation of an electric transmission line, with the right of ingress and egress whenever necessary, as well as the right to control any trees, brush, or shrubs on said strip or adjacent thereto which may interfere with the maintenance of said line.

Defendant's petition of taking contains the following: "* * * and the owners and the lessees retain the use of said land under said line and between said structures and the applicant obligates itself to pay all future crop damages incident to the construction, maintenance and reconstruction of said line when and if such damages occur. The right of ingress and egress will be exercised in the manner suggested by the occupant of said premises, but if applicant deems that manner improper then it will enter within 50 feet of the center line of said easement, installing, maintaining and using gates where necessary in all fences which now or might hereafter cross or be adjacent to said right-of-way."

Defendant sets out eight assignments of error. We will discuss only those we deem pertinent.

It seems to be defendant's theory that consideration of damages herein should be limited solely to that portion of plaintiff's farm where the use has actually been restricted, and that the jury could consider therefor only the diminished value of the land actually embraced in the easement. In addition to the fact that there is no merit to that position, the jury was properly instructed on the correct rule, which actually was the theory on

which the case was tried. Ordinarily, this court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties. Durfee v. Keiffer, 168 Neb. 272, 95 N. W. 2d 618.

A condemnee is entitled to recover full compensation for the land actually taken, if any was taken, and for such damages to the residue of the land as are equivalent to the diminution in the value thereof. Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N. W. 833.

In this case, the only property actually appropriated for the exclusive use of condemner is the area upon which the structures were erected, which involves less than 1 acre. However, the easement involves a strip 100 feet wide and 6,336.8 feet long, or 14.55 acres, running diagonally across the section. It is patent that this perpetual easement would necessarily diminish the value of the entire section as well as the area embraced in the easement.

In a condemnation proceeding under the power of eminent domain where the land is not taken the measure of damages is the difference in the reasonable market value before and after the damaging, taking into consideration the uses to which the land was put and for which it was reasonably suitable. Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209.

Defendant in its brief calls attention to its self-imposed obligation to pay all future crop damage incident to the construction, maintenance, and reconstruction of the power line situated on the easement when and if such damages occur, in an effort to mitigate any damages suffered by the plaintiffs as the result of the taking of the easement. They do not argue this point, but merely point it out. This point is adequately covered in Little v. Loup River Public Power Dist., 150 Neb. 864, 36 N. W. 2d 261, 7 A. L. R. 2d 355, at page 866, and no further comment herein is necessary.

The defendant claims that the verdict is excessive.

Defendant's two expert witnesses fixed the damages at $530 and $1,000. Plaintiffs' three expert witnesses fixed the damages from $26,240 to $32,800. Plaintiff, Stephen Schimonitz, fixed the damages at $26,240. The award in county court was $5,795.50. The verdict of the jury herein was $9,840. The rule is that the amount of damages sustained by a landowner for a right-of-way condemned across his land is a question of a local nature, proper to be determined by a jury of the county, and this court ordinarily will not interfere with the verdict if it is based on the evidence in the case. Kennedy v. Department of Roads & Irrigation, 150 Neb. 727, 35 N. W. 2d 781.

Plaintiffs' witnesses were substantial landowners in the locality who were well acquainted with local conditions. Defendant's experts were real estate brokers, one from the locality and one from Grand Island, Nebraska. The qualifications of the witnesses who testified were established, and while there was marked disagreement between the witnesses for the plaintiffs and those for the defendant as to the market value of the land after the appropriation, it is evident that the figures given by defendant's experts were so unrealistic that the jury did not believe them. The jury verdict is well within the range of the testimony. The evidence of plaintiff's witnesses was pertinent to the issue and it would be arbitrary and without justification for this court to substitute its judgment for that of the jury.

The plaintiffs' land before the taking was adaptable to irrigation using the valley system, a self-propelled sprinkler system in common use throughout the area. This is a system where the sprinkler is mounted on a pipe suspended upon wheels driven in a circle around a centrally located pivot point. Plaintiffs' evidence is that this system could not be used after the taking, and while a portion of the area could be irrigated by pipes or a skid tow sprinkler, this would be as effective and would be more expensive.

When the evidence is conflicting, the verdict of a jury will not be set aside unless it is shown to be clearly wrong. Little v. Loup River Public Power Dist., 150 Neb. 864, 36 N. W. 2d 261, 7 A. L. R. 2d 355.

In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. Sall v. Schnackenberg, 178 Neb. 699, 134 N. W. 2d 808.

A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake or that it is clear that the jury disregarded the evidence or controlling rules of law. Garska v. Harris, 172 Neb. 339, 109 N. W. 2d 529.

On the record herein it cannot be said that the verdict of the jury is excessive. There is no merit to this assignment.

Defendant claims the attorney's fee allowed by the trial court is excessive. Section 76-720, R. R. S. 1943, provides that if an appeal is taken from the award of the appraisers by the condemner and the amount of the final judgment is not less than 85 percent of the award, the court may in its discretion award to the condemnee a reasonable sum for the fee of his attorney. The award in county court was $5,795.50. The verdict of the jury was $9,840, or an increase of $4,044.50. The allowance of an attorney's fee was proper herein. It is the amount thereof which the defendant questions.

The minimum fee schedule of the Nebraska Bar Association provides in eminent domain proceedings if a fee is charged on a flat time basis the charge shall be governed by the same circumstances as in any other case, taking into account the amount and problems involved, and the experience and skill of the attorney. If the fee is contingent, and the case is tried on the merits, then the schedule provides the fee ordinarily should not exceed

50 percent of the increase over the offer before trial. In this case the offer was $1,000 and the jury verdict was $9,840. The fee allowed was $2,200. However, we do not interpret the reference in section 76-720, R. R. S. 1943, to a reasonable fee to mean a contingent fee. The fee contemplated by this section is one that is reasonably compensatory for the services rendered. There is no showing in the record of the time spent by counsel in preparation for trial or otherwise. The record indicates a trial of 2 days duration. Any fee allowed must be based on an estimate of the time and preparation required for the record before us. On this basis we determine a reasonable fee to be $1,500, and find the fee allowed by the trial court excessive to the extent of $700. We reduce the judgment of the trial court $700, and affirm the judgment as so reduced. Additionally, we fix the fee for services in this court at $750, and tax all costs to defendant.

AFFIRMED AS MODIFIED.

PAUL H. PIERSON, APPELLEE, V. JAMES R. CLEVEN ET AL., APPELLANTS.

157 N. W. 2d 408

Filed March 22, 1968. No. 36755.

1. **Trial: Damages.** An instruction so framed as to mislead the jury into a double award for an item of damage is prejudicially erroneous.
2. ———: ———. A verdict for damages based on an instruction in which a statement concerning recovery for an item of damage is redundant, may nevertheless imply a single award for the item.
3. ———: ———. A verdict for damages will not be set aside on the ground of excessiveness unless it is so clearly exorbitant as to indicate unfair prejudice or disregard of evidence or controlling rules of law.

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

Chambers, Holland & Dudgeon, for appellants.

Asa A. Christensen, for appellee.

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

SMITH, J.

Defendants admitting liability, a jury awarded plaintiff $55,448.84 for personal injuries and property damage sustained in an automobile collision. Defendants have appealed. Their contentions are related to an instruction to the jury and the amount of the verdict.

The instruction, No. 6, is said to have authorized double recovery for pain and suffering. It reads in part: "* * * you should consider the nature and extent of his injuries, * * * his suffering of mind and body * * *, expenses * * *, pain and suffering, mental or physical, sustained to date and which * * * will be sustained in the future * * *. You are not permitted to allow the plaintiff any damages by way of punishment * * * nor as an example * * * since the law * * * does not permit the same and allows only compensatory damages, that is, such damages as will fairly make the plaintiff whole for any such damages you find he has sustained; * * *."

An instruction so framed as to mislead the jury into a double award for an item of damage is prejudicially erroneous. McCarty v. Morrow, 173 Neb. 643, 114 N. W. 2d 512; Singles v. Union P. R.R. Co., 173 Neb. 91, 112 N. W. 2d 752. A verdict for damages based on an instruction in which a statement concerning recovery for an item of damage is redundant, may nevertheless imply a single award for the item. The verdict here was general. The phrase "pain and suffering" is easily understood. Under the instruction the damages were to be compensatory, not punitive. The redundancy was not prejudicial error.

On April 22, 1966, and after the collision, plaintiff, in a coma, was received at the emergency room of Bryan Memorial Hospital, Lincoln, Nebraska. Examination by an orthopedist and a general surgeon revealed multiple

injuries: Fracture of a little finger; deep lacerations of the face and the left tibia; hemorrhage; shock; cerebral concussion; depressed fracture of the left parietal area, located in the skull, and loss of brain substance through the hole; extensive compound fractures of the maxilla or upper jaw; and exploded fracture of the right knee with the whole joint exposed.

Immediate surgery was imperative. The doctors promptly began preparatory treatment using oxygen, intravenous fluids, and transfusions. In the operating room the general surgeon discovered fragmentation of the depressed bone of the skull. He removed part of it, elevating the remainder. Meanwhile the orthopedist was working on the lower extremities. He removed the pieces of the right kneecap which had been fragmented beyond repair. The patellar tendon was mended. Edges of the gross lacerations were sewed together. The right leg was encased in a cast which was to be taken off 27 days later. During this hospitalization of 16 days a dental surgeon wired the fractured jaw so that plaintiff could not open his mouth during a period of 5 weeks. Three weeks more passed before plaintiff could insert a spoon.

Prior to the collision plaintiff, age 40, had been in good health. Estimates of permanent disability to the body as a whole are 20 and 25 percent, and to the right leg 50 percent. Some of the permanent injuries are intense headaches at 2-week intervals, loss of 4 teeth, numbness in the right side of the mouth, and malocclusion. Romping is intolerable because of the disability to the leg. Other motions such as climbing and descending stairs, dressing, kneeling, and lifting are greatly restricted. Manual labor unduly tires plaintiff. Susceptibility to injury has increased.

Plaintiff was employed as foreman of a millroom in the furniture factory operated by Union College. After the collision he received two raises in pay. His wages in April 1967, were $131.20 for the workweek of 47½ hours. He sustained the following losses: $1,715.19, foreman's

wages; part-time employment elsewhere at $20 a week; opportunity for promotion to the position of plant superintendent with a raise of $10 a week; $200, property damage; $3,233.65, hospital and medical expenses; and an anticipated $450 for future dental expense.

The duties of plaintiff as foreman were supervision of assistants, training of students, and maintenance of the millroom machinery. Areas of trouble for him in April 1967, were decision making, absence because of headache, the stairway from the millroom level to his office on an upper level, maintenance of machinery, and exhaustion at the close of the workday. Plaintiff was also skilled in carpentry and masonry, but he can no longer work as a mason, and his employability for carpentry is limited. No one was optimistic about improvement.

A verdict for damages will not be set aside on the ground of excessiveness unless it is so clearly exorbitant as to indicate unfair prejudice or disregard of evidence or controlling rules of law. Zawada v. Anderson, 181 Neb. 467, 149 N. W. 2d 329.

In determining nonpecuniary harm, a jury might reasonably find these circumstances: Plaintiff had eagerly resumed work. Although his own account of the injuries was modest, the other witnesses, who were not disposed to exaggerate, described plaintiff's conditions graphically. We conclude that the verdict was not excessive.

The judgment is affirmed.

AFFIRMED.

IRVIN WAYNE MCKINLEY, APPELLANT, V. JUDITH MCKINLEY, APPELLEE.

157 N. W. 2d 405

Filed March 22, 1968. No. 36758.

1. **Divorce. The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case.**

2. ———. Although the statute provides that the wife shall be allowed alimony out of the husband's estate in such an amount as the court shall deem just and reasonable, having regard to the ability of the husband, his earning capacity is an element to be considered and, 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.

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

Knapp & Tarrell, for appellant.

Mitchell, Taylor & Beatty, for appellee.

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

CARTER, J.

Plaintiff, Irvin Wayne McKinley, brought this action for divorce against the defendant, Judith McKinley. The trial court granted a divorce to the defendant and granted the custody of the minor children of the parties to the defendant. The court made a division of the property and an allowance of child support, alimony, and attorney's fees. The plaintiff has appealed.

The only issues on this appeal are the correctness of that part of the trial court's decree dividing the property and fixing the amount of the child support, alimony, and attorney's fees.

The parties were married on June 30, 1963. Two children were born to the marriage, Beverly, age 3 years, and Brian, age 1 year. At the time of trial the defendant was 24 years of age and the plaintiff was approximately the same age. Both were attending college in Ottawa, Kansas, at the time of the marriage and neither completed work for a degree. They moved to Kearney, Nebraska, shortly after their marriage where they have resided for more than 2 years. Plaintiff has been employed by Slatter Food Service as director of dining services at Kearney State College. Plaintiff's gross

earnings have been aproximately $9,000 per year with an average take-home pay of $600 per month. The parties do not own a home and they have accumulated no savings. They own some personal property and owe some sizeable debts. It is evident from the record that the cause of the divorce is the fault of the plaintiff.

The record shows that the income of the plaintiff was used up in living expenses during the period of the marriage. They had an automobile of the present value of $600. They also had the following property on which they listed the cost price: Household furniture, $1,950; a set of encyclopedias, $398; a sewing machine, $300; a washing machine, $312; a reclining chair, $150; a television set and stereo, $1,000; and miscellaneous items such as dishes, small appliances, and the like, $500. Each had an insurance policy providing protection but of little actual value. Plaintiff participated in a stock profit-sharing plan that had an actual value of $126 at the time of the trial. Plaintiff also participated in a pension plan which had an actual value of $70. The last two items were deducted from his gross earnings. They also had an interest in a mutual fund that had a small value. The total value of their property on the above basis of calculation amounted to approximately $5,406.

The parties owed the following debts: First National Bank, $1,833; Platte Valley State Bank, $398; government educational loan, $1,200; medical bills, $170; a total of $3,061. The monthly payments due on these long-term obligations amounted to approximately $112 other than the deductions made from plaintiff's gross earnings.

On these facts, the trial court, after considering the living expenses of the defendant and her two small children and the requirements of the plaintiff in maintaining himself, entered a decree providing substantially as follows: The plaintiff was awarded the automobile, the television and stereo set, his golf, hunting, and fishing equipment, and his personal belongings. The de-

fendant was awarded the balance of the furniture, appliances, and the dishes, linens, and other miscellaneous items. In addition, defendant was awarded $85 per month per child for the support of the children, $150 per month for 2 years as alimony, and attorney's fees in the total amount of $475 for services rendered in the district court by her attorney.

We feel that the division of property was correct. Reckling v. Reckling, 172 Neb. 731, 111 N. W. 2d 627. The allowance of child support is not excessive under all the circumstances. The allowance of alimony in the amount of $3,600 is entirely proper under our holdings in Prosser v. Prosser, 156 Neb. 629, 57 N. W. 2d 173, and Sowder v. Sowder, 179 Neb. 29, 136 N. W. 2d 231. We cannot say that the allowance of attorney's fees in the amount of $475 is excessive in view of the fact that there were two trials of the case in district court. The problem before this court, as it was in the district court, is the apportionment of the earnings of the plaintiff between the creditors of the parties, a sufficient amount to maintain the wife and the two small children, and a sufficient amount for the husband to maintain himself.

In this respect, the wife is unable to work or to prepare herself to work by completing her college education without incurring the additional expense of caring for the children in her absence. On the other hand, the husband is charged with the obligation of making payments in retiring the debts incurred during the marriage. Each of the parties will have to make some sacrifices until some of the debts are paid and more money is thereby made available for the maintenance of two households instead of one. Luxuries such as membership in clubs and organizations must be curtailed when necessary to carry out the primary obligations of the parties.

We affirm the division of property, the award of child support, and the allowance of attorney's fees by the district court. We modify the award of $3,600 as ali-

mony to provide that such amount shall be paid at the rate of $100 per month for 3 years. Alimony and child support payments will commence as of the termination of the child support ordered paid during the pendency of the action. The costs of this appeal are taxed to the plaintiff, including an attorney's fee in the amount of $250 for services rendered by defendant's attorney in this court. The decree of the district court is affirmed as so modified.

AFFIRMED AS MODIFIED.

SMITH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. LESLIE R. FITZGERALD, APPELLANT.

157 N. W. 2d 415

Filed March 22, 1968. No. 36759.

1. **Post Conviction.** A petitioner is required to allege facts, which if proved would constitute an infringement of his constitutional rights.
2. ———. A petitioner is required to set forth facts and not merely conclusions.

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

Norman Krivosha and Rodney P. Cathcart, for appellant.

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

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

WHITE, C. J.

This is a post conviction case (sections 29-3001 to 29-3004, R. S. Supp., 1965), in which petitioner alleges a violation of his constitutional right of appeal. Douglas v. California (1963), 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed.

2d 811; Swenson v. Bosler (1967), 386 U. S. 258, 87 S. Ct. 996, 18 L. Ed. 2d 33; State v. Willams (1967), 181 Neb. 692, 150 N. W. 2d 260. The district court denied an evidentiary hearing. We affirm the judgment.

The petitioner alleges: "That the said Plaintiff was denied his constitutional rights in that he was not afforded the opportunity to appeal said conviction and has been denied the right to appeal said conviction." No facts are alleged to support this conclusion.

A petitioner is required to allege facts, which if proved would constitute an infringement of his constitutional rights. State v. Clingerman, 180 Neb. 344, 142 N. W. 2d 765. A petitioner is required to set forth facts and not merely conclusions. State v. Losieau, 180 Neb. 671, 144 N. W. 2d 406.

Under the above authorities, a mere denial of the right or opportunity to appeal is clearly an allegation of a legal conclusion only, and affords no basis for post conviction relief. Further the record shows that defendant per se perfected an appeal to this court which was dismissed as being out of time. State v. Fitzgerald, case No. 36426, of the records of this court.

Just how he was denied the right or opportunity to appeal within the prescribed statutory time does not appear nor are any such facts alleged. An evidentiary hearing under such circumstances would be purely speculative, no factual issues could be made, and the State and previous counsel for petitioner would have no opportunity to adequately defend. The situation is akin to a mere allegation of general negligence in a tort action. The judgment of the district court is correct and is affirmed.

AFFIRMED.

TERRY GENE FRISCH, A MINOR, ET AL., APPELLANTS, V. FRANK SVOBODA ET AL., APPELLEES.

157 N. W. 2d 774

Filed March 29, 1968. No. 36691.

1. **Judgments.** The burden is upon the party moving for summary judgment to show conclusively that no issue of fact exists.
2. **Depositions: Trial.** Where depositions are attached to the bill of exceptions together with an order of the trial court reciting that the depositions are a proper and necessary part of the record, and the record otherwise shows that the depositions were considered by the trial court as being in evidence, the depositions will be considered as having been received in evidence in the trial court.
3. **Joint Adventures.** A joint adventure is in the nature of a partnership in which the parties have a common interest and equal voice in the performance of the undertaking and the control of the agencies used therein.
4. **Joint Adventures: Partnership.** The absence of a mutual interest in the profits or benefits of the undertaking is conclusive that a partnership or joint adventure does not exist.

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

Paul L. Kubitschek and Tedd C. Huston, for appellant.

Jewell & Otte, for appellee Svoboda.

William W. Griffin, for appellee Shane.

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

BOSLAUGH, J.

This is an action for damages by Terry Gene Frisch against Frank Svoboda and Charles Shane. The plaintiff was injured while filling a tank truck with liquid fertilizer.

The amended petition alleged that the defendants were engaged in a joint business adventure or that the plaintiff was employed by both defendants. The defendant Shane moved for a summary judgment in his favor, alleging that there was no genuine issue of material

fact because depositions on file showed that the defendants were not engaged in a joint adventure and that the plaintiff was not an employee of Shane.

The trial court found that the pleadings "and the depositions on file and in evidence for the consideration of the Court" established that there was no genuine issue of material fact respecting the existence of a joint adventure or employment of the plaintiff by Shane. The motion was sustained and the action dismissed as to Shane. The plaintiff's motion for new trial was overruled and he has appealed.

The bill of exceptions does not show that any evidence was offered or received at the hearing on the motion for summary judgment. Shane contends that this requires that the judgment be affirmed on the theory that a finding will be presumed correct in the absence of a bill of exceptions.

The problem here is not the absence of a bill of exceptions but a bill of exceptions that appears to contain no evidence to sustain the finding of the trial court. The burden of proof was on the movant to show conclusively that there was no issue of fact. Collett v. Hendrickson, 172 Neb. 571, 110 N. W. 2d 851. If there was no evidence before the trial court, the findings cannot be sustained.

Attached to the bill of exceptions are depositions of the plaintiff and the two defendants. Also attached to the bill of exceptions is an order of the trial court finding that certain other depositions, erroneously included in the bill of exceptions as originally prepared, should be excluded. This order recites that the attorneys in attendance, representing the plaintiff and Shane, "stipulated that the other depositions remaining in the record are a proper and necessary part of said record and correctly included in the Bill of Exceptions." Under the particular circumstances in this case, we believe that the depositions of the plaintiff and the defendants should be considered as having been received in evidence by the trial court and properly included in the bill of ex-

ceptions. See Cramer v. Clark, 121 Wash. 507, 209 P. 688, 24 A. L. R. 970.

The plaintiff testified that he had worked for Svoboda in a feedstore during the summer of 1963; that on July 14, 1964, he asked Svoboda "if there would be any work"; that Svoboda said yes; and that he commenced working that afternoon.

The plaintiff received all of his instructions from Svoboda and had no contact with Shane concerning the employment that commenced on July 14, 1964. The plaintiff's duties included unloading, hauling, and spreading liquid fertilizer. The fertilizer was pumped from a railroad tank car into a tank truck for transportation to where it was to be applied. The tanks on the applicators were then filled from the tank truck. The plaintiff was required to fill the tank truck from the tank car; drive the tank truck to the field; fill the applicator tank from the truck tank; and then operate a tractor which pulled the applicator. The plaintiff was injured while filling the tank truck on July 15, 1964.

The plaintiff testified that he considered that Svoboda had hired him to do the work but thought that there was some connection with Shane because Shane had furnished the truck and applicator.

Svoboda testified that Shane was in the fertilizer business and owned the tank truck and applicator. Svoboda had agreed with Shane to furnish a tractor and to unload, haul, and apply the fertilizer for 50 cents an acre. The payment was for the services of Svoboda and the use of his tractor. Svoboda had no interest in the fertilizer business and did not receive any commission for the sale of fertilizer. Svoboda did the work at his convenience, and there was no agreement concerning any employees to be hired by Svoboda. Shane did not know that Svoboda had hired the plaintiff, and the plaintiff was paid by Svoboda. Svoboda had two sons who helped him with the work; and if they were paid anything, it was by Svoboda.

Shane testified that he was in the liquid fertilizer business in 1964; that he had no partner or associate in the business other than his wife; that he sold the fertilizer applied; and that he "hired" Svoboda to apply it for him. Shane's only obligation to Svoboda was to pay him 50 cents per acre for applying the fertilizer. Shane's testimony, generally, was the same as that of Svoboda.

A joint adventure is in the nature of a partnership in which the parties have a common interest and equal voice in the performance of the undertaking and the control of the agencies used therein. Soulek v. City of Omaha, 140 Neb. 151, 299 N. W. 368. The absence of a mutual interest in the profits or benefits of the undertaking is conclusive that a partnership or joint adventure does not exist. Gardner v. Kothe, 172 Neb. 364, 109 N. W. 2d 405.

There is an entire absence of evidence to show that Shane and Svoboda were engaged in a joint adventure or that the plaintiff was an employee of Shane. Gardner v. Kothe, *supra*. The evidence shows conclusively that there was no genuine issue of material fact in regard to these allegations.

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

AFFIRMED.

SPENCER, J., participating on briefs.

PARAMOUNT PAPER PRODUCTS COMPANY, INC., APPELLANT, v. AETNA CASUALTY & SURETY COMPANY, APPELLEE.

157 N. W. 2d 763

Filed March 29, 1968. No. 36705.

1. **Insurance: Evidence.** The exclusionary clause found in standard fidelity insurance policies restricting recovery to losses in regard to which the proof is not dependent upon an inventory computation or a profit and loss computation is valid and is not ambiguous.

2. ———: ———. The requirement that losses be proved by evidence wholly apart from such computations is applicable to the extent of the loss as well as to the fact of loss.
3. ———: ———. Evidence of such computations may be properly used for the purposes of corroboration.
4. ———: ———. An "inventory" is a simple list or enumeration of merchandise, materials, or property on hand.
5. ———: ———. A "computation" involves the act or action of computing.
6. ———: ———. Proof of a unit-type inventory is not barred by the exclusionary clause. It applies only to inventories which because of their inherent nature or because of the necessity for comparison require certain computations.
7. **Insurance: Contracts.** Parties to a contract may make the contract in any legal form they desire and agree upon.
8. **Insurance: Evidence.** Where employee dishonesty exists, an inference that all losses revealed by an inventory computation are attributable to employee dishonesty is too uncertain and speculative to provide a basis for recovery in the absence of other evidence bearing thereon.

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

Matthews, Kelley & Cannon, for appellant.

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

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

NEWTON, J.

This is an action on a blanket crime policy issued by defendant to plaintiff. As a part of the insuring agreement, the policy provides coverage as follows: "EMPLOYEE DISHONESTY COVERAGE. 1. Loss of Money, Securities and other property which the Insured shall sustain through any fraudulent or dishonest act or acts committed by any of the Employees, acting alone or in collusion with others." It also contains the following exclusion clause referred to as Section 2. "This Policy does not apply: * * * (b) to loss, or to that part of any loss, as the case may be, the proof of which, either as

to its factual existence or as to its amount, is dependent upon an inventory computation or a profit and loss computation; provided, however, that this paragraph shall not apply to loss of Money, Securities or other property which the Insured can prove, through evidence wholly apart from such computations, is sustained by the Insured through any fraudulent or dishonest act or acts committed by any one or more of the Employees; * * *."

At the conclusion of plaintiff's evidence, the trial court sustained defendant's motion to dismiss and plaintiff appeals.

The evidence indicates that plaintiff is in the printing business, its primary business being the making up and printing of labels of various types for which it uses rather specialized and expensive types of paper and tape. Officials in plaintiff's Los Angeles, California, plant became aware of what appeared to be too large a discrepancy existing between the amount of paper purchased and that used in the business. It then employed a private detective to work as an undercover man in the plant which resulted in the subsequent arrest and conviction of two of plaintiff's employees on charges of two thefts from plaintiff's paper and tape stock. All of the materials involved in the two incidents uncovered by the detective were recovered and no claim is made for the loss of such materials. Thereafter, plaintiff sought to ascertain, by means of inventory computations, the amount of any loss alleged to be attributable to theft by employees. An inventory was taken on May 31, 1965, and as a starting point, an inventory taken on October 31, 1964, was used. This is the period covered by the computations mentioned. The inventories of the stock were taken on a unit basis and then reduced to values in dollars and cents. The unit inventory taken October 31, 1964, was not available at the time of trial. The inventories, books, and accounts of plaintiff referred to in determining the amount of loss were checked by plaintiff's employees and partially by a certified public accountant

for purposes of verification. The accountant stated that figures used by him in making cost studies were compiled by the use of raw-material-usage figures obtained from the plaintiff's books; that such cost studies vary and are not absolute; and that this is true also of the material-usage figures similarly obtained. It was also conceded to be possible that loss of material could have been caused by "* * * union activities, deliberate delay, personal relations, theft and so forth, * * *." The evidence further discloses that there was a considerable waste in connection with the business in that the labels made up were in various sizes and shapes, were run off on large rolls of paper, and when cut out, left unused a considerable portion of such raw material. Also, there was waste in preparing the presses for each new run and high speed presses being used, if errors were made or the printing process was not adequate, a considerable volume of paper would be wasted before the error or failure to print properly was observed and corrected. Plaintiff's employees knew of no other instance of theft by employees other than the two incidents heretofore mentioned, resulting in the arrest and conviction of the two employees mentioned. In obtaining paper from the stockroom for printing purposes, the pressmen doing the work would go to the stockroom, obtain the paper required, and no check was made of paper so removed from the stockroom on such occasions.

Plaintiff contends that the exclusionary clause, in view of the proviso therein contained, must be construed to mean that although inventory computations cannot be used to prove the fact of loss until there has been independent evidence on that proposition, once the fact that loss by theft has been established, the amount of such loss may then be proved by an inventory computation. On the contrary, defendant contends that both the fact and the amount of the loss must be proved by evidence independent of an inventory computation. In order to resolve this question of interpretation, it would

be well to review the history of this clause and the available decisions interpreting it.

Difficulties have been encountered in claims against insurance companies on employee fidelity bonds for a considerable period of time. In cases where no direct or circumstantial evidence of specific losses or shortages or of employee dishonesty was available and it was necessary to rely upon abnormal inventory shortages, insurers were concerned with the uncertainty and unreliability of some inventory accounting procedures and the possibility that such inventory shortages could have been the result of factors other than employee infidelity. In an attempt to alleviate this situation, insurers inserted a clause in such policies requiring "conclusive proof." In view of the liberal interpretation placed upon the conclusive proof clause by the courts, this also was found to be unsatisfactory and the exclusionary clause which is the subject of discussion in the present case has become standard. See Hoboken Camera Center, Inc. v. Hartford Acc. & Ind. Co. (1967), 93 N. J. Super. 484, 226 A. 2d 439.

It appears that insurers wish to make it clear that there was no coverage for any loss based on inventory or profit and loss computations, to rule out a determination of the amount of loss by means of such computations, to limit coverage to losses definitely due to dishonesty, and to make it clear that coverage extended only to that part of any loss definitely proven to have resulted from dishonest acts. It further appears that insurers recognized the fact that inventory shortages could come about as the result of many conditions other than employee dishonesty. For example, such a shortage could result in instances where inadequate or erroneous records were kept, as the result of breakage, spillage, or waste, as the result of errors in measuring or counting, as the result of errors in recording or paying for goods, or as the result of theft by other than employees. There are many other factors besides those enumerated which could

contribute to inventory shortages. One common inventory practice is by stock records of goods on hand maintained on the basis of aggregate dollar value, calculations of sales records, taking into account the average market or mark-up used to determine the cost of goods sold, and the dollar value of the inventory which should be on hand. There is always a likelihood of some degree of estimation error in such a system as contrasted with a unit-basis inventory and accounting system which, if accurately maintained, being based on an actual accounting of specific items on hand and identification of items sold may be reasonably accurate, although even then the possibility remains of a dishonest or erroneous accounting of inventory. Inventory shortage exists when a physical inventory of goods taken on a unit basis is less than the amount shown on the books of the insured. In the present instance, the inventory was taken on a unit basis although partially used rolls of paper were inventoried by means of measurement and estimation. This was then reduced to a dollar value, the original unit value discarded and the dollar value thus arrived at was compared with the dollar value of goods sold. It is apparent that the exclusionary clause was designed for the purpose of preventing recovery on the basis of unreliable inventory computations which are subject to the many unreliable features above referred to and to forestall recovery except for losses shown with reasonable certainty to have resulted from the dishonest acts of employees and not from other causes.

There appear to be only a few cases dealing directly with the controversial clause herein. All are comparatively recent and will be taken up in chronological order.

In Fort Smith Tobacco & Candy Co. v. American Guar. & Liab. Ins. Co (1962), 208 F. Supp. 244, the court held that the exclusionary clause was not ambiguous; that the insured was bound by such clause and had the burden of proving a loss in conformity therewith; and that recovery could be had only on evidence wholly apart from

inventory or profit and loss computations which " 'reasonably proves that the loss was in fact due to the fraud or dishonesty of one or more of said employees, * * *.' " In this case, there was other evidence of employee dishonesty, but the court refused to permit the establishment of the amount of the alleged loss by proof of an inventory shortage and stated, in substance, that because some loss had been caused by employee dishonesty, any inference that the entire loss as shown by an inventory shortage was caused by employee dishonesty was not permissible, was too uncertain or speculative, and was based merely on conjecture or possibilities.

