Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
11/08/2026 03:05 PM CST

STATE OF NEBRASKA, APPELLEE, V. ERNEST LEE HOLLAND, APPELLANT.

161 N. W. 2d 862

Filed October 18, 1968. No. 36875.

1. **Criminal Law: Evidence.** A district court's finding that an in-custody statement of an accused is voluntary must appear from the record with unmistakable clarity.
2. ———: ———. A finding that a statement of an accused is voluntary will not ordinarily be set aside unless the finding is clearly erroneous.
3. **Criminal Law: Constitutional Law.** The State is not constrained in the exercise of its police power to ignore experience that marks a class of offenders or a family of offenses for special treatment.
4. ———: ———. Section 28-411 (2), R. S. Supp., 1967, relating to felony convictions for simple assault and battery committed by certain prisoners, is not violative of constitutional clauses concerning unreasonable classification, special legislation, equal protection, or due process.

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

Chambers, Holland, Dudgeon & Beam, 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.

SMITH, J.

In this criminal prosecution the information charged that defendant, while confined in the Nebraska Penal and Correctional Complex, had unlawfully struck and wounded Reuben Loos. A jury found defendant guilty, and he has appealed. His contentions concern (1) admissibility of statements made by him in response to official interrogation, (2) lack of a definition of the word "unlawfully" in jury instructions, and (3) constitutionality of the statute under which he was prosecuted.

Defendant, a prisoner, and Loos, a captain of the

guards, had met about 3:30 p.m., February 9, 1967, in a yard of the penal complex. Either an accidental loss of balance or a blow from defendant's fist during the meeting caused Loos to fall backward and headfirst to the pavement. On the following morning Sergeant Donald E. Mayhew of the Nebraska State Patrol interrogated defendant. Mayhew's account is in part as follows: " * * * (Defendant) said, 'I spun around and cut down on (Loos) * * * struck him with my right fist. * * * I squared off, waiting for him to get up. * * *.' "

The court without the jury held a hearing on the constitutional admissibility of Mayhew's version of defendant's statements. Foundation testimony of Mayhew is summarized as follows: He and Lieutenant Aiken of the guards were already present in the interview room at 8:30 a.m., February 10, 1967, when defendant entered. Mayhew first complied with the requirements of Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974. Defendant said he did not wish assistance of counsel at that time. Defendant's statements were not improperly induced. Aiken was present throughout the interrogation.

Mayhew was contradicted by defendant as follows: Lieutenant William Aiken had visited defendant's cell a short time prior to the interrogation, saying, "Get up rebel. I got a couple of guys that want to talk to you.' " Defendant objected, but Aiken persisted: " 'It ain't going to hurt you to go on up and sit around. * * * If you'll * * * talk, I'll give you some cigarettes.' " The two walked together to the interview room, and on the way Aiken threatened defendant as follows: "Aiken says, 'Don't go up there and make a' * * * ass out of myself or he was going to whop me." During the interrogation defendant was not informed of his constitutional rights. He told Mayhew and Aiken that he had not struck Loos, that Loos had fallen accidentally. Mayhew's contrary testimony was untrue. Defendant had been convicted of a felony five times.

The court expressly found waiver and voluntariness, admitting the statements into evidence and complying with this requirement: The trial court's "conclusion that the confession is voluntary must appear from the record with unmistakable clarity." Sims v. Georgia, 385 U. S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593.

A finding that a statement of an accused is voluntary will not ordinarily be set aside unless the finding is clearly erroneous. Cf. Clark v. State, 79 Neb. 473, 113 N. W. 211, rehearing denied, 79 Neb. 482, 113 N. W. 804; Koenigstein v. State, 103 Neb. 580, 173 N. W. 603; Jackson v. State, 133 Neb. 786, 277 N. W. 92.

Mayhew and defendant alone testified to the interrogation. Faced with defendant's testimony, the State failed to disclose why it was not calling Aiken to the witness stand. It now infers oversight, relying partly on the following record: Prior to the trial the court on motion of defendant directed the clerk to issue a subpoena to "William Aikin, 3101 South 44th Street, Lincoln, Nebraska." The record presents a problem that is difficult but distinguishable from Sims v. Georgia, 389 U. S. 404, 88 S. Ct. 523, 19 L. Ed. 2d 634. We conclude that the findings are not clearly erroneous.

In jury instruction No. 5 on elements of the offense, the court used the word "unlawfully" without definition, stating in part: "That defendant did unlawfully strike and wound Reuben Loos." The jury should have readily understood the instruction. This case was not one in which definition of "unlawfully" in jury instructions was required. See, Schleif v. State, 131 Neb. 875, 270 N. W. 510; Hodgkins v. State, 36 Neb. 160, 54 N. W. 86. See, also, State v. Tull (Mo.), 375 S. W. 2d 100.

The information was laid under subsection (2) of the following section: "(1) Except as provided in subsection (2) * * *, whoever * * * unlawfully strikes or wounds another shall, upon conviction * * * be imprisoned * * * not exceeding six months * * *. (2) Whoever, being confined or in legal custody in the Nebraska Penal and

Correctional Complex or any road camp thereof, whether as trusty or otherwise, or in the State Reformatory for Women * * * unlawfully strikes or wounds another, shall be guilty of a felony and shall, upon conviction * * * be imprisoned * * * not more than five years." § 28-411, R. S. Supp., 1967.

Regarding the subsection, defendant asserts unreasonable classification, special legislation, and deprivation of equal protection and due process in violation of the Fourteenth Amendment to the Constitution of the United States, and Article I, section 3, and Article III, section 18, of the Constitution of Nebraska. The subsection in defendant's view unconstitutionally discriminates between prisoners and others and between prisoners in the institutions named in the subsection and prisoners in jails.

The Legislature with good reason might recognize special needs for discipline and safety in administration of the penal complex and the women's reformatory. See State v. Goodman (Mo.), 425 S. W. 2d 69. The subsection under attack comports with the tradition of general deterrence, special deterrence, and social defense. "* * * a State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment." Skinner v. State of Oklahoma ex rel. Williamson, 316 U. S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655. See, also, Finley v. California, 222 U. S. 28, 32 S. Ct. 13, 56 L. Ed. 75; Creigh v. Larsen, 171 Neb. 317, 106 N. W. 2d 187; King v. Swenson (Mo.), 423 S. W. 2d 699. The claims of unconstitutionality are untenable. The judgment is affirmed.

AFFIRMED.

IN RE PETITION OF CONSUMERS PUBLIC POWER DISTRICT. NORRIS PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, ET AL., APPELLANTS, V. STATE OF NEBRASKA EX REL. DAN S. JONES, JR., DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF NEBRASKA, ET AL., APPELLEES.
161 N. W. 2d 869

Filed October 18, 1968. No. 36897.

1. **Appeal and Error: Administrative Law.** An appeal to the district court from a decision of the Department of Water Resources of this state is not commenced or perfected by filing within 30 days of the service of the final decision of the department a petition in the office of the district court, but the plaintiffs on appeal must also cause a summons to issue on the petition on appeal within 30 days as directed by subsection (2), section 84-917, R. R. S. 1943.
2. ———: ———. A summons issued within 30 days and subsequently served thereafter is a valid service of summons under section 84-917, R. R. S. 1943.
3. ———: ———. Summonses issued and served after the 30-day time to appeal do not meet the requirements of subsection (2), section 84-917, R. R. S. 1943, and require a dismissal of the petition on appeal as not being in compliance with the statutory appeal procedure.

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

Crosby, Pansing, Guenzel & Binning and Lawrence L. Reger, for appellants.

Wilson, Barlow & Watson, for appellee Consumers P. P. Dist.

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

CARTER, J.