In Tri-Motors Sales, Inc. v. Travelers Ind. Co. (1963), 19 Wis. 2d 99, 119 N. W. 2d 327, the court held the exclusionary clause to be ambiguous and applied it only in regard to proof of the fact of loss but not in regard to the amount of loss. The inventory in this case was based upon a dollar rather than on a unit basis and it was conceded that there could be some variations in this type of computation. The court concluded that there could be two interpretations: (1) The words " 'as to its amount' " carry over into the proviso and prohibit the use of inventory computations, or (b), that such words do not carry over and on proof of some loss by theft, the insured could then prove the amount of loss by means of the computations mentioned in the clause. The court adopted the second interpretation, stating that the proviso was meaningless under the first interpretation and would permit only cumulative proof of loss by means of inventory computations.

In Mid-Continent Stores, Inc. v. Central Surety & Ins. Corp. (Mo., 1964), 377 S. W. 2d 567, the court held that the language used in the exclusionary clause was clear and unambiguous; the parties to the contract had a right to contract to such limitations or conditions of liability as they might agree upon; and the contract excluded any loss, the proof of which either as to its factual existence

or as to its amount was dependent upon an inventory or profit and loss computation.

The case of Sun Ins. Co. of New York v. Cullum's Men Shop, Inc. (1964, 5th Cir.), 331 F. 2d 988, dealt with the loss of certain men's suits. Definite evidence was produced of the theft of some suits, but plaintiff relied upon a unit-inventory system to show the amount of the loss. It appears that a swatch book was kept in which was entered the number, name of the manufacturer, the color, style, size, and cost of each suit, together with a swatch of the material of which the suit was made when available. Each suit coming into the store was entered in this manner in the swatch book and a corresponding number was entered on a tag attached to the sleeve of each suit. As the suits were sold, each tag would be removed and at the end of each business day, the suits indicated by the sleeve tags to have been sold were crossed out of the swatch book. To ascertain the extent of the loss, a check of the tags removed from the suits was made against the swatch book. In this instance, the court considered the evidence sufficiently reliable to permit recovery although stating that the system mentioned for ascertaining the loss did not constitute an inventory computation.

In the case of Anschutz & Associates v. Conley (1964), 74 N. M. 363, 393 P. 2d 710, the only question presented was whether or not, in view of the exclusionary clause, the insured received under the policy the coverage which he had requested. The court held that he did receive such coverage and that the exclusionary clause simply set out the acceptable means of proving a loss.

In Kentuckiana Sales, Inc. v. Security Ins. Co. of New Haven (Ky. App., 1965), 394 S. W. 2d 744, plaintiff operated a redemption center for trading stamps and sought to recover for a loss of merchandise and trading stamps. There was evidence of one theft by one employee of both merchandise and stamps, but this property was recovered. Insofar as the loss of merchandise

was concerned, plaintiff relied on an inventory computation. In regard to the amount of stamps lost, plaintiff relied upon a periodic checking of the stamps redeemed against the number canceled by means of perforations. The court refused to accept the inventory computation as proof of the loss of merchandise, ruling that the amount, as well as the fact of loss, must be established by other evidence, but once such evidence was produced, the inventory computation could then be made use of as supplemental or cumulative evidence of such loss. It did accept the evidence submitted in regard to the loss of trading stamps and held that this did not constitute an inventory computation.

In Gillette Co. v. Travelers Indemnity Co. (1966, 7th Cir.), 365 F. 2d 7, there was evidence of theft by an employee of certain merchandise which was recovered. Plaintiff sought to recover for other losses attributed to employee dishonesty, the only evidence of which either as to fact or amount, was arrived at by means of an inventory computation. Plaintiff claimed that the exclusionary clause was ambiguous and resulted, if strictly construed, in the practical nullification of the contract. Nevertheless, the court strictly construed the exclusionary clause. It was pointed out that since the only merchandise regarding which there was direct evidence of theft had been recovered; there was no proof of loss due to employee dishonesty either in fact or in regard to the amount except such as might be inferred by reason of an inventory computation and recovery was denied.

The case of Locke Distributing Co. v. Hartford Acc. & Indem. Co. (Mo., 1966), 407 S. W. 2d 658, dealt with an inventory shortage in a beer warehouse. There was no direct evidence of the theft of beer from the warehouse although there was evidence of theft of the company funds by an employee. The court ruled that inventory computations were admissible as evidence, but that this, in the absence of other evidence, was not competent proof of loss. The court stated that the words

"as to its amount" were clearly intended to be carried over into the proviso found in the exclusionary clause and prohibited proof of the amount of the loss by means of an inventory computation even though there was independent evidence of the act of stealing.

The last case dealing with the subject is that of Hoboken Camera Center, Inc. v. Hartford Acc. & Ind. Co., *supra.* The court arrived at the conclusion that public policy, as outlined in certain New Jersey decisions, would prohibit a strict interpretation of the exclusionary clause. The following excerpt serves to indicate the thinking and ruling of the court on this subject: "Such accommodation, in our judgment, should preclude recovery by the insureds under this bond if they had no proof whatever of an employee-connected loss other than inventory or profit and loss computations, no matter how reliable in the particular case. On the other hand, inventory records may by their very nature constitute inherently indispensable proof of an allowable claim under a fidelity bond in one or the other or both of two respects: (a) as the only available proof of the full amount of a loss, there being some appreciable proof from other facts or circumstances of a loss caused by employee-dishonesty; (b) as corroboration sufficient to make a case for the fact-finder of the fact of an employee-connected loss where independent proof thereof, considered alone, might be insubstantial. To deny an insured the right to adduce proof of inventory records for either of these purposes might in a particular case defeat justice by precluding recovery on a meritorious claim by use of the only proofs reasonably available to the insured and probative thereof. So to do would contravene public policy, not only in defeating the reasonable expectations of coverage of the purchaser of the insurance but also in allowing a private agreement to nullify the inherently probative effect of relevant evidence."

It will be observed that court decisions from other

jurisdictions cover a wide range. In some, the exclusionary clause has been strictly interpreted. In others, the clause has been held to be ambiguous and to permit of a more liberal construction. Still others have permitted recovery where the inventory computation was made upon a reasonably reliable unit basis although in such cases, the courts denied that the evidence actually constituted inventory computations, and finally, the Hoboken case is one in which the court refused to interpret the clause literally on the ground that it was contrary to public policy.

As heretofore mentioned, the exclusionary clause in its present form was adopted for the purpose of requiring *definite proof* of loss by reason of dishonest acts on the part of employees. It was necessary for the insurers to protect themselves against claims based upon questionable and uncertain inventory or profit and loss computations. It is apparent that there is no ambiguity existing by reason of the proviso contained in the exclusionary clause. The plain meaning of the language used definitely indicates that proof, other than that arrived at by means of an inventory or profit and loss computation, is required not only as to the fact of a loss, but also as to the amount of such loss although such computations are not forbidden as corroborative evidence. The exclusionary clause admittedly limits coverage under the policy but does not nullify it nor does it necessarily require that the thief be caught "red-handed" before recovery can be had. There are many instances in which losses by theft can be shown by other means. It will be noted that the exclusionary clause does not bar recovery based upon an inventory, but only upon an "inventory computation or profit and loss computation." The word computation, as defined in Webster's Third New International Dictionary, at page 468, means: "the act or action of computing: * * *." An inventory made upon a unit or physical basis comprises simply a list of merchandise or materials on hand and there is no computation or comput-

ing in regard thereto, it is simply an enumeration. See Black's Law Dictionary (4th Ed.) p. 959. On the other hand, an inventory taken and reduced to a dollars and cents basis does involve the act of computing and is a computation. It would, therefore, appear that the exclusionary clause does not bar an inventory made upon a unit basis, but does bar inventories which require computation to reduce them to some other basis, or, where when one inventory is compared with a later one, it is necessary to compute and allow for sales and purchases made in the interim. As noted before, insurers simply wish to require definite proof of losses due to employee dishonesty. Where employee dishonesty clearly exists, it would appear that a reasonably reliable inventory made upon a unit basis would serve to meet the purpose for which the exclusionary clause was included in the policy. It cannot be denied that the parties are free to contract on any basis agreed upon; that where employee dishonesty exists, an inference that all losses revealed by an inventory are attributable to employee dishonesty in view of the inherent uncertainties in such inventory computations are too uncertain and speculative in nature to provide a reliable basis for recovery; and that the parties are entitled to a strict or literal construction of the exclusionary clause.

In the present case, plaintiff had knowledge of only two thefts by employees and the merchandise lost as a result of these thefts was all recovered. Consequently, plaintiff has failed to prove by either direct or circumstantial evidence any loss whatsoever by reason of employee dishonesty. It has simply shown that such dishonesty had existed and, by inference, it seeks to attribute its entire loss revealed by an inventory computation to employee dishonesty. Here we are not dealing with a simple inventory or list of goods on hand, but with the conversion thereof into dollars and cents figures, and a comparison of two such inventories necessarily requiring a computation of purchases, sales, waste, etc.,

in the interim, in other words, with "an inventory computation" which is barred insofar as proof of loss is concerned by the exclusionary clause in the absence of other evidence of such loss.

The judgment of the district court was correct.

AFFIRMED.

SMITH and McCOWN, JJ., concurring in result.

The policy provision in our opinion prohibits proof by inventory records that are not trustworthy. An important circumstance is the degree of estimation involved in the inventory system. The probative value of unit-type or perpetual inventory records is ordinarily higher than that of records based chiefly on generalized estimates. The distinction between an "enumeration" and a "computation" of inventory shortage is subtle, productive of confusion, and unserviceable. We cannot formulate a single rule that will satisfactorily cover the innumerable variables of trustworthiness. We concur in the result. See, Hoboken Camera Center, Inc. v. Hartford Acc. & Ind. Co., 93 N. J. Super. 484, 226 A. 2d 439; Kurland, "Claims For Inventory Shortage Resulting From Employee Dishonesty under Fidelity Insurance Bonds—a Present Appraisal," 33 Ins. Counsel J. 397 (1966); Bunge, "Inventory Shortages," 20 Ins. Counsel J. 271 (1953).

PAUL D. BECKMAN ET AL., APPELLANTS, V. CITY OF GRAND ISLAND, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES, CENTRAL NEBRASKA COUNCIL ON ALCOHOLISM, INC., A CORPORATION, INTERVENER-APPELLEE.

157 N. W. 2d 769

Filed March 29, 1968. No. 36745.

1. **Zoning.** Zoning laws should be given a fair and reasonable construction in the light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in

which they are employed, and the general structure of the law as a whole.

2. ———. In interpreting the language of a zoning ordinance to determine the extent of the restriction upon use of the property, the language must be interpreted, where doubt exists as to the intention of the legislative body, in favor of the property owner and against any implied extension of the restriction.

3. ———. The name by which an institution is designated or called is not of controlling importance in determining whether or not it is a permissible use under a zoning ordinance. The question is to be determined by the activities or character of the business or services carried on and not by the name.

4. ———. In interpreting definitions in zoning statutes or ordinances, the court cannot supply what the municipal legislative body might have provided but which the court cannot by reasonable construction say that it did provide.

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

Wagoner & Grimminger, for appellants.

James L. Parmelee, Jr., and Duane A. Burns, for appellee.

John R. Higgins, for intervener-appellee.

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

MCCOWN, J.

This is an action initiated by the appellants to reverse a decision of the board of adjustment of the City of Grand Island issuing an occupancy permit under the provisions of the zoning regulations of the city.

The intervener, Central Nebraska Council on Alcoholism, Inc., applied for an occupancy permit for premises situated at 406 West Koenig Street, which is located in a B-Residence district. The premises had been used as a funeral home until 1958, for offices for a while thereafter, and were vacant at the time of the application. Appellants' property is located in the vicinity, partially in the B-Residence district and partially in the

B-Business district. The certificate of occupancy was granted by the chief building inspector subject to certain parking and alteration requirements. On appeal, the board of adjustment determined that the proposed use of the premises as a rehabilitation center for dwelling purposes is permitted under the provisions of the zoning ordinances and regulations of the city. Appellants filed a petition on appeal in the district court under the provisions of section 19-912, R. S. Supp., 1965. The district court affirmed the decision of the board of adjustment and dismissed the appeal.

Appendix I, section 3, of the zoning code applicable to A-Residence districts provides:

"(a) Use. No building or premises shall be used and no building shall be herafter (sic) erected or structurally altered unless otherwise provided in this ordinance, except for one or more of the following uses:

"1. Single family dwelling, two family dwelling.

"2. Church, college, community building, public library, public museum, school. Provided, however, that the word school as used in this section shall not include vocational or trade schools, schools for abnormal adults or children, or institutions other than those required for children to attend, that is elementary secondary as the term is ordinarily used.

"3. Public park, public playground, public recreation building, school or college stadium or athletic field, golf courses.

"4. * * *.

"5. * * *.

"6. Philanthropic institution, other than penal or corrective, hospitals or sanitarium other than for contagious diseases and other than for the insane or feeble-minded.

"7. * * *.

"8. * * *.

"9. Uses customarily incident to any of the above

uses when located on the same lot and not involving the conduct of a business, * * *."

B-Residence district restrictions are contained in Appendix I, section 4, as follows:

"(a) Use. No building or premises shall be used and no building shall be hereafter erected or structurally altered, unless otherwise provided in this ordinance, except for one or more of the following uses:

"(1) Any use permitted in A-Residence District.

"(2) Multiple dwelling.

"(3) Dormitory, sorority or fraternity house; boarding or rooming house.

"(4) Professional office or studio * * *.

"(5) Vocational or trade school and school or institution of a similar character.

"(6) * * *.

"(7) Uses customarily incident to any of the above uses when located on the same lot and not involving the conduct of a business."

Appendix I, section 1, defines a boardinghouse as: "A building, other than a hotel, where lodging and meals are provided for four or more persons, not members of a family, for compensation."

It was stipulated that the hearing was not based on any question of nuisance per se, but was based solely on the zoning ordinance. The basic issue is, therefore, whether the issuance of the occupancy permit was in contravention of the zoning regulations of the City of Grand Island.

Central Nebraska Council on Alcoholism, Inc., proposes to use the premises for what is referred to as a rehabilitation center or recovery house for alcoholics where room and board would be furnished. The ordinary occupancy of the house would include 5 to 30 men. Individuals residing on the premises would be charged a flat weekly rate. Admission will be strictly voluntary and residents are free to leave at any time. Residents must want to come to the house, must want to

help themselves with their alcoholism problem, and must be recoverable so that they will become self-sufficient. The center would help the residents get a job. The house would provide an alcohol-free environment in which the men can live. It will also provide a balanced menu and living quarters and meaningful human relationship as a vital part of recovery from alcoholism. Residents are described as detoxified alcoholics. No psychotics or acute chronic alcoholics will be admitted. The manager is to be a recovered alcoholic and the philosophy of Alcoholics Anonymous is to be used for counseling on the premises. The center provides no psychiatric or individual therapy or medical dispensation. The center would not pay doctor or hospital bills or provide such services for the residents.

Zoning laws should be given a fair and reasonable construction in the light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole. State v. Smiley, *ante* p. 211, 153 N. W. 2d 906.

In interpreting the language of the ordinance to determine the extent of the restriction upon use of the property, the language must be interpreted, where doubt exists as to the intention of the legislative body, in favor of the property owner and against any implied extension of the restriction. 1 Rathkopf (3d Ed.), The Law of Zoning and Planning, 8-1.

The zoning regulations applicable here permitted philanthropic institutions, other than penal or corrective; hospitals or sanitariums, other than for contagious diseases or other than for the insane or feeble-minded; dormitories; sorority or fraternity houses; professional offices or studios; and vocational or trade schools and schools or institutions of a similar character. These were all in addition to boarding or lodginghouses specifically defined in the regulations.

Here the burden of proof was on the appellants to establish that the proposed use of the premises was in violation of the zoning ordinances. Essentially, the appellants' position is that although the use here concededly met all the criteria specified in the regulations defining a boardinghouse, this was not enough. It is contended that the motivation or purpose which underlies the establishment of the facility reflected in the name "rehabilitation center," is primary, and that the use of the premises as a boardinghouse is only incidentally necessary in accomplishing the actual purpose. The thrust of appellants' argument is that the regulations do not specifically mention a rehabilitation center for alcoholics and that a boardinghouse with a specified purpose and program is therefore excluded. Carried to its logical conclusion, the appellants' argument is that if the purpose motivating the use, or the use itself, does not in all respects fit the usual concept of a specified permissive use, it is prohibited, even though it constitutes a combination of permitted uses. We cannot agree.

The name by which an institution is designated or called is not of controlling importance in determining whether or not it is a permissible use under a zoning ordinance. The question is to be determined by the activities or character of the business or services carried on and not by the name. See, Annotation, 64 A. L. R. 2d 1167, at page 1168; Crain v. City of Louisville, 298 Ky. 421, 182 S. W. 2d 787.

Although we are not cited to any cases involving a residential rehabilitation center for alcoholics, factual situations involving other special interest groups living together have been considered by the courts. The specific descriptive words or definitions considered have included boarding and lodginghouses, club houses, clubs, fraternities, sororities, dormitories, etc. See, United Cerebral Palsy Assn. v. Zoning Board of Adj., 382 Pa. 67, 114 A. 2d 331 (young men suffering from cerebral palsy living together as club house or dormitory); City

of St. Louis v. Art Publication Society (Mo.), 203 S. W. 2d 902 (dormitory or sorority house for young women music students as boarding or lodginghouse); City of Gulfport v. Daniels, 231 Miss. 599, 97 So. 2d 218, 64 A. L. R. 2d 1161 (children's day nursery as boarding or rooming house); Brotherhood of Railroad Signalmen v. Zoning Board, 348 Ill. App. 106, 108 N. E. 2d 43 (union headquarters as fraternity); Robertson v. Western Baptist Hospital (Ky. App.), 267 S. W. 2d 395 (hospital nurses home as family or single housekeeping unit); Crain v. City of Louisville, *supra* (nursing home as boarding and lodging house or hospital and clinic). The language of the last-cited case, in discussing whether a nursing home was a boardinghouse or a hospital, is appropriate here. "While perhaps it could not be characterized as either exclusively, it is certainly something in between the two establishments and, as the ordinance permits use for either purpose, it must be construed as permitting use of an institution that is between the two in character, for the extremes include the mean."

Within the ambit of the zoning regulations as a whole, it is immaterial in this case whether the proposed use be termed a hospital or sanitarium, a philanthropic institution, a fraternity house, or a boarding and roominghouse. In that connection, the trial court found that alcoholism is a disease and that finding is specifically affirmed. However, the specific issue is whether the premises are used as a boardinghouse within the meaning of the zoning regulations defininig a boardinghouse. The sole definition of a boardinghouse in the regulation is: "A building, other than a hotel, where lodging and meals are provided for four or more persons, not members of a family, for compensation." No other limitations are expressed in the definition and no other limitations may now be considered in determining whether the proposed use of these premises constituted the operation of a boarding or lodginghouse within the meaning of the zoning ordinances. The evidence brings

the use of the premises well within such definitions and the character of use meets all the requirements of a boardinghouse within the meaning of the zoning regulations.

In interpreting definitions in zoning statutes or ordinances, the court cannot supply what the municipal legislative body might have provided but which the court cannot by reasonable construction say that it did provide. See 8 McQuillin (3d Rev. Ed.), Municipal Corporations, § 25.128a, p. 355. Restrictions in zoning ordinances and regulations should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language.

The facts here establish that the proposed use of the premises as a rehabilitation center for alcoholics, furnishing residential board and room facilities, is not violative of the zoning ordinances and regulations of the City of Grand Island. The action of the trial court was correct and the judgment is affirmed.

AFFIRMED.

GORDON MCELHOSE, APPELLEE, V. UNIVERSAL SURETY CO., APPELLANT.

158 N. W. 2d 228

Filed March 29, 1968. No. 36767.

1. **Public Works Contracts: Mechanics' Liens.** The purpose of section 52-118, R. S. Supp., 1965, and sections 52-118.01 and 52-118.02, R. R. S. 1943, is to give those supplying labor and materials for construction of improvements for the state protection comparable to that furnished by mechanics' and materialmen's liens where private construction is involved.
2. ———: ———. Such statutes are remedial in nature and are to be liberally construed to effectuate the legislative purpose.
3. ———: ———. The proviso contained in section 52-118.01, R. R. S. 1943, limits the right to bring suit on the payment bond required by section 52-118, R. S. Supp., 1965, to those materialmen, laborers, and subcontractors who deal directly with the

prime contractor and those materialmen, laborers, and subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor.

4. ———: ———. A materialman or supplier, according to the general usage of the terms, can be and often is a subcontractor. Under the statute a more restrictive definition of these terms is required.

5. ———: ———. The distinction between a subcontractor and a materialman or supplier turns on the substantiality and importance of the relationship between the middle party and the prime contractor. If the middle party has taken responsibility for a large and definable part of the construction project, he is a subcontractor, otherwise he is a materialman or supplier.

6. ———: ———. The ultimate determination of whether a supplier of material is a materialman or subcontractor within the meaning of the statute governing payment bonds of contractors for public improvements depends upon a consideration of the extent to which, in matters of substance, the prime contractor delegates to the supplier, and the supplier undertakes to perform for the prime contractor, a specific part of the labor or material requirements of the prime contract.

7. ———: ———. In determining if a party is a subcontractor within the meaning of the act, the determination is not dependent on how the parties designate themselves. The quesion is one of fact.

8. ———: ———. While the labor or materials furnished must be used and consumed in the prosecution of the prime contract, it is not required that the subcontractor install his product or do any on-site work.

9. ———: ———. Rental charges for equipment furnished to perform work on the contract are recoverable under a contractor's payment bond if such equipment is not a capital asset of the user.

10. ———: ———. Where it appears that a claimant furnished equipment to a subcontractor within the meaning of the statute, he is within the class of suppliers or materialmen protected by the prime contractor's payment bond.

Appeal from the district court for Cedar County: JOSEPH E. MARSH, Judge. Affirmed.

Sidner, Gunderson, Svoboda & Schilke, for appellant.

Roscoe L. Rice, Frank Roubicek, and George Johnson, for appellee.

Richard W. Smith, Richard L. Spangler, Jr., and Woods, Aitken & Aitken, for amicus curiae.

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

CARTER, J.

This is an action by Gordon McElhose against Universal Surety Company to recover the rental due for the use of two caterpillar tractors under the provisions of a public works bond furnished by Universal. On a trial to the court, a jury having been waived, the trial court found for the plaintiff in the amount of $7,500 and costs, including an attorney's fee of $1,500. Universal has appealed to this court.

The evidence shows that from May to August 1965, Blacktop, Inc., was a general contractor with the State of Nebraska on a road construction project in Cedar County. The project undertaken by Blacktop was for the construction of the base and the asphalt and concrete surfacing work to the shoulders of the road. Universal executed a public works contract bond as required by section 52-118, R. S. Supp., 1965, which in its overall effect is "* * * conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material and equipment rental which is actually used or rented in the erecting, furnishing, or repairing of the public structure or improvement or in performing the contract."

In the spring of 1965, the Laurel Sand and Gravel Company, a trade name under which John Calcavechia operated as sole owner, entered into a written agreement to furnish Blacktop with about 33,424 yards of gravel in accordance with state specifications at the site of the road construction project at specified prices at a total cost of $92,708.50. This gravel was to be delivered

at the rate of 800 cubic yards per day for each working day as counted by the state. Calcavechia conducted his business at three different gravel pits which were 14, 16, and 28 miles from the project. He ordinarily sold gravel to anyone desiring the product. He testified that during the period of his contract with Blacktop he sold no gravel except rejected gravel other than a quantity sold to Dobson Brothers, another road contractor.

Calcavechia owned one caterpillar tractor which he found inadequate in fulfilling his contract with Blacktop. In May, Calcavechia rented a tractor from McElhose at a rental of $14 per hour. In June he rented a second tractor from McElhose at the same rental. Under the agreement, Calcavechia was to pay for the gas, oil, upkeep, and minor repairs. McElhose was to make all major repairs. Due to bad weather and breakdowns some question arose as to the amount of rental due McElhose which was amicably fixed in the total amount of $7,500. The furnishing of gravel was completed in August. McElhose estimated the completion date as August 15, 1965. The two rented tractors were used only at the gravel pits, a minimum of 14 miles from the road construction project. Neither of the rented tractors was ever at the site of the project.

On or about July 1, 1965, McElhose told Calcavechia he could use some money. He was told by Calcavechia that he had received no money from Blacktop who was waiting for money from the state in order to pay Calcavechia. About 3 weeks later, McElhose talked to L. R. Harpstreith, president of Blacktop, about being paid for the rental of his tractors. Harpstreith stated that not enough work had been done to submit an estimate. McElhose had a subsequent conversation with Ron Keefer, an officer of Blacktop, in which Keefer said when they got some money from the state for Calcavechia, they would see that he got his money; that he was not to worry. McElhose said he told Keefer he would pull the tractors off the job unless he got some money and Keefer said

not to do that as it would paralyze the operation; that they would see that he got his money. McElhose said he talked to Harpstreith after the job was completed. Harpstreith wanted a copy of the bill to use in settling with Calcavechia. On or about August 20, 1965, McElhose called at the gravel pit to make a final settlement with Calcavechia of the amount due. At this time, they agreed on the amount due as being $7,500. McElhose made up a final bill for the $7,500 and sent it to Calcavechia. He also sent a copy of the bill to Blacktop by registered mail which was receipted for on October 19, 1965. He never talked with a representative of Blacktop after sending it a copy of the bill by registered mail.

Armond Kuehn, project engineer for the state, testified that by virtue of his position he was required to supervise the work and see that all statutory requirements as to insurance, bonds, pay scales, and the like were met. He saw to it that Blacktop had insurance but not as to subcontractors who were not approved as such. He did not check Calcavechia in this respect as he considered him a supplier of materials and not a subcontractor within the meaning of the law. He testified he had no control over Calcavechia, that he had seen the tractors working in the gravel pits, but did not know that they were leased equipment. He said the rented tractors did no work on the job and, in fact, there were no such tractors used on the site of the project. Harpstreith testified that McElhose called him on the telephone in August and told him that Calcavechia owed him $7,500 in rentals which Harpstreith said he would pay if an assignment to McElhose was presented. He said McElhose called him later at a time when he had money belonging to Calcavechia available, that Calcavechia was contending he owed only $4,000 to McElhose, and that he would pay it over only on an assignment by Calcavechia, which was never produced. He said he told McElhose that Calcavechia was a supplier and not a subcontractor, that Blacktop was not

liable, and for that reason he would pay McElhose's claim only if an assignment from Calcavechia was presented. Harpstreith stated that he contracted for the gravel delivered on the job, that he had no control over Calcavechia, and that his only concern was that Calcavechia deliver the gravel on the job site pursuant to their agreement.

It was upon this evidence that the trial court found that Universal was liable on its bond for the payment of the tractor rentals in the amount of $7,500 and denied Universal's contention that Calcavechia was a supplier of materials to Blacktop without a right of recovery against Blacktop or its contract bondsman, Universal.

Insofar as applicable to the parties in this case, section 52-118, R. S. Supp., 1965, provides in part as follows: "It shall be the duty of the State of Nebraska, * * * empowered by law to enter into a contract for the erecting and furnishing, or the repairing of any * * * highway * * * to enter into such contract, to which the general provisions of the mechanics' lien laws do not apply, and where the mechanics and laborers have no lien to secure the payment of their wages and materialmen who furnish material and who lease equipment for such work have no lien to secure payment therefor, to take from the person * * * to whom the contract is awarded a bond, * * * conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material and equipment rental which is actually used or rented in the erecting, furnishing, or repairing of the * * * improvement or in performing the contract."

It is not disputed that the gravel was used in the construction of the highway. The rental of the two caterpillar tractors was necessitated by plaintiff's contract to deliver the large quantities of gravel set forth therein. The evidence does not establish that the small quantities of gravel sold elsewhere than to Blacktop was not or could not have been provided by the cater-

pillar tractors owned by the plaintiff. Nor can it be questioned that the delivery of gravel under Calcavechia's contract with Blacktop was not subject to the general provisions of the mechanics' lien law. The evidence also shows that plaintiff notified Blacktop by registered mail of his claim for rentals in the amount of $7,500 for the use of the two caterpillar tractors in providing the gravel for use by Blacktop in performing its contract with the state. The question therefore resolves itself into one as to whether or not the rental of the caterpillar tractors is a contract with a subcontractor within the provisions of the statute, or whether or not the delivery of the gravel was the supplying of material, as defendant contends, and not within the contemplation of the statute.

In Kiewit Sons' Co. v. National Casualty Co., 142 Neb. 835, 8 N. W. 2d 192, a similar issue was involved. In that case, Roadmix Construction Company entered into a contract with the state to construct a road. The claims of the plaintiff against the bondsman of Roadmix were for obligations owed by Roadmix to plaintiff for rental charges for equipment supplied by plaintiff and used in carrying on the work of the contract and the cost of transportation of plaintiff's rental equipment to and from the job. In sustaining the claim, this court said: "The equipment furnished by plaintiff was not a part of the regular equipment of Roadmix, but a part of regular equipment ordinarily used by a contractor engaged in road construction. The use of this equipment, so rented and transported to and from the job as occasion required, under the supervision of plaintiff's engineer, contributed directly to the construction of the highway. The value of that use (and that is what rental is) is within the protection of, contemplated and intended by the statute and the bond and one not too remotely connected with the principal work. The rule adhered to in some jurisdictions, that the materials to be lienable must be incorporated into the structure or public work

for which the contract was executed under the circumstances here existent, is too narrow, under a liberal interpretation of the statute, as required. In fact, the machinery or equipment, placed on the job by plaintiff and rented by Roadmix, transported to and from the job as required, constituted material actually used in the construction and repair of the highway. * * *

"We conclude that the items sued for by plaintiff are recoverable under the statute and bond. Such items so furnished constitute labor and material purchased under an agreement of hire or lease, in that all that is purchased is consumed in aid of the contract, within the meaning of the second condition of the bond and of section 52-118, Comp. St. 1929, 'conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material which is actually used * * * in performing the contract.' "

West v. Detroit Fidelity & Surety Co., 118 Neb. 544, 225 N. W. 673, was an action against the subcontractor to recover for labor and material furnished in the construction of a public highway. In this case contracts for the hauling of gravel were made with truckowners at a fixed price per mile. The contractor made arrangements with garagemen and mechanics to make repairs to these trucks upon orders from the contractor to whom they were to be charged. The contractor deducted the cost of repairs from the amount due for hauling. This court held "that the labor and materials used in making such repairs were 'supplies used or employed on said contract,' within the meaning of those terms, and chargeable to the surety."

The defendant attempts to differentiate between subcontractors and suppliers, but it is clear from the West case that the use of these general terms does not afford a basis for determining liability. A materialman or supplier can be a subcontractor. The written contract between Blacktop and Calcavechia for furnishing gravel according to specifications and for delivering it to the

project site in the quantity required points toward Calcavechia as a subcontractor and not a supplier as that term is used in its restricted meaning. See, Fremont Foundry & Machine Co. v. Saunders County, 136 Neb. 101, 285 N. W. 115; Nye-Schneider-Fowler Co. v. Roeser, 103 Neb. 614, 173 N. W. 605.

Defendant relies primarily on Concrete Steel Co. v. Rowles Co., 101 Neb. 400, 163 N. W. 323. In this case Rowles Co. was a general contractor with the county of Webster for the construction of a courthouse and gave a bond with National Surety Company as surety. Concrete Steel Co., at the request of the Julian S. Nolan Company, furnished steel for the construction of the courthouse. Plaintiff sued the general contractor and its surety. No service of process was had on the general contractor and the case proceeded against the surety company. The contractor purchased a quantity of reinforcing steel from the Nolan Company and understood that payment was to be made to that company. The bills were rendered by the Nolan Company to the contractor and were paid to the Nolan Company without notice to the contractor that any other parties were interested therein. The Nolan Company ordered the steel from the plaintiff which was shipped directly to the contractor by the plaintiff. Plaintiff knew the contractor was paying the Nolan Company who had no knowledge of plaintiff's interest. The court held the failure of plaintiff to give notice of its interest precluded it from collecting payment a second time from the contractor. The case was correctly decided, but is distinguishable and inapplicable here.

The Nebraska Chapter, Associated General Contractors of America, Inc., have filed a brief amicus curiae, asserting that section 52-118, R. S. Supp., 1965, and sections 52-118.01 and 52-118.02, R. R. S. 1943, are patterned after Title 40 U. S. C. A., §§ 270a to 270e, known as the Miller Act, and that we should follow the federal courts' construction of that act which is asserted to be consistent

with the defendant's position in the case before us. The issue involves the interpretation to be given to the proviso in section 52-118.01, R. R. S. 1943, which is the same for all practical purposes as the proviso contained in Title 40 U. S. C. A., § 270b. Such provision in the state statute provides in part: "Provided, that any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such bond shall have a right of action upon the bond upon giving written notice to the contractor within four months from the date on which such person did or performed the last of the labor, or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed."

In MacEvoy Co. v. United States, 322 U. S. 102, 64 S. Ct. 890, 88 L. Ed. 1163, it is said: "The proviso of § 2(a), which has no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor. To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers of the Act. * * * The ultimate question in this case, therefore, is whether Miller, the materialman to whom Tomkins sold the goods and who in turn supplied them to MacEvoy, was a subcontractor within the meaning of the proviso. If he was, Tomkins' direct contractual relationship with him enables Tomkins to recover on MacEvoy's payment bond. If Miller was not a subcontractor, Tomkins stands in too

remote a relationship to secure the benefits of the bond."

Without committing ourselves on other factors, we meet the issue by a determination as to whether or not Calcavechia was a subcontractor. We point out that Calcavechia had a written contract with Blacktop to deliver about 33,424 cubic yards of gravel at the site of the project for the sum of $92,708.50. We think this contract for the delivery of gravel in such a quantity and for such a price for material so essential to the construction of a highway makes Calcavechia a subcontractor under the federal court decisions on that issue.

In Aetna Casualty & Surety Co. v. United States (1967), 382 F. 2d 615, the court said: "As we read MacEvoy, in a borderline case the distinction between a 'subcontractor' and 'materialman' turns on the substantiality and importance of the relationship between the middle party and the prime contractor. If a middle party has taken responsibility for a large and definable part of the construction project, he is a 'subcontractor'; otherwise he is a 'materialman'. * * * Courts have found, however, that a delegation of responsibility may be sufficient to render a middle party a 'subcontractor' when the middle party fabricated a complex installation, of relatively great importance in relation to the entire project. The classification held true even though the middle party did not install his product or do any on-site work. In United States v. MSI Corp., 2 Cir. 1965, 350 F. 2d 285, for example, the middle party's contract was to furnish 'a hydraulic system for opening and closing massive missile launcher roofs'. Id. at 286. And in United States v. Monaco & Son, D. Md. 1963, 222 F. Supp. 175, the court classified as a 'subcontractor' one who had agreed to furnish all the materials necessary to complete a heat distribution system. * * * The most important factor is the nature of the items Rogers supplied. None was a complex, integrated system. The most complex items were prefabricated stairs and ladders. Most of the items were such things as trench covers and

frames; hand, guard, and wall rails; pipe sleeves; door lintels; soffit frames; floor expansion joint covers; and frames for fire extinguisher cabinet recesses. Both the variety and the relative simplicity of the items supplied weigh heavily against finding that Rogers took over a significant and definable part of the construction project."

We think that Calcavechia was a subcontractor. He not only contracted to furnish gravel in a large quantity, but he contracted to furnish it on a daily basis to keep the project moving. It was a daily necessity under the prime contract and, as such, was furnished in prosecution of the work provided for in the prime contract. Under such circumstances, whether or not Calcavechia is a subcontractor is a question of fact under all the circumstances. The delivery of gravel, under the circumstances shown, was an assumption of a specific part of the material requirements of the prime contractor. Under the meaning of the applicable statutes, a subcontractor is defined generally as follows: A subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, giving consideration to the substantiality and importance of the relationship between the prime contractor and the alleged subcontractor, the relative importance of the work and materials to the prime contract, and the nature of the materials supplied as an integral part of the project.

Section 52-118, R. S. Supp., 1965, and sections 52-118.01 and 52-118.02, R. R. S. 1943, are highly remedial in their nature. They should be given a liberal construction and application in order to give effect to the intention of the Legislature to protect those whose labor and materials become a part of public projects. Whether or not a plaintiff is dealing with a subcontractor or a materialman, as those terms are used in the act, involves a question of fact. The trial court found under the evidence that Calcavechia was a subcontractor. The judgment of the

trial court has the effect of a jury verdict. We cannot say that the judgment was clearly wrong. Under this finding of fact, plaintiff is entitled to recover on Blacktop's payment bond. The costs, including an attorney's fee of $750 for services rendered in this court, are taxed to the defendant.

AFFIRMED.

CLARA SNYDER, APPELLANT, V. FORT KEARNEY HOTEL COMPANY, INC., A CORPORATION, APPELLEE.
157 N. W. 2d 782

Filed March 29, 1968. No. 36807.

1. **Pleading.** An extrajudicial admission is not ordinarily final and conclusive upon the party by whom it is made.
2. **Judgments.** A summary judgment may be entered when it appears there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
3. **Buildings: Negligence.** It is true that the existence of a change in floor level in a business establishment and the fact that an invitee falls thereon is insufficient to establish negligence.
4. ———: ———. Such factors, when coupled with other conditions, may constitute negligence.

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

Mitchell, Taylor & Beatty, for appellant.

Tye, Worlock, Tye & Jacobsen and Jeffrey L. Orr, for appellee.

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

NEWTON, J.

This action is based on personal injuries alleged to have been sustained as the result of a fall in defendant's hotel. Defendant's motion for summary judgment was sustained and plaintiff appeals.

Plaintiff's petition alleges she entered the hotel for the purpose of having lunch and while there, sought to enter the ladies restroom which was on the second floor. The restroom door opened off a second-floor hallway; immediately behind the door was approximately a 6-inch step-up or change in floor level which plaintiff struck with her foot, causing her to fall and break her hip. In substance, the plaintiff's charges of negligence are that the change in floor level constituted a dangerous condition, inadequate illumination in the hallway, a glaring effect produced by the white tile floor in the restroom impairing vision, and lack of proper warning of the change in floor level.

For answer to the petition, defendant admitted ownership and operation of the hotel, and that plaintiff fell and was injured at the time and place alleged; generally denied all other allegations; and alleged that the hallway was well lighted, that the restroom door had a clearly visible sign on the outside. "WOMEN STEP UP," and on the inside, "STEP DOWN PLEASE," familiarty of plaintiff with the premises, clear visibility of the floor elevation, and contributory negligence.

In the absence of a reply, the allegations contained in the answer must be considered to be denied by plaintiff.

Pictures of the scene of the accident were received in evidence but there being insufficient foundation therefor cannot be considered at this time.

Evidence gleaned from the plaintiff's deposition and affidavit reveals the facts hereinafter set out. She was 66 years of age, went to the hotel for the purpose alleged in her petition, fell at the restroom door due to stumbling on the step-up into the restroom, and was injured. The hallway was poorly illuminated, she failed to note whether or not there was a sign on the door as on reaching it, she met other people in the hallway, stepped next to the wall adjacent to the door, opened it, and proceeded to enter. She failed to notice the change in floor elevation due to a glaring light inside reflecting off the white tile

floor. It "seemed real bright" after being in the dimly lit hallway and she did not look down on entering. She had been in the hotel restroom at least once several months before, but did not recall the change in floor elevation. She said that a statement given by her soon after the accident when in a hospital was taken when she was in shock and unable to answer intelligently. She denies any recollection of it.

The previous statement given by plaintiff contradicts the evidence given in her deposition in several material aspects, but does not serve to cancel any issues of fact raised by her testimony and pleadings. An extrajudicial admission is not ordinarily final and conclusive upon the party by whom it is made. See, Aye v. Gartner, 172 Neb. 162, 108 N. W. 2d 798; Vermaas v. Heckel, 170 Neb. 321, 102 N. W. 2d 647.

Section 25-1332, R. R. S., 1943, provides that a summary judgment may be entered when it appears: "* * * there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." It is true that the existence of a change in floor level in a business establishment and the fact that an invitee falls thereon is insufficient to establish negligence. See Annotation, 65 A. L. R. 2d, p. 482. However, such factors, when coupled wtih other conditions may constitute negligence. See, Annotation, 65 A. L. R. 2d, p. 473; Annotation, 66 A. L. R. 2d, p. 443. The cases cited in the foregoing annotations amply demonstrate that a change in floor level, coupled with an inadequate warning where the condition is not obvious, or with such factors as inadequate illumination or blinding light may present a dangerous situation sufficient to form a basis for a finding of negligence.

Here the record discloses the presence of allegations and evidence indicating inadequate illumination in the hallway, a glaring effect in the restroom, and the absence of readily observable signs warning of a change in floor level. The present record fails to establish the nature

or existence of warning signs at the time and place of the accident, or that the change in floor level was so obvious that it did not create a dangerous condition. It also reflects a dispute of fact in regard to the adequacy of the lighting arrangements and plaintiff's familiarity with the premises. Under such circumstances, we are unable to conclude that no issue of fact arises either in regard to defendant's negligence or plaintiff's contributory negligence. The judgment of the trial court is reversed and the cause is remanded.

REVERSED AND REMANDED.

SMITH, J., participating on briefs.

ORVILLE WILLIAMS, APPELLANT, V. AL DOBBERSTEIN, DOING BUSINESS AS DOBBERSTEIN ROOFING COMPANY, ET AL., APPELLEES.

157 N. W. 2d 776

Filed March 29, 1968. No. 36809.

1. **Workmen's Compensation: Limitations of Actions.** If an employee suffers an injury, which appears to be slight, but which is progressive in its course, and which several physicians were unable to correctly diagnose, his failure to file claim, or bring suit within the time limited by law, will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.
2. ———: ———. Under the Nebraska Workmen's Compensation Act, the period of limitation provided in section 48-137, R. S. Supp., 1965, runs from the time it is reasonably apparent that a compensable injury has been sustained, if the employee is aware that the disability is due to his employment.

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

Dier & Ross, for appellant.

H. L. Blackledge, for appellees.

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

McCOWN, J.

This is a workmen's compensation case. The one judge compensation court entered judgment for the plaintiff. On appeal, the district court reversed and entered judgment for defendants on the ground that the action was not commenced within 1 year from the date of the accident. The plaintiff has appealed.

On September 4, 1965, plaintiff was operating a swing boom which was used to haul gravel up to the roof where he was working. The boom was an A-shaped steel boom, approximately 6 or 7 feet tall. While the plaintiff was operating the boom, it tipped over pinning him between the boom and the wheelbarrow in which the gravel was to be dumped. The other employees removed the boom from the plaintiff and he rested about an hour and then returned to his work. Plaintiff reported the accident to his employer the same day, but continued to work as usual the remainder of that day and each working day thereafter until December 11, 1965. He did not go to any doctor until that date when he went to see his own physician, Dr. Peck. Plaintiff testified that during the period from September 4 to December 11, 1965, the pain kept getting worse and that because of the pain he couldn't lift things as he had before, and that he "just figured it was soreness and it would eventually work out." Dr. Peck put the plaintiff in the hospital in traction from December 15 to 20, 1965. Thereafter, Dr. Peck referred him to Dr. Gogela, a neurologist. The plaintiff thereafter went to a chiropractor in Holdrege for treatment. On February 21, 1966, the defendant compensation insurance carrier arranged to have plaintiff examined for evaluation by Dr. Yost. Dr. Yost's report of March 8, 1966, stated: "He could, from his symptoms and signs, have a centrally protruding disc. The symptoms and signs could all be

from just a lumbo-sacral instability, however." Dr. Yost concluded that he did not feel that the plaintiff's symptoms "have stabilized so that a definitive disability evaluation can be made." Plaintiff returned to work for his employer on June 5, 1966, and worked until the latter part of December 1966. During November 1966, the plaintiff went to Dr. House, an orthopedic surgeon in Grand Island, who had a myelogram taken and determined that plaintiff had an intervertebral disc protrusion. The plaintiff filed his petition in the Workmen's Compensation Court on December 1, 1966. He was operated on in January 1967, and returned to work for his employer once more on June 14, 1967, doing the same type of work he had done prior to the accident. His permanent partial disability was determined to be 12 percent of the body as a whole.

The sole issue presented is whether or not the action was barred by the 1-year statute of limitations, section 48-137, R. S. Supp., 1965. The district court concluded that the plaintiff had failed to prove that his injury was latent and progressive, and that he knew of the injury and that it was progressing from the date of the injury on September 4, 1965.

It is the defendants' position that since the plaintiff knew that he had an accident, and had pain which he associated with the accident; therefore the injury cannot be latent or progressive, and the statute of limitations began to run on the date of the accident. We cannot agree on either count.

As early as Clary v. R. S. Proudfit Co. (1933), 124 Neb. 582, 247 N. W. 417, this court said that "a latent accidental injury, seeming at first to be trifling and noncompensatory, but subsequently resulting in a progressive disease and a disability, occurs when its true nature is discovered by him or when the diseased condition culminates in disability."

It is unreasonable to conclude that an injury is not latent merely because the plaintiff suffered pain, when

thereafter several physicians were unable to correctly diagnose his injury. In Welke v. City of Ainsworth, 179 Neb. 496, 138 N. W. 2d 808, we reaffirmed the rule of Astuto v. Ray Gould Co., 123 Neb. 138, 242 N. W. 375: "If an employee suffers an injury, which appears to be slight, but which is progressive in its course, and which several physicians were unable to correctly diagnose, his failure to file claim, or bring suit within the time limited by law, will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident." See, also, Ohnmacht v. Peter Kiewit Sons Co., 178 Neb. 741, 135 N. W. 2d 237.

Pain alone is not compensable under our statute, and disability is the basic factor which gives rise to a claim for compensation. Here the plaintiff did not lose any work nor see any doctor until December 1965. Until that date, he had missed no work nor incurred any medical expenses and had nothing for which to make a claim. An overall analysis of the act points directly to the conclusion that the statutory limitation was not intended to commence until there was a claim on which it could run. This conclusion is directly reflected in many opinions of this court even prior to 1963. In 1963, the Legislature affirmed such an interpretation by changing the definition of the word "accident." Prior to that time, section 48-151, R. R. S. 1943, read in part: "Throughout this act, the following words and phrases as used therein shall be considered to have the following meaning, respectively, unless the context shall clearly indicate a different meaning in the construction used: * * * (2) The word accident as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen *event* happening suddenly and violently * * *." (Italics supplied.)

In 1963, subsection (2) was changed to read: "(2)

The word accident as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen *injury* happening suddenly and violently * * *." (Italics supplied.)

Under this definition, the period of limitation provided in section 48-137, R. S. Supp., 1965, runs from the date of the injury. There is almost complete judicial agreement that under a statute of limitations dating the claim period from the injury, the period runs from the time compensable injury becomes apparent. See 2 Larson, Workmens Compensation Law, § 78.42(a), p. 263.

We hold that under the Nebraska Workmen's Compensation Act, the period of limitation provided in section 48-137, R. S. Supp., 1965, runs from the time it is reasonably apparent that a compensable injury has been sustained, if the employee is aware that the disability is due to his employment. In this case, no compensable claim or disability arose prior to December 11, 1965, and the action was commenced in less than 1 year thereafter.

The judgment of the district court is reversed and the cause remanded with directions to enter judgment for the plaintiff in accordance with the award of the Workmen's Compensation Court of June 13, 1967.

REVERSED AND REMANDED WITH DIRECTIONS.

SPENCER, J., participating on briefs.

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Account, Action on.

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Actions.

1. So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the petition may be changed and others added in order to cure imperfections and mistakes in the matter of stating the plaintiff's case. May Plumbing Co. v. Shaver ---------- 251
2. Generally, a prescriptive right will not commence to run until some act or fact exists giving the party against whom the right is claimed a cause of action. Kuta v. Flynn ---------- 479
3. A declaratory judgment action will not be entertained if there is pending, at the time of its commencement, another action or proceeding to which the same persons are parties, and in which are involved, and may be adjudicated, the same issues that are involved in the declaratory judgment action. Berigan Bros. v. Growers Cattle Credit Corp. ---- 656
4. A declaratory judgment action is not a substitute for nor may it be used to supersede proper proceedings already pending in a court having jurisdiction of the parties and the subject matter. But where a pending proceeding does not afford an adequate remedy for the causes pleaded in a petition for declaratory relief, it is not a bar to such relief. Berigan Bros. v. Growers Cattle Credit Corp. ---------- 656

Administrative Law.

1. Where the Livestock Auction Market Board determines from competent evidence that a livestock auction market would beneficially serve the livestock economy after giving reasonable consideration to the five propositions listed in statute, it is the duty of the board to issue a market license. Midwest L. C. Co. v. Tri-State L. C. Co. ---------- 41
2. The scope of a regulatory statute in derogation of the common law will not be extended beyond its

express provisions. If its terms have been complied with and so found by the regulatory board on competent and relevant evidence, its findings will not be disturbed by the courts. Midwest L. C. Co. v. Tri-State L. C. Co. ---------- 41

3. Where the Livestock Auction Market Board has jurisdiction of an application for a license to operate a livestock auction market and the evidence is sufficient, if believed, to sustain the grant of a license, even if the evidence is in direct conflict, the order of the board is not arbitrary or capricious. Midwest L. C. Co. v. Tri-State L. C. Co. -------- 41

4. While an administrative board may relax the strict rules of evidence applicable in law courts in affording a full and fair hearing, it must in every instance require any action taken by it to be supported by competent and relevant evidence. Midwest L. C. Co. v. Tri-State L. C. Co. ---------- 41

5. Where it appears in an error proceeding that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the administrative agency will be affirmed. First Nat. Bank & Trust Co v. Ley ---------- 164

6. Under statute, it is a ministerial and mandatory duty of the county board to set aside in the general fund an amount equal to the county extension budget submitted by the county extension service. State ex rel. Agricultural Extension Service v. Miller ---------- 285

7. The county extension service has the exclusive power to prepare and adopt its budget provided that it shall be in an amount not to exceed $7,500 or an amount equal to a four-tenths mill levy on the dollar upon the assessed value of all the taxable property in such county. State ex rel. Agricultural Extension Service v. Miller ---------- 285

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9. The Nebraska Revenue Act of 1967 constitutes a valid and lawful delegation of authority to the State Board of Equalization and Assessment and does not violate the Constitution of Nebraska nor of the United States. Anderson v. Tiemann ---------- 393

10. The Nebraska Revenue Act of 1967 does not unconstitutionally delegate judicial power to the Tax Commissioner. Anderson v. Tiemann ---------- 393

Adultery.

1. Where the evidence in a suit for a divorce establishes adultery on the part of one of the parties thereto, the court is required to grant the prayer of the other party seeking a divorce on that ground unless prevented from doing so by applicable statutory provisions. Covault v. Covault ---------- 119
Wolpa v. Wolpa ---------- 178
2. Where a wife is found guilty of adultery she is ordinarily an unfit person to have the care and custody of her minor children as against the husband she has wronged where he is a fit and proper person to have their custody. Covault v. Covault ------ 119
Wolpa v. Wolpa ---------- 178
3. When a divorce shall be decreed for the cause of adultery committed by the wife, the husband may hold such of her personal estate as the court shall deem just and reasonable under all of the circumstances in the case, and the same shall be determined and decreed by the court at the time of the granting of such divorce. Wolpa v. Wolpa ------ 178
4. Where a wife is found to be guilty of adultery, she is an unfit person as a matter of law to have the care and custody of her minor child as against the husband she has wronged who is without fault. Morrissey v. Morrissey ---------- 268

Adverse Possession.

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Affidavits.

An affidavit which was in fact sworn to before a notary public is sufficient for the purpose of withdrawing a signature from a petition under the statute providing for merger of school districts, even though the affidavit does not state specifically that it was made under oath or sworn to before a notary public. Reid v. Slepicka ---------- 485

Appeal and Error.

1. Where there is irreconcilable conflict on a material issue, the Supreme Court will, in determining the weight of the evidence of witnesses who appear in court to testify, consider the fact that the trial court observed them and their manner of testifying and must have accepted one version of the facts rather than the other. Peters v. Halligan ------ 51
2. Rule for trial of equity case de novo stated. Lunzmann v. Yost ---------- 101
3. Alleged errors of the trial court in an action at law which are not referred to in a motion for new trial will not be considered in the Supreme Court. Stauffer v. Wilson ---------- 129
4. It is not within the province of the Supreme Court in a law action to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, the Supreme Court will review the judgment rendered, will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly wrong. Stauffer v. Wilson -- 129
5. The findings of the district court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong. Stauffer v. Wilson -- 129
   Wonderling v. Conley ---------- 446
6. In an appeal from a judgment in a law action tried by the court without a jury, the Supreme Court will not disturb findings of fact based on conflicting evidence unless such findings of fact are clearly wrong. The credibility of witnesses and the weight to be given their testimony in such cases are for the trier of fact. Highway Equipment & Supply Co. v. Jones ---------- 234
7. The finding on a first appeal becomes the law of the case on a retrial of the same issues unless on a second trial the facts are materially and substantially different. Muller Enterprises, Inc. v. Samuel Gerber Adv. Agcy., Inc. ---------- 261
8. Unless timely objection is made, an objection to incompetent evidence is presumed to have been waived and may not be asserted for the first time on appeal. State v. Whited ---------- 282
9. Eminent Domain Act provides that in an appeal from an award of appraisers in a condemnation proceeding, the party appealing shall within 30

days after the filing of the award file a notice of appeal and serve a copy of the same upon all parties bound by the award. These provisions are mandatory and are in addition to the statutory undertaking required. Radil v. State ---------- 291

10. The right to appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action. Radil v. State ---------- 291

11. Evidence admitted without objection cannot be considered as grounds for error. State v. Riley ------ 300

12. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred. State v. Riley -- 300

13. A divorce action is for trial de novo in the Supreme Court. Applegate v. Applegate ---------- 342

14. It is the duty of the Supreme Court on review of the findings made by a trial court, when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby, to give weight thereto. Rolfsmeyer v. Seward County ---------- 348

15. By the provisions of statute, the Supreme Court has authority to reduce the sentence in a criminal case and to render such sentence as in its opinion is warranted by the evidence. State v. Alvarez ---- 358

16. In determining the question as to whether or not a sentence shall be reduced, the Supreme Court is performing a judicial function and it should perform such function without regard to considerations of sympathy, mercy, or public opinion. State v. Alvarez ---------- 358

17. In all cases arising under statute providing for reduction of sentence in criminal case, substantial reason supported by the evidence must be found to cause either an affirmance or reduction of a sentence. State v. Alvarez ---------- 358

18. Instructions to the jury must be considered as a whole, and when thus considered, if the law is correctly stated, and the jury could not have been misled, a claim of prejudicial error in the instruc-

tions is not available. State v. Kosinski ---------- 390
19. Where punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Escamilla ---------- 466
20. Statute makes it the duty of the Supreme Court, when proper proceedings are had, to review the sentence and to set aside any sentence which the evidence will not warrant; and, further, if the sentence is set aside, to render such sentence as may be justified by the evidence. State v. Escamilla -- 466
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25. Consideration of a cause on appeal is limited to errors assigned and discussed, and unless error is assigned, the judgment of the lower court should be affirmed unless the Supreme Court at its own option considers plain error not assigned. United States Nat. Bank v. Feenan ---------- 524
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dence without objection being made thereto, error cannot be predicated thereon on appeal. American Oil Co. v. City of Omaha ---------- 532
28. It is prejudicial error to submit to the jury an essential issue of fact for which there is no proof. Pensyl v. Gibb ---------- 573
29. An instruction should not assume as established a disputed issue of fact. Pensyl v. Gibb ---------- 573
30. It is the duty of the trial court on its own motion to instruct as to all issues of fact that are pleaded and upon which there is evidence to support them. Pensyl v. Gibb ---------- 573
31. It is no part of the duty of the Supreme Court to search a record for the purpose of ascertaining if there is error in it. On the other hand, every reasonable presumption will be indulged in favor of the correctness of the judgment of a district court, and any ruling of that court, alleged to be erroneous, must be specifically pointed out to be reviewed in the Supreme Court. Kasparek v. May -- 582
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33. An assignment of error asserting excessive damages may not be considered by the Supreme Court if it is not properly raised in the trial court on motion for new trial or argued in the appellant's brief in the Supreme Court. Deremer v. State ---------- 586
34. The parol evidence rule is not merely one of evidence but is a rule of substantial law which declares that certain kinds of facts are legally ineffective and forbids them to be proved. Mid States Engineering v. Rohde ---------- 590
35. It is presumed on appeal that a trial court in trying a case without a jury did not consider incompetent evidence. Abel v. Southwest Cas. Ins. Co -------- 605
36. Errors in instructions not prejudicial to the complaining party are not a ground for reversal of a judgment otherwise correct. Hansen v. First Westside Bank ---------- 664
37. Where a party appealing from the district court to the Supreme Court fails to file a cost bond within 1 month after the rendition of the judgment or final order appealed from or within the time extended by the Supreme Court on a showing of good cause, such appeal will be dismissed. County of Hall v. Engleman ---------- 676

38. Error may not be predicated on the reception of inadmissible evidence where there has been no objection made to the offer thereof, or where a party has stated he has no objection to such evidence, or where he agrees or stipulates that such evidence should be admitted. State v. Cook 684
39. An order striking a counterclaim is not a final order which may be reviewed upon appeal while the main action is otherwise pending in the district court. Benes v. Matulka 744
40. In an error proceeding, it is mandatory that the transcript be properly authenticated and timely filed to vest the appellate court with jurisdiction of the subject matter. Lemburg v. Nielsen 747
41. If conflicting evidence is specially resolved by the trial court according to the demeanor of the witnesses, the resultant findings will be considered correct on de novo review in the Supreme Court. Eden v. Eden 768
42. Ordinarily, the Supreme Court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties. Schimonitz v. Midwest Electric Membership Corp. 810

Appearance.

In a proceeding to declare children residing within the state dependent or neglected children, and process is personally served on parents and they appear generally or by counsel, the separate juvenile court has complete jurisdiction, and its decree is effective and binding on the parents. Miller v. Department of Public Welfare 155

Arrest.

1. Arrest without a warrant must be based upon probable cause which exists from facts and circumstances within the officers' knowledge or of which they had reasonably trustworthy information which was sufficient to warrant men of reasonable caution in the belief that an offense has been, or is, being committed. State v. Perez 680
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2. The existence of probable cause must be determined by a practical and not by any technical standard. State v. Cook 684

Attorney and Client.

1. Where the adultery of a wife is established she is not ordinarily entitled to an award of an attorney's fee or the costs of the suit. Covault v. Covault -- 119
   Wolpa v. Wolpa ---------- 178
2. The court disbarring an attorney has inherent power to reinstate him. To reinstate a disbarred attorney means to again invest him with the right to practice law, but it is not a revocation or vacation of the order of disbarment. State ex rel. Sorensen v. Goldman ---------- 126
3. The primary factor in the reinstatement of a disbarred lawyer is whether or not the applicant, notwithstanding his former misconduct, is now fit to be admitted to the practice of law and that there is reasonable ground to believe that this present fitness will permanently continue in the future. State ex rel. Sorensen v. Goldman ---------- 126
4. In considering an application for the reinstatement of a disbarred attorney, the Supreme Court owes a solemn duty to the public and legal profession which must be performed without regard to feelings of sympathy, the stigma of disbarment, and the asserted severity of punishment. State ex rel. Sorensen v. Goldman ---------- 126
5. In addition to proof of existing good moral character, an applicant for reinstatement must have the same qualifications and be otherwise eligible for admission to the bar as in the case of an original application. State ex rel. Sorensen v. Goldman -- 126
6. Under the law of this state, the Supreme Court is without authority to reinstate a disbarred attorney who is a nonresident of Nebraska, even though all other qualifications for reinstatement are established. State ex rel. Sorensen v. Goldman -------- 126
7. An applicant ordinarily cannot procure the setting aside of a default judgment against him on the ground of his mistaken belief that he had retained or arranged for an attorney to protect his interests. He must see to it that the attorney accepts his employment, otherwise his failure ordinarily constitutes inexcusable negligence. Commercial Sav. & Loan Assn. v. Holly Development, Inc. -------- 335
8. Attorneys' fees in divorce proceedings will ordinarily be denied where no reasonable justification appears for the position taken by the party claiming them. Hohensee v. Hohensee ---------- 388

9. Under the provisions of the Workmen's Compensation Act, an attorney's fee cannot be allowed to a plaintiff for legal services rendered in the Supreme Court where the employer obtains a reduction of the award on his appeal. Harrington v. Missouri Valley Constr. Co. ---------- 434
10. Uninsured motorist coverage in an insurance contract is in the nature of a substitute liability or guaranty contract, and recovery thereon permits the allowance of attorney's fees. Stephens v. Allied Mut. Ins. Co. ---------- 562
11. The amount of the allowance of the attorney's fees generally rests in the sound discretion of the trial court, considering the applicable elements involved therein. Stephens v. Allied Mut. Ins. Co. ---------- 562
12. Post conviction relief on the ground of ineffective assistance of counsel will not be granted unless counsel's assistance was so grossly inept as to shock the conscience of the court. State v. Tunender -- 701

Automobiles.

1. Where the nature and extent of the injuries received by the plaintiff in an automobile accident are in dispute, photographs of the automobiles involved in the collision tending to show the force of the collision are admissible as bearing on those issues. Springer v. Smith ---------- 107
2. Where a defendant charged with making and uttering a "no fund" or "no account" check gave the check as a part payment of the purchase price for an automobile, there is adequate consideration for the check even though delivery of the automobile was not made until the next day when the details of the sale transaction were completed. State v. Edmonds 140
3. Generally it is negligence as a matter of law for a motorist to drive a motor vehicle on a highway in such manner that he cannot stop in time to avoid a collision with an object within the range of his vision. Basiljevac v. Ready Mixed Concrete Co. -- 199
4. Conditions affecting the visibility of a motorist impose upon the driver the duty to exercise a degree of care commensurate with existing circumstances. Bosiljevac v. Ready Mixed Concrete Co. -- 199
5. Ordinarily, conditions such as frost, ice, snow, mist, or fog are not intervening causes excusing the exercise of ordinary care by a driver but are conditions that require a driver to exercise a degree

of care commensurate with the circumstances. Bosiljevac v. Ready Mixed Concrete Co. ---------- 199
6. Conditions with respect to dust have the same effect as snow, ice, and other natural conditions. Bosiljevac v. Ready Mixed Concrete Co. ---------- 199
7. Under the particular facts, the rental of cargo trailers for attachment to passenger automobiles by the operator of a service station was an accessory use customarily incident to the permitted service station business. State v. Smiley ---------- 211
8. An automobile which has been serviced by a filling station operator and is being driven to a parking place on the filing station premises is not being "used in an automobile business" within the exclusionary provisions of an automobile liability insurance policy. Truck Ins. Exchange v. State Farm Mut. Auto. Ins. Co. ---------- 330
9. Liability of driver under motor vehicle guest statute stated. Warmbier v. Zeurlein ---------- 425
10. Gross negligence within the meaning of the motor vehicle guest statute defined. Warmbier v. Zeurlein 425
11. The burden of proof is upon the guest who seeks to recover to prove by a preponderance of the evidence that the owner and operator of the automobile in which he was a guest was guilty of gross negligence. Failure to so prove or the fact that the operator of the automobile may have been guilty of ordinary negligence is insufficient to warrant a recovery in favor of the guest. Warmbier v. Zeurlein -------- 425
12. A provision in a contract of insurance, drawn by the insurer to comply with statutory requirement of uninsured motorist coverage, must be construed in light of the purpose and policy of the statute. Stephens v. Allied Mut. Ins. Co. ---------- 562
13. The purpose of a statute or provision is to give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy. Stephens v. Allied Mut. Ins. Co. ---------- 562
14. The insolvency of a tort-feasor's insurance carrier occurring subsequent to an accident, with a consequent refusal or inability of the carrier to defend or pay a judgment or claim resulting therefrom for which the tort-feasor has become liable, constitutes a "denial of coverage" within the meaning of such provision in the uninsured motorist clause of the

insured's policy. Stephens v. Allied Mut. Ins. Co. 562

15. A provision in an automobile liability policy that an insurer shall not be obligated to pay under uninsured motorist coverage for that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured automobile which represents expenses for medical services paid or payable under the medical payments coverage of the policy is void and against public policy in that it reduces the minimum coverage of uninsured motorist protection prescribed by law. Stephens v. Allied Mut. Ins. Co. ---------- 562

16. When a dispute exists with reference to right-of-way at an open intersection and there is a conflict in the evidence regarding the facts pertaining thereto, it generally presents a question for the jury. Flanagin v. DePriest ---------- 776

17. Duty of motorist entering an intersection stated. Flanagin v. DePriest ---------- 776

18. Before a verdict can be directed against a motorist for failing to see an approaching automobile at a nonprotected intersection, the position of the approaching automobile must be undisputedly located in a favored position. Flanagin v. DePriest ------ 776

19. Statute, sometimes referred to as the omnibus statute, is applicable only to automobile liability insurance policies which have been certified as proof of financial responsibility. State Farm Mut. Auto. Ins. Co. v. Pierce ---------- 805

20. A driver exclusion agreement limiting the coverage of an automobile liability insurance policy as to a particular driver is not void as against public policy. State Farm Mut. Auto. Ins. Co. v. Pierce -- 805

21. Forbearance of a right of cancellation or termination is sufficient consideration to support an agreement reducing the coverage of an existing automobile liability insurance policy. State Farm Mut. Auto. Ins. Co. v. Pierce ---------- 805

Bail.