On May 9, 1967, Consumers Public Power District filed its petition with the Department of Water Resources of the State of Nebraska requesting that the petition creating Consumers be amended by increasing its chartered territory in accordance with a resolution of its board of

directors. On June 14, 1967, objections to the approval of the petition were filed by Norris Public Power District and Phil E. Buel. On June 15, 1967, a hearing was held on the petition before the Director of the Department of Water Resources. Norris, Buel, Platte Valley Public Power and Irrigation District, and the Nebraska Electric Generation and Transmission Co-op, Inc., appeared at the hearing as objectors. The proponent, Consumers, submitted evidence in support of its petition and an objector, Norris, submitted evidence in opposition to the approval of the proposed amendment to Consumers' chartered territory. The director subsequently entered his order approving the proposed amendment. Without dispute the time for appeal began to run on June 29, 1967.

On July 26, 1967, Norris and Buel filed their petition on appeal in the district court for Lancaster County. Plaintiffs on appeal named the following defendants: State of Nebraska ex rel. Dan S. Jones, Jr., Director of the Department of Water Resources of the State of Nebraska; Department of Water Resources of the State of Nebraska; Consumers Public Power District; and 26 other public power districts which are specifically named. No contention is made that all parties defendant are not necessary parties to the appeal.

The statutory provisions for the review of an order of the Department of Water Resources provides as follows: "Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. Summons shall be served as in other actions except that a copy of the petition shall be served upon any such agency together with the summons. The court, in its discretion, may permit other interested persons to intervene." § 84-917 (2), R. R. S. 1943. The primary question before the court is whether or not the district court

obtained jurisdiction of the appeal under the foregoing statute.

Service of summons was properly had on State of Nebraska ex rel. Dan S. Jones, Jr., Director of the Department of Water Resources, and the Department of Water Resources, and there is no issue regarding service of process as to them.

A praecipe for service of summons on Consumers was filed by plaintiff Norris on July 28, 1967. Summons was issued for Consumers on July 28, 1967. The summons was served on Consumers on July 31, 1967. It is plain that this summons was issued within the 30-day period in which the appeal could be perfected and actually served after such 30-day period. Such service was made within the 30-day period under the rule that a summons is served when it is issued within the prescribed time and subsequently delivered by the serving officer. Ballard v. Thompson, 40 Neb. 529, 58 N. W. 1133; Gorgen v. County of Nemaha, 174 Neb. 588, 118 N. W. 2d 758.

Summonses were issued for the remaining 26 public power districts on August 1, 1967, and served between the dates of August 4, 1967, and August 17, 1967. Such summonses were neither issued nor served within 30 days after the time for appeal commenced. It is the contention of plaintiffs on appeal that such service of summons is not required within the 30-day appeal period under the quoted appeal provision of subsection (2), section 84-917, R. R. S. 1943.

The case does not involve a situation where a defendant was not served because not found within the jurisdiction or unable to be served for any other reason. The defendants not served within 30 days from the effective date of the final disposition of the application were all public corporations with a permanent residence within the jurisdiction of the Department of Water Resources and subject to the service of summons at all times. No reason exists why summonses could not have issued within 30 days and subsequently been served.

The only issue is whether or not the controlling statute required the issuance of such summonses within the 30-day appeal period.

The subsection of the statute by its first sentence states that proceedings for review shall be instituted by filing a petition in the district court after service of the final decision of the agency. The second sentence provides that all parties of record shall be made parties to the proceedings for review. In other words, the clear meaning is that the parties appealing are not only required to file a petition in the district court, but they must file a petition making all parties of record parties to the appeal proceeding. But the statute requires more to lodge jurisdiction of the appeal in the district court. It requires that summons issue as in other cases. This simply means that a summons must be served which will be valid under the general rules of law governing the validity of a summons and its service. All these requirements must be met to invoke the jurisdiction of the district court on an appeal from an adverse decision of an administrative agency. The last sentence of the subsection makes it clear that the requirements for invoking the jurisdiction of the district court do not prevent the district court from permitting other interested parties to intervene in the proceedings on appeal. In summary, the statute requires the filing of a petition, with all parties of record made parties, and the service of summons on such parties, all within 30 days from the service of the final decision of the agency, after which the district court gains jurisdiction of the appeal.

The plaintiffs contend that the words, "Proceedings for review shall be instituted by filing a petition in the district court," mean that the jurisdiction of the district court is complete with the filing of the petition. With this we cannot agree. It is true that in common usage the words "shall be instituted" mean "to commence" or "to begin." But it has a literal meaning of broader import that is applicable here. Its authoritative mean-

ing is "to inaugurate or originate a design, plan, or purpose." (Quotation marks ours.) See Webster's Third New International Dictionary. We think that the words "shall be instituted by filing a petition" is used in the sense that it originates a procedure that is further spelled out in the language which follows it in the same paragraph of the statute.

In dealing with a more extreme case than we have before us, the court in Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S. W. 152, 13 A. L. R. 524, said: "It is argued that since the act provides that the appeal for review of the award may be taken within twenty days after the rendition of the final order, by petition, and in a subsequent paragraph of the same section adds: 'Summons shall issue upon the petition, etc.,' the filing of the petition is in effect the commencement of the action by appeal in the circuit court. We conceive the section, when read as a whole, to mean that the petition must not only be filed within the twenty days after the final order of the board, but summons must be issued thereon within that time, otherwise the very purpose of the act would be defeated by the delays which the appellant could work by failing to cause a summons to issue."

We think, further, that it was the intention of the Legislature that a suit in which all parties of record are parties be commenced within 30 days from date of the service of the final decision of the Department of Water Resources on the aggrieved party in order to secure a review. The filing without the issuance of a summons is not the commencement of an action. § 25-217, R. R. S. 1943. We necessarily conclude that it was the intention of the legislative act to require within 30 days the filing of a petition with all parties of record made parties to the suit and the issuance of summons subsequently served to confer jurisdiction on the district court. The trial court properly dismissed the

action which makes it unnecessary for us to consider other assignments of error.

The judgment of the district court is affirmed.

AFFIRMED.

FRED J. FREDERICKSON, APPELLANT, V. ERNEST L. ALBERTSEN, THE MAYOR, AND THE CIVIL SERVICE COMMISSION OF THE CITY OF SOUTH SIOUX CITY, NEBRASKA, APPELLEES.
161 N. W. 2d 712

Filed October 18, 1968. No. 36905.

1. **Municipal Corporations: Public Officers and Employees.** Under statutes governing cities of the first class, the chief of police has immediate superintendence of the police, and the mayor has superintending control of all officers and affairs of the city.
2. ———: ———. Civil service commissions of cities of the first class possess broad discretion in ruling on orders of discharge by appointing powers.
3. ———: ———. On appeal by an employee of a city of the first class from the civil service commission to district court, the only issue under section 19-1808, R. R. S. 1943, is whether the commission's order was made in good faith for cause.

Appeal from the district court for Dakota County: JOSEPH E. MARSH, Judge. Affirmed.

Leamer & Galvin, for appellant.

Don A. Fitch, for appellees.

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

SMITH, J.

The chief of police of South Sioux City, Nebraska, under civil service refused to obey an order of the mayor. Consequences to the chief, Fred J. Frederickson, included (1) an order by the mayor for discharge of Frederickson for insubordination, (2) an investigation by the civil service commission, (3) the commission's affirmance of the discharge, and (4) an affirmance of the commission's

order on appeal to district court. Frederickon has appealed to this court. The question is whether the mayor exceeded his authority in making the order that Frederickson refused to obey.