All persons shall be bailable by sufficient sureties, except for treason and murder, where the proof is evident or the presumption great. State v. Pilgrim 594

Banks and Banking.

1. Presumption arising from nonpayment of no fund or insufficient fund check stated. State v. Edmonds 140

2. Where a defendant charged with making and uttering a "no fund" or "no account" check gave the check as a part payment of the purchase price of an automobile, there is adequate consideration for the check even though delivery of the automobile was not made until the next day when the details of the sale transaction were completed. State v. Edmonds ---------- 140
3. The requirement in the Banking Act that only a corporation may conduct a bank in this state is satisfied if the corporate organization of the proposed bank is complete before the charter is issued. First Nat. Bank & Trust Co. v. Ley ---------- 164
4. All the requirements of the Banking Act must be satisfied before the Department of Banking may issue a charter or the certificate provided for by statute, but the department may determine matters which are discretionary in nature before all other requirements of the act have been satisfied. First Nat. Bank & Trust Co. v. Ley ---------- 164
5. A finding by the Department of Banking in the language of the statute may be adequate in a particular case. First Nat. Bank & Trust Co. v. Ley -- 164
6. The president of a bank has no authority, springing from his official position, to make an agreement that the liability of a party on commercial paper payable to the bank shall never be enforced. Department of Banking v. Keeley ---------- 645

Bills and Notes.

1. Where the guarantor of a promissory note is compelled to pay the principal's debt, the law raises an implied promise by the principal to reimburse the guarantor and upon payment of the debt by the guarantor, such guarantor has a cause of action against the debtor for the amount due under the guaranty. Highway Equipment & Supply Co. v. Jones ---------- 234
2. The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt. Department of Banking v. Keeley ---------- 645
3. As between the original parties and as against transferees who are not bona fide purchasers for value, a renewal note is open to all defenses which might have

been made against the original note. Department of Banking v. Keeley ---------- 645

Boats and Boating.

1. Under the State Boat Act of Nebraska, the owner of a motorboat is liable for any injury or damage caused by the negligent operation of the boat if it is being used with his consent. Reed v. Reed -------- 136
2. A motorboat is not a "motor vehicle" within the meaning of the Nebraska guest statute. Reed v. Reed ---------- 136

Boundaries.

1. The evidence was insufficient to establish a common boundary line by monument so as to bind adjoining landowners to such line as against a line described by deeds of conveyance. Lunzmann v. Yost -------- 101
2. The meander lines of a river as established by the original government survey are not boundary lines unless made so by the instrument of conveyance and the waters themselves constitute the real boundary. Summerville v. Scotts Bluff County ---------- 311
3. Unrestricted grants of the government bounded on streams and other waters are to be construed according to the laws of the state in which the lands lie. Summerville v. Scotts Bluff County ---------- 311
4. Subject to the easement of navigation, riparian owners are entitled to the possession and ownership of the island formerly under waters of the stream as far as the thread of the stream. Summerville v. Scotts Bluff County ---------- 311
5. The fixing of boundary lines is within the exclusive domain of the Legislature. Campbell v. City of Lincoln ---------- 459

Building and Loan Associations.

Advance payments made to a building and loan association, for the purpose of defraying taxes and insurance upon property mortgaged as security for a loan, are the property of the association and exempt from intangible tax under statute referred to in opinion. First Fed. S. & L. Assn. v. Board of Equalization ---------- 25

Buildings.

1. A proprietor must take reasonable precautions to protect invitees from foreseeable dangers in arrange-

ment and use of his premises. His duty does not ordinarily encompass dangers either known to the invitee or so obvious that the invitee may be reasonably expected to discover them. Hansen v. First Westside Bank ---------- 664

2. It is true that the existence of a change in floor level in a business establishment and the fact that an invitee falls thereon is insufficient to establish negligence. Snyder v. Fort Kearney Hotel Co., Inc. 859
3. A change in floor level, when coupled with other conditions, may constitute negligence. Snyder v. Fort Kearney Hotel Co., Inc. ---------- 859

Burglary.

Where evidence of the finding and identification of a tool of the nature commonly used in breaking and entering is received without objection, the subsequent admission of a photograph showing such instrument at the scene of the offense is not prejudicial. State v. Williams ---------- 372

Capital Punishment.

1. Whatever repugnance individuals may feel toward capital punishment must be laid aside in obedience to the law of the state and in deference to the judgment of the sentencing court. State v. Alvarez 358
2. The death penalty by electrocution as a punishment for crime is not a cruel and unusual punishment within the meaning of the state and federal Constitutions. State v. Alvarez ---------- 358
3. Whether or not a sentence of death will be imposed, and is necessary under the law, is a question to be determined from the nature of the crime and all the facts and circumstances bearing upon the issue in the particular case. State v. Alvarez ---- 358
4. In determining if a sentence of death is to be reduced to life imprisonment, mental abnormality of the convicted person is to be considered, but mental abnormality is not necessarily a controlling factor. The nature and extent of the abnormality is the primary factor. State v. Alvarez ---------- 358
5. In determining if a sentence of death is to be reduced to life imprisonment, the Supreme Court should consider the age of the defendant, his previous history and environment, his cooperativeness with law enforcement officers, a plea of guilty if there be one, and any other mitigating factors; but the weight to

be given to such evidence is for the sentencing court when considered with all the circumstances of the case. State v. Alvarez ---------- 358

Citizens.

The privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Anderson v. Tiemann ---------- 393

Compromise and Settlement.

One accepting a check, knowing it is offered in full settlement on a disputed account or claim, is estopped to claim that it was not accepted in full settlement. State v. Nickel Grain Co., Inc. ---------- 191

Constitutional Law.

1. Within the meaning of the due process clause, laws for the levy and collection of general taxes stand upon a different footing than laws for the levy and collection of special assessments or special taxes. Frye v. Haas ---------- 73
2. The power to levy a general tax is inherent in the sovereign, is purely legislative in character, and due process does not require that the property subject to the tax or the amount to be levied should be subjected to judicial inquiry. Frye v. Haas ---- 73
3. Tax proceedings are necessarily summary in nature, are not judicial in character, due process does not require notice and an opportunity to be heard at any particular stage of the proceedings, and notice by a statute itself is sufficient. Frye v. Haas ------ 73
4. There is no constitutional command that notice of the assessment or levy of a tax, and opportunity to contest it, must be given in advance of the assessment or levy. It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay it becomes final and irrevocable. Frye v. Haas ---------- 73
5. There is no requirement of due process that a taxpayer must be given an opportunity to be heard before any particular stage of the taxation process.

Frye v. Haas ---------- 73
6. The state Constitution requires all corporations to be created by general law, except those corporations organized for charitable, educational, penal, or reformatory purposes. Frye v. Haas ---------- 73
7. Pretrial interrogation of a criminal suspect by law enforcement officers, without informing him of his right to legal counsel, of his right to remain silent, and of the fact that his statements may be used against him, does not constitute prejudicial error in the absence of proof that the statement or confession was used in evidence at the trial. State v. Livingston 257
8. Before a law can be determined to be unconstitutional, the express provision of the Constitution which the law contravenes must be pointed out. Radil v. State ---------- 291
9. The death penalty by electrocution as a punishment for crime is not a cruel and unusual punishment within the meaning of the state and federal Constitutions. State v. Alvarez ---------- 358
10. Where the totality of the circumstances surrounding a confrontation made prior to June 12, 1967, shows that it was not unnecessarily suggestive and conducive to irreparable mistaken identification, it is not a denial of due process of law. State v. Sears -- 384
11. Each and every clause in a constitution has been inserted for some useful purpose. Anderson v. Tiemann ---------- 393
12. The constitutional amendment, Article VIII, section 1B, adopted by the electorate in November 1966, grants to the Nebraska Legislature the authority to enact income tax legislation which adopts by reference future income tax laws of the United States as they become effective; and the provisions of the Nebraska Revenue Act of 1967, with reference thereto, are valid. Anderson v. Tiemann ---------- 393
13. The rule-making authority granted to the Tax Commissioner by the Nebraska Revenue Act of 1967 is a valid and lawful delegation of authority, and does not violate the Constitution of Nebraska nor of the United States. Anderson v. Tiemann ---------- 393
14. The Nebraska Revenue Act of 1967 constitutes a valid and lawful delegation of authority to the State Board of Equalization and Assessment and does not violate the Constitution of Nebraska nor of the United States. Anderson v. Tiemann ---------- 393
15. The Nebraska Revenue Act of 1967 does not uncon-

stitutionally delegate judicial power to the Tax Commissioner. Anderson v. Tiemann ---------- 393
16. The Constitution of Nebraska does not prohibit a graduated state income tax. Anderson v. Tiemann 393
17. A franchise tax based upon or measured by the income of a corporation is not a property tax within the meaning of Article VIII, section 1, of the Constitution of Nebraska. Anderson v. Tiemann ---- 393
18. A tax classification, although discriminatory, is not arbitrary nor violative of the equal protection clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it. Anderson v. Tiemann ---------- 393
19. The privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Anderson v. Tiemann ---------- 393
20. The allowance and limitation of the food sales tax credit only to residents does not constitute unjust or unreasonable discrimination under the privileges and immunities and equal protection clauses of the Fourteenth Amendment. Anderson v. Tiemann -- 393
21. The Nebraska Revenue Act of 1967 contains but one general subject, taxation, and does not violate Article III, section 14, of the Constitution of Nebraska, providing that no bill shall contain more than one subject. Anderson v. Tiemann ---------- 393
22. The Supreme Court will not decide questions of constitutionality of statutes unless they have been raised by a litigant whose interests are adversely affected. The courts will not set aside a law as violative of the Constitution for the reason that there is a possibiilty that one's interest may be injuriously affected in the future. Anderson v. Tiemann ---------- 393
23. The constitutional right to trial by jury is a personal privilege which may be waived. The prosecution is without power to require a jury trial if the defendant wishes to waive it. State v. Godfrey ---- 451
24. The classification of cities of the state into classes and subclasses, and the conferring upon them of corporate powers by acts of the Legislature of a general nature, the provisions of which are applica-

ble to but one of such classes or subclasses, is not repugnant to any provision of the Constitution. Campbell v. City of Lincoln ---------- 459
25. The Legislature shall not pass local or special laws incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village. Campbell v. City of Lincoln ---------- 459
26. A valid classification of cities for purposes of legislation must admit of additions to it. It must be so construed as to preclude addition to the numbers included within it. Campbell v. City of Lincoln -- 459
27. Statute authorizing city of primary class to annex contiguous or adjacent lands is not so restrictive as to constitute special legislation. Campbell v. City of Lincoln ---------- 459
28. No legislative bill shall contain more than one subject and the same shall be clearly expressed in the title. Campbell v. City of Lincoln ---------- 459
29. The property of no person shall be taken for public use without full compensation therefor. Campbell v. City of Lincoln ---------- 459
30. Statutory provision declaring a misdemeanor for contributing to delinquency, neglect, or need of special supervision of a minor child is not unconstitutional as being vague and uncertain, an unlawful delegation of legislative power, or lacking in uniformity. State v. Simants ---------- 491
31. The right of an owner of property abutting on a street or highway to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without due process of law and compensation for his loss. American Oil Co. v. City of Omaha ---------- 532
32. Statute in Mechanic's Lien Law declaring certain acts unlawful and providing attempted imprisonment therefor are contrary to provisions of Article I, section 20, Constitution of Nebraska. State ex rel. Norton v. Janing ---------- 539
33. The standard relating to federal and Nebraska constitutional guarantees of a speedy trial is reasonableness. State v. Pilgrim ---------- 594
34. The general test of constitutionality with respect to prohibitions against special legislation is reasonableness of classification and uniformity of operation. State Tax Cases ---------- 621
35. Provision enlarging the time for appeal from valua-

tion decisions entered by the State Board of Equalization and Assessment in the year 1966 is special legislation prohibited by the Constitution of Nebraska. State Tax Cases ---------- 621
36. Statute relating to the sterilization of mentally deficient persons as a condition prerequisite to parole or discharge, constitutes a valid exercise of the police power. State v. Cavitt ---------- 712
37. The sterilization statute providing for the sterilization of mentally defective persons as a prerequisite to parole or discharge from the state institution for mentally defective persons, does not deny the equal protection of the law as class legislation. State v. Cavitt ---------- 712
38. The term "mentally deficient" when applied to persons is not so vague and indefinite as to make the sterilization statute unconstitutional. State v. Cavitt 712
39. The sterilization statute is not unconstitutional in that quasi-judicial powers are unlawfully delegated to the board of examiners of mental deficients by the terms of the act. State v. Cavitt ---------- 712
40. The fact standards and guidelines provided by the sterilization statute for the guidance of the board of examiners of mental deficients in administering the statute in accordance with the legislative purpose are sufficient, and do not constitute an unlawful delegation of legislative power. State v. Cavitt ---------- 712
41. The hearing provided by statute before the board of examiners of mental deficients composed of competent physicians, with the right of appeal to the courts, affords constitutional procedural due process. State v. Cavitt ---------- 712
42. Statutes regarding sterilization of mental deficients are in all respects constitutional and enforcible. State v. Cavitt ---------- 712
43. Assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. State v. Montgomery -- 737
44. The court's jurisdiction at the commencement of a trial may be lost during the course of the proceedings if it develops that defendant's constitutional rights have been abridged. State v. Montgomery 737
45. Where defendant at time of sentencing and after having effect of guilty plea explained elected to

stand on guilty plea, he cannot complain that he was deprived of his constitutional right to a warning of the consequences of a guilty plea. State v. Cooper ---------- 765

46. The Miranda procedural requirements for conducting an in-custody interrogation for the purpose of eliciting incriminating statements do not apply to the obtaining of consent to a search under the Fourth Amendment to the Constitution of the United States. State v. Forney ---------- 802

47. The findings and holdings of a single Judge of the Supreme Court in State v. Forney, 181 Neb. 757, 150 N. W. 2d 915, have been examined and are adhered to. State v. Forney ---------- 802

Constitutional Law, Construction of.

Constitutional provisions should receive even broader and more liberal construction than statutes. Constitutions are not subject to rules of strict construction. Anderson v. Tiemann ---------- 393

Contempt.

1. The refusal of a witness to answer questions or interrogatories within the scope of statute subjects the witness to the penalties for civil contempt. Campbell v. Lutz ---------- 27
2. Civil contempt is available to enforce a previous decree, but not to afford a remedy for the recovery of subsequent damages. Kasparek v. May ---------- 582
3. Finding defendants in contempt does not ipso facto determine plaintiffs had actually been damaged, or the amount of such damages if any had been sustained. Kasparek v. May ---------- 582

Continuance.

1. A motion for a continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the court. Unless an abuse of such discretion is shown, the ruling on the motion will not be disturbed. Jordan v. Butler ---------- 626
2. Where a continuance is sought on the ground that defendant is ill and is a material witness in his own behalf, the showing in support of the motion is insufficient if it fails to disclose the material facts to which defendant would testify, if present. Jordan v. Butler ---------- 626
3. An application for a continuance is addressed to

the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby. State v. Woods ---------- 668

Contractors.

For medical payments coverage, accidental bodily injury to an independent contractor in the repair of a family home, without other circumstances, is not excluded by the following clause: The policy "Does Not Apply * * * to bodily injury to * * * any person * * * if such person * * * is on the premises because of a business conducted thereon, or is injured by an accident arising out of such business. Wymore v. Farmers Mut. Ins. Co. of Nebraska ---------- 763

Contracts.

1. A fundamental and indispensable basis of any enforceable agreement is that there be a meeting of the minds of the parties as to the essential terms and conditions of the proposed contract. Peters v. Halligan ---------- 51
2. Rule stated where recovery can be had for part performance of contract, subject to recoupment. Peters v. Halligan ---------- 51
3. The rule that a party who has failed fully to perform his contract cannot recover on the contract for part performance applies only to entire indivisible, and not to severable, contracts; and there may be a recovery on the contract for a part performance of a divisible contract. Peters v. Halligan 51
4. A contract for a commission for providing a scheme for insurance advertising and for finding an insurance company to participate, containing no terminable date, is enforcible for such time as the advertising agency uses the scheme in its advertising with the found insurance company. Muller Enterprises, Inc. v. Samuel Gerber Adv. Agcy., Inc. ---- 261
5. A contract for a commission for providing a scheme for insurance advertising and for finding an insurance company to participate is executory insofar as the advertising agency is concerned and the duration of the obligation is commensurate with the agency's performance which it may terminate at any time by refusing the advertising. Muller Enterprises, Inc. v. Samuel Gerber Adv. Agcy., Inc ---------- 261

6. When a contract has been performed by one of the parties thereto, the law will not permit injustice to him by permitting the other party to retain the benefit without compensation unless compelled by some inexorable rule. Muller Enterprises, Inc. v. Samuel Gerber Adv. Agcy., Inc. ---------- 261
7. If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce the 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. Mid States Engineering v. Rohde ---------- 590
8. If a written contract contains a complete obligation without ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included therein. Mid States Engineering v. Rohde ---------- 590
9. A written contract expressed in unambiguous language is not subject to interpretation or construction and the intention of the parties to such a contract must be determined from its contents. Mid States Engineering v. Rohde ---------- 590
10. An agent who fails to disclose the fact of his agency and represents himself as principal inducing another to deal with him as such is liable and may be treated as principal for all purposes, unless and until the fact of his agency is known or made known by him to the contractor. Baxter & Sons v. Sofio ---------- 599
11. An agent purporting to act upon his own account, but in fact making a contract on account of an undisclosed principal, is a party to the contract. Baxter & Sons v. Sofio ---------- 599
12. The interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of their true intent and ordinarily should be enforced by the court. Baxter & Sons v. Sofio ---------- 599
13. A contract or agreement is a manifestation of mutual assent by two or more persons to one another. Baxter & Sons v. Sofio ---------- 599
14. The contract of a surety, acting for compensation, is construed most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect. Abel v. Southwest Cas. Ins. Co. ---------- 605

15. Under the Uniform Commercial Code, title to goods passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods and, if the contract requires delivery at destination, title passes on delivery or tender there, unless the contract of sale provides otherwise. Jordan v. Butler ---------- 626
16. The Uniform Commercial Code does not provide for a revesting of title for the nonpayment of the purchase price alone except where the contract so provides. Jordan v. Butler ---------- 626
17. Parties to a contract may make the contract in any legal form they desire and agree upon. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. -- 828

Conversion.

A claim for damages for slander and malicious prosecution may not be pleaded as a counterclaim in an action for conversion even though the slander and malicious prosecution relate to the alleged conversion. Benes v. Matulka ---------- 744

Corporations.

1. The state Constitution requires all corporations to be created by general law, except those corporations organized for charitable, educational, penal, or reformatory purposes. Frye v. Haas ---------- 73
2. Ordinarily, a corporation is domiciled for tax purposes in the state of its incorporation; and, in the absence of a statute to the contrary, its intangible personal property has its tax situs in that state, unless a business situs elsewhere has been established. Equity Union Grain Co. v. Board of Equalization ---------- 182
3. When a foreign corporation is domesticated, there is a domestic corporation within each state insofar as the corporation has been created by, and exists under, its laws, and a foreign corporation insofar as it exists and exercises franchises under the laws of another state. Equity Union Grain Co. v. Board of Equalization ---------- 182
4. Domesticating a foreign corporation in Nebraska, for purposes of taxation, has much the same effect as establishing a business situs in Nebraska and its intangible property may have a situs, for taxation purposes, apart from the state of its original incorporation. Equity Union Grain Co. v. Board of

Equalization ---------- 182
5. Before a state, where a corporation has been domesticated or has established a business situs, may tax such intangible property, it must appear to have a reasonable connection with the business of the company in such state in that it has a localized use, is primarily an asset of the local business, and under local management and control. Equity Union Grain Co. v. Board of Equalization ---------- 182
6. A state has no authority to tax the property of a foreign corporation which is clearly outside the state and forming no part of its domestic business. Equity Union Grain Co. v. Board of Equalization -- 182

Costs.

1. Costs of a divorce action in case of wife's adultery are ordinarily taxable to the wife. Wolpa v. Wolpa 178
2. Where an appeal in a probate matter is vexatious or for delay, the district court properly exercises its discretion by taxing the costs, including attorneys' fees, to the appellant. United States Nat. Bank v. Feenan ---------- 524
3. An attorney serving as guardian ad litem is entitled to reasonable compensation to be fixed by the court and chargeable as costs in the action. State v. Cavitt ---------- 712
4. Reference in statute to a reasonable attorney's fee does not mean a contingent fee. The fee contemplated is one that is reasonably compensatory for the services rendered. Schimonitz v. Midwest Electric Membership Corp. ---------- 810

Counties.

1. Under statute, it is a ministerial and mandatory duty of the county board to set aside in the general fund an amount equal to the county extension budget submitted by the county extension service. State ex rel. Agricultural Extension Service v. Miller ---------- 285
2. Counties and county boards can only exercise such powers as are expressly granted by statute. State ex rel. Agricultural Extension Service v. Miller ---- 285

County Courts.

A court has discretion in fixing the amount of an appeal bond in a probate proceeding. Rundall v. Whiteside ---------- 176

Courts.

1. The separate juvenile court of Lancaster County has exclusive jurisdiction as to the custody of neglected, dependent, or delinquent children. Miller v. Department of Public Welfare ---------- 155
2. The jurisdiction of the separate juvenile court is continuing over any child adjudged a neglected or dependent child. The court has power to order a change in the custody or care of such child if at any time it is made to appear to the court that it would be for the best interests of the child to make such a change. Miller v. Department of Public Welfare -- 155
3. When a dependent child has been disposed of by placement the person, association, institution, or probation officer with whom placed may, with the assent of the juvenile court, consent to adoption in an adoption proceeding. Miller v. Department of Public Welfare ---------- 155
4. It is the general rule that a court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, unless the prior jurisdiction has been terminated. Miller v. Department of Public Welfare ---------- 155
5. A writ of habeas corpus can be granted only by a court having jurisdiction. The exercise of power to grant the writ cannot be used to unsettle valid legal proceedings, or to interfere with the exercise of jurisdiction of other courts. Miller v. Department of Public Welfare ---------- 155
6. The doctrine of issue preclusion or collateral estoppel recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly. Vincent v. Peter Pan Bakers, Inc. ------ 206
7. The county court has and retains jurisdiction to review and discipline an administrator or executor for breach of fiduciary duty until there has been full compliance with all judgments, orders, and decrees and until the estate has been placed in the hands of the distributees. Sass v. Sass ---------- 277
8. Orders of a probate court adjusting or correcting accounts of an administrator, made while he was acting as such administrator, are interlocutory and not final until his discharge as administrator and final settlement of his accounts upon such discharge. Sass v. Sass ---------- 277
9. Where a statute is susceptible of two constructions,

one of which renders it constitutional and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid. Anderson v. Tiemann ---------- 393

10. The Supreme Court will not decide questions of constitutionality of statutes unless they have been raised by a litigant whose interests are adversely affected. The courts will not set aside a law as violative of the Constitution for the reason that there is a possibility that one's interest may be injuriously affected in the future. Anderson v. Tiemann 393

11. Where a law or rule of court relates to a matter of procedure only and no substantial right is taken away, the law is not ex post facto. State v. Howard 411

12. The record of the trial court, when properly certified to the Supreme Court, imports absolute verity. If the record is incorrect, any correction must be made in the district court. Wonderling v. Conley -------- 446

13. Courts have the power to inquire into and determine whether conditions exist which authorize annexation. Campbell v. City of Lincoln ---------- 459

14. When the transcript of the record of the examining magistrate shows that an accused has had or waived a preliminary examination, and it is contended that in fact no such examination was had or waived, the absence of such examination or waiver should be raised by plea in abatement. State v. Moss ------ 502

15. Defects in procedure which might have been attacked by a motion to quash or a plea in abatement are waived when a defendant pleads to the general issue. State v. Moss ---------- 502

16. A claim of error on the ground of ineffective assistance of counsel must be supported by a record showing that counsel's assistance was so grossly inept as to shock the conscience of the court. State v. Moss ---------- 502

17. The general rule is that, while a court will take judicial notice of its records, it will not in one case take such notice of the record in another case. Kasparek v. May ---------- 582

18. The opinion of the Supreme Court may not be introduced in evidence for any purpose. If material, it is the judgment therein which is admissible. Kasparek v. May ---------- 582

19. A statute fixing a time for appeal to a court regulates the practice of courts of justice. State Tax

Cases ---------- 621

20. A court of equity has jurisdiction to enjoin a threatened injury whenever its nature is such that it could not be adequately compensated in damages and it continuance would occasion a constantly recurring grievance. City of Syracuse v. Farmers Elevator, Inc. ---------- 783

Criminal Law.

1. In a prosecution for cattle stealing, it is not necessary to allege or prove the value of the cattle stolen. State v. Nelson ---------- 31
2. Ownership of chattels may, in an indictment for their theft, be laid either in the owner, or in the person who at the time of the theft was in the actual peaceable possession of them, although such person may have no other property therein than the right of possession as against the thief. State v. Nelson ---------- 31
3. In prosecutions for larceny, nonconsent of the owner of the property alleged to have been stolen may, in a proper case, be inferred from circumstances. State v. Nelson ---------- 31
4. Conduct related in opinion held to be relevant in showing guilt of defendant. State v. Nelson ---------- 31
5. The mere fact that a witness in a criminal prosecution is a regular public law enforcement officer does not entitle an accused to an instruction that the jury, in weighing his testimony, should exercise greater care than in weighing the testimony of other witnesses. State v. Nelson ---------- 31
6. In a criminal action, an instruction which informs the jurors that they have nothing to do with the punishment of the defendant and that they have no right to take into consideration what punishment he might or might not receive, in event of his conviction, is proper in the cases where the punishment is left to the trial court. State v. Nelson ---------- 31
7. Absence of any direct, incriminatory evidence is ordinarily made the test of the obligation of the trial court to instruct as to the probative value and manner of considering circumstantial evidence in a criminal case. State v. Nelson ---------- 31
8. The right of accused to discharge for failure to receive a speedy hearing or trial is a personal right which may be waived. It ordinarily is waived if the accused fails to assert his right by making

a demand for hearing or trial, by resisting a continuance, or by failing to make some effort to secure a speedy hearing or trial. State v. Gau ---- 114

9. The correctness of the ruling of a district court in giving or refusing instructions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial. State v. Gau ---------- 114

10. The credibility of witnesses and the weight of their testimony are to be determined by the jury in a criminal case. State v. Myers ---------- 117

11. In determining the sufficiency of the evidence to sustain the conviction in a criminal prosecution, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, or to weigh the evidence. State v. Myers 117

12. In a prosecution for indecent assault, it is not essential that the testimony of the prosecutrix be corroborated by other testimony as to the particular act charged. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony. State v. Myers ---------- 117

13. In a criminal case, it is only when there is a total want of proof to support a material allegation of the information, or where the testimony is of so weak or doubtful character that a conviction based thereon cannot be sustained, that a court will be justified in directing a verdict of not guilty. State v. Edmonds ---------- 140

14. For post conviction relief on the ground of ineffective assistance of counsel, it must appear that counsel's assistance was so grossly inept as to shock the conscience of the court. State v. Putnam 185

15. Ineffectiveness of counsel is not inferable from the single fact that only 15 minutes passed between appointment of counsel and arraignment of defendant. State v. Putnam ---------- 185

16. A prosecuting attorney ordinarily may agree on recommendations for sentence and disposition of other charges or potential charges against defendant. State v. Putnam ---------- 185

17. The right of an accused to a hearing on revocation of probation has no constitutional basis and exists only by virtue of statute. State v. Holiday -------- 229

18. Probation may not be revoked except upon a proper charge and probative evidence of violation. State v. Holiday ---------- 229

19. The accused is entitled to a fair and impartial hearing, but not to a formal trial or trial by jury. The violation of probation need not be proved beyond a reasonable doubt. State v. Holiday 229
20. Rules stated as to the effect of granting of probation and procedure on violation of parole outlined. State v. Holiday 229
21. If the court is to revoke probation for a violation occurring within the probationary period, procedure to that end must be instituted within the probationary period, or within a reasonable time thereafter. State v. Holiday 229
22. It is sufficient if an information is filed within the probationary period or within a reasonable time thereafter and the fact that hearing on such information was delayed is not ordinarily material. State v. Holiday 229
23. The requirements for the admission of a confession or statement secured from a defendant during in-custody interrogation stated. Opportunity to exercise rights granted under these requirements must be afforded to accused throughout the interrogation. State v. Ransom 243
24. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. State v. Ransom 243
25. 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. Ransom 243
26. The general rule is that in criminal cases it is not error to exclude evidence which is not substantive proof of any fact relative to the issues in the case. State v. Ransom 243
27. A sentence imposed within the limits of the statute will not be disturbed unless there appears to be an abuse of discretion. State v. Ransom 243
28. An accused in a criminal prosecution is entitled to a trial upon competent, relevant evidence; evidence which at least tends to establish his guilt or

innocence; and evidence which has no such tendency, but which, if effective at all, could only serve to excite the minds and inflame the passions of the jurors, should not be admitted. State v. Fleming 249

29. Pretrial interrogation of a criminal suspect by law enforcement officers, without informing him of his right to legal counsel, of his right to remain silent, and of the fact that his statements may be used against him, does not constitute prejudicial error in the absence of proof that the statement or confession was used in evidence at the trial. State v. Livingston ---------- 257

30. A plea of guilty, if understandingly and voluntarily made, is conclusive. Such a plea, so made, eliminates all questions as to the admissibility of evidence. State v. Livingston ---------- 257

31. Where a defendant in a criminal case is shown to have less than average intelligence but is mentally competent under the law, his comparative intelligence is a matter that may be considered by the trial court in determining the sentence to be imposed. State v. Livingston ---------- 257

32. 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 say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Whited ---------- 282

33. Where voluntary statements or confessions are not offered or received in evidence, the foundational requirements for such are not material and, on objection or motion, should be excluded or stricken, if they are not otherwise relevant to the issues. State v. Whited ---------- 282

34. A person who has been twice convicted of crime, sentenced and committed to prison, is a habitual criminal even though the sentences imposed may have been served during a continuous period of imprisonment. Huffman v. Sigler ---------- 290

35. A verdict in a larceny case which does not determine the value of the property stolen will not support a sentence. State v. Houp ---------- 298

36. The trial court may set aside a verdict of guilty in a larceny case on its own motion and order a new trial. State v. Houp ---------- 298

37. It is a fundamental rule that the evidence of the commission of other crimes or being tried for other

crimes, with exceptions, is incompetent, irrelevant, and immaterial and ordinarily prejudicial to the rights of a defendant. State v. Riley ---------- 300

38. The "other-crimes" rule is a rule of relevance and such evidence is ordinarily prejudicial because prior criminal activity is irrelevant to the proof of the commission of a specific crime. State v. Riley -- 300

39. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Riley ---------- 300

40. Statements made by a defendant at the scene of the crime, immediately after his arrest and while an investigation is in progress to determine whether he was involved in the crime, are admissible in evidence if otherwise shown to be voluntary. State v. Carr ---------- 308