The controversy stemmed from an increase in personnel with officer rank from one to three—chief of police, captain, and lieutenant. The city needed officers with rank on duty during the scheduled periods known as morning, afternoon, and midnight shifts. Soon after the new appointments, the mayor ordered Chief Frederickson to assign the lieutenant to the midnight shift. The chief refused. The lieutenant consequently performed duties that included those of a training officer on the morning shift on which the chief also worked. The chief in defense of his position testified: "* * * it was my responsibility and my duty to use any personnel as I saw fit and in the best interest of the department."

South Sioux City, a city of the first class with about 8,500 population, is governed by the following statutory provisions: "The chief of police shall have the immediate superintendence of the police." § 16-323, R. R. S. 1943. "The mayor * * * shall have the superintending control of all the officers and affairs of the city, * * *." § 16-312, R. R. S. 1943. The city's civil service commission possesses broad discretion in ruling on orders of discharge by appointing powers. On appeal to district court the only issue is whether the commission's order was made in good faith for cause. § 19-1808, R. R. S. 1943. Ackerman v. Civil Service Commission, 177 Neb. 232, 128 N. W. 2d 588.

Assignments of policemen with officer rank to scheduled periods of duty in a department that numbers only three officers may express major policy. The district court found in this case that the civil service commission had acted in good faith for cause. The finding on the evidence was not clearly erroneous. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS R. LENZ, APPELLANT.

161 N. W. 2d 710

Filed October 18, 1968. No. 36906.

Criminal Law: Appeal and Error. 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.

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

Max A. Powell, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

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

SPENCER, J.

Defendant herein pleaded guilty to the crime of robbery and was sentenced to 5 years in the Nebraska Penal and Correctional Complex. Defendant perfected this appeal, claiming the sentence to be excessive and urging that the trial court abused its discretion in not placing him on probation.

On September 19, 1967, defendant, who had been released from the South Dakota Penitentiary in August 1967, walked into a motel office west of Fremont, Nebraska, waived a derringer at one of the owners, and demanded that the money in the drawer be laid on the counter. Defendant picked up the money, wiped the counter where his hand touched, and disappeared. Defendant was apprehended November 7, 1967, on another charge and gave a statement admitting the robbery.

Defendant assigns but does not argue the refusal of the trial court to place him on probation. Clearly, it would have been an abuse of discretion for the trial

court to have granted probation herein. That assignment merits no discussion.

Defendant was prosecuted under the provisions of section 28-414, R. R. S. 1943, which provides for a term in the Nebraska Penal and Correctional Complex of not less than 3 nor more than 50 years. The rule on appellate review of the excessiveness of a sentence is well settled in this jurisdiction. "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. Mayes, 183 Neb. 165, 159 N. W. 2d 203.

Has there been an abuse of discretion herein? Obviously not. Defendant used a gun which he insisted was unloaded, but his victim would not know this fact if it were a fact. He had a previous record, and subsequent to this robbery was arrested on another matter. In spite of his youth, 21 years of age, when we consider the record herein and his professional approach as disclosed by precautions he took, if anything the sentence was very lenient.

The judgment of the district court should be and hereby is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARTHUR BORGMANN AND MARVIN GERHEARDT, APPELLANTS.
161 N. W. 2d 711

Filed October 18, 1968. No. 36908.

Criminal Law: Appeal and Error. Where a sentence has been imposed by the district court within statutory limits, it will not be disturbed in the absence of an abuse of discretion.

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

Arthur Borgmann and Marvin Gerheardt, pro se.

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

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

SPENCER, J.

These cases involve prosecutions under the provisions of section 28-532, R. R. S. 1943. Both cases arose out of the same incident, involve the same issue, and were consolidated for purposes of appeal.

Both defendants are 22 years of age and have previously served a term each in the Nebraska State Reformatory. Defendants, together with two minors, one 18 and the other 16, broke into a farm home in Saline County and stole three guns and a safe containing $805 in cash, a coin collection, savings bonds, three abstracts of title, and other papers. The guns and a portion of the coin collection were recovered, but the savings bonds, abstracts, and papers had been burned.

Both defendants pleaded guilty and were each sentenced to 5 years in the Nebraska Penal and Correctional Complex. The only issue raised herein is the excessiveness of the sentences. The statute provides for imprisonment for from 1 to 10 years, so the sentences imposed are within the limits prescribed for the offense. The law is well settled in this jurisdiction that where a sentence has been imposed by the district court within statutory limits, it will not be disturbed in the absence of an abuse of discretion. Nicholson v. Sigler, 183 Neb. 24, 157 N. W. 2d 872.

It is evident there has been no abuse of discretion herein. The judgments of the district court should be and hereby are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY BAKER, APPELLANT.
161 N. W. 2d 864

Filed October 21, 1968. No. 36829.

1. **Criminal Law: Burglary.** An entry with the intent to steal is an unlawful entry which satisfies the requirements of section 28-533, R. R. S. 1943, that the entry be willful and malicious.
2. **Criminal Law: Searches and Seizures.** Where the defendant has consented to a search, the search is not illegal because the consent was given in the presence of police officers and the defendant had not been advised concerning his rights.

Appeal from the district court for Lincoln County: HUGH STUART, Judge. Affirmed.

Baskins, Baskins & Schneider, 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, Jerry Baker, was convicted of felonious entry of a grocery store. His motion for new trial was overruled and he has appealed.

The record shows that the defendant's father had an agreement with the Jack & Jill Store in North Platte, Nebraska, to furnish custodial service to the store. The defendant had been doing this work at the store for about 18 months. On April 29, 1966, at about 7:15 p.m., the defendant, his wife, and another person entered the store. The store was closed at that time and they used a key furnished for that purpose to unlock the door and enter the store. After they had entered the store they proceeded to clean it. The defendant was seen placing merchandise and groceries in a tank-type vacuum cleaner and in a paper sack. At about 8:45 p.m., the defendant left the building carrying a paper sack which he placed in a panel truck parked outside the store. He reentered the building and carried a mop bucket out to the truck. He

reentered the building again and brought out the vacuum cleaner and another paper sack. At about this time Richard Edwards, one of the owners of the store, appeared and asked to look in the vacuum cleaner and the sacks. The police arrived and also asked to look in the vacuum cleaner and the sacks. The defendant consented and removed the vacuum cleaner and the sacks from the truck. The police and Edwards then examined their contents. The defendant was placed under arrest and taken to the police station.

The defendant was charged under section 28-533, R. R. S. 1943, which provides in part as follows: "Whoever willfully and maliciously, either in the daytime or night season, enters any * * * store, * * * and attempts to * * * rob or steal, * * * shall upon conviction thereof * * *" be sentenced to imprisonment. The offense under this section is a statutory variation of burglary and consists of the unlawful entry of the building and the committing or attempt to commit one of the acts enumerated. McElhaney v. Fenton, 115 Neb. 299, 212 N. W. 612; Smith v. State, 68 Neb. 204, 94 N. W. 106.

The defendant contends that there was no unlawful entry of the building in this case because the defendant had the permission of the owners to enter the building to do custodial work, and a key had been furnished for that purpose. Where breaking and entering is required, a consent to enter is usually a defense. See State v. Sneff, 22 Neb. 481, 35 N. W. 219.

The State contends that an entry with the intent to steal is an unlawful entry and satisfies the requirement that the entry be willful and malicious. Although there is authority to the contrary, this appears to be the better rule where the requirement of a breaking has been eliminated. See, McCreary v. State, 25 Ariz. 1, 212 P. 336; People v. Sears, 62 Cal. 2d 737, 44 Cal. Rptr. 330, 401 P. 2d 938; People v. Schneller, 69 Ill. App. 2d 50, 216 N. E. 2d 510; State v. Skillings, 98 N. H. 203, 97 A. 2d 202; State v. Schaffer, 113 Ohio App. 125, 17 Ohio O. 2d

114, 177 N. E. 2d 534; Annotation, 93 A. L. R. 2d 531.

There was evidence in this case from which the jury could find the defendant intended to steal at the time he entered the store. The evidence was sufficient to sustain the conviction.

Before trial the defendant moved to suppress as evidence the items taken from the truck at the time he was apprehended outside the grocery store. This motion was overruled and the ruling is assigned as error.

The evidence shows that the defendant consented to the search. The fact that police officers were present at the time of the search and the defendant was not advised concerning his rights did not make the search illegal. State v. Forney, 181 Neb. 757, 150 N. W. 2d 915, 182 Neb. 802, 157 N. W. 2d 403. The motion to suppress was properly overruled.

It is unnecessary to consider the other assignments of error.

The judgment of the trial court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The defendant was obviously guilty of larceny. However, he was charged and convicted of an aggravated statutory form of burglary. The evidence was undisputed that he had permission to enter the building at the time and place to do custodial work, and that he performed such work.

Section 28-533, R. R. S. 1943, has two separate elements: First, the unlawful entry and second, the committing or attempting to commit one of the acts enumerated after entry. See Fredericksen v. Dickson, 148 Neb. 739, 29 N. W. 2d 334.

The rule is supportable that an unlawful or malicious intent at the time of entry may be inferred from the commission of a crime after entry, and make the entry unlawful. However, most of the cases supporting such a rule do not involve factually established privilege of entry, and have evidence only of the commission of un-

lawful acts after entry. They do not ordinarily involve situations where the defendant is licensed or privileged to enter and also performs the acts for which permission was given.

The majority holding here would permit a petty shoplifter, caught in the act, to be convicted of an aggravated statutory form of burglary. It seems apparent that the statute was not intended to suggest that a simple entry is presumed to be unlawful if the requisite intent is present. "The character or kind of entry is expressly qualified; it must be unlawful in itself, that is, trespassory, and without regard to the second element of the crime, the intent to steal." Smith v. State, 362 P. 2d 1071, 93 A. L. R. 2d 525 (Alaska 1961).

Aggravated burglary sanctions ought not to be imposed upon one who enters a building lawfully by right or consent. Modern penal provisions as to burglary specifically except situations where the premises are at the time open to the public or the actor is licensed or privileged to enter. See American Law Institute, Model Penal Code, § 221.1, Burglary.

The language of section 28-533, R. R. S. 1943, is only typical of the archaic and confused state of our present criminal code. For example, section 28-535, R. R. S. 1943, still authorizes imprisonment in the "dungeon of the jail." Revision is long overdue.

STATE OF NEBRASKA EX REL. LOREN MORRIS, APPELLEE, V. FRANK MARSH, APPELLANT, IMPLEADED WITH CLARENCE A. H. MEYER, APPELLEE.

162 N. W. 2d 262

Filed October 21, 1968. No. 37128.

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

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

Ray C. Simmons and John A. Wagoner, for appellee Morris.

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

PER CURIAM.

On September 16, 1968, the district court entered its peremptory writ of mandamus to Frank Marsh, Secretary of State, commanding him to take the necessary steps to place on the ballot in the November 5, 1968, Nebraska general election, the initiative petition proposal seeking a constitutional amendment prohibiting the State of Nebraska from levying an income tax for state purposes, and requiring him to accept and file the initiative petition therefor, and to take the other actions required by the Constitution of the State of Nebraska and Nebraska statutory provisions to assure that said initiative proposal be placed on the ballot.

The matter was advanced for hearing on the docket of this court and was argued and submitted on October 16, 1968.

Now on this 21st day of October 1968, the order of the district court that peremptory writ of mandamus to the Secretary of State be issued and writ allowed is affirmed. Written opinion to be filed on a later date.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority ruling herein. When the written opinion is filed, I will elaborate on the reasons for my position. For the present, I state that to hold as the majority do is to abort the provisions of section 32-704, R. R. S. 1943. I would dismiss the action for failure to file an itemized verified statement of contributions and expenses within a reasonable time, as required by that statute. I am also satisfied that the

case should be dismissed on its merits. A necessarily limited review of the law applicable convinces me that a sufficient number of valid objections were made by the Secretary of State to invalidate the petitions.

NEWTON, J., joins in this dissent.

CLARA SIEMSEN, APPELLANT, V. SKY HARBOR AIR SERVICE, INC., APPELLEE.
161 N. W. 2d 867

Filed October 25, 1968. No. 36894.

Negligence. Negligence is a failure to do what a reasonable and prudent person would have done under the circumstances or doing what a reasonable and prudent person would not have done under the circumstances.

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

Marchetti & Samson, for appellant.

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

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

BOSLAUGH, J.

This is an action for damages for personal injuries brought by Clara Siemsen against Sky Harbor Air Service, Inc. The trial court sustained the defendant's motion to dismiss made at the close of the plaintiff's evidence. The plaintiff's motion for new trial was overruled and she has appealed.

The plaintiff has been a registered nurse for more than 35 years. In April 1964, the plaintiff was employed to attend a heart patient who was to be flown to Omaha, Nebraska, from New Orleans, Louisiana, in one of the defendant's airplanes. The plaintiff does not contend that she was an employee of the defendant.

The airplane which the defendant furnished for this trip was a small passenger plane. The seats behind the pilot had been removed and an arrangement made so that the patient could lie down during the trip. On the trip to Omaha the plaintiff sat in one of the seats on the other side of the plane so that she could attend the patient during the flight.

The surface of the pad on which the patient lay during the flight was approximately 16 inches above the floor. The patient's head was located just behind the pilot's seat and a little forward of the plaintiff's seat. The plaintiff's seat faced forward and could be moved to the front or the rear, but could not be turned to the side.

Before taking off, the pilot directed the passengers to fasten their seat belts. The plaintiff fastened her seat belt and remained seated during the flight, but loosened the belt after the plane was in the air. The patient required constant attention during the flight which required the plaintiff to reach toward the patient and twist her body. The plaintiff noticed a "pulling" sensation in her lower back during the flight and developed an ache by the time she arrived in Omaha. Her condition became worse during the next few days and she was hospitalized on the fourth day. She was found to have a herniated vertebral disk, and a laminectomy was performed 2 weeks later. The attending physician testified that it was his opinion that the twisting of the plaintiff's body while she was seated in the airplane with the belt tightened was a competent producing cause of her injuries.

The plaintiff's theory of the case is that the defendant is a common carrier and that she was injured as a result of the defendant's negligence. Negligence is a failure to do what a reasonable and prudent person would have done under the circumstances or doing what a reasonable and prudent person would not have done under the circumstances. Farmer v. S.M.S. Trucking Co., 180 Neb. 779, 145 N. W. 2d 922.

The petition alleged that the defendant was negligent

in failing to provide the plaintiff with a "safe instrumentality" in which to practice her profession. The plaintiff's contention is that the defendant should have provided her with a seat which faced the patient or one that could be turned so as to face the patient.

There is no evidence that the plaintiff's seat or any other part of the airplane was defective, that it was customary to equip airplanes with seats which can be turned to the side, or that it was improper to use an airplane without such equipment for ambulance purposes. The plaintiff's attempt to prove that the defendant had another airplane with such equipment would not establish that the airplane furnished was not properly equipped. The evidence does not show that the defendant should have anticipated that the plaintiff would be injured by attending the patient while seated in the airplane.

The trial court found that the evidence was insufficient to sustain a finding of any negligence on the part of the defendant. This finding was correct, and the motion to dismiss was properly sustained. It is unnecessary to determine whether the evidence established that the defendant was a common carrier or to consider the other assignments of error.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARY IONE RANDOLPH, APPELLANT.

162 N. W. 2d 123

Filed October 25, 1968. No. 36925.