41. Evidence which tends to show that a footprint found at the scene of the crime was made by the defendant's shoe is admissible without proof of a known footprint. State v. Carr ---------- 308

42. 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. Fowler ---------- 333

43. 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. State v. Fowler ---------- 333

44. By the provisions of statute, the Supreme Court has authority to reduce the sentence in a criminal case and to render such sentence as in its opinion is warranted by the evidence. State v. Alvarez ------ 358

45. In determining the question as to whether or not a sentence shall be reduced, the Supreme Court is performing a judicial function and it should perform such function without regard to considerations of sympathy, mercy, or public opinion. State v. Alvarez 358

46. In all cases arising under statute providing for reduction of sentence in criminal case, substantial reason supported by the evidence must be found to cause either an affirmance or reduction of a sentence. State v. Alvarez ---------- 358
47. The fixing of minimum and maximum penalties as punishment for crime is for the Legislature with which the Supreme Court is powerless to interfere. State v. Alvarez ---------- 358
48. Where an accused is identified as having been at or near the scene of a crime about the time of its commission, evidence showing that he owned, possessed, or had access to any articles with which the crime was or might have been committed is competent. State v. Williams ---------- 372
49. 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, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Williams ---------- 372
50. Where the totality of the circumstances surrounding a confrontation made prior to June 12, 1967, shows that it was not unnecessarily suggestive and conducive to irreparable mistaken identification, it is not a denial of due process of law. State v. Sears 384
51. An indigent defendant is entitled to legal counsel at public expense on a hearing for the revocation of an order of probation and the imposition of a deferred sentence under the Sixth and Fourteenth Amendments to the Constitution of the United States. State v. Holiday ---------- 410
52. A defendant in a criminal action may not properly complain of the admission of evidence, allegedly incompetent, to which no objection was made. State v. Howard ---------- 411
53. In a criminal prosecution, the State may not make use of evidence unconstitutionally obtained to make a case for the jury. But a case having been so made, the State may use evidence unconstitutionally obtained to impeach the credibility of the defendant on collateral matters not ultimately involved in the issue of guilt. State v. Howard ---------- 411
54. Rule stated as to admissibility of statements of defendant after full Miranda warnings are given. State v. Godfrey ---------- 451
55. Record failed to show that defendant was unavoid-

ably prevented from filing his motion for a new trial within the statutory time. State v. Smith 458

56. Where the punishment of an offense created by statute is left to the discretion of the trial court within prescribed limits, a sentence imposed within those limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Escamilla 466

57. Statute makes it the duty of the Supreme Court, when proper proceedings are had, to review the sentence and to set aside any sentence which the evidence will not warrant; and, further, if the sentence is set aside, to render such sentence as may be justified by the evidence. State v. Escamilla 466

58. While a penal statute must be expressed in clear language, it is not necessary that it be so written as to be beyond the mere possibility of more than one construction. State v. Simants 491

59. Intent is an essential element in the crime of shooting with intent to kill, wound, or maim and proof thereof is indispensable to sustain a conviction, but such intent is ordinarily inferable from the facts and circumstances. State v. Moss 502

60. While a voluntary confession is insufficient standing alone, to prove that a crime has been committed, it is competent evidence of that fact, and may, with slight corroborative circumstances, be sufficient to sustain a conviction. State v. Moss 502

61. Where the punishment of a criminal offense is left to the discretion of a court within prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion. A substantial reason for the reduction of the sentence must be warranted by the evidence. State v. Moss 502

62. A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of the Constitution of Nebraska. Delay v. Brainard 509

63. The purpose of a preliminary hearing 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. Delay v. Brainard 509

64. In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of evidence taken at the preliminary examination to require a person to be tried on a criminal charge, the court will not weigh the evidence but only inquire as to the ex-

istence of evidence to sustain the charge. Delay v. Brainard ---------- 509
65. Evidence that would justify a committing magistrate in finding that probable cause existed for the detention of a defendant need not necessarily be sufficient to sustain a verdict of guilty when he is placed on trial. Delay v. Brainard ---------- 509
66. In the reception of evidence a committing magistrate is not strictly governed by technical rules applicable on a final trial. Delay v. Brainard ---------- 509
67. The negligence on which a charge of involuntary manslaughter is predicated may be the omission of an act which it is the person's duty to perform. Delay v. Brainard ---------- 509
68. For a parent having special charge of an infant child to so culpably neglect it that death ensues as a consequence of such neglect is manslaughter, although death or grievous bodily harm were not intended. Delay v. Brainard ---------- 509
69. Culpable neglect in omitting to perform a legal duty will sustain a manslaughter conviction. Delay v. Brainard ---------- 509
70. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment. In the absence of any denial or contradictory evidence, such record is sufficient to support a finding by the trial court that the accused has been convicted prior thereto. State v. Roan Eagle ---------- 535
71. Whoever aids, abets, or procures another to commit any offense may be prosecuted and punished as if he were the principal offender. State v. Oziah ---------- 577
72. An instruction to the jury to disregard exhibits ordinarily protects a defendant from unfair prejudice in management of the exhibits before the jury. State v. Pilgrim ---------- 594
73. Failure of defendant or his counsel to move for discharge prior to trial or entry of plea of guilty constitutes a waiver of the right to a speedy trial. State v. Pilgrim ---------- 594
74. All persons shall be bailable by sufficient sureties, except treason and murder, where the proof is evident or the presumption great. State v. Pilgrim ---------- 594
75. 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 ren-

der them liable to its penalties. State v. Green ---- 615
76. It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. State v. Green ---------- 615
77. A municipal ordinance may constitute reckless driving and willful reckless driving separate offenses and provide separate minimum penalties for each offense. State v. Green ---------- 615
78. Malice and a purpose to kill are essential elements of murder in the second degree. State v. Walle -- 642
79. A defendant has no absolute right to be placed in a private cell, given access to a typewriter, carbon paper, legal pads, and a law library, or to be furnished with a daily transcript of the testimony. State v. Walle ---------- 642
80. An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby. State v. Woods ---------- 668
81. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the State to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. State v. Woods ------ 668
82. An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. State v. Woods ---------- 668
83. Participation and criminal intent may be inferred from presence, companionship, and conduct before and immediately after the offense. State v. Perez 680
State v. Cook ---------- 684
State v. Watson ---------- 692
84. Evidence that a burglary has been committed together with evidence that some of the property taken in the burglary was discovered in the possession of the defendant, coupled with other incriminating circumstances or conduct, is sufficient to sustain a conviction for burglary. State v. Perez --------- 680
85. An individual subjected to in-custody interrogation for the purposes of eliciting incriminating statements may knowingly and intelligently waive the right to counsel being present during the course of the interrogation. State v. Perez ---------- 680
86. Where there is evidence that several persons par-

ticipated in a criminal act, the acts and declarations of one of them, while so participating, are admissible against all of the others. State v. Cook -- 684
State v. Watson ---------- 692
87. A motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such a motion will not be disturbed in the absence of a showing of abuse of discretion. State v. Cook ---------- 684
88. There is some danger of prejudice in any trial involving multiple defendants but severance should be denied in the absence of a showing of prejudice against which the trial court will not be able to afford protection. State v. Cook ---------- 684
89. Error may not be predicated on the reception of inadmissible evidence where there has been no objection made to the offer thereof, or where a party has stated he has no objection to such evidence, or where he agrees or stipulates that such evidence should be admitted. State v. Cook ---------- 684
90. It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. State v. Watson ---------- 692
91. Rule stated as to the admission of declarations of a coconspirator made after the conspiracy terminated. State v. Watson ---------- 692
92. Rule stated as to the admission of statements of coconspirator made immediately after, or close in time to, the accomplishment of the criminal purpose of the conspiracy. State v. Watson ---------- 692
93. It is recommended that upon tender of a guilty plea the court inquire about plea discussions and any plea agreement between counsel. State v. Tunender 701
94. The right to a separate trial depends upon a showing that prejudice will result from a joint trial. State v. Montgomery ---------- 737
95. A motion for a separate trial is addressed to the sound discretion of the trial court and its ruling on such motion will not be disturbed in the absence of a showing of an abuse of discretion. State v. Montgomery ---------- 737
96. There is some danger of prejudice in any trial in-

volving multiple defendants, but severance should be denied in the absence of a showing of prejudice against which the trial court will not be able to afford protection. State v. Montgomery ---------- 737

97. Where one attorney represents two codefendants, conflict of interests which denies one or both defendants effective assistance of counsel is a distinct possibility, and when such conflict exists, the conviction cannot stand. State v. Montgomery ---------- 737

98. The court's jurisdiction at the commencement of a trial may be lost during the course of the proceedings if it develops that defendant's constitutional rights have been abridged. State v. Montgomery ---------- 737

99. A motion for severance must be made before trial if a defendant is aware of a ground for severance. State v. Montgomery ---------- 737

100. Where a defendant has been unable to obtain information on the nature of a confession of a codefendant until the day of trial, the motion for severance may be made when the confession is offered in evidence if there is a conflict of interests. State v. Montgomery ---------- 737

101. Effect of voluntary guilty plea on prior alleged coerced confession stated. State v. Cooper -------- 765

102. There must be proof that a confession, admission, or statement was used in evidence against the defendant. State v. Cooper ---------- 765

103. Where defendant at time of sentencing and after having effect of guilty plea explained elected to stand on guilty plea, he cannot complain that he was deprived of his constitutional right to a warning of the consequences of a guilty plea. State v. Cooper ---------- 765

104. The Miranda procedural requirements for conducting an in-custody interrogation for the purpose of eliciting incriminating statements do not apply to the obtaining of consent to a search under the Fourth Amendment to the Constitution of the United States. State v. Forney ---------- 802

Damages.

1. A party may recover on a quantum meruit basis for partial performance for the value of benefits conferred even though he fails or refuses to perform the contract, subject to any counterclaim for damages that the other party has sustained by reason of the

breach of the agreement. Peters v. Halligan ------ 51
2. Under the evidence adduced, a jury might reasonably infer that the dumping of sand by defendant in the Platte River substantially contributed to a subsequent ice jam against a sandbar downstream, a levee failure upstream, and flood damage to plaintiff's property. Paulson v. Ford ---------- 86
3. The damages in this case held to be excessive, appearing to have been given under the influence of passion and prejudice. Paulson v. Ford ---------- 86
4. Where the nature and extent of the injuries received by the plaintiff in an automobile accident are in dispute, photographs of the automobiles involved in the collision tending to show the force of the collision are admissible as bearing on those issues. Springer v. Smith ---------- 107
5. Where a trial court properly submits to a jury pain and suffering that plaintiff has heretofore sustained, the trial court is not required to instruct the jury that it is not to make an award for possible future pain. Springer v. Smith ---------- 107
6. In order to impose liability for injury to an invitee, the dangerous condition must have been known to the owner or occupant or have existed for such time that it was his duty in the exercise of ordinary care to know of it. Kozloski v. Modern Litho, Inc. -- 270
7. An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the state of his right of access to an existing highway. American Oil Co. v City of Omaha ---------- 532
8. The amount of damages sustained by a landowner for a right-of-way condemned across his land is a question of a local nature, proper to be determined by a jury of the county, and the Supreme Court ordinarily will not interfere with the verdict if it is based on the evidence in the case. American Oil Co. v. City of Omaha ---------- 532
Schimonitz v. Midwest Electric Membership Corp. 810
9. Civil contempt is available to enforce a previous decree, but not to afford a remedy for the recovery of subsequent damages. Kasparek v. May -- 582
10. Finding defendants in contempt does not ipso facto determine plaintiffs had actually been damaged, or amount of such damages if any had been sustained. Kasparek v. May ---------- 582
11. Impairment of reasonable access to an abutting

owner's propery is not an independent element of damage but may be considered as one of the circumstances bearing upon the diminution of the value of his remaining property at the time of the taking. Deremer v. State ---------- 586

12. Rule for measure of damages in eminent domain proceedings stated. Hughes Farms, Inc. v. Tri-State G. & T. Assn., Inc. ---------- 791
Schimonitz v. Midwest Electric Membership Corp. 810

13. In a condemnation proceeding, the value of crops growing on the land and injured or destroyed by the taking are properly considered in determining the value of the land. Hughes Farms, Inc. v. Tri-State G. & T. Assn., Inc. ---------- 791

14. Damages in a condemnation action are peculiarly of a local nature and weight and credibility of valuation testimony are for the jury. Hughes Farms, Inc. v. Tri-State G. & T. Assn., Inc. ---------- 791

15. Where condemner in application for perpetual easement alleges intention that landowners retain use of land and condemner obligates itself to pay future crop damages and case is presented to jury on this basis, the judgment should contain provision that easement is subject to such obligation to pay future damages. Hughes Farms, Inc. v. Tri-State G. & T. Assn., Inc. ---------- 791

16. A condemnee is entitled to recover full compensation for the land actually taken, if any was taken, and for such damages to the residue of the land as are equivalent to the diminution of the value thereof. Schimonitz v. Midwest Electric Membership Corp. -- 810

17. An instruction so framed as to mislead the jury into a double award for an item of damage is prejudicially erroneous. Pierson v. Cleven ---------- 816

18. A verdict for damages based on an instruction in which a statement concerning recovery for an item of damage is redundant, may nevertheless imply a single award for the item. Pierson v. Cleven ------ 816

19. A verdict for damages will not be set aside on the ground of excessiveness unless it is so clearly exorbitant as to indicate unfair prejudice or disregard of evidence of controlling rules of law. Pierson v. Cleven ---------- 816

Depositions.

Conditions set out under which depositions were considered as having been received in evidence by the

trial court. Frisch v. Svoboda ---------- 825

Divorce.

1. In a divorce action, 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. Sanny v. Sanny -- 1
2. In the context of child custody disputes in a divorce case, unfitness of a parent is not restricted to moral unfitness nor to inability or failure to provide physical needs and requirements of the child. The overriding and primary concern is for the best interests of the child. Sanny v. Sanny ---------- 1
3. Where the evidence in a suit for a divorce establishes adultery on the part of one of the parties thereto, the court is required to grant the prayer of the other party seeking a divorce on that ground unless prevented from doing so by applicable statutory provisions. Covault v. Covault ---------- 119
   Wolpa v. Wolpa ---------- 178
4. Where a wife is found guilty of adultery she is ordinarily an unfit person to have the care and custody of her minor children as against the husband she has wronged where he is a fit and proper person to have their custody. Covault v. Covault 119
5. Where the adultery of a wife is established she is not ordinarily entitled to an award of an attorney's fee or the costs of the suit. Covault v. Covault -- 119
6. Rule stated as to validity of separation agreement between husband and wife. Clatterbaugh v. Clatterbaugh ---------- 160
7. Property settlement agreements should not be lightly regarded but should be scrutinized and controlled to the end that the division of the property and other benefits shall not be inequitable, unfair, and unreasonable under the circumstances. Clatterbaugh v. Clatterbaugh ---------- 160
8. Where a wife is conclusively found to be guilty of adultery, she is an unfit person as a matter of law to have the care and custody of her minor children as against the husband she has wronged. Wolpa v. Wolpa ---------- 178
9. Ordinarily, courts may not properly deprive a parent of his custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or he has forfeited that right. Wolpa v. Wolpa ---------- 178

10. Where adultery of a wife is established, she is not entitled to an award of alimony or attorney's fees. Wolpa v. Wolpa ---------- 178
11. Costs of a divorce action in case of wife's adultery are ordinarily taxable to the wife. Wolpa v. Wolpa 178
12. When a divorce shall be decreed for the cause of adultery committed by the wife, the husband may hold such of her personal estate as the court shall deem just and reasonable under all of the circumstances in the case, and the same shall be determined and decreed by the court at the time of the granting of such divorce. Wolpa v. Wolpa ---- 178
13. In a divorce action where the credible evidence on material questions of fact is in irreconcilable conflict, the Supreme 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. Heiser v. Heiser ---------- 216
14. Where a wife is found to be guilty of adultery, she is an unfit person as a matter of law to have the care and custody of her minor child as against the husband she has wronged who is without fault. Morrissey v. Morrissey ---------- 268
15. It is impossible to lay down any general rule as to the degree of corroboration in a divorce action as each case must be decided on its own facts and circumstances. Applegate v. Applegate ---------- 342
16. A divorce action is for trial de novo in the Supreme Court. Applegate v. Applegate ---------- 342
17. In a divorce action where the credible evidence on material questions of fact is in irreconcilable conflict, the Supreme 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. Klein v. Klein -- 387
18. Attorneys' fees in divorce proceedings will ordinarily be denied where no reasonable justification appears for the position taken by the party claiming them. Hohensee v. Hohensee ---------- 388
19. The residence of one of the parties in the county in which the action is brought is necessary to the jurisdiction of the court in a divorce action. Fletcher v. Fletcher ---------- 549
20. Condonation is forgiveness, express or implied, for

a breach of marital duty with the implied condition that the offense shall not be repeated. Fletcher v. Fletcher ---------- 549

21. Forgiveness and condonation are complete if there is a voluntary resumption of marital relations. Fletcher v. Fletcher ---------- 549

22. Condonation is dependent upon future good conduct and a repetition of the offense revives the wrong condoned. Fletcher v. Fletcher ---------- 549

23. A judgment that defendant save plaintiff harmless from all liability for necessaries furnished to plaintiff is erroneously indefinite. Bolles v. Bolles ---- 798

24. The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case. McKinley v. McKinley ---- 819

25. In setting amount of alimony to be paid to wife, the husband's earning capacity is an element to consider; and 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. McKinley v. McKinley ---------- 819

Domicile.

1. The jurisdiction of a state to regulate the custody of an infant found within its territory does not depend upon the domicile of the parents nor upon the domicile of the child. It arises out of the power that every sovereignty possesses as parens patriae to every child within its borders, and residence of the child within the state sufficies even though the domicile may be in another jurisdiction. Miller v. Department of Public Welfare ---------- 155

2. It is the universal rule that residence in a community is determined by the intention of the parties. Fletcher v. Fletcher ---------- 549

3. The residence of one of the parties in the county in which the action is brought is necessary to the jurisdiction of the court in a divorce action. Fletcher v. Fletcher ---------- 549

Drainage.

Statute referred to in opinion contemplates that the rights of a sanitary and improvement district and of a municipality will be promptly adjusted after annexation of part of the district by the municipality. Sanitary & Improvement Dist. v. City of Ralston ---------- 63

Drains.

1. The owner of land may collect diffused waters, change their course, or pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow by nature. Rolfsmeyer v. Seward County ---- 348
   Kuta v. Flynn ---- 479
2. When diffused surface waters gather in volume in velocity or flow into a natural depression, draw, gulch, or drainway, such waters are not subject to the rule that they may be dammed, repelled, or diverted without liability as in the case of diffused surface waters. Rolfsmeyer v. Seward County ---- 348

Due Process of Law.

The knowing use of false testimony or the permitting of false testimony to stand when the prosecution knows the same to be false ordinarily constitutes the denial of due process of law when it is material to the guilt or innocence of the accused or to the penalty to be imposed. State v. Howard ---- 411

Easements.

1. Rule stated as to duty of landowner to the public with respect to use of private way. Bosiljevac v. Ready Mixed Concrete Co. ---- 199
2. An easement by prescriptive right can be acquired only by adverse use for 10 years. Kuta v. Flynn ---- 479

Eminent Domain.

1. Injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain. State v. Nickel Grain Co., Inc. ---- 191
2. The power conferred on the county judge by the eminent domain act and the duties required of him by that act are not judicial powers and duties but are purely ministerial in character. State v. Nickel Grain Co., Inc. ---- 191
3. The vacation or closing of a street is not analogous to an eminent domain proceeding to appropriate private property for public use. State v. Nickel Grain Co., Inc. ---- 191
4. The fact that a property owner or those desiring

to enter his property may have to travel a circuitous and longer route to reach certain points because of traffic regulations changing the direction of traffic does not give rise to an injury different in kind from that sustained by the general public, and affords no basis for an action for damages. State v. Nickel Grain Co., Inc. ---------- 191

5. Eminent Domain Act provides that in an appeal from an award of appraisers in a condemnation proceeding, the party appealing shall within 30 days after the filing of the award file a notice of appeal and serve a copy of the same upon all parties bound by the award. These provisions are mandatory and are in addition to the statutory undertaking required. Radil v. State ---------- 291

6. In a condemnation action, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong. American Oil Co. v. City of Omaha ---------- 532

7. The amount of damages sustained by a landowner for a right-of-way condemned across his land is a question of a local nature, proper to be determined by a jury of the county, and the Supreme Court ordinarily will not interfere with the verdict if it is based on the evidence in the case. American Oil Co. v. City of Omaha ---------- 532
Schimonitz v. Midwest Electric Membership Corp. -- 810

8. Impairment of reasonable access to an abutting owner's property is not an independent element of damage but may be considered as one of the circumstances bearing upon the diminution of the value of his remaining property at the time of the taking. Deremer v. State ---------- 586

9. Rule for measure of damages in eminent domain proceedings stated. Hughes Farms, Inc. v. Tri- State G. & T. Assn., Inc. ---------- 791
Schimonitz v. Midwest Electric Membership Corp. 810

10. In a condemnation proceeding, the value of crops growing on the land and injured or destroyed by the taking are properly considered in determining the value of the land. Hughes Farms, Inc. v. Tri-State G. & T. Assn., Inc. ---------- 791

11. Damages in a condemnation action are peculiarly of a local nature and weight and credibility of valuation testimony are for the jury. Hughes Farms, Inc. v. Tri-State G. & T. Assn., Inc. ---------- 791

12. Where condemner in application for perpetual ease-

ment alleges intention that landowners retain use of land and condemner obligates itself to pay future crop damages and case is presented to jury on this basis, the judgment should contain provision that easement is subject to such obligation to pay future damages. Hughes Farms, Inc. v. Tri-State G. & T. Assn., Inc. ---- 791

13. A condemnee is entitled to recover full compensation for the land actually taken, if any was taken, and for such damages to the residue of the land as are equivalent to the diminution in the value thereof. Schimonitz v. Midwest Electric Membership Corp. 810

Equity.

1. Rule for trial of equity case de novo stated. Lunzmann v. Yost ---- 101
2. An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. State v. Nickel Grain Co., Inc. ---- 191
3. Where one of two innocent persons must suffer by the acts of a third, the one whose conduct, act, or omission enabled such third person to occasion the loss must sustain it if the other party acted in good faith without knowledge of the facts, and altered his position to his detriment. Jordan v. Butler ---- 626
4. Where a party by fraud substitutes other property for that covered by a lien, a court of equity may treat the proceeds of the substituted property in the nature of a trust for the benefit of the defrauded lienor and direct its distribution in accordance with the priorities of the parties. Jordan v. Butler ---- 626

Estates.

A court has discretion in fixing the amount of an appeal bond in a probate proceeding. Rundall v. Whiteside ---- 176

Estoppel.

1. Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions, but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class. Sani-

tary & Improvement Dist. v. City of Ralston ---- 63
2. A party may not properly base a claim of estoppel in his favor on his own wrongful act or dereliction of duty, or fraud committed or participated in by him, or on acts or omissions induced by his own conduct, concealment, or representations. Sanitary & Improvement Dist. v. City of Ralston ---------- 63
3. The doctrine of issue preclusion or collateral estoppel recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly. Vincent v. Peter Pan Bakers, Inc. ------ 206
4. In a negligence action, a prior determination of common issues of negligence in another action is ordinarily not conclusive where the parties are not the same. Vincent v. Peter Pan Bakers, Inc. ------ 206
5. Ordinarily an estoppel or waiver must be pleaded by the party invoking it, but when the facts showing an estoppel or waiver are within the issues made by the pleadings and the evidence thereof is admissible for any purpose, it is not necessary that the estoppel or waiver shall be specifically pleaded. Robbins v. National Life & Acc. Ins. Co. ---------- 749
6. An estoppel to assert a lapse of a policy of insurance for nonpayment of premiums cannot be successfully asserted unless an established custom by the insurer inconsistent with the policy is shown, upon which the insured relied to his injury, and that it would be inequitable under the circumstances to enforce the provisions of the contract providing for the lapse of the policy for nonpayment of the premium. Robbins v. National Life & Acc. Ins. Co. 749

Evidence.

1. The refusal of a witness to answer questions or interrogatories within the scope of statute subjects the witness to the penalties for civil contempt. Campbell v. Lutz ---------- 27
2. While an administrative board may relax the strict rules of evidence applicable in law courts in affording a full and fair hearing, it must in every instance require any action taken by it to be supported by competent and relevant evidence. Midwest L. C. Co. v. Tri-State L. C. Co. ---------- 41
3. The requirements for the admission of a confession or statement secured from a defendant during in-custody interrogation stated. Opportunity to exercise rights granted under these requirements must

be afforded to accused throughout the interrogation. State v. Ransom ---------- 243
4. 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. Ransom ---------- 243
5. The general rule is that in criminal cases it is not error to exclude evidence which is not substantive proof of any fact relative to the issues in the case. State v. Ransom ---------- 243
6. An accused in a criminal prosecution is entitled to a trial upon competent, relevant evidence; evidence which at least tends to establish his guilt or innocence; and evidence which has no such tendency, but which, if effective at all, could only serve to excite the minds and inflame the passions of the jurors, should not be admitted. State v. Fleming 249
7. Unless timely objection is made, an objection to incompetent evidence is presumed to have been waived and may not be asserted for the first time on appeal. State v. Whited ---------- 282
8. Where voluntary statements or confessions are not offered or received in evidence, the foundational requirements for such are not material and, on objection or motion, should be excluded or stricken, if they are not otherwise relevant to the issues. State v. Whited ---------- 282
9. It is a fundamental rule that the evidence of the commission of other crimes or being tried for other crimes, with exceptions, is incompetent, irrelevant, and immaterial and ordinarily prejudicial to the rights of a defendant. State v. Riley ---------- 300
10. The "other-crimes" rule is a rule of relevance and such evidence is ordinarily prejudicial because prior criminal activity is irrelevant to the proof of the commission of a specific crime. State v. Riley -- 300
11. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Riley ---------- 300
12. Evidence admitted without objection cannot be considered as grounds for error. State v. Riley ------ 300

13. Statements made by a defendant at the scene of the crime, immediately after his arrest and while an investigation is in progress to determine whether he was involved in the crime, are admissible in evidence if otherwise shown to be voluntary. State v. Carr ---------- 308
14. Evidence which tends to show that a footprint found at the scene of the crime was made by the defendant's shoe is admissible without proof of a known footprint. State v. Carr ---------- 308
15. An instruction stating that circumstantial evidence is proof of facts and circumstances from which another fact may be "presumed or inferred" is not erroneous. State v. Carr ---------- 308
16. If the evidence in a personal injury action raises question of negligence on the part of defendants, plaintiff's claim against the individual defendants should be submitted to the jury. Landmesser v. County of Cheyenne ---------- 345
17. When there has been a conflict in the evidence, the Supreme Court will, in determining the weight of the evidence where there is an irreconcilable conflict therein on a material issue, 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 other. Applegate v. Applegate ---------- 342
Rolfsmeyer v. Seward County ---------- 348
18. It is the duty of the Supreme Court on review of the findings made by a trial court, when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby, to give weight thereto. Rolfsmeyer v. Seward County ---------- 348
19. Whether or not a sentence of death will be imposed, and is necessary under the law, is a question to be determined from the nature of the crime and all the facts and circumstances bearing upon the issue in the particular case. State v. Alvarez ---------- 358
20. In determining if a sentence of death is to be reduced to life imprisonment, mental abnormality of the convicted person is to be considered, but mental abnormality is not necessarily a controlling factor. The nature and extent of the abnormality is the primary factor. State v. Alvarez ---------- 358
21. In determining if a sentence of death is to be reduced to life imprisonment, the Supreme Court should

consider the age of the defendant, his previous history and environment, his cooperativeness with law enforcement officers, a plea of guilty if there be one, and any other mitigating factors; but the weight to be given to such evidence is for the sentencing court when considered with all the circumstances of the case. State v. Alvarez ---------- 358

22. Any probative evidence showing a violation of probationary conditions by conduct sufficient to convince the district court that the defendant will not refrain from criminal acts in the future without punishment will sustain the revocation of probation. State v. Ward ---------- 370

23. Where evidence of the finding and identification of a tool of the nature commonly used in breaking and entering is received without objection, the subsequent admission of a photograph showing such instrument at the scene of the offense is not prejudicial. State v. Williams ---------- 372

24. A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description. State v. Williams ---------- 372

25. Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received. State v. Williams ---------- 372

26. Where an accused is identified as having been at or near the scene of a crime about the time of its commission, evidence showing that he owned, possessed, or had access to any articles with which the crime was or might have been committed is competent. State v. Williams ---------- 372

27. 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, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Williams ---------- 372

28. A judgment will not be reversed because of the admission of irrelevant evidence which was not prejudicial. State v. Sears ---------- 384

29. In a divorce action where the credible evidence on material questions of fact is in irreconcilable conflict, the Supreme 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. Klein v. Klein 387

30. The knowing use of false testimony or the permitting of false testimony to stand when the prosecution knows the same to be false ordinarily constitutes a denial of due process of law when it is material to the guilt or innocence of the accused or to the penalty to be imposed. State v. Howard ---------- 411

31. The recantation of testimony given at a criminal trial by an accomplice, in the absence of knowledge by the prosecution that it is false, ordinarily involves only a question of credibility to be determined from all the evidence and circumstances. State v. Howard ---------- 411

32. A defendant in a criminal action may not properly complain of the admission of evidence, allegedly incompetent, to which no objection was made. State v. Howard ---------- 411

33. In a criminal prosecution, the State may not make use of evidence unconstitutionally obtained to make a case for the jury. But a case having been so made, the State may use evidence unconstitutionally obtained to impeach the credibility of the defendant on collateral matters not ultimately involved in the issue of guilt. State v. Howard ---- 411

34. Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference. R & S Corp. v. Barnes ---------- 431

35. 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. R & S Corp. v. Barnes ---------- 431

36. The burden of proof is on the plaintiff, not only to show that he sustained a personal injury by an accident arising out of and in the course of his employment, but he must also establish by evidence leading to a direct conclusion or by a legitimate inference therefrom that the accident caused the disability. Harrington v. Missouri Valley Constr. Co. 434

37. A hospital bill not shown by evidence to have been incurred as a result of the compensable accident

is not allowable as a charge against the employer. Harrington v. Missouri Valley Constr. Co. 434
38. Intent is an essential element in the crime of shooting with intent to kill, wound, or maim and proof thereof is indispensable to sustain a conviction, but such intent is ordinarily inferable from the facts and circumstances. State v. Moss 502
39. While a voluntary confession is insufficient standing alone, to prove that a crime has been committed, it is competent evidence of that fact, and may, with slight corroborative circumstances, be sufficient to sustain a conviction. State v. Moss 502
40. Circumstances affecting contemporaneousness under the Uniform Business Records as Evidence Act are complexity of the information in the record, training and skill of the recorder, and reasonableness of the elapsed time generally. Metropolitan Protection Service, Inc. v. Tanner 507
41. Evidence that would justify a committing magistrate in finding that probable cause existed for the detention of a defendant need not necessarily be sufficient to sustain a verdict of guilty when he is placed on trial. Delay v. Brainard 509
42. In the reception of evidence a committing magistrate is not strictly governed by technical rules applicable on a final trial. Delay v. Brainard 509
43. Where testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. American Oil Co. v. City of Omaha 532
44. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity for the purpose of enhancing punishment. In the absence of any denial or contradictory evidence, such record is sufficient to support a finding by the trial court that the accused has been convicted prior thereto. State v. Roan Eagle 535
45. The general rule is that, while a court will take judicial notice of its records, it will not in one case take such notice of the record in another case. Kasparek v. May 582
46. The opinion of the Supreme Court may not be introduced in evidence for any purpose. If material, it is the judgment therein which is admissible. Kasparek v. May 582
47. The parol evidence rule is not merely one of evi-

dence but is a rule of substantive law which declares that certain kinds of facts are legally ineffective and forbids them to be proved. Mid States Engineering v. Rohde ---------- 590

48. If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce the 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. Mid States Engineering v. Rohde ---------- 590

49. The proper rule is that a verdict should be directed if the evidence is undisputed or if the evidence, although conflicting, is so conclusive that it is insufficient to justify a verdict or sustain a judgment. Baxter & Sons v. Sofio ---------- 599

50. It is presumed on appeal that a trial court in trying a case without a jury did not consider incompetent evidence. Abel v. Southwest Cas. Ins. Co. ---------- 605

51. In a prosecution for uttering a forged check, testimony of a proper officer of the drawee bank that the drawer has no account in the bank and is unknown to the bank is admissible to show that the the drawer is a fictitious person. State v. Morgan 639

52. A return slip bearing a notation "No Acct" attached to the check by an employee of the drawee bank is hearsay and not admissible in the absence of other and sufficient foundation evidence. State v. Morgan 639

53. A photograph of a homicide victim which tends to illustrate a converted issue is admissible where there is proper foundational evidence. State v. Walle -- 642

54. Rule for consideration of motion for directed verdict stated. Department of Banking v. Keeley ---- 645

55. Evidence that a burglary has been committed together with evidence that some of the property taken in the burglary was discovered in the possession of the defendant, coupled with other incriminating circumstances or conduct, is sufficient to sustain a conviction for burglary. State v. Perez ---------- 680

56. Where there is evidence that several persons participated in a criminal act, the acts and declarations of any one of them, while so participating, are admissible against all of the others. State v. Cook -- 684
State v. Watson ---------- 692

57. Rule stated as to the admission of declarations of a coconspirator made after the conspiracy terminated. State v. Watson ---------- 692

58. Rule stated as to the admission of statements of coconspirator made immediately after, or close in time to, the accomplishment of the criminal purpose of the conspiracy. State v. Watson ---------- 692
59. There must be proof that a confession, admission, or statement was used in evidence against the defendant. State v. Cooper ---------- 765
60. Parol evidence is admissible in an action by strangers to establish an oral trust in a joint bank or savings account. Eden v. Eden ---------- 768
61. Evidence must be clear, satisfactory, and convincing in character to establish an express oral trust. Eden v. Eden ---------- 768
62. If conflicting evidence is specially resolved by the trial court according to the demeanor of the witnesses, the resultant findings will be considered correct on de novo review in the Supreme Court. Eden v. Eden ---------- 768
63. In weighing the evidence, particular significance may be given to the fact that a man remains silent when confronted with serious and responsible evidence against himself which is within his power to contradict. Eden v. Eden ---------- 768
64. When a dispute exists with reference to right-of-way at an open intersection and there is a conflict in the evidence regarding the facts pertaining thereto, it generally presents a question for the jury. Flanagin v. DePriest ---------- 776
65. Before a verdict can be directed against a motorist for failing to see an approaching automobile at a nonprotected intersection, the position of the approaching automobile must be undisputedly located in a favored position. Flanagin v. DePriest ---------- 776
66. Rule stated for determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury. Flanagin v. DePriest ---------- 776
67. When the evidence is conflicting, the verdict of a jury will not be set aside unless it is shown to be clearly wrong. Schimonitz v. Midwest Electric Membership Corp. ---------- 810
68. In testing the sufficiency of the evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.