1. **Trial.** A special instruction to the jury on a particular phase of the issues is ordinarily not required without a request.
2. **Criminal Law: Pardons and Paroles.** Persons convicted of murder, treason, or forcible rape belong to a class that section 29-2217, R. R. S. 1943, excludes from eligibility for probation.

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

John J. Respeliers and Edmund McGinn, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and KOKJER and ACH, District Judges.

SMITH, J.

Upon conviction for second degree murder defendant was sentenced to 10 years' imprisonment. For error on appeal she assigns a jury instruction and the district court's refusal to place her on probation.

Jury instruction No. 9 on criminal intent concluded as follows: "If the State has failed to establish * * * that the defendant's conduct was purposeful rather than accidental, your verdict will be 'not guilty.'" Defendant contends that the court ought to have expanded the language relating to accident. She requested no instruction. A special instruction to the jury on a particular phase of the issues is ordinarily not required without a request. Rains v. State, 173 Neb. 586, 114 N. W. 2d 399. Instruction No. 9 was not erroneous.

The district court reluctantly denied probation on the single ground of statutory ineligibility. Section 29-2217, R. R. S. 1943, directs the court to investigate every person convicted of any crime, except murder, treason, or forcible rape. If "such" judge, considering probation criteria, has the opinion that the accused will refrain from criminal acts, the court may order probation. § 29-2218, R. R. S. 1943. The parties argue about the meaning of the sections. According to defendant, doubts should be resolved in her favor because of an inherent judicial power rooted in common law.

The source of judicial power over the probation process was considered in: Ex parte United States, 242 U. S. 27, 37 S. Ct. 72, 61 L. Ed. 129; State v. Valrand,

103 N. H. 518, 176 A. 2d 189; State v. Johnson, 42 N. J. 146, 199 A. 2d 809; Dept. Justice, Attorney General's Survey of Release Procedures, Vol. II Probation, pp. 3 to 21 (1939); and Grinnell, "The Common Law History of Probation," 32 J. Crim. L. & Cr. 15 (1941), reprinted in 45 Mass. L. Q. 70. Judicial authority and the meaning of a probation statute similar in important respects to sections 29-2217 and 29-2218, R. R. S. 1943, were discussed in Casper v. State, 100 Neb. 367, 160 N. W. 92. Casper upon conviction of larceny from the person had been placed on probation in district court. This court in reviewing the judgment said:

"It is urged that the court was without authority * * *. The act * * * does not apply to persons convicted of certain crimes * * *. Among these is '* * * larceny * * * (from) the person.' We find no other section * * * conferring such power * * *. We are reluctant to reverse the order * * *, but feel compelled to obey the statute. The facts justified the order, if the law did not prohibit * * * such clemency * * * in a case of this kind."

Defendant belongs to a class that the Legislature has excluded from eligibility for probation. The judgment is affirmed.

AFFIRMED.

RICHARD MILLER, APPELLANT, V. ALLEN BUDDY MOELLER, APPELLEE, REVIVED IN NAME OF MARGARET I. MOELLER, SPECIAL ADMINISTRATRIX OF THE ESTATE OF ALLEN BUDDY MOELLER, DECEASED, APPELLEE.

162 N. W. 2d 224

Filed November 1, 1968. No. 36722.

1. **Automobiles: Negligence.** A motorist owes a duty of reasonable care to a pedestrian who is crossing a street at a point not a regular crossing.
2. ———: ———. A pedestrian crossing at a regular crosswalk with the right-of-way has a right, until he has notice or knowl-

edge to the contrary, to assume that others will respect his right-of-way.

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

Henry C. Rosenthal, Jr., and Schrempp, Rosenthal, McLane & Bruckner, for appellant.

Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellee.

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

SMITH, J.

This personal injury claim arose from a car-pedestrian collision. At the close of plaintiff's evidence-in-chief before a jury the claim was dismissed on motion for insufficient evidence. Plaintiff appeals.

The collision occurred at approximately 11:20 p.m., October 7, 1964, on an east-west street, L, which intersected a north-south street, Twenty-fourth, in Omaha, Nebraska. A north-south crosswalk measured 20½ feet from the west curb line of Twenty-fourth Street westward to a painted strip 1 foot wide. The curb or north lane of two for westbound traffic was 11⅔ feet wide.

Statements of the motorist, Allen Buddy Moeller, now deceased, follow: Prior to the collision he was turning his 1964 Pontiac from a north course on Twenty-fourth Street to a west course on L Street. Near the end of the turn he for the first time saw plaintiff, who was stepping off the north curb 6 feet away. Plaintiff walked 5 feet south to a location 2 feet in front of Allen's right headlight and 18 feet west of the crosswalk. When the Pontiac struck plaintiff its speed was 5 miles an hour which carried it 10 feet beyond the impact. It stopped on a heading several degrees north of west and astraddle the dividing line between the westbound lanes. Plaintiff lay approximately 5⅓ feet away. Knocked in the stomach, he had fallen backward and northwest.

The scene after the collision is also described in police photographs and testimony of police officers. The Pontiac was not damaged. Its rear wheels were almost touching the east edge of the painted strip that marked the west boundary of the crosswalk. Hamburgers and French fried potatoes were located in an area 25 feet west of the crosswalk and near the north curb. Plaintiff's body lay in the south half of the north westbound lane, the line from head to foot running northeast. A witness who was not a policeman saw plaintiff's body against the north curb, the line from head to foot running west.

Plaintiff, a retiree age 63, had visited the Pheasant Bar on the day of the collision. A pocket billiards table, fellowship, and 4 glasses of draught beer had kept him there from 4:20 p.m to 11 p.m. Next he stopped 2 blocks north at Kinsella's Bar, which his son-in-law owned. It was located on the west side of Twenty-fourth Street a fractional block north of L Street. After a momentary stay plaintiff walked to Marlow's Cafe located on the east side of Twenty-fourth Street a half block south of L Street. He departed 10 minutes later with two hamburgers and French fried potatoes for Kinsella's Bar. The period from the departure to his admission to Douglas County Hospital was wiped out of his memory.

A general physician, Dr. John J. O'Hearn, examined plaintiff at Douglas County Hospital on the night of the collision. Dr. O'Hearn noted a laceration over the left eye, bruises on the left side of the head, and a fracture of the right ischium, a bone located in the pelvic region. Plaintiff was confused but rational. He had sustained a cerebral concussion, and retrograde amnesia is often a symptom of the injury.

A motorist owes a duty of reasonable care to a pedestrian who is crossing a street at a point not a regular crossing. Nisi v. Checker Cab Co., 171 Neb. 49, 105 N. W. 2d 523. A pedestrian crossing at a regular crosswalk with the right-of-way has a right, until he has notice or

knowledge to the contrary, to assume that others will respect his right-of-way. Zawada v. Anderson, 181 Neb. 467, 149 N. W. 2d 329.

Allen's negligence and plaintiff's contributory negligence, an affirmative defense, were issues of fact for the jury. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

WILLIAM SULLIVAN ET AL., APPELLANTS, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION OF THE METROPOLITAN CLASS, ET AL., APPELLEES.
162 N. W. 2d 227

Filed November 1, 1968. No. 36886.

1. **Municipal Corporations: Injunction.** Where an attempted annexation of territory to a municipal corporation is illegal, injunction is a proper remedy, and resort to a court of equity is proper either to prevent consummation of the annexation or, if it has been completed, to have the proceedings declared null and void.
2. **Municipal Corporations: Parties.** Where a person has a personal, pecuniary, and legal interest which is adversely affected by an annexation ordinance, he has standing to contest the validity of the ordinance.
3. **Municipal Corporations: Statutes.** Annexing of territory by a metropolitan city, pursuant to section 14-117, R. R. S. 1943, is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the annexation thereof. In doing so, it is not for the courts to determine what portions may be properly annexed, for the fixing of boundary lines under this authority is a legislative act.
4. **Municipal Corporations: Zoning.** The use of land for agricultural purposes does not necessarily mean it is rural in character. It is the nature of its location as well as its use which determines whether or not it is rural or urban in character.

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

Fitzgerald, Brown, Leahy, McGill & Strom, Stephen T. McGill, and William J. Brennan, Jr., for appellants.

Edward M. Stein, for appellees.

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

SPENCER, J.

This action seeks to determine the validity of ordinance No. 23304 of the city of Omaha, annexing an irregular tract of land abutting the city on the southwest. The trial court determined the ordinance to be a legal, valid, and enforceable ordinance, and appellants perfected this appeal.

The area annexed comprises 400.4 acres, of which 312 acres is state right-of-way extending 2.74 miles along Interstate Highway No. 80; 62.5 acres of Union Pacific Railroad Company right-of-way; and 25.9 acres of other land, of which 15.09 acres were owned and used as a plant site by the International Paper Company. The approximately 10 acres remaining were leased for agricultural purposes at the time the ordinance became effective, had no improvements of any nature, and had not been subdivided or platted.

The appellants herein do not live in or own property in any portion of the area being annexed. They own property which was approximately 4½ miles from the city limits previous to the annexation, but is within the 3-mile zoning area of the city after annexation.

Appellees contend that appellants are not real parties in interest and have no standing to bring this action. The issue is one of first impression in this jurisdiction, and so far as we are able to determine there are no decisions in other jurisdictions on this precise point. The only authority cited by appellees is Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490, in which we said: " 'Where an attempted annexation of territory to a municipal corporation is illegal, injunction is a proper remedy, and resort to a court of equity is proper either to prevent consummation of the annexation or, if it has been completed, to have the proceedings declared null and

void * * *. A suit to obtain such relief * * * may be entertained on suit of a municipality, or at the instance of the voters or property owners in the territory sought to be annexed.' "

It must be conceded that the extension of the 3-mile limit of the city of Omaha over appellants' land does subject their property to the regulatory power of the city in several particulars. This creates a personal, pecuniary, and legal interest in the annexation ordinance. Obviously appellants may be aggrieved persons when they are included within a zoning area without their consent. Is this sufficient to give them standing to maintain an action to determine the legality of the ordinance? We hold that it is. We hold that the enumeration of real parties in interest in Wagner v. City of Omaha, *supra,* is not exclusive. Where a person has a personal, pecuniary, and legal interest which is adversely affected by an annexation ordinance, he has standing to contest the validity of the ordinance.

The main thrust of appellants' argument is two-fold: First, there is no authority for annexation of a highway right-of-way without the annexation of the adjoining land; and, second, that a portion of the area annexed is agricultural lands, rural in character. The burden is on one who attacks an ordinance, valid on its face and enacted under reasonable authority, to prove facts to establish its invalidity. Bierschenk v. City of Omaha, 178 Neb. 715, 135 N. W. 2d 12.

The annexation herein ends on the south at Q Street and Interstate Highway No. 80. The portion of the annexation from L Street to Q Street is confined to the state right-of-way embracing Interstate Highway No. 80. This area at the time of the annexation was bounded on the east and the west by agricultural lands, although a substantial residential development exists to the west of the strip being farmed.

Section 14-117, R. R. S. 1943, so far as material herein, provides as follows: "The corporate limits of any

city of the metropolitan class shall be fixed and determined by the council of such city by ordinance. The city council of any metropolitan city may at any time extend the corporate limits of such city over any lands, lots, tracts, street or highway, such distance as may be deemed proper in any direction, * * *. This grant of power shall not be construed as conferring power upon the council to extend the limits of a metropolitan city over any agricultural lands which are rural in character." This statute specifically permits a city to extend its corporate limits "over any * * * highway." We find the area from L Street to Q Street sufficiently joins the city so that it could properly be included in the annexation, provided that the area is of such character that the city had authority to include it.

Annexing of territory by a metropolitan city, pursuant to section 14-117, R. R. S. 1943, is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the annexation thereof. In doing so, it is not for the courts to determine what portions may be properly annexed, for the fixing of boundary lines under this authority is a legislative act. Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490.

This brings us to the crux of the problem. Does the annexation involve agricultural land rural in character? The use of land for agricultural purposes does not necessarily mean it is rural in character. It is the nature of its location as well as its use which determines whether it is rural or urban in character. In Wagner v. City of Omaha, *supra*, we said: " 'Rural' means of or pertaining to the country as distinguished from a city or town, whereas 'urban' means of or belonging to a city or town. In many of the cities and villages throughout the state there are tracts which are only partially developed as residential areas wherein substantial parts of the land are used for agricultural purposes but which tracts are, in fact, urban in character. It was clearly not the inten-

tion of the Legislature, if such an area develops outside the boundaries of a metropolitan city, to prevent such city from annexing it. It was, however, the purpose of the act to prevent annexation by such city of agricultural areas which are rural in character."

Exhibits 1 and 2 are aerial maps of the southwest portion of the city of Omaha, embracing the area being annexed. The evidence indicates that portions of the right-of-way included in the annexation are bound on two sides by agricultural land which is not included. The entire area being annexed goes through the heart of a rapidly developing residential and industrial area. On the facts of this case we cannot say that the appellants have met their burden to prove that the right-of-way included in the annexation was essentially rural in character.

The evidence is undisputed that at the time ordinance No. 23304 was adopted 10 acres embraced in the area annexed were leased for agricultural purposes and would be classified as agricultural lands. The land has never been subdivided or platted, has no improvements of any nature, and is being farmed. It is, however, contiguous to a highly developing industrial area. For all intents and purposes this tract, while agricultural, is essentially urban in character.

We do not think appellants have met their burden herein. It follows the annexation is valid, and the judgment herein should be and is affirmed.

AFFIRMED.

VELMA MERCER, APPELLANT AND CROSS-APPELLEE, V. ROBERT E. MERCER, APPELLEE AND CROSS-APPELLANT.
162 N. W. 2d 230

Filed November 1, 1968. No. 36928.

1. **Divorce.** Any unjustifiable conduct which destroys the legitimate ends and objects of matrimony constitutes extreme cruelty.

2. ———. A divorce from bed and board is in the nature of a conditional decree, leaving the legal status of the parties unchanged in many respects but relieving both parties from all obligations and rights to cohabitation while making the necessary adjustments of their property to assure support during the continuance of their relationship. It is a complete and permanent separation of the parties without a legal dissolution of the marriage.
3. ———. Where one party has prayed for a divorce from bed and board and has adduced sufficient proof duly corroborated in support thereof, and in the same action the other party has prayed for an absolute divorce but has not adduced sufficient proof duly corroborated in support thereof, the trial court has no discretion in granting the remedy but must grant the divorce from bed and board as prayed.
4. ———. In a suit for a divorce from bed and board the court will adjust the property rights between the parties only to the extent necessary to provide for the separate maintenance of the party entitled thereto.

Appeal from the district court for Lancaster County: BARTLETT E. BOYLES, Judge. Affirmed in part, and in part reversed and remanded with directions.

Nelson, Harding, Leonard & Tate and Richard H. Williams, for appellant.

Perry, Perry, Sweet & Witthoff, for appellee.

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

BOSLAUGH, J.

The plaintiff, Velma Mercer, commenced this action to obtain a limited divorce from the defendant, Robert E. Mercer. By cross-petition the defendant requested an absolute divorce. The trial court found against the parties and dismissed both the petition and the cross-petition. Both parties filed motions for new trial which were overruled. The plaintiff has appealed and the defendant has cross-appealed.

The evidence shows that the parties were married in 1945. They had five children, four of whom are living

at home. The defendant owns and operates an automobile dealership at Hickman, Nebraska.