Schimonitz v. Midwest Electric Membership Corp. 810
69. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake or that it is clear that the jury disregarded the evidence or controlling rules of law. Schimonitz v. Midwest Electric Membership Corp. ---------- 810
70. The exclusionary clause found in standard fidelity insurance policies restricting recovery to losses in in regard to which the proof is not dependent upon an inventory computation or a profit and loss computation is valid and is not ambiguous. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. 828
71. The requirement that losses be proved by evidence wholly apart from inventory computations is applicable to the extent of the loss as well as to the fact of loss. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. ---------- 828
72. Evidence of inventory computations may be properly used for the purposes of corroboration. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. ---------- 828
73. An "Inventory" is a simple list or enumeration of merchandise, materials, or property on hand. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. ---------- 828
74. A "computation" involves the act or action of computing. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. ---------- 828
75. Proof of a unit-type inventory is not barred by the exclusionary clause. It applies only to inventories which because of their inherent nature or because of the necessity for comparison require certain computations. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. ---------- 828
76. Where employee dishonesty exists, an inference that all losses revealed by an inventory computation are attributable to employee dishonesty is too uncertain and speculative to provide basis for recovery in the absence of other evidence bearing thereon. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. ---------- 828

Ex Post Facto.

Where a law or rule of court relates to a matter of procedure only and no substantial right is taken away, the law is not ex post facto. State v. Howard 411

Executors and Administrators.

1. The county court has and retains jurisdiction to review and discipline an administrator or executor for breach of fiduciary duty until there has been full compliance with all judgments, orders, and decrees and until the estate has been placed in the hands of the distributees. Sass v. Sass 277
2. Orders of a probate court adjusting or correcting accounts of an administrator, made while he was acting as such administrator, are interlocutory and not final until his discharge as administrator and final settlement of his accounts upon such discharge. Sass v. Sass 277

Forgery.

In a prosecution for uttering a forged check, testimony of a proper officer of the drawee bank that the drawer has no account in the bank and is unknown to the bank is admissible to show that the drawer is a fictitious person. State v. Morgan 639

Fraud.

1. Under the Uniform Commercial Code, a person with a voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase, the purchaser has such power even though the delivery was in exchange for a check later dishonored, that the sale was for cash by agreement, or delivery was procured through fraud punishable as larcenous under the criminal law. Jordan v. Butler 626
2. A fraudulent purchase of personal property accompanied with delivery is not void, but voidable only, at the election of the vendor, and until it is avoided the vendee has the power to make a valid mortgage or sale of the goods to a bona fide purchaser having no notice of the fraud. Jordan v. Butler 626
3. When goods obtained by fraud have been mortgaged by the fraudulent vendee to secure a present indebtedness, to a mortgagee in good faith without notice of the fraud, the latter stands in the position of an innocent purchaser of the property for value to the extent of the mortgage debt. Jordan v. Butler 626
4. Where one of two innocent persons must suffer

by the acts of a third, the one whose conduct, act, or omission enabled such third person to occasion the loss must sustain it if the other party acted in good faith without knowledge of the facts, and altered his position to his detriment. Jordan v. Butler ---------- 626

5. Where a party by fraud substitutes other property for that covered by a lien, a court of equity may treat the proceeds of the substituted property in the nature of a trust for the benefit of the defrauded lienor and direct its distribution in accordance with the priorities of the parties. Jordan v. Butler ---------- 626

6. A defrauded party must be diligent and prudent in his effort to detect the fraud, and means of knowledge thereof are equivalent to knowledge. Department of Banking v. Keeley ---------- 645

Fraud and Deceit.

1. Where a question in an application for reinstatement of an insurance policy calls for an answer peculiarly within the knowledge of the applicant, an untrue answer relating to a matter material to the risk and relied upon by the insurer to his injury, if timely advantage is taken thereof by the insurer, will void the policy. Robbins v. National Life & Acc. Ins. Co. ---------- 749

2. Applications for reinstatement of a policy of insurance after a lapse of the policy for nonpayment of premiums are not required to be attached to the original policy, unless so provided by the policy, in order to constitute a basis for fraud in procuring a reinstatement. Robbins v. National Life & Acc. Ins. Co. ---------- 749

Guaranty.

Where the guarantor of a promissory note is compelled to pay the principal's debt, the law raises an implied promise by the principal to reimburse the guarantor and upon payment of the debt by the guarantor, such guarantor has a cause of action against the debtor for the amount due under the guaranty. Highway Equipment & Supply Co. v. Jones ---------- 234

Guilty Plea.

Effect of voluntary guilty plea on prior alleged coerced

confession stated. State v. Cooper ---------- 765

Habeas Corpus.

1. It is the general rule that a court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, unless the prior jurisdiction has been terminated. Miller v. Department of Public Welfare ---------- 155
2. A writ of habeas corpus can be granted only by a court having jurisdiction. The exercise of power to grant the writ cannot be used to unsettle valid legal proceedings, or to interfere with the exercise of jurisdistion of other courts. Miller v. Department of Public Welfare ---------- 155
3. In a habeas corpus proceeding instituted for the purpose of testing the sufficiency of evidence taken at the preliminary examination to require a person to be tried on a criminal charge, the court will not weigh the evidence but only inquire as to the existence of evidence to sustain the charge. Delay v. Brainard ---------- 509

Habitual Criminals and Subsequent Offenders.

Under the habitual criminal law, prior convictions may be used as the basis for enhancing the penalty for a subsequent felony conviction, even though they have previously been used for such purpose on a prior habitual criminal conviction. State v. Losieau -- 367

Highways.

1. One whom a possessor of land intentionally or negligently misleads into believing that part of his land is a public highway is entitled to expect that the possessor will afford him a security similar to that which he would be entitled to expect were the land actually a highway. Bosiljevac v. Ready Mixed Concrete Co. ---------- 199
2. The rules regarding the existence of an implied invitation, when it is difficult to distinguish a private road or way from a public road, have their limitations and in instances where the possessor of the land erects a barricade which is readily observable or posts notices indicating the nature of the private way, such rules are not applicable. Bosiljevac v. Ready Mixed Concrete Co. ---------- 199
3. Generally it is negligence as a matter of law for a

motorist to drive a motor vehicle on a highway in such manner that he cannot stop in time to avoid a collision with an object within the range of his vision. Bosiljevac v. Ready Mixed Concrete Co. ---- 199

4. The right of an owner of property abutting on a street or highway to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without due process of law and compensation for his loss. American Oil Co. v. City of Omaha ---------- 532

5. An abutting property owner is entitled to recover the damages resulting from the destruction or material impairment by the state of his right of access to an existing highway. American Oil Co. v. City of Omaha ---------- 532

6. A failure or refusal to define the word "forfeit" as used in an instruction regarding right-of-way at an open intersection is not error when the instructions as a whole were adequate to clearly convey the sense in which the word was used. Flanagin v. DePriest ---------- 776

7. The words "approaching," "entering," and "reaching" as used in an instruction defining the statutory right-of-way at an open intersection are generally synonymous and interchangeable. Flanagin v. DePriest ---------- 776

Homicide.

1. Malice and a purpose to kill are essential elements of murder in the second decree. State v. Walle ---- 642

2. A photograph of a homicide victim which tends to illustrate a controverted issue is admissible where there is proper foundational evidence. State v. Walle ---------- 642

Husband and Wife.

1. Rule stated as to validity of separation agreement between husband and wife. Clatterbaugh v. Clatterbaugh ---------- 160

2. Property settlement agreements should not be lightly regarded but should be scrutinized and controlled to the end that the division of the property and other benefits shall not be inequitable, unfair, and unreasonable under the circumstances. Clatterbaugh v. Clatterbaugh ---------- 160

Indecent Exposure.

In a prosecution for indecent assault, it is not essential that the testimony of the prosecutrix be corroborated by other testimony as to the particular act charged. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony. State v. Myers ---------- 117

Indictments and Informations.

1. A variance between the allegations in the information and the evidence offered in proof thereof is not fatal unless it is material to the merits of the case or such as is prejudicial to the defendant. State v. Nelson ---------- 31
2. It is sufficient if an information is filed within the probationary period or within a reasonable time thereafter and the fact that hearing on such information was delayed is not ordinarily material. State v. Holiday ---------- 229
3. An allegation of ownership of a building is not necessary to allege the offense of burglary as long as the building is sufficiently identified for the purpose of showing that the property involved is not the property of the accused, and showing that the accused did not have the right to enter the premises. State v. Ransom ---------- 243
4. A formal information and arraignment conforming to criminal procedure is not required for revocation of probation. Technical formality and preciseness of charge are unnecessary. State v. Ward 370

Infants.

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. Sanny v. Sanny ---------- 1
2. An appeal from a finding and judgment of the district court that a child is neglected or dependent is disposed of in the Supreme Court by trial de novo upon the record. Mullikin v. Lutkehuse ---------- 132
3. A neglected child is defined. Mullikin v. Lutkehuse 132
4. A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it must be in danger of so becoming in the near future. Mullikin v. Lutkehuse ---------- 132

5. The jurisdiction of a state to regulate the custody of an infant found within its territory does not depend upon the domicile of the parents nor upon the domicile of the child. It arises out of the power that every sovereignty possesses as parens patriae to every child within its borders, and residence of the child within the state suffices even though the domicile may be in another jurisdiction. Miller v. Department of Public Welface ---------- 155
6. The separate juvenile court of Lancaster County has exclusive jurisdiction as to the custody of neglected, dependent, or delinquent children. Miller v. Department of Public Welfare ---------- 155
7. The jurisdiction of the separate juvenile court is continuing over any child adjudged a neglected or dependent child. The court has power to order a change in the custody or care of such child if at any time it is made to appear to the court that it would be for the best interests of the child to make such a change. Miller v. Department of Public Welfare ---------- 155
8. When a dependent child has been disposed of by placement the person, association, institution, or probation officer with whom placed may, with the assent of the juvenile court, consent to adoption in an adoption proceeding. Miller v. Department of Public Welfare ---------- 155

Injunction.

1. If taxes are levied without authority of law, their collection may be enjoined. Frye v. Haas ---------- 73
2. Injunction is a proper action in which to present the question of unlawful or improper exercise of the power of eminent domain. State v. Nickel Grain Co., Inc. ---------- 191

Insurance.

1. For a garden-variety contract insuring against accidental death the beneficiary may recover upon proof of an accident that was an active, efficient, and precipitating cause of death. Neeman v. John Hancock Mut. Life Ins. Co. ---------- 144
2. In the case of preexisting coronary artery disease, accidental injury, and sudden death caused by acute coronary insufficiency, the evidence of causality was insufficient to sustain a verdict for the beneficiary. Neeman v. John Hancock Mut. Life Ins. Co. ---------- 144

3. An interpretation of an insurance contract should satisfy reasonable expectations of the insured at the time of the contract. Rolfsmeier v. Implement Dealers Mut. Ins. Co. ---------- 150
4. If a contract prepared by an insurer is reasonably open to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the insured will be adopted. Rolfsmeier v. Implement Dealers Mut. Ins. Co. ---------- 150
5. An automobile which has been serviced by a filling station operator and is being driven to a parking place on the filling station premises is not being "used in an automobile business" within the exclusionary provisions of an automobile liability insurance policy. Truck Ins. Exchange v. State Farm Mut. Auto. Ins. Co. ---------- 330
6. An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made. Stephens v. Allied Mut. Ins. Co. ---------- 562
7. Rule as to consideration and interpretation of language in insurance contract stated. Stephens v. Allied Mut. Ins. Co. ---------- 562
8. A provision in a contract of insurance, drawn by the insurer to comply with statutory requirement of uninsured motorist coverage, must be construed in light of the purpose and policy of the statute. Stephens v. Allied Mut. Ins. Co. ---------- 562
9. The purpose of a statute or provision is to give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy. Stephens v. Allied Mut. Ins. Co. ---------- 562
10. The insolvency of a tort-feasor's insurance carrier occurring subsequent to an accident, with a consequent refusal or inability of the carrier to defend or pay a judgment or claim resulting therefrom for which the tort-feasor has become liable, constitutes a "denial of coverage" within the meaning of such provision in the uninsured motorist clause of the insured's policy. Stephens v. Allied Mut. Ins. Co. -- 562
11. A provision in an automobile liability policy that an insurer shall not be obligated to pay under uninsured motorist coverage for that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured auto-

mobile which represents expenses for medical services paid or payable under the medical payments coverage of the policy is void and against public policy in that it reduces the minimum coverage of uninsured motorist protection prescribed by law. Stephens v. Allied Mut. Ins. Co. ---------- 562

12. Uninsured motorist coverage in an insurance contract is in the nature of a substitute liability or guaranty contract, and recovery thereon permits the allowance of attorney's fees. Stephens v. Allied Mut. Ins. Co. ---------- 562

13. The statutorily declared public policy of this state is that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while such insurers are not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to the distant forums for the purpose of asserting legal rights under such policies. Abel v. Southwest Cas. Ins. Co. ---------- 605

14. A set of circumstances in which an insurer possesses a conditional power to avoid its contract is the following: A misrepresentation in the application for policy was made knowingly by the insured with intent to deceive. The misrepresentation deceived the insurer to its injury. Vackiner v. Mutual of Omaha ---------- 611

15. The Servicemen's Group Life Insurance policy provided by federal statute is a contract between the government of the United States and the insurers for the benefit of those insured. Johnson v. Prudential Ins. Co. ---------- 673

16. The Servicemen's Group life Insurance Act is the supreme law of the land and controls over conflicting state law with respect to the disposition of proceeds of policies issued thereunder. Johnson v. Prudential Ins. Co. ---------- 673

17. Under the Servicemen's Group Life Insurance Act, the minority of the insured at the time of the designation of beneficiary in the insurance policy is not a bar to his designation of a beneficiary and such a designation will be enforced in accordance with its terms. Johnson v. Prudential Ins. Co. ---------- 673

18. Where a question in an application for reinstatement of an insurance policy calls for an answer peculiarly within the knowledge of the applicant, an untrue answer relating to a matter material to the risk

and relied upon by the insurer to his injury, if timely advantage is taken thereof by the insurer, will void the policy. Robbins v. National Life & Acc. Ins. Co. 749

19. Notice to the agent is notice to the principal, where such notice is received by the agent while acting within the scope of his authority. Robbins v. National Life & Acc. Ins. Co. 749

20. An insurance agent, empowered to solicit applications for insurance and to receive payments of the premiums, binds the company by knowledge acquired in and about the preparation of the application and by representations made to the insured in so doing. The same rule applies where the agent obtains an application for reinstatement. Robbins v. National Life & Acc. Ins. Co. 749

21. Information coming to a soliciting agent or a premium collector after the issuance of a policy or a reinstatement of a lapsed policy for nonpayment of premiums, in which he participated, is not imputable to his principal. Robbins v. National Life & Acc. Ins. Co. 749

22. An estoppel to assert a lapse of a policy of insurance for nonpayment of premiums cannot be successfully asserted unless an established custom by the insurer inconsistent with the policy is shown, upon which the insured relied to his injury, and that it would be inequitable under the circumstances to enforce the provisions of the contract providing for the lapse of the policy for nonpayment of the premium. Robbins v. National Life & Acc. Ins. Co. 749

23. Applications for reinstatement of a policy of insurance after a lapse of the policy for nonpayment of premiums are not required to be attached to the original policy, unless so provided by the policy, in order to constitute a basis for fraud in procuring a reinstatement. Robbins v. National Life & Acc. Ins. Co. 749

24. For medical payments coverage, accidental bodily injury to an independent contractor in the repair of a family home, without other circumstances, is not excluded by the following clause: The policy "Does Not Apply * * * to bodily injury to * * * any person * * * if such person * * * is on the premises because of a business conducted thereon, or is injured by an accident arising out of such business." Wymore v. Farmers Mut. Ins. Co. of Nebraska 763

25. Statute, sometimes referred to as the omnibus stat-

ute, is applicable only to automobile liability insurance policies which have been certified as proof of financial responsibility. State Farm Mut. Auto. Ins. Co. v. Pierce ---------- 805

26. Generally, a renewal contract is subject to the laws in force at the time the contract became effective. State Farm Mut. Auto. Ins. Co. v. Pierce -------- 805

27. A driver exclusion agreement limiting the coverage of an automobile liability insurance policy as to a particular driver is not void as against public policy. State Farm Mut. Auto. Ins. Co. v. Pierce -------- 805

28. Forbearance of a right of cancellation or termination is sufficient consideration to support an agreement reducing the coverage of an existing automobile liability insurance policy. State Farm Mut. Auto. Ins. Co. v. Pierce ---------- 805

29. The exclusionary clause found in standard fidelity insurance policies restricting recovery to losses in regard to which the proof is not dependent upon an inventory computation or a profit and loss computation is valid and is not ambiguous. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. -- 828

30. The requirement that losses be proved by evidence wholly apart from inventory computations is applicable to the extent of the loss as well as to the fact of loss. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. ---------- 828

31. Evidence of inventory computations may be properly used for the purposes of corroboration. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. ---------- 828

32. An "inventory" is a simple list or enumeration of merchandise, materials, or property on hand. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. ---------- 828

33. A "computation" involves the act or action of computing. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. ---------- 828

34. Proof of a unit-type inventory is not barred by the exclusionary clause. It applies only to inventories which because of their inherent nature or because of the necessity for comparison require certain computations. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. ---------- 828

35. Parties to a contract may make the contract in any legal form they desire and agree upon. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. -- 828

36. Where employee dishonesty exists, an inference that all losses revealed by an inventory computation are attributable to employee dishonesty is too uncertain and speculative to provide a basis for recovery in the absence of other evidence bearing thereon. Paramount Paper Products Co., Inc. v. Aetna Cas. & Sur. Co. ---------- 828

Interest.

1. In order to be liquidated so as to bear interest, a claim must be fixed and determined or readily determinable; but it is sufficient for this purpose if it is ascertainable by computation or a recognized standard. Mid States Engineering v. Rohde ---------- 590
2. The general rule is that, in the absence of agreement to the contrary, liquidated demands bear interest whereas unliquidated demands do not. Mid States Engineering v. Rohde ---------- 590

Joint Adventures.

1. In an action seeking a personal judgment against the individual members of a partnership or a joint adventure the petition does not state a cause of action if it fails to state that there is no partnership property or that it is insufficient to satisfy the debts of the partnership or joint adventure. Horn's Crane Service v. Prior ---------- 94
2. The principal distinction between a partnership and a joint adventure is that the latter may relate to a single transaction. The law of partnership applies to the questions arising between the parties and among the parties in relation to third parties. Horn's Crane Service v. Prior ---------- 94
3. A joint adventure is in the nature of a partnership in which the parties have a common interest and equal voice in the performance of the undertaking and the control of the agencies used therein. Frisch v. Svoboda ---------- 825
4. The absence of a mutual interest in the profits or benefits of the undertaking is conclusive that a partnership or joint adventure does not exist. Frisch v. Svoboda ---------- 825

Joint Tenancy.

The form and nature of a joint deposit in the name of two persons in a bank or a savings and loan asso-

ciation is not, upon the death of one of the co-owners, conclusive as to the ownership of the deposit by the surviving coowner as between him and a third person who claims that the surviving co-owner holds a legal title to the funds in trust for the third party. Eden v. Eden ---------- 768

Judges.

The power conferred on the county judge by the eminent domain act and the duties required of him by that act are not judicial powers and duties but are purely ministerial in character. State v. Nickel Grain Co., Inc. ---------- 191

Judgments.

1. An application to vacate a default judgment is a matter of discretion for the trial court. The burden of showing an abuse of discretion is upon the party adversely affected by the order of the trial court. Commercial Sav. & Loan Assn. v. Holly Development, Inc. ---------- 335
2. Where an application to vacate a default judgment is occasioned by the fault, negligence, or want of ordinary diligence on the part of the applicant shown to have been served with summons, he will not ordinarily be permitted to deny the correctness of the judgment or renew the controversy. Commercial Sav. & Loan Assn. v. Holly Development, Inc. 335
3. An applicant ordinarily cannot procure the setting aside of a default judgment against him on the ground of his mistaken belief that he had retained or arranged for an attorney to protect his interests. He must see to it that the attorney accepts his employment, otherwise his failure ordinarily constitutes inexcusable negligence. Commercial Sav. & Loan Assn. v. Holly Development, Inc. ---------- 335
4. An application seeking to vacate a default judgment taken against him must not only exhibit a defense to the action, but he must also show that such judgment was the result of fraud, accident, or mistake, unmixed with fault, negligence, or want of reasonable diligence on his part. Commercial Sav. & Loan Assn. v. Holly Development, Inc. ---------- 335
5. A judgment will not be reversed because of the admission of irrelevant evidence which was not prejudicial. State v. Sears ---------- 384
6. The judgment of the trial court in an action at

law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside unless clearly wrong. Wonderling v. Conley ------ 446

7. Consideration of a cause on appeal is limited to errors assigned and discussed, and unless error is assigned, the judgment of the lower court should be affirmed unless the Supreme Court at its own option considers plain error not assigned. United States Nat. Bank v. Feenan ---------- 524

8. A declaratory judgment action will not be entertained if there is pending, at the time of its commencement, another action or proceeding to which the same persons are parties, and in which are involved, and may be adjudicated, the same issues that are involved in the declaratory judgment action. Berigan Bros. v. Growers Cattle Credit Corp. ---- 656

9. A declaratory judgment action is not a substitute for nor may it be used to supersede proper proceedings already pending in a court having jurisdiction of the parties and the subject matter. But where a pending proceeding does not afford an adequate remedy for the causes pleaded in a petition for declaratory relief, it is not a bar to such relief. Berigan Bros. v. Growers Cattle Credit Corp. ------ 656

10. The Uniform Declaratory Judgments Act is applicable only where there is a present, actual controversy, and only where justiciable issues are presented and all interested persons are made parties to the proceedings. Berigan Bros. v. Growers Cattle Credit Corp. ---------- 656

11. The law favors a remedy which avoids a multiplicity of suits. It also favors a remedy which will speedily determine and settle the diverse rights and obligations of all the parties to a transaction requiring judicial determination. Berigan Bros. v. Growers Cattle Credit Corp. ---------- 656

12. Conditions for obtaining declaratory relief under the Uniform Declaratory Judgments Act stated. Berigan Bros. v. Growers Cattle Credit Corp. ------ 656

13. A judgment that defendant save plaintiff harmless from all liability for necessaries furnished to plaintiff is erroneously indefinite. Bolles v. Bolles ---- 799

14. The burden is upon the party moving for summary judgment to show conclusively that no issue of fact exists. Frisch v. Svoboda ---------- 825

15. A summary judgment may be entered when it appears there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law. Snyder v. Fort Kearney Hotel Co., Inc. ---------- 859

Juries.

Objections to the mode of selecting petit jurors must be made before the trial to be of any avail. State v. Nelson ---------- 31

Larceny.

1. In a prosecution for cattle stealing, it is not necessary to allege or prove the value of the cattle stolen. State v. Nelson ---------- 31
2. Ownership of chattels may, in an indictment for their theft, be laid either in the owner, or in the person who at the time of the theft was in the actual peaceable possession of them, although such person may have no other property therein than the right of possession as against the thief. State v. Nelson 31
3. In prosecutions for larceny, nonconsent of the owner of the property alleged to have been stolen may, in a proper case, be inferred from circumstances. State v. Nelson ---------- 31
4. A verdict in a larceny case which does not determine the value of the property stolen will not support a sentence. State v. Houp ---------- 298

Liability of Landlord.

A landowner should not be held liable for defects which an investigation might reveal unless the situation suggests an investigation, and the facts indicate to a reasonably prudent man the likelihood of existence of some hidden danger to persons lawfully on the premises. Kozloski v. Modern Litho, Inc. ---------- 270

Licenses.

1. Where the Livestock Auction Market Board determines from competent evidence that a livestock auction market would beneficially serve the livestock economy after giving reasonable consideration to the five propositons listed in statute, it is the duty of the board to issue a market license. Midwest L. C. Co. v. Tri-State L. C. Co. ---------- 41
2. Where the Livestock Auction Market Board has jurisdiction of an application for a license to operate a livestock auction market and the evidence is sufficient, if believed, to sustain the grant of a license,

even if the evidence is in direct conflict, the order of the board is not arbitrary or capricious. Midwest L. C. Co. v. Tri-State L. C. Co. ---------- 41

Limitations of Actions.

1. The latest item of a continuous account removes prior items from the operation of the statute of limitations. Wellnitz v. Muck ---------- 22
2. Where a new independent cause of action is filed by way of amendment, the statute of limitations runs until the filing of such amended petition. Horn's Crane Service v. Prior ---------- 94
3. The tolling effect of a pleading upon the statute of limitations is unchanged by an amended pleading that amplifies the prior statement. J. R. Watkins Co. v. Wiley ---------- 242
4. Employee must give notice and commence action within the statutory period after he had knowledge that compensable disability resulted from the original accident. Williams v. Dobberstein ---------- 862
5. Under the Nebraska Workmen's Compensation Act, the period of limitation runs from the time it is reasonably apparent that a compensable injury has been sustained, if the employee is aware that the disability is due to his employment. Williams v. Dobberstein ---------- 862

Livestock.

1. The regulation of livestock auction markets under the police power of the state is a proper subject for legislative action. Midwest L. C. Co. v. Tri-State L. C. Co. ---------- 41
2. The operation of a livestock auction market is a lawful business which any person has a right to pursue, subject only to reasonable legislative regulation. Midwest L. C. Co. v. Tri-State L. C. Co. ---------- 41

Malicious Prosecution.

A claim for damages for slander and malicious prosecution may not be pleaded as a counterclaim in an action for conversion even though the slander and malicious prosecution relate to the alleged conversion. Benes v. Matulka ---------- 744

Mandamus.

1. A writ of mandamus may be issued to any inferior tribunal, corporation, board, or person, to compel the

performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. State ex rel. Agricultural Extension Service v. Miller ---------- 285

2. Where a specific duty is provided by statute, mandamus may be invoked to enforce it if denied; and the party entitled to such relief will not be forced to pursue his remedy by circuitous and dilatory action at law. State ex rel. Agricultural Extension Service v. Miller ---------- 285

Mechanics' Liens.

1. In a suit to foreclose a mechanic's lien where the amount of the lien is the reasonable value of the labor and materials furnished, the defendant may properly inquire into the amount of work done, the rates of pay therefor, and the correctness of the amount chargeable to him. Campbell v. Lutz ------ 27
2. Mechanic's lien statutes are remedial in nature and require a liberal construction so as to effectuate their objects and purposes. They find their basis in the equitable principle that everyone who, by his labor and materials, contributes to the preservation or enhancement of the property of another, thereby acquires a right to compensation. Peters v. Halligan ---------- 51
3. If the furnishing of materials and labor under a contract is sufficient to create an indebtedness or liability, it is sufficient to create a lien under the provisions of the statute. Peters v. Halligan ------ 51
4. Rule stated where recovery can be had for part performance of contract, subject to recoupment. Peters v. Halligan ---------- 51
5. A mechanic's lien in favor of a principal contractor grows out of the contractual relations between the owner of the property improved and the contractor. The right to such a lien is based upon the contract and its purpose is to secure the debt due under the contract. Central Constr. Co. v. Keefer ---------- 83
6. When labor or materials have been furnished pursuant to a written contract, the contractor is required to record a copy of the contract with the account. The recording of a copy of the contract is essential to the lien. Central Constr. Co. v. Keefer 83
7. Where an earlier contract has been superseded by a later contract, which materially changed the obligations of the parties, the recording of a copy of the

earlier contract will not support a claim of a mechanic's lien. Central Constr. Co. v. Keefer ------ 83
8. The object of the mechanic's lien law being to secure the claims of those who have made improvements within its terms, it should receive a liberal interpretation to give full effect to its provisions. May Plumbing Co. v. Shaver ---------- 251
9. The word "owner" as used in our mechanic's lien law is not limited in its meaning to an owner of the fee, but means the owner of any interest in the lands and includes every character of title, whether legal or equitable, fee simple, or leasehold. May Plumbing Co. v. Shaver ---------- 251
10. Statute in Mechanic's Lien Law declaring certain acts unlawful and providing attempted imprisonment therefor are contrary to provisions of Article I, section 20, Constitution of Nebraska. State ex rel. Norton v. Janing ---------- 539
11. Purpose of statutes requiring payment bonds on public building construction contracts stated. McElhose v. Universal Surety Co. ---------- 847
12. Statutes requiring payment bonds on public building construction contracts are remedial in nature and are to be liberally construed to effectuate the legislative purpose. McElhose v. Universal Surety Co. ---------- 847
13. Statute of limitations on bringing suit on payment bonds required on public building construction contracts stated. McElhose v. Universal Surety Co. ---------- 847
14. A materialman or supplier, according to the general usage of the terms, can be and often is a subcontractor. Under the statute a more restrictive definition of these terms is required. McElhose v. Universal Surety Co. ---------- 847
15. Distinction between subcontractor and a materialman or supplier stated. McElhose v. Universal Surety Co. ---------- 847
16. Ultimate consideration in distinguishing between a subcontractor and materialman stated. McElhose v. Universal Surety Co. ---------- 847
17. In determining if a party is a subcontractor within the meaning of the statute, the determination is not dependent on how the parties designate themselves. The question is one of fact. McElhose v. Universal Surety Co. ---------- 847
18. While the labor or materials furnished must be

used and consumed in the prosecution of the prime contract, it is not required that the subcontractor install his product or do any on-site work. McElhose v. Universal Surety Co. ---------- 847

19. Rental charges for equipment furnished to perform work on the contract are recoverable under a contractor's payment bond if such equipment is not a capital asset of the user. McElhose v. Universal Surety Co. ---------- 847

20. Where it appears that a claimant furnished equipment to a subcontractor within the meaning of the statute, he is within the class of suppliers or materialmen protected by the prime contractor's payment bond. McElhose v. Universal Surety Co. 847

Mentally Deficients, Sterilization of.