The parties commenced having difficulties in November 1966. The plaintiff testified that the defendant became nervous, irritable, and very critical of the plaintiff; that the defendant told her that he did not love her any more and that she was mentally inferior to him; that he began staying away from the family home until late at night; and that on their wedding anniversary, April 11, 1967, the defendant asked the plaintiff for a divorce. A trial separation took place in January 1967, and the defendant was away from home again in May 1967. The parties finally separated in August 1967, and this action was filed several days later. There was substantial corroboration of the plaintiff's testimony.

The defendant testified that he was harassed and nagged by the plaintiff and that she interfered with his disciplining of the children. The defendant also testified about alleged unjust accusations made by the plaintiff, but there was no substantial corroboration of his testimony.

The statutes of this state provide that a divorce from bed and board may be decreed for the cause of extreme cruelty. § 42-302, R. R. S. 1943. Any unjustifiable conduct which destroys the legitimate ends and objects of matrimony constitutes extreme cruelty. Scholz v. Scholz, 172 Neb. 184, 109 N. W. 2d 156.

A divorce from bed and board is in the nature of a conditional decree, leaving the legal status of the parties unchanged in many respects but relieving both parties from all obligations and rights to cohabitation while making the necessary adjustments of their property to assure support during the continuance of the relationship. Scholz v. Scholz, *supra*. It is a complete and permanent separation of the parties without a legal dissolution of the marriage. Kehr v. Kehr, 173 Neb. 532, 114 N. W. 2d 26, 6 A. L. R. 3d 463.

Where one party has prayed for a divorce from bed

and board and has adduced sufficient proof duly corroborated in support thereof, and in the same action the other party has prayed for an absolute divorce but has not adduced sufficient proof duly corroborated in support thereof, the trial court has no discretion in granting the remedy but must grant the divorce from bed and board as prayed. Shomaker v. Shomaker, 166 Neb. 164, 88 N. W. 2d 221. See, also, Yost v. Yost, 143 Neb. 80, 8 N. W. 2d 686; Pick v. Pick, 99 Neb. 433, 156 N. W. 769.

The trial court refused to grant the plaintiff any relief but was of the opinion that the plaintiff's evidence was sufficient to establish a prima facie case. From our review of the record we conclude that the evidence is sufficient to entitle the plaintiff to the relief requested.

Although the court has the power to adjust all property rights between the parties in a suit for divorce from bed and board, it will do so only to the extent necessary to provide for the separate maintenance of the party entitled thereto. Sanford v. Sanford, 173 Neb. 835, 115 N. W. 2d 451. This rule is particularly applicable where, as in this case, there appears to be some possibility of an eventual reconciliation of the parties.

An appraiser appointed by the trial court determined that the defendant had a net worth of $124,532.22 and an average net annual income from his business of approximately $16,000. The plaintiff had been employed as a nurse's aid with take-home pay of approximately $180 per month, but at the time of the trial this employment had been terminated for medical reasons.

The plaintiff has continued to live in the family home with the children during the litigation. During the pendency of the appeal the parties stipulated that defendant would pay the sum of $140 per week to the plaintiff plus all mortgage payments on the family residence, including interest, taxes, and insurance, and maintain Blue Cross insurance. We think this arrangement should be continued until the further order of the court.

That part of the judgment of the district court dismissing the petition of the plaintiff is reversed and the cause remanded with directions to enter a judgment granting the plaintiff a limited divorce in conformity with this opinion. All costs of the action, including a fee in the amount of $1,500 for the services of the plaintiff's attorney in the district court and in this court, are taxed to the defendant.

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

IN RE FREEHOLDERS PETITION OF WILBERT H. AND SELMA L. SCHWANEBECK.

WILBERT H. SCHWANEBECK ET AL., APPELLANTS, V. EDWARD BRUNKEN ET AL., APPELLEES.

162 N. W. 2d 225

Filed November 1, 1968. No. 36951.

Schools and School Districts. A school district maintaining nonaccredited high school grades is a nonaccredited high school district within the meaning of section 79-403 (2), R. R. S. 1943, which concerns the translocation of land upon petition.

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

Moyer & Moyer, for appellants.

McFadden & Kirby, for appellees.

Heard before WHITE, C. J., BOSLAUGH, SMITH, and MCCOWN, JJ., and HUBKA, ACH, and GARROTTO, District Judges.

SMITH, J.

An administrative board denied a petition of Wilbert H. Schwanebeck and wife for translocation of their land from School District No. 33 of Platte County. The district court dismissed the petition on appeal, and peti-

tioners have appealed to this court. The question is whether district No. 33 was a nonaccredited high school district within the meaning of a statutory requirement for translocation.

District No. 33 in February 1967 was a nonaccredited high school district, Class II. On March 3 at a special meeting and election held by the district the following question was submitted to the voters: "Shall * * * (the district) discontinue its high school and close the same commencing with the school year 1967 to 1968, and thereupon become a Class I District * * *?" The affirmative of the question carried. The petition, filed March 31, was denied by the administrative board on May 17. The district was still maintaining nonaccredited high school grades.

Class I includes any district that maintains only elementary grades under one board. The symbol Class II includes any district that has 1,000 inhabitants or less and that maintains both elementary and high school grades under one board. § 79-102 (1) and (2), R. R. S. 1943. Schwanebecks petitioned under section 79-403 (2), R. R. S. 1943, which directs translocation upon satisfaction of certain requirements. One is that petitioner's land must be located in a nonaccredited high school district.

The argument concerns the effect of the election which district No. 33 held under the following authority: "If a Class II district, by a vote * * * at * * * special meeting, shall decide to discontinue the high school and close the same, the district shall thereupon become a Class I district. At such meeting * * * (officers) shall be elected * * *. After such change becomes effective, the district and its officers shall have the powers and be governed by the provisions of law applicable to Class I school districts." § 79-701 (3), R. R. S. 1943.

We read the phrase "nonaccredited high school district" in a context of requirements for translocation of land upon petition. District No. 33, whatever its class or other status, was maintaining nonaccredited high

school grades. It was therefore a nonaccredited high school district within the meaning of section 79-403 (2), R. R. S. 1943. Objectors tacitly concede that Schwanebecks satisfied all other statutory requirements. Translocation of the land ought to have been ordered.

The judgment of the district court is reversed and the cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA EX REL. LOREN MORRIS, APPELLEE, V. FRANK MARSH, APPELLANT, IMPLEADED WITH CLARENCE A. H. MEYER, APPELLEE.

162 N. W. 2d 262

Filed November 8, 1968. No. 37128.

1. **Constitutional Law: Initiative and Referendum.** Constitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed to make effective the powers reserved.
2. **Constitutional Law: Statutes.** It is clearly the duty of this court to give a statute an interpretation which meets constitutional requirements if it can be reasonably done.
3. **Initiative and Referendum: Time.** A requirement that an initiated measure be submitted at the first general election held not less than 4 months after filing of the petition is satisfied by a filing on July 5 for a general election to be held November 5.
4. **Initiative and Referendum: Affidavits.** Where the circulator of an initiative petition has signed and sworn to a properly executed statutory form of affidavit that he or she is a legal and qualified voter of the State of Nebraska, there is a presumption that he or she is a qualified elector in the absence of affirmative evidence to the contrary.
5. ———: ———. Where there is no evidence of fraud or irregularity on the part of the circulator in his circulation of the initiative petitions, evidence that he, as an individual, signed two other petition forms for the same measure does not destroy the presumption of validity of his affidavit as a circulator nor

justify the disqualification of concededly valid signatures obtained by him as circulator.