1. Statute relating to the sterilization of mentally deficient persons as a condition prerequisiate to parole or discharge, constitutes a valid exercise of the police power. State v. Cavitt ---------- 712

2. The sterilization statute providing for the sterilization of mentally defective persons as a prerequisite to parole or discharge from the state institution for mentally defective persons, does not deny the equal protection of the law as class legislation. State v. Cavitt ---------- 712

3. The term "mentally deficient" when applied to persons is not so vague and indefinite as to make the sterilization statute unconstitutional. State v. Cavitt 712

4. The sterilization statute is not unconstitutional in that quasi-judicial powers are unlawfully delegated to the board of examiners of mental deficients by the terms of the act. State v. Cavitt ---------- 712

5. The fact standards and guidelines provided by the sterilization statute for the guidance of the board of examiners of mental deficients in administering the statute in accordance with the legislative purpose are sufficient, and do not constitute an unlawful delegation of legislative power. State v. Cavitt ---------- 712

6. The hearing provided by statute before the board of examiners of mental deficients composed of competent physicians, with the right of appeal to the courts, affords constitutional procedural due process. State v. Cavitt ---------- 712

7. The surgical operations of vasectomy on mentally defective male persons and of salpingectomy on

mentally defective females are not inhuman, unreasonable, or oppressive, and in no sense of the word do they constitute punishment for crime. State v. Cavitt ---------- 712

8. Statutes regarding sterilization of mental deficients are in all respects constitutional and enforcible. State v. Cavitt ---------- 712

Motions, Rules and Orders.

1. The trial court may reasonably require that a motion to waive a jury trial be made or filed within a reasonable time prior to trial as a condition to the consent of the court. State v. Godfrey ------ 451
2. An order striking a counterclaim is not a final order which may be reviewed upon appeal while the main action is otherwise pending in the district court. Benes v. Matulka ---------- 744

Motor Vehicles.

A motorboat is not a "motor vehicle" within the meaning of the Nebraska guest statute. Reed v. Reed ---------- 136

Municipal Corporations.

1. Statute referred to in opinion contemplates that the right of a sanitary and improvement district and of a municipality will be promptly adjusted after annexation of part of the district by the municipality. Sanitary & Improvement Dist. v. City of Ralston -- 63
2. Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions, but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class. Sanitary & Improvement Dist. v. City of Ralston ---------- 63
3. Liability of city to an owner or person claiming an interest in property not abutting upon streets or alleys proposed to be vacated by action of the city council stated. Kraft & Sons, Inc. v. City of Lincoln 187
4. An abutting landowner does not have a vested interest in the flow of traffic past his premises and any damage sustained because of the diversion of traffic is not compensable. Kraft & Sons, Inc. v. City of Lincoln ---------- 187
5. A property owner may not recover damages for the obstruction of a street or highway unless he has

sustained an injury different in kind, and not merely in degree, from that suffered by the public at large. Kraft & Sons, Inc. v. City of Lincoln ---------- 187

6. Village, as used in statute, applies to villages in the ordinary and popular sense of the term. State ex rel. Little v. Board of County Commissioners -- 419

7. The word village suggests a small urban community. This ordinarily means an assemblage of residences, less than a town or city, urban or semi-urban in character, and having a density of population greater than usually found in rural areas. State ex rel. Little v. Board of County Commissioners -- 419

8. An inhabitant within the intent of statute is one who actually and permanently resides in the area embraced in the petition for incorporation. State ex rel. Little v. Board of County Commissioners -- 419

9. The classification of cities of the state into classes and subclasses, and the conferring upon them of corporate powers by acts of the Legislature of a general nature, the provisions of which are applicable to but one of such classes or subclasses, is not repugnant to any provision of the Constitution. Campbell v. City of Lincoln ---------- 459

10. The Legislature shall not pass local or special laws incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village. Campbell v. City of Lincoln ---------- 459

11. A valid classification of cities for purposes of legislation must admit of additions to it. It must be so construed as to preclude addition to the numbers included within it. Campbell v. City of Lincoln ---------- 459

12. Municipal corporations are subject to legislative control and the annexation authority of a municipality is valid within the exclusive discretion of the Legislature. Campbell v. City of Lincoln -------- 459

13. An airport authority, duly created by a city under the Cities Airport Authorities Act, is a supplementary, separate, and independent public corporation, and the parent municipal corporation is not liable for the torts of the authority. Lock v. City of Imperial ---------- 526

14. Statute on zoning is an enabling act empowering cities of the second class and villages to extend existing ordinances to a one-half mile area surrounding municipal limits, but it does more. It authorizes the inclusion of this one-half mile area in

all future ordinances. City of Syracuse v. Farmers Elevator, Inc. ---------- 783
15. It is not necessary for a city to wait until the operation of an anticipated business demonstrated that its use was a nuisance. City of Syracuse v. Farmers Elevator, Inc. ---------- 783
16. It is not incumbent upon a city of the second class to enact an ordinance prohibiting a nuisance before it has a right to apply to a court of equity for relief. City of Syracuse v. Farmers Elevator, Inc. 783

Negligence.
1. An instruction which states, that before the plaintiff may recover, he must prove by a preponderance of the evidence that plaintiff's injuries were proximately caused by the negligence of the defendant and the amount of plaintiff's damages, sufficiently informs the jury as to what it should do in the event the plaintiff's evidence as to a particular element of the damage claimed fails to preponderate in favor of the plaintiff. Springer v. Smith -------- 107
2. An answer which admits negligence of a defendant and that such negligence was the proximate cause of the accident, but denies the nature and extent of the injuries suffered, does not constitute an admission that the injuries were proximately caused by such accident and negligence. Springer v. Smith 107
3. The doctrine of assumption of risk is applicable where the injured party knows that a danger exists and voluntarily assumes the risk of injury from that danger. Makovicka v. Lukes ---------- 168
4. Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character. Makovicka v. Lukes ---------- 168
5. Plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to avert harm to himself or another, or exercise or protect a right or privilege of which the defendant has no right to deprive him. Makovicka v. Lukes 168
6. Liability of host to guest for injury sustained on host's premises stated. Johnson v. Goodier ------ 172
7. A licensee takes the premises as he finds them, the only duty of the occupier being to give notice of traps or concealed dangers. Johnson v. Goodier 172

8. The perils of darkness usually are held to be assumed by one who voluntarily proceeds into it. Johnson v. Goodier ---------- 172
9. Darkness alone calls upon a person to exercise greater caution for his own safety than is ordinarily required. Where light has failed, obstructions have been encountered, and there are no especial circumstances requiring a person to proceed, he who goes forward into an unfamiliar dark space does so at his own risk, and if accident and injury follow, he is guilty of negligence, as a matter of law, which bars recovery. Johnson v. Goodier ---------- 172
10. Rule stated as to duty of landowner to the public with respect to use of private way. Bosiljevac v. Ready Mixed Concrete Co. ---------- 199
11. One whom a possessor of land intentionally or negligently misleads into believing that part of his land is a public highway is entitled to expect that the possessor will afford him a security similar to that which he would be entitled to expect were the land actually a highway. Bosiljevac v. Ready Mixed Concrete Co. ---------- 199
12. The rules regarding the existence of an implied invitation, when it is difficult to distinguish a private road or way from a public road, have their limitations and in instances where the possessor of the land erects a barricade which is readily observable or posts notices indicating the nature of the private way, such rules are not applicable. Bosiljevac v. Ready Mixed Concrete Co. ---------- 199
13. In a negligence action, a prior determination of common issues of negligence in another action is ordinarily not conclusive where the parties are not the same. Vincent v. Peter Pan Bakers, Inc. ------ 206
14. A social guest is a mere licensee. Hackney v. Klintworth ---------- 219
15. The owner or occupant of property owes to a licensee the duty to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care. Hackney v. Klintworth ---------- 219
16. When a hidden danger is spoken of or peril known to the possessor of land, reference is made to one that the possessor knows to be dangerous and which he might reasonably expect a guest to encounter.

Hackney v. Klintworth ---------- 219
17. Negligence is ordinarily defined as the doing of some act under the circumstances surrounding the accident involved, which a man of ordinary prudence would not have done, or the failure to do some act or to take some precaution which a man of ordinary prudence would have done or taken. Kozloski v. Modern Litho, Inc. ---------- 270
18. In order to impose liability for injury to an invitee, the dangerous condition must have been known to the owner or occupant or have existed for such time that it was his duty in the exercise of ordinary care to know of it. Kozloski v. Modern Litho, Inc. ---------- 270
19. A landowner should not be held liable for defects which an investigation might reveal unless the situation suggests an investigation, and the facts indicate to a reasonably prudent man the likelihood of existence of some hidden danger to persons lawfully on the premises. Kozloski v. Modern Litho, Inc. ---------- 270
20. There is negligence only where no care is exercised to avert a risk to others which reasonably should be apprehended. Kozloski v. Modern Litho, Inc. ---------- 270
21. Generally speaking, no one is bound to guard against or take measures to avert that which, under the circumstances, a reasonably prudent person would not anticipate as likely to happen. Kozloski v. Modern Litho, Inc. ---------- 270
22. One may not be said to be negligent because he fails to make provision against an accident which he could not be reasonably expected to foresee. Kozloski v. Modern Litho, Inc. ---------- 270
23. An owner has a legal duty to exercise ordinary care to keep his premises safe for an invitee, but he is not an insurer. Kozloski v. Modern Litho, Inc. -- 270
24. Liability of driver under motor vehicle guest statute stated. Warmbier v. Zeurlein ---------- 425
25. There is no fixed rule for the ascertainment of what constitutes gross negligence, but whether or not gross negligence exists must be determined from the facts and circumstances of each case. Warmbier v. Zeurlein ---------- 425
26. Gross negligence within the meaning of the motor vehicle guest statute defined. Warmbier v. Zeurlein 425
27. The burden of proof is upon the guest who seeks to

recover to prove by a preponderance of the evidence that the owner and operator of the automobile in which he was a guest was guilty of gross negligence. Failure to so prove or the fact that the operator of the automobile may have been guilty of ordinary negligence is insufficient to warrant a recovery in favor of the guest. Warmbier v. Zeurlein ------ 425

28. 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. R & S Corp. v. Barnes ---------- 431

29. The negligence on which a charge of involuntary manslaughter is predicated may be the omission of an act which it is the person's duty to perform. Delay v. Brainard ---------- 509

30. For a parent having special charge of an infant child to so culpably neglect it that death ensues as a consequence of such neglect is manslaughter, although death or grievous bodily harm were not intended. Delay v. Brainard ---------- 509

31. Culpable neglect in omitting to perform a legal duty will sustain a manslaughter conviction. Delay v. Brainard ---------- 509

32. A proprietor must take reasonable precautions to protect invitees from foreseeable dangers in arrangement and use of his premises. His duty does not ordinarily encompass dangers either known to the invitee or so obvious that the invitee may be reasonably expected to discover them. Hansen v. First Westside Bank ---------- 664

33. Duty of motorist entering an intersection stated. Flanagin v. DePriest ---------- 776

34. Rule stated for determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury. Flanagin v. DePriest ---------- 776

35. It is true that the existence of a change in floor level in a business establishment and the fact that an invitee falls thereon is insufficient to establish negligence. Snyder v. Fort Kearney Hotel Co., Inc. 859

36. A change in floor level, when coupled with other conditions, may constitute negligence. Snyder v. Fort Kearney Hotel Co., Inc. ---------- 859

New Trial.

1. The trial court may set aside a verdict of guilty in a larceny case on its own motion and order a new trial. State v. Houp ---------- 298
2. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred. State v. Riley -- 300
3. Record failed to show that defendant was unavoidably prevented from filing his motion for a new trial within the statutory time. State v. Smith -- 458
4. Statute requires that to vest jurisdiction in the Supreme Court, a notice of appeal must be filed in the district court within 1 month after the rendition of judgment or of the overruling of a motion for new trial. State v. Blunt ---------- 477

Newspapers.

Performing the mechanical acts of reproducing a newspaper, outside the county in which the newspaper has its office and is produced, published, issued, and distributed, does not violate the requirement of statute that a legal newspaper "be printed, either in whole or in part, in an office maintained at the place of publication." Wymore Arbor State, Inc. v. Korinek ---------- 557

Notice.

Notice to the agent is notice to the principal, where such notice is received by the agent while acting within the scope of his authority. Robbins v. National Life & Acc. Ins. Co. ---------- 749

Nuisances.

1. Generally, a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact. City of Syracuse v. Farmers Elevator, Inc. ---- 783
2. A legal and proper activity may be a nuisance in fact simply because of its location. City of Syracuse v. Farmers Elevator, Inc. ---------- 783
3. A legitimate business may become a nuisance by reason of the conditions implicit in and unavoidably resulting from its operation. City of Syracuse

v. Farmers Elevator, Inc. ---------- 783
4. It is not necessary for a city to wait until the operation of an anticipated business demonstrated that its use was a nuisance. City of Syracuse v. Farmers Elevator, Inc. ---------- 783
5. It is not incumbent upon a city of the second class to enact an ordinance prohibiting a nuisance before it has the right to apply to a court of equity for relief. City of Syracuse v. Farmers Elevator, Inc. 783

Parent and Child.
1. In a divorce action, 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. Sanny v. Sanny 1
2. 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. Sanny v. Sanny ---------- 1
Wolpa v. Wolpa ---------- 178
3. In the context of child custody disputes in a divorce case, unfitness of a parent is not restricted to moral unfitness nor to inability or failure to provide physical needs and requirements of the child. The overriding and primary concern is for the best interests of the child. Sanny v. Sanny ---------- 1
4. The courts may not properly deprive the parents of the custody of their children unless it be shown that such parents are unfit to perform the duties and responsibilities of parenthood, or that they have forfeited that right. Mullikin v. Lutkehuse ------ 132
5. Where a parent has been shown to be unfit to have the care and custody of a minor child, the primary concern of the court is the best interest and welfare of the child. Mullikin v. Lutkehuse ---------- 132
6. The remarriage of a mother, previously denied custody of children, is not alone sufficient evidence of changed circumstances to warrant a change in custody in the absence of clear and convincing evidence that the custodial parent is failing to provide proper and reasonable care for the children; that the best interests and welfare of the children are adversely affected; and that the present noncustodial parent can and will better perform the duties of a custodial parent in the best interests of the children. Van Eperen v. Van Eperen ---------- 579

7. 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. McNeill v. McNeill ---------- 759
8. Rule as to change in custody of minor child as between parent and nonparent where latter originally given custody by final order of the court stated. McNeill v. McNeill ---------- 759
9. The discretion of the trial court with respect to changing the custody of minor children is subject to review, but the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. McNeill v. McNeill ---------- 759
10. The court determines which parent is to have custody according to the best interest of the child. Bolles v. Bolles ---------- 798

Parties.

1. A will contestant is not permitted to proceed in forma pauperis without legislative authority. Rundall v. Whiteside ---------- 176
2. The Supreme Court has no jurisdiction to determine the title of the United States government to public land where the United States is not a party to the action and no judgment or decree which could be entered in such case could in any manner be binding upon the United States. Summerville v. Scotts Bluff County ---------- 311

Partnership.

1. In an action seeking a personal judgment against the individual members of a partnership or a joint adventure the petition does not state a cause of action if it fails to state that there is no partnership property or that it is insufficient to satisfy the debts of the partnership or joint adventure. Horn's Crane Service v. Prior ---------- 94
2. A partnership is an association of persons organized as a separate entity to carry on a business for profit. Horn's Crane Service v. Prior ---------- 94
3. The principal distinction between a partnership and a joint adventure is that the latter may relate to a single transaction. The law of partnership applies

to the questions arising between the parties and among the parties in relation to third parties. Horn's Crane Service v. Prior ---------- 94

4. The remedies against a partnership and the individual members are cumulative and there is no requirement that the firm or entity be sued and process served on it in order to acquire jurisdiction over individual members to establish their separate liability. Horn's Crane Service v. Prior ---------- 94

5. The absence of a mutual interest in the profits or benefits of the undertaking is conclusive that a partnership or joint adventure does not exist. Frisch v. Svoboda ---------- 825

Patents.

When a second patent is issued pursuant to a resurvey covering land covered by a prior patent or patents based on the original government survey, the question as to which patent conveyed title to the land covered by the later patent must be determined by a court of competent jurisdiction. Summerville v. Scotts Bluff County ---------- 311

Pleading.

1. An answer which admits negligence of a defendant and that such negligence was the proximate cause of the accident, but denies the nature and extent of the injuries suffered, does not constitute an admission that the injuries were proximately caused by such accident and negligence. Springer v. Smith -- 107

2. A pleading includes an attached exhibit that is incorporated therein by reference. J. R. Watkins Co. v. Wiley ---------- 242

3. The tolling effect of a pleading upon the statute of limitations is unchanged by an amended pleading that amplifies the prior statement. J. R. Watkins Co. v. Wiley ---------- 242

4. A party who stands on a general demurrer to a pleading thereby admits the material facts averred, and must take all the consequences which result from such admission. May Plumbing Co. v. Shaver 251

5. A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated. May Plumbing Co. v. Shaver -- 251

6. So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the petition may be changed and others

added in order to cure imperfections and mistakes in the matter of stating the plaintiff's case. May Plumbing Co. v. Shaver ---------- 251

7. When the transcript of the record of the examining magistrate shows that an accused has had or waived a preliminary examination, and it is contended that in fact no such examination was had or waived, the absence of such examination or waiver should be raised by plea in abatement. State v. Moss ---------- 502

8. Defects in procedure which might have been attacked by a motion to quash or a plea in abatement are waived when a defendant pleads to the general issue. State v. Moss ---------- 502

9. An appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction. Abel v. Southwest Cas. Ins. Co. -- 605

10. When actual contested issues of law and fact are presented with a definite assertion of legal rights and a positive denial thereof, the requirement of a justiciable issue is met. Berigan Bros. v. Growers Cattle Credit Corp. ---------- 656

11. Ordinarily an estoppel or waiver must be pleaded by the party invoking it, but when the facts showing an estoppel or waiver are within the issues made by the pleadings and the evidence thereof is admissible for any purpose, it is not necessary that the estoppel or waiver shall be specifically pleaded. Robbins v. National Life & Acc. Ins. Co. ---------- 749

12. An extrajudicial admission is not ordinarily final and conclusive upon the party by whom it is made. Snyder v. Fort Kearney Hotel Co., Inc. ---------- 859

Post Conviction.

1. Where from the files and records in a post conviction action it is clear that the motion raises no issue as to the defendant's constitutional rights, the court may properly deny an evidentiary hearing. State v. Carreau ---------- 295

2. Under the Post Conviction Act, it is within the discretion of the district court as to whether or not legal counsel shall be appointed to represent a defendant on appeal to the Supreme Court and, in the absence of a showing of an abuse of discretion, the failure to appoint counsel is not error.

State v. Jackson ---------- 472

3. When evidence is insufficient to sustain a finding that defendant's plea of guilty was wrongfully obtained by promises of leniency, that he was denied the right to retain counsel of his own choosing, and that court-appointed counsel was ineffective because not given an opportunity to investigate and ascertain the facts of defendant's case, relief by the trial court is properly denied. State v. Jackson 472

4. When a defendant who has been convicted in a criminal action contends that his right to appeal has been defeated due to a violation of a constitutional right, his remedy is one arising under the Post Conviction Act. State v. Blunt ---------- 477

5. Post conviction relief on the ground of ineffective assistance of counsel will not be granted unless counsel's assistance was so grossly inept as to shock the conscience of the court. State v. Tunender -- 701

6. A petitioner is required to allege facts, which if proved would constitute an infringement of his constitutional rights. State v. Fitzgerald -------- 823

7. A petitioner is required to set forth facts and not merely conclusions. State v. Fitzgerald ---------- 823

Post Conviction Evidentiary Hearing.

1. The Post Conviction Act specifically authorizes the trial court to examine the files and records and to determine whether or not a prisoner may be entitled to the relief he seeks. If the trial court finds from such examination that the proceeding is without foundation, an evidentiary hearing may properly be denied. State v. Carreau ---------- 295

2. If examination of record shows that pretrial statements of defendant were voluntary, no full evidentiary hearing is granted. State v. Fugate -------- 325

3. 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. State v. Fowler ---------- 333

4. An illegal search and seizure issue cannot be considered in a post conviction review where the circumstances of the search and seizure were fully known to the defendant at the time of the trial resulting in his conviction. State v. Losieau -------- 367

5. In a post conviction proceeding, petitioner has the

burden of establishing a basis for relief. State v. Williams ---------- 444

6. Under the Post Conviction Act, it is within the discretion of the district court as to whether or not legal counsel shall be appointed to represent a defendant on appeal to this court and, in the absence of a showing of an abuse of discretion, the failure to appoint counsel is not error. State v. Williams -- 444

7. If the motion of a prisoner and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief under the Post Conviction Act, the court may overrule the motion without a hearing. State v. Duncan -------- 598

8. In a post conviction proceeding, petitioner has the burden of establishing a basis for relief. State v. Raue ---------- 735

Principal and Agent.

1. An agent who fails to disclose the fact of his agency and represents himself as principal inducing another to deal with him as such is liable and may be treated as principal for all purposes, unless and until the fact of his agency is known or made known by him to the contractor. Baxter & Sons v. Sofio -------- 599

2. An agent purporting to act upon his own account, but in fact making a contract on account of an undisclosed principal, is a party to the contract. Baxter & Sons v. Sofio ---------- 599

3. An insurance agent, empowered to solicit applications for insurance and to receive payments of the premiums, binds the company by knowledge acquired in and about the preparation of the application and by representations made to the insured in so doing. The same rule applies where the agent obtains an application for reinstatement. Robbins v. National Life & Acc. Ins. Co. ---------- 749

4. Information coming to a soliciting agent or a premium collector after the issuance of a policy or a reinstatement of a lapsed policy for nonpayment of premiums, in which he participated, is not imputable to his principal. Robbins v. National Life & Acc. Ins. Co. ---------- 749

Probable Cause.

1. Arrest without a warrant must be based upon probable cause which exists from facts and circumstances within the officers' knowledge or of which

they had reasonably trustworthy information which was sufficient to warrant men of reasonable caution in the belief that an offense has been, or is, being committed. State v. Perez ---------- 680
State v. Cook ---------- 684
State v. Watson ---------- 692
2. The existence of probable cause must be determined by a practical and not by any technical standard. State v. Cook ---------- 684

Probation and Parole.
1. A formal information and arraignment conforming to criminal procedure is not required for revocation of probation. Technical formality and preciseness of charge are unnecessary. State v. Ward ---------- 370
2. Any probative evidence showing a violation of probationary conditions by conduct sufficient to convince the district court that the defendant will not refrain from criminal acts in the future without punishment will sustain the revocation of probation. State v. Ward ---------- 370
3. An indigent defendant is entitled to legal counsel at public expense on a hearing for the revocation of an order of probation and the imposition of a deferred sentence under the Sixth and Fourteenth Amendments to the Constitution of the United States. State v. Holiday ---------- 410

Process.
1. The remedies against a partnership and the individual members are cumulative and there is no requirement that the firm or entity be sued and process served on it in order to acquire jurisdiction over individual members to establish their separate liability. Horn's Crane Service v. Prior ---------- 94
2. In a proceeding to declare children residing within the state dependent or neglected children, and process is personally served on parents and they appear generally or by counsel, the separate juvenile court has complete jurisdiction, and its decree is effective and binding on the parents. Miller v. Department of Public Welfare ---------- 155
3. An irregularity in the certificate appearing on the reverse side of a copy of a summons served upon the defendant does not invalidate the service where the defendant was not misled or prejudiced in any way. Heiser v. Heiser ---------- 216

Property.

The "total assessed valuation of the property within the school district" includes both tangible and intangible property. Reid v. Slepicka ---------- 485

Public Administrative Bodies.

An airport authority, duly created by a city under the Cities Airport Authorities Act, is a supplementary, separate, and independent public corporation, and the parent municipal corporation is not liable for the torts of the authority. Lock v. City of Imperial 526

Public Lands.

1. When a second patent is issued pursuant to a resurvey covering land covered by a prior patent or patents based on the original government survey, the question as to which patent conveyed title to the land covered by the later patent must be determined by a court of competent jurisdiction. Summerville v. Scotts Bluff County ---------- 311
2. The United States is not an indispensable party where the issue to be determined in the case involves only the right of possession between two claimants of surface rights to the same land whose claims arise under different patents from the United States, where the United States has no present right of possession. Summerville v. Scotts Bluff County 311
3. The Supreme Court has no jurisdiction to determine the title of the United States government to public land where the United States is not a party to the action and no judgment or decree which could be entered in such case could in any manner be binding upon the United States. Summerville v. Scotts Bluff County ---------- 311

Public Officers and Employees.

1. A police officer stationed on a public highway for the purpose of directing traffic in the proper performance of his duties is required to assume a position, which, in view of the close proximity of approaching traffic, is necessarily a place of danger. Pensyl v. Gibb ---------- 573
2. A police officer stationed on a public highway for the purpose of directing traffic is not required to keep a constant lookout for the approach of cars from any and all directions. Pensyl v. Gibb ------ 573
3. A police officer properly directing traffic on a public

highway is required to keep a reasonable lookout and to exercise care in the circumstances commensurate with the dangers and consistent with the faithful performance of the duties of his employment. Pensyl v. Gibb ---------- 573

Public Works and Contracts.

1. Purpose of statutes requiring payment bonds on public building construction contracts stated. McElhose v. Universal Surety Co. ---------- 847
2. Statutes requiring payment bonds on public building construction contracts are remedial in nature and are to be liberally construed to effectuate the legislative purpose. McElhose v. Universal Surety Co. ---------- 847
3. Statute of limitations on bringing suit on payment bonds required on public building construction contracts stated. McElhose v. Universal Surety Co. -- 847
4. A materialman or supplier, according to the general usage of the terms, can be and often is a subcontractor. Under the statute a more restrictive definition of these terms is required. McElhose v. Universal Surety Co. ---------- 847
5. Distinction between subcontractor and a materialman or supplier stated. McElhose v. Universal Surety Co. ---------- 847
6. Ultimate consideration in distinguishing between a subcontractor and materialman stated. McElhose v. Universal Surety Co. ---------- 847
7. In determining if a party is a subcontractor within the meaning of the statute, the determination is not dependent on how the parties designate themselves. The question is one of fact. McElhose v. Universal Surety Co. ---------- 847
8. While the labor or materials furnished must be used and consumed in the prosecution of the prime contract, it is not required that the subcontractor install his product or do any on-site work. McElhose v. Universal Surety Co. ---------- 847
9. Rental charges for equipment furnished to perform work on the contract are recoverable under a contractor's payment bond if such equipment is not a capital asset of the user. McElhose v. Universal Surety Co. ---------- 847
10. Where it appears that a claimant furnished equipment to a subcontractor within the meaning of the statute, he is within the class of suppliers or mate-

rialmen protected by the prime contractor's payment bond. McElhose v. Universal Surety Co. ---------- 847

Right to Counsel.

1. The right to counsel is a personal right and may be knowingly waived. State v. Escamilla ---------- 466
2. Under the Post Conviction Act, it is within the discretion of the district court as to whether or not legal counsel shall be appointed to represent a defendant on appeal to the Supreme Court and, in the absence of a showing of an abuse of discretion, the failure to appoint counsel is not error. State v. Jackson ---------- 472
3. When evidence is insufficient to sustain a finding that defendant's plea of guilty was wrongfully obtained by promises of leniency, that he was denied the right to retain counsel of his own choosing, and that court-appointed counsel was ineffective because not given an opportunity to investigate and ascertain the facts of defendant's case, relief by the trial court is properly denied. State v. Jackson -- 472
4. Where an indigent defendant elects to defend himself, it is within the discretion of the trial court to appoint the public defender as his technical adviser. State v. Walle ---------- 642
5. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the State to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. State v. Woods -- 668
6. An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. State v. Woods ---------- 668
7. An individual subjected to in-custody interrogation for the purposes of eliciting incriminating statements may knowingly and intelligently waive the right to counsel being present during the course of the interrogation. State v. Perez ---------- 680
8. Where one attorney represents two codefendants, conflict of interests which denies one or both defendants effective assistance of counsel is a distinct possibility, and when such conflict exists, the conviction cannot stand. State v. Montgomery ------- 737
9. Assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be

untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. State v. Montgomery -- 737

Robbery.

The theft of property is a necessary element of the crime of robbery. Proof regarding the taking, identity, and value of such property is not only pertinent but necessary and required in order to prove the crime. When properly identified, it is always admissible. State v. Gau ---------- 114

Sales.

1. Under the Uniform Commercial Code, title to goods passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods and, if the contract requires delivery at destination, title passes on delivery or tender there, unless the contract of sale provides otherwise. Jordan v. Butler -------- 626
2. The Uniform Commercial Code does not provide for a revesting of title for the nonpayment of the purchase price alone except where the contract so provides. Jordan v. Butler ---------- 626
3. Under the Uniform Commercial Code, a person with a voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase, the purchaser has such power even though the delivery was in exchange for a check later dishonored, that the sale was for cash by agreement, or delivery was procured through fraud punishable as larcenous under the criminal law. Jordan v. Butler -------- 626
4. A fraudulent purchase of personal property accompanied with delivery is not void, but voidable only, at the election of the vendor, and until it is avoided the vendee has the power to make a valid mortgage or sale of the goods to a bona fide purchaser having no notice of the fraud. Jordan v. Butler ---------- 626
5. When goods obtained by fraud have been mortgaged by the fraudulent vendee to secure a present indebtedness, to a mortgagee in good faith without notice of the fraud, the latter stands in the position of an innocent purchaser of the property for value to the extent of the mortgage debt. Jordan v. Butler ---------- 626

Schools and School Districts.

1. The determination of the number of children of school age in a joint school district residing in a county is not an adjudicative fact and requires no judicial hearing. Frye v. Haas ---------- 73
2. The validity and sufficiency of a petition under the statute governing consolidation of school districts are determined by the county superintendent after notice and hearing, and the validity or sufficiency of the signatures upon the petition is not determined upon basis of the list of legal voters alone. Reid v. Slepicka ---------- 485
3. A list or lists of the legal voters in a school district which in fact includes all of the legal voters in the district is sufficient under the statute providing for consolidation of school districts. It is not jurisdictional that the list contain a sworn statement that all of the legal voters in the district are included. Reid v. Slepicka ---------- 485
4. The parents of pupils who have obtained a transfer for school purposes are not legal voters in the new district for the purpose of petitions under the statute providing for consolidation of school districts. Reid v. Slepicka ---------- 485
5. An affidavit which was in fact sworn to before a notary public is sufficient for the purpose of withdrawing a signature from a petition under the statute providing for merger of school districts, even though the affidavit does not state specifically that it was made under oath or sworn to before a notary public. Reid v. Slepicka ---------- 485
6. The "total assessed valuation of the property within the school district" includes both tangible and intangible property. Reid v. Slepicka ---------- 485
7. Statute which provides that the legal organization of a school district shall be presumed when the district has exercised the privileges and franchises of a district for 1 year does not apply to a district in which the validity of the organization of the district has been in litigation since its inception. Reid v. Slepicka ---------- 485

Searches and Seizures.

1. An illegal search and seizure issue cannot be considered in a post conviction review where the circumstances of the search and seizure were fully known to the defendant at the time of the trial re-

sulting in his conviction. State v. Losieau 367
2. Probable cause for a warrantless search must be determined on the particular facts and circumstances of each case. State v. Forney 802
3. The existence of probable cause must be determined by a practical and not by any technical standard and where time is of the essence it is a highly relevant factor in evaluating the circumstances. State v. Forney 802
4. Probable cause for searching motor vehicles or other things readily moved may not be treated the same as questions arising out of searches of fixed structures. State v. Forney 802
5. The findings and holdings of a single Judge of the Supreme Court in State v. Forney, 181 Neb. 757, 150 N. W. 2d 915, have been examined and are adhered to. State v. Forney 802

Service Stations.

Under the particular facts, the rental of cargo trailers for attachment to passenger automobiles by the operator of a service station was an accessory use customarily incident to the permitted service station business. State v. Smiley 211

States.

1. A consent to suit is a waiver of immunity from suit which permits the enforcement of a preexisting liability. It is not a waiver of immunity from liability and does not create a cause of action not previously existing. Stadler v. Curtis Gas, Inc. 6
2. When a state, by itself or through its corporate creations, embarks in an enterprise, especially when commercial in character or which is usually carried on by individuals or private companies, its sovereign character is ordinarily waived, and it is subject to like regulations with persons engaged in the same calling. Stadler v. Curtis Gas, Inc. 6

Statutes.

1. The regulation of livestock auction markets under the police power of the state is a proper subject for legislative action. Midwest L. C. Co. v. Tri-State L. C. Co. 41
2. The operation of a livestock auction market is a lawful business which any person has a right to pursue, subject only to reasonable legislative regula-

tion. Midwest L. C. Co. v. Tri-State L. C. Co. ---- 41
3. The scope of a regulatory statute in derogation of the common law will not be extended beyond its express provisions. If its terms have been complied with and so found by the regulatory board on competent and relevant evidence, its findings will not be disturbed by the courts. Midwest L. C. Co. v. Tri-State L. C. Co. ---------- 41
4. Rules of statutory construction are created to resolve ambiguities, not create them. Frye v. Haas -- 73
5. The right of an accused to a hearing on revocation of probation has no constitutional basis and exists only by virtue of statute. State v. Holiday ------ 229
6. Counties and county boards can only exercise such powers as are expressly granted by statute. State ex rel. Agricultural Extension Service v. Miller -- 285
7. Where general and special provisions of a statute are in conflict, the general law yields to the special. State ex rel. Agricultural Extension Service v. Miller 285
8. Where a specific duty is provided by statute, mandamus may be invoked to enforce it if denied; and the party entitled to such relief will not be forced to pursue his remedy by circuitous and dilatory action at law. State ex rel. Agricultural Extension Service v. Miller ---------- 285
9. The right to appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action. Radil v. State ---------- 291
10. Before a law can be determined to be unconstitutional, the express provision of the Constitution which the law contravenes must be pointed out. Radil v. State ---------- 291
11. Whatever repugnance individuals may feel toward capital punishment must be laid aside in obedience to the law of the state and in deference to the judgment of the sentencing court. State v. Alvarez 358
12. The fixing of minimum and maximum penalties as punishment for crime is for the Legislature with which the Supreme Court is powerless to interfere. State v. Alvarez ---------- 358
13. Where a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional, it is the duty of the court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it

valid. Anderson v. Tiemann ---------- 393
14. The adoption of a state income tax based upon present and future federal income tax laws does not constitute a waiver of the sovereignty of the state, nor an abdication of its functions, nor constitute a violation of the requirements of a representative form of government. Anderson v. Tiemann ---------- 393
15. The Nebraska Revenue Act of 1967 contains but one general subject, taxation, and does not violate Article III, section 14, of the Constitution of Nebraska, providing that no bill shall contain more than one subject. Anderson v. Tiemann ---------- 393
16. Village, as used in statute, applies to villages in the ordinary and popular sense of the term. State ex rel. Little v. Board of County Commissioners ---- 419
17. The word village suggests a small urban community. This ordinarily means an assemblage of residences, less than a town or city, urban or semiurban in character, and having a density of population greater than usually found in rural areas. State ex rel. Little v. Board of County Commissioners ---------- 419
18. An inhabitant within the intent of statute is one who actually and permanently resides in the area embraced in the petition for incorporation. State ex rel. Little v. Board of County Commissioners -- 419
19. The burden is on one who attacks a statute or an ordinance, valid on its face and enacted by lawful authority, to prove facts to establish its invalidity. Campbell v. City of Lincoln ---------- 459
20. Statute authorizing city of primary class to annex contiguous or adjacent lands is not so restrictive as to constitute special legislation. Campbell v. City of Lincoln ---------- 459
21. No legislative bill shall contain more than one subject and the same shall be clearly expressed in the title. Campbell v. City of Lincoln ---------- 459
22. While a penal statute must be expressed in clear language, it is not necessary that it be so written as to be beyond the mere possibility of more than one construction. State v. Simants ---------- 491
23. Statutory provision declaring a misdemeanor for contributing to delinquency, neglect, or need of special supervision of a minor child is not unconstitutional as being vague and uncertain, an unlawful delegation of legislative power, or lacking in uniformity. State v. Simants ---------- 491
24. Performing the mechanical acts of reproducing a

newspaper, outside the county in which the newspaper has its office and is produced, published, issued, and distributed, does not violate the requirement of statute that a legal newspaper "be printed, either in whole or in part, in an office maintained at the place of publication." Wymore Arbor State, Inc. v. Korinek ---------- 557

25. The statutorily declared public policy of this state is that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while such insurers are not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to the distant forums for the purpose of asserting legal rights under such policies. Abel v. Southwest Cas. Ins. Co. 605

26. 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. State v. Green ------ 615

27. It is a fundamental requirement of due process of law that a criminal statute be reasonably clear and definite. State v. Green ---------- 615

28. A municipal ordinance may constitute reckless driving and willful reckless driving separate offenses and provide separate minimum penalties for each offense. State v. Green ---------- 615

29. The general test of constitutionality with respect to prohibitions against special legislation is reasonableness of classification and uniformity of operation. State Tax Cases ---------- 621

30. A statute fixing a time for appeal to a court regulates the practice of courts of justice. State Tax Cases ---------- 621

31. Provision enlarging the time for appeal from valuation decisions entered by the State Board of Equalization and Assessment in the year 1966 is special legislation prohibited by the Constitution of Nebraska. State Tax Cases ---------- 621

32. Rule for lodging jurisdiction with Supreme Court on appeal from a single action involving multiple tax sale certificates on tax liens stated. County of Hall v. Engleman ---------- 676

33. Where a party appealing from the district court to the Supreme Court fails to file a cost bond within 1 month after the rendition of the judgment or final order appealed from or within the time

extended by the Supreme Court on a showing of good cause, such appeal will be dismissed. County of Hall v. Engleman ---------- 676

Statutes, Construction of.

1. In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. State v. Simants ---------- 491
2. A penal statute is required to be construed strictly, but should be given a sensible construction, and general terms therein should be so limited in their construction as not to lead to injustice, oppression, or an absurd consequence. State v. Simants ------ 491
3. A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of words of a statute in the connection with which they are used and in the light of the mischief to be remedied; the rule requiring strict construction of a penal statute is not violated by giving to the words their full meaning in the connection in which they are employed. State v. Simants ------ 491
4. It is the duty of the Supreme Court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done. State v. Simants ---------- 491

Streets.

1. Liability of city to an owner or person claiming an interest in property not abutting upon streets or alleys proposed to be vacated by action of the city council stated. Kraft & Sons, Inc. v. City of Lincoln 187
2. An abutting landowner does not have a vested interest in the flow of traffic past his premises and any damage sustained because of the diversion of traffic is not compensable. Kraft & Sons, Inc. v. City of Lincoln ---------- 187
3. A property owner may not recover damages for the obstruction of a street or highway unless he has sustained an injury different in kind, and not merely in degree, from that suffered by the public at large. Kraft & Sons, Inc. v. City of Lincoln ---------- 187
4. The vacation or closing of a street is not analogous to an eminent domain proceeding to appropriate pri-

vate property for public use. State v. Nickel Grain Co., Inc. ---------- 191

5. The fact that a property owner or those desiring to enter his property may have to travel a circuitous and longer route to reach certain points because of traffic regulations changing the direction of traffic does not give rise to an injury different in kind from that sustained by the general public, and affords no basis for an action for damages. State v. Nickel Grain Co., Inc. ---------- 191

6. The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances. American Oil Co. v. City of Omaha ---------- 532

7. The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances. Deremer v. State ---- 586

Supersedeas.

Generally, supersedeas is not a prerequisite to an appellate review. Reid v. Slepicka ---------- 485

Taxation.

1. Advance payments made to a building and loan association, for the purpose of defraying taxes and insurance upon property mortgaged as security for a loan, are the property of the association and exempt from intangible tax under statute referred to in opinion. First Fed. S. & L. Assn. v. Board of Equalization ---------- 25

2. Within the meaning of the due process clause, laws for the levy and collection of general taxes stand upon a different footing than laws for the levy and collection of special assessments or special taxes. Frye v. Haas ---------- 73

3. The power to levy a general tax is inherent in the sovereign, is purely legislative in character, and due process does not require that the property subject to the tax or the amount to be levied should be subjected to judicial inquiry. Frye v. Haas ---- 73

4. Tax proceedings are necessarily summary in nature, are not judicial in character, due process does not require notice and an opportunity to be heard at any particular stage of the proceedings, and notice by a statute itself is sufficient. Frye v. Haas ---- 73

5. There is no constitutional command that notice of the assessment or levy of a tax, and opportunity to contest it, must be given in advance of the assessment or levy. It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay it becomes final and irrevocable. Frye v. Haas ---------- 73
6. Statute referred to in opinion creates a direct cause of action in the tax proceedings by which a taxpayer may test the validity, for any reason, of a tax or any part thereof. Frye v. Haas ---------- 73
7. If taxes are levied without authority of law, their collection may be enjoined. Frye v. Haas ---------- 73
8. There is no requirement of due process that a taxpayer must be given an opportunity to be heard before any particular stage of the taxation process. Frye v. Haas ---------- 73
9. Ordinarily, a corporation is domiciled for tax purposes in the state of its incorporation; and, in the absence of a statute to the contrary, its intangible personal property has its tax situs in that state, unless a business situs elsewhere has been established. Equity Union Grain Co. v. Board of Equalization ---------- 182
10. When a foreign corporation is domesticated, there is a domestic corporation within each state insofar as the corporation has been created by, and exists under, its laws, and a foreign corporation insofar as it exists and exercises franchises under the laws of another state. Equity Union Grain Co. v. Board of Equalization ---------- 182
11. Domesticating a foreign corporation in Nebraska, for purposes of taxation, has much the same effect as establishing a business situs in Nebraska and its intangible property may have a situs, for taxation purposes, apart from the state of its original incorporation. Equity Union Grain Co. v. Board of Equalization ---------- 182
12. Before a state, where a corporation has been domesticated or has established a business situs, may tax such intangible property, it must appear to have a reasonable connection with the business of the company in such state in that it has a localized use, is primarily an asset of the local business, and under local management and control. Equity Union Grain Co. v. Board of Equalization ---------- 182

13. A state has no authority to tax the property of a foreign corporation which is clearly outside the state and forming no part of its domestic business. Equity Union Grain Co. v. Board of Equalization -- 182
14. The constitutional amendment, Article VIII, section 1B, adopted by the electorate in November 1966, grants to the Nebraska Legislature the authority to enact income tax legislation which adopts by reference future income tax laws of the United States as they become effective; and the provisions of the Nebraska Revenue Act of 1967, with reference thereto, are valid. Anderson v. Tiemann ---------- 393
15. The adoption of a state income tax based upon present and future federal income tax laws does not constitute a waiver of the sovereignty of the state, nor an abdication of its functions, nor constitute a violation of the requirements of a representative form of government. Anderson v. Tiemann ------ 393
16. The Constitution of Nebraska does not prohibit a graduated state income tax. Anderson v. Tiemann -- 393
17. A franchise tax based upon or measured by the income of a corporation is not a property tax within the meaning of Article VIII, section 1, of the Constitution of Nebraska. Anderson v. Tiemann 393
18. A tax classification, although discriminatory, is not arbitrary nor violative of the equal protection clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it. Anderson v. Tiemann ---------- 393
19. The allowance and limitation of the food sales tax credit only to residents does not constitute unjust or unreasonable discrimination under the privileges and immunities and equal protection clauses of the Fourteenth Amendment. Anderson v. Tiemann ---------- 393
20. Rule for lodging jurisdiction with Supreme Court on appeal from a single action involving multiple tax sale certificates on tax liens stated. County of Hall v. Engleman ---------- 676

Tender.

Where a certain sum of money is tendered by a debtor to a creditor on the condition that he accept it in full satisfaction of his demands, the sum being in dispute, the creditor must either refuse the tender or accept it. If he accepts it, he accepts the condition also, notwithstanding any protest. State v.

Nickel Grain Co., Inc. ---------- 191

Torts.

When one does an act which proves injurious to another, an action in tort may arise in favor of the injured person, although the act was done without malice and no injury was intended. Makovicka v. Lukes 168

Trial.

1. Objections to the mode of selecting petit jurors must be made before the trial to be of any avail. State v. Nelson ---------- 31
2. In a criminal action, an instruction which informs the jurors that they have nothing to do with the punishment of the defendant and that they have no right to take into consideration what punishment he might or might not receive, in event of his conviction, is proper in the cases where the punishment is left to the trial court. State v. Nelson -- 31
3. Absence of any direct, incriminatory evidence is ordinarily made the test of the obligation of the trial court to instruct as to probative value and manner of considering circumstantial evidence in a criminal case. State v. Nelson ---------- 31
4. Where there is irreconcilable conflict on a material issue, the Supreme Court will, in determining the weight of the evidence of witnesses who appear in court to testify, consider the fact that the trial court observed them and their manner of testifying and must have accepted one version of the facts rather than the other. Peters v. Halligan ------- 51
   Applegate v. Applegate ---------- 342
   Rolfsmeyer v. Seward County ---------- 348
5. An instruction which states, that before the plaintiff may recover, he must prove by a preponderance of the evidence that plaintiff's injuries were proximately caused by the negligence of the defendant and the amount of plaintiff's damages, sufficiently informs the jury as to what it should do in the event the plaintiff's evidence as to a particular element of the damage claimed fails to preponderate in favor of the plaintiff. Springer v. Smith ------ 107
6. Where a trial court properly submits to a jury pain and suffering that plaintiff has heretofore sustained, the trial court is not required to instruct the jury that it is not to make an award for possible future pain. Springer v. Smith ---------- 107

7. The correctness of the ruling of a district court in giving or refusing instructions cannot be considered here unless such ruling is first challenged in the district court by motion for a new trial. State v. Gau ---------- 114
8. Alleged errors of the trial court in an action at law which are not referred to in a motion for new trial will not be considered in the Supreme Court. Stauffer v. Wilson ---------- 129
9. The findings of the district court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong. Stauffer v. Wilson -- 129
10. A party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence. Reed v. Reed ---------- 136
11. If there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law. Reed v. Reed 136
12. In an appeal from a judgment in a law action tried by the court without a jury, the Supreme Court will not disturb findings of fact based on conflicting evidence unless such findings of fact are clearly wrong. The credibility of witnesses and the weight to be given their testimony in such cases are for the trier of fact. Highway Equipment & Supply Co. v. Jones ---------- 234
13. 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 say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Whited ------ 282
14. An instruction stating that circumstantial evidence is proof of facts and circumstances from which another fact may be "presumed or inferred" is not erroneous. State v. Carr ---------- 308
15. 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. Fowler ---------- 333
16. 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. State v. Fowler ---------- 333

17. If the evidence in a personal injury action raises question of negligence on the part of defendants, plaintiff's claim against the individual defendants should be submitted to the jury. Landmesser v. County of Cheyenne ---------- 345

18. Instructions to the jury must be considered as a whole, and when thus considered, if the law is correctly stated and the jury could not have been misled, a claim of prejudicial error in the instructions is not available. State v. Kosinski ---------- 390

19. The record of the trial court, when properly certified to the Supreme Court, imports absolute verity. If the record is incorrect, any correction must be made in the district court. Wonderling v. Conley 446

20. The constitutional right to trial by jury is a personal privilege which may be waived. The prosecution is without power to require a jury trial if the defendant wishes to waive it. State v. Godfrey ---- 451

21. The trial court may reasonably require that a motion to waive a jury trial be made or filed within a reasonable time prior to trial as a condition to the consent of the court. State v. Godfrey ---------- 451

22. Instructions must be considered as a whole in determining whether a particular instruction or the lack thereof is prejudicial. State v. Moss -------- 502

23. Circumstances affecting contemporaneousness under the Uniform Business Records as Evidence Act are complexity of the information in the record, training and skill of the recorder, and reasonableness of the elapsed time generally. Metropolitan Protection Service, Inc. v. Tanner ---------- 507

24. In a condemnation action, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong. American Oil Co. v. City of Omaha ---------- 532

25. It is prejudicial error to submit to the jury an essential issue of fact for which there is no proof. Pensyl v. Gibb ---------- 573

26. An instruction should not assume as established a disputed issue of fact. Pensyl v. Gibb ---------- 573

27. It is the duty of the trial court on its own motion to instruct as to all issues of fact that are pleaded and upon which there is evidence to support them. Pensyl v. Gibb ---------- 573
28. A refusal of a requested instruction, substantially covered by the charge given, is not error. Deremer v. State ---------- 586
29. An assignment of error asserting excessive damages may not be considered by the Supreme Court if it is not properly raised in the trial court on motion for new trial or argued in the appellant's brief in the Supreme Court. Deremer v. State ---------- 586
30. An instruction to the jury to disregard exhibits ordinarily protects a defendant from unfair prejudice in management of the exhibits before the jury. State v. Pilgrim ---------- 594
31. The standard relating to federal and Nebraska constitutional guarantees of a speedy trial is reasonableness. State v. Pilgrim ---------- 594
32. Failure of defendant or his counsel to move for discharge prior to trial or entry of plea of guilty constitutes a waiver of the right to a speedy trial. State v. Pilgrim ---------- 594
33. The proper rule is that a verdict should be directed if the evidence is undisputed or if the evidence, although conflicting, is so conclusive that it is insufficient to justify a verdict or sustain a judgment. Baxter & Sons v. Sofio ---------- 599
34. A motion for a continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the court. Unless an abuse of such discretion is shown, the ruling on the motion will not be disturbed. Jordan v. Butler ---------- 626
35. Where a continuance is sought on the ground that defendant is ill and is a material witness in his own behalf, the showing in support of the motion is insufficient if it fails to disclose the material facts to which defendant would testify, if present. Jordan v. Butler ---------- 626
36. Rule for consideration of motion for directed verdict stated. Department of Banking v. Keeley -- 645
37. Errors in instructions not prejudicial to the complaining party are not a ground for reversal of a judgment otherwise correct. Hansen v. First Westside Bank ---------- 664
38. A trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon

an information before or after the trial has begun when there is no showing of prejudice to the rights of the defendant. State v. Woods ---------- 668

39. A motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such a motion will not be disturbed in the absence of a showing of an abuse of discretion. State v. Cook 684

40. There is some danger of prejudice in any trial involving multiple defendants but severance should be denied in the absence of a showing of prejudice against which the trial court will not be able to afford protection. State v. Cook ---------- 684

41. The right to a separate trial depends upon a showing that prejudice will result from a joint trial. State v. Montgomery ---------- 737

42. A motion for a separate trial is addressed to the sound discretion of the trial court and its ruling on such motion will not be disturbed in the absence of a showing of an abuse of discretion. State v. Montgomery ---------- 737

43. There is some danger of prejudice in any trial involving multiple defendants, but severance should be denied in the absence of a showing of prejudice against which the trial court will not be able to afford protection. State v. Montgomery ---------- 737

44. A motion for severance must be made before trial if a defendant is aware of a ground for severance. State v. Montgomery ---------- 737

45. Where a defendant has been unable to obtain information on the nature of a confession of a codefendant until the day of trial, the motion for severance may be made when the confession is offered in evidence if there is a conflict of interests. State v. Montgomery ---------- 737

46. It is not error to refuse a requested instruction if the legal principles therein announced are either incorrectly stated or inapplicable to the issues involved. Flanagin v. DePriest ---------- 776

47. A failure or refusal to define the word "forfeit" as used in an instruction regarding right-of-way at an open intersection is not error when the instructions as a whole were adequate to clearly convey the sense in which the word was used. Flanagin v. DePriest ---------- 776

48. The words "approaching," "entering," and "reaching" as used in an instruction defining the statutory right-of-way at an open intersecion are generally

synonymous and interchangeable. Flanagin v. DePriest ---------- 776
49. 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. Flanagin v. DePriest ---------- 776
50. The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of the instruction is reasonably clear. Flanagin v. DePriest ---------- 776
51. Ordinarily, the Supreme Court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties. Schimonitz v. Midwest Electric Membership Corp. ---------- 810
52. When the evidence is conflicting, the verdict of a jury will not be set aside unless it is shown to be clearly wrong. Schimonitz v. Midwest Electric Membership Corp. ---------- 810
53. In testing the sufficiency of the evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. Schimonitz v. Midwest Electric Membership Corp. ---------- 810
54. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake or that it is clear that the jury disregarded the evidence or controlling rules of law. Schimonitz v. Midwest Electric Membership Corp. ---------- 810
55. An instruction so framed as to mislead the jury into a double award for an item of damage is prejudicially erroneous. Pierson v. Cleven ---------- 816
56. A verdict for damages based on an instruction in which a statement concerning recovery for an item of damage is redundant may nevertheless imply a single award for the item. Pierson v. Cleven ---------- 816
57. A verdict for damages will not be set aside on the ground of excessiveness unless it is so clearly exorbitant as to indicate unfair prejudice or disregard of evidence of controlling rules of law. Pierson v. Cleven ---------- 816
58. Conditons set out under which depositions were considered as having been received in evidence by the

trial court. Frisch v. Svoboda ---------- 825

Trusts.

1. In order to create a trust, it must clearly appear that such was the intention of the parties. Rankin v. City Nat. Bank of Crete ---------- 224
2. Ordinarily a trust is not created where the transaction is as consistent with another relationship as with that of a trust. Rankin v. City Nat. Bank of Crete ---------- 224
3. The form and nature of a joint deposit in the name of two persons in a bank or a savings and loan association is not, upon the death of one of the coowners, conclusive as to the ownership of the deposit by the surviving coowner as between him and a third person who claims that the surviving coowner holds a legal title to the funds in trust for the third party. Eden v. Eden ---------- 768
4. Parol evidence is admissible in an action by strangers to establish an oral trust in a joint bank or savings account. Eden v. Eden ---------- 768
5. Evidence must be clear, satisfactory, and convincing in character to establish an express oral trust. Eden v. Eden ---------- 768

United States.

1. The United States is not an indispensable party where the issue to be determined in the case involves only the right of possession between two claimants of surface rights to the same land whose claims arise under different patents from the United States, where the United States has no present right of possession. Summerville v. Scotts Bluff County 311
2. The Servicemen's Group Life Insurance policy provided by federal statute is a contract between the government of the United States and the insurers for the benefit of those insured. Johnson v. Prudential Ins. Co. ---------- 673
3. The Servicemen's Group Life Insurance Act is the supreme law of the land and controls over conflicting state law with respect to the disposition of proceeds of policies issued thereunder. Johnson v. Prudential Ins. Co. ---------- 673

Usury.

1. The usurious character of a transaction is determined as of the date of its inception and, if it is usurious in its inception, no subsequent transaction

will cure it. Highway Equipment & Supply Co. v. Jones ---------- 234
2. Where a usurious contract is renewed by the giving of a renewal or substituted contract, the usury follows into and becomes a part of the latter contract, making it subject to the defense of usury to the same extent as was the original transaction. Highway Equipment & Supply Co. v. Jones ------ 234
3. The taint of usury attaches to all consecutive obligations or securities growing out of the original usurious transaction, and none of the descendant obligations, however remote, are free from it if the descent can be traced. Highway Equipment & Supply Co. v. Jones ---------- 234

Waters.
1. Under the evidence adduced, a jury might reasonably infer that the dumping of sand by defendant in the Platte River substantially contributed to a subsequent ice jam against a sandbar downstream, a levee failure upstream, and flood damage to plaintiff's property. Paulson v. Ford ---------- 86
2. The damages in this case held to be excessive, appearing to have been given under the influence of passion and prejudice. Paulson v. Ford ---------- 86
3. The meander lines of a river as established by the original government survey are not boundary lines unless made so by the instrument of conveyance and the waters themselves constitute the real boundary. Summerville v. Scotts Bluff County ---------- 311
4. Unrestricted grants of the government bounded on streams and other waters are to be construed according to the laws of the state in which the lands lie. Summerville v. Scotts Bluff County ---- 311
5. Subject to the easement of navigation, riparian owners are entitled to the possession and ownership of the island formerly under waters of the stream as far as the thread of the stream. Summerville v. Scotts Bluff County ---------- 311
6. Surface waters are waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow. Rolfsmeyer v. Seward County ---------- 348
Kuta v. Flynn ---------- 479
7. The owner of land may collect diffused waters, change their course, or pond them upon his land,

or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow by nature. Rolfsmeyer v. Seward County ---------- 348
Kuta v. Flynn ---------- 479

8. When diffused surface waters gather in volume in velocity or flow into a natural depression, draw, gulch, or drainway, such waters are not subject to the rule that they may be dammed, repelled, or diverted without liability as in the case of diffused surface waters. Rolfsmeyer v. Seward County ---- 348
9. Diffused surface waters, which ordinarily result from rainfall and melting snow and having no permanent source of supply or regular course, may be dammed, diverted, or otherwise repelled by an adjoining landowner without liabiilty, if it is necessary and done without negligence. Kuta v. Flynn ---------- 479

Wills.

A will contestant is not permitted to proceed in forma pauperis without legislative authority. Rundall v. Whiteside ---------- 176

Witnesses.

1. Conduct related in opinion held to be relevant in showing guilt of defendant. State v. Nelson ------ 31
2. The mere fact that a witness in a criminal prosecution is a regular public law enforcement officer does not entitle an accused to an instruction that the jury, in weighing his testimony, should exercise greater care than in weighing the testimony of other witnesses. State v. Nelson ---------- 31
3. The credibility of witnesses and the weight of their testimony are to be determined by the jury in a criminal case. State v. Myers ---------- 117
4. The recantation of testimony given at a criminal trial by an accomplice, in the absence of knowledge by the prosecution that it was false, ordinarily involves only a question of credibility to be determined from all the evidence and circumstances. State v. Howard ---------- 411
5. A trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice to the rights

of the defendant. State v. Woods ---------- 668

Words and Phrases.

"Public assembly" interpreted to mean a company of persons collected together in one place. City of Syracuse v. Farmers Elevator, Inc. ---------- 783

Work and Labor.

A party may recover on a quantum meruit basis for partial performance for the value of benefits conferred even though he fails or refuses to perform the contract, subject to any counterclaim for damages that the other party has sustained by reason of the breach of the agreement. Peters v. Halligan 51

Workmen's Compensation.

1. General disabilities which are the normal, usual, and logical consequence of injuries to specific members are not compensable under specified subdivision of statute. Burrious v. North Platte Packing Co. ---------- 122
2. It was clearly the intent of the Legislature to fix the amount of the benefits for loss of specific members under specified subdivision of statute without regard to the extent of the subsequent disability suffered with respect to the particular work or industry of the employee. Burrious v. North Platte Packing Co. ---------- 122
3. Where an employee has suffered a schedule injury to some particular member or members, and some unusual or extraordinary condition as to other members or other parts of the body has developed, he may be compensated under specified subdivision of statute. Burrious v. North Platte Packing Co. -- 122
4. When an employee meets with an accident resulting in a schedule injury, which accident also accelerates or aggravates an existing impairment to a state of disability, such disability not being the result of a natural progression of the impairment, there may be an award of compensation therefor. Burrious v. North Platte Packing Co. ---------- 122
5. In the absence of unusual or extraordinary other physical injury, the compensation cannot exceed the amount specified in specified subdivision of statute. Burrious v. North Platte Packing Co. ---------- 122
6. The rule of liberal construction of the Workmen's Compensation Act does not apply to the evidence to

support a claim. Stevens v. Josten-Wilbert Vault Co. 322
7. A workmen's compensation award cannot be based on possibility or speculation, and, if an inference favorable to the claimant can only be reached on the basis thereof, then he cannot recover. Stevens v. Josten-Wilbert Vault Co. 322
8. Symptoms of pain and anguish such as weakness, pallor, faintness, sickness, nausea, and expressions of pain clearly involuntary, or other symptoms indicating a deleterious change in bodily conditions, may constitute objective symptoms as required by the Workmen's Compensation Act. Harrington v. Missouri Valley Constr. Co. 434
9. The requirement that objective symptoms of an injury be produced at the time of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown. Harrington v. Missouri Valley Constr. Co. 434
10. The burden of proof is on the plaintiff, not only to show that he sustained a personal injury by an accident arising out of and in the course of his employment, but he must also establish by evidence leading to a direct conclusion or by a legitimate inference therefrom that the accident caused the disability. Harrington v. Missouri Valley Constr. Co. 434
11. A hospital bill not shown by evidence to have been incurred as a result of the compensable accident is not allowable as a charge against the employer. Harrington v. Missouri Valley Constr. Co. 434
12. Under the provisions of the Workmen's Compensation Act, an attorney's fee cannot be allowed to a plaintiff for legal services rendered in the Supreme Court where the employer obtains a reduction of the award on his appeal. Harrington v. Missouri Valley Constr. Co. 434
13. Employee must give notice and commence action within the statutory period after he had knowledge that compensable disability resulted from the original accident. Williams v. Dobberstein 862
14. Under the Nebraska Workmen's Compensation Act, the period of limitation runs from the time it is reasonably apparent that a compensable injury has been sustained, if the employee is aware that the disability is due to his employment. Williams v. Dobberstein 862

Zoning.

1. A nonconforming use is an existing use which is contrary to the zoning regulations. A permitted use is not a conforming use. County of Saunders v. Moore ---------- 377
2. An existing use means the utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose. County of Saunders v. Moore ---------- 377
3. An existing use for business purposes ordinarily means a construction or use of the premises so that they are adaptable for the business purpose and the actual employment of the building, room, or land within the scope of the purpose. County of Saunders v. Moore ---------- 377
4. A contemplated or intended use standing alone is not sufficient to constitute a nonconforming use. County of Saunders v. Moore ---------- 377
5. To obtain a vested interest in a nonconforming use, a person, prior to the effective date of the regulation or ordinance making such use nonconforming and while violating no existing law or regulation, must cause either substantial construction to be made thereon or incur substantial liabilities relating directly thereto, or both. County of Saunders v. Moore ---------- 377
6. A property owner who claims rights by virtue of a nonconforming use has the burden of proof to establish such nonconforming use. County of Saunders v. Moore ---------- 377
7. A permit to use land for a use then permissible under zoning regulations may be revoked, changed, or altered unless substantial construction is made or substantial liabilities incurred relating directly thereto, or both. County of Saunders v. Moore ---- 377
8. Statute on zoning is an enabling act empowering cities of the second class and villages to extend existing ordinances to a one-half mile area surrounding municipal limits, but it does more. It authorizes the inclusion of this one-half mile area in all future ordinances. City of Syracuse v. Farmers Elevator, Inc. ---------- 783
9. Rule as to establishment of a vested interest in a nonconforming use stated. City of Syracuse v. Farmers Elevator, Inc. ---------- 783
10. A property owner who claims rights by virtue of a nonconforming use has the burden of proof to

establish such nonconforming use. City of Syracuse v. Farmers Elevator, Inc. ---------- 783

11. The selection of a place of business is not necessarily left to the owner alone. That subject is often a matter of both public and private concern. City of Syracuse v. Farmers Elevator, Inc. -------- 783

12. Construction of zoning laws stated. Beckman v. City of Grand Island ---------- 840

13. Construction of zoning ordinance stated. Beckman v. City of Grand Island ---------- 840

14. The name by which an institution is designated or called is not of controlling importance in determining whether or not it is a permissible use under a zoning ordinance. The question is to be determined by the activities or character of the business or services carried on and not by the name. Beckman v. City of Grand Island ---------- 840

15. In interpreting definitions in zoning statutes or ordinances, the court cannot supply what the municipal legislative body might have provided but which the court cannot by reasonable construction say that it did provide. Beckman v. City of Grand Island 840