6. **Constitutional Law: Initiative and Referendum: Statutes.** The power of initiative must be liberally construed to promote the democratic process and the right of initiative constitutionally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise.
7. **Initiative and Referendum: Statutes.** On an otherwise validly executed initiative petition form, where the actual and exact date on which the signature of an elector was signed is readily apparent, the omission or faulty rendition of the date should be treated as a clerical or technical error and constitutes substantial compliance with the statute.
8. **Initiative and Referendum: Customs and Usages.** Ditto marks have a clear and definite meaning and their use on an initiative petition cannot be held objectionable.
9. **Initiative and Referendum: Statutes.** A substantial compliance with section 32-704, R. R. S. 1943, in filing the itemized verified statement of contributions and expenditures is all that is required.

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

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

Ray C. Simmons and John A. Wagoner, for appellee Morris.

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

MCCOWN, J.

This is a mandamus action to require the Secretary of State to accept and file an initiative petition seeking a constitutional amendment prohibiting the State of Nebraska from levying an income tax for state purposes.

On February 7, 1968, a copy of the form of initiative petition to be used, together with a sworn statement as to the names of persons or corporations sponsoring the petition or contributing or pledging contributions, was filed with the Secretary of State. There is no con-

tention that either of these documents were not in compliance with statutory requirements.

On July 3, 1968, petitions bearing the signatures of 57,521 electors were filed with the Secretary of State. On July 5, 1968, additional petition forms were filed. The number of valid signatures required was 48,640. No issue is raised as to the constitutionally required distribution among counties.

On July 3, 1968, a verified statement as to persons or corporations contributing or receiving money or other thing of value was filed with the petition forms. Supplemental itemized verified statements were filed on August 12 and August 28, 1968. On July 26, 1968, the Secretary of State issued his certification in which he found that less than 48,640 of the signatures were acceptable or valid, and that the person or persons presenting such petitions failed to file a satisfactory itemized verified statement as provided by section 32-704, R. R. S. 1943. He then found the initiative petition to be insufficient and refused to certify the proposed amendment to the ballot for the 1968 general election.

This action was filed in the district court for Lancaster County on August 5, 1968. Peremptory writ of mandamus was issued on September 16, 1968, requiring the respondent Secretary of State to accept and file the initiative petition and to take the necessary steps to place the issue on the ballot for the November 5, 1968, general election. On appeal to this court, the matter was advanced for hearing and on October 21, 1968, Per Curiam judgment was entered affirming the judgment of the district court, with written opinion to follow.

The evidence and stipulations at the hearings in the district court indicate that the respondent Secretary of State rejected some 14,000 signatures, approximately 25 percent of those filed. It is conceded by the respondent that 43,964 valid signatures were filed on July 3, 1968 before 5 p.m. It is also conceded that there were 2,494 signatures contained on petitions filed after 5 p.m.

on July 3, 1968, and on July 5, 1968, which would have been valid except for the "late filing."

The constitutional provisions dealing with the initiative are basic. Article III, section 1, of the Constitution of Nebraska, provides in part: "The people reserve for themselves, however, the power to propose laws, and amendments to the constitution, and to enact or reject the same at the polls, independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature."

Article III, section 2, Constitution of Nebraska, provides in part: "The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. * * * The constitutional limitations as to the scope and subject matter of statutes enacted by the Legislature shall apply to those enacted by the initiative."

Article III, section 4, Constitution of Nebraska, provides in part: "The method of submitting and adopting amendments to the Constitution provided by this section shall be supplementary to the method prescribed in the article of this Constitution, entitled, 'Amendments' and the latter shall in no case be construed to conflict herewith. The provisions with respect to the initiative and referendum shall be self-executing, but legislation may be enacted to facilitate their operation."

The inter-action and effect of these constitutional provisions upon statutes intended to "facilitate their operation" has been considered many times. In Klosterman v. Marsh, 180 Neb. 506, 143 N. W. 2d 744, we said: "Constitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed to make effective the powers reserved. The case of State ex rel. Ayres v. Amsberry, 104 Neb. 273, 177 N. W. 179, although later vacated on procedural grounds stated: 'The amendment under consideration

reserves to the people the right to act in the capacity of legislators. The presumption should be in favor of the validity and legality of their act. The law should be construed, if possible, so as to prevent absurdity and hardship and so as to favor public convenience.' The court later said: 'Any legislation which would hamper or render ineffective the power reserved to the people would be unconstitutional.' "

We also said in State ex rel. Ayres v. Amsberry, 104 Neb. 273, 177 N. W. 179: "Laws to facilitate the operation of the amendment must be reasonable, so as not to unnecessarily obstruct or impede the operation of the law." It is clearly the duty of this court to give a statute an interpretation which meets constitutional requirements if it can be reasonably done. State ex rel. Winter v. Swanson, 138 Neb. 597, 294 N. W. 200.

Relator filed pages of the initiative petition on July 5, 1968, to support a submission at the general election scheduled for November 5. Respondent ruled that the filing was untimely under Article III, section 2, Constitution of Nebraska, which reads in part: "* * * when thus signed the petition shall be filed with the Secretary of State, who shall submit the measure * * * at the first general election held not less than four months after such petition shall have been filed."

The district court concluded that the filing on July 5 was timely for submission on November 5. Discovering no authoritative precedent, he took the position of Pafford v. Hall, 217 Ark. 734, 233 S. W. 2d 72, which construed the following provision: "* * * Initiative petitions * * * shall be filed * * * not less than four months before the election at which they are to be voted upon * * *." Ark. Const., amend. 7. Pafford applied the general rule followed in most United States jurisdictions, the court saying: "* * * This election is to be held on November 7, and it is argued that the filing of the petition on July 7 was one day too late. That result can be reached only by excluding both the first and the

last day * * * we have consistently held that only one of the two days need be excluded."

Nebraska analogies trend in opposite directions. The minority method of computation was approved for determination of the effective date of legislation in McGinn v. State, 46 Neb. 427, 65 N. W. 46; and Summerville v. North Platte Valley Weather Control Dist., 170 Neb 46, 101 N. W. 2d 748. See, Dillon v. Gloss, 256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994; In re Donaldson, 138 F. 2d 419; Mushel v. Board of County Commissioners of Benton County, 152 Minn. 266, 188 N. W. 555; generally 98 A. L. R. 2d 1331. Other Nebraska cases adopted the majority method. A requirement that certificates of nomination be filed at least 8 days before election was satisfied by a filing on October 31 for election on November 8. State v. Dewey, 73 Neb. 396, 102 N. W. 1015. A requirement for service of summons 3 days before trial was met by service on December 24 of summons returnable December 27, the trial date, in Messick v. Wigent, 37 Neb. 692, 56 N. W. 493. See, also, White v. German Ins. Co., 15 Neb. 660, 20 N. W. 30; Gurske v. Britt, 86 Neb. 312, 125 N. W. 539.

The fiction of an indivisible day is "a figurative recognition of the fact that people do not trouble themselves without reason about a nicer division of time." Burnet v. Willingham L. & T. Co., 282 U. S. 437, 51 S. Ct. 185, 75 L. Ed. 448. Measurement based on the fiction is approximate whether we exclude both or only one of the terminal days. Apart from the fiction, the deviation in this case was probably several hours, surely less than 24, out of 4 months. There is little or no dispute that in terms of a full day and an exact date, November 5 is a date exactly 4 months after July 5. The respondent attempts to read the language of the Constitution as requiring the election to be held *more* than 4 months after the filing of the petition, instead of "not *less* than 4 months." (Emphasis ours.) The district court's computation was correct.

We hold that a requirement that an initiated measure be submitted at the first general election held not less than 4 months after filing of the petition is satisfied by a filing on July 5 for a general election to be held November 5.

The respondent objected to and disqualified the pages of the petition and every signature thereon where the circulator of the particular pages did not sign his full Christian name to the verification or, if a woman, signed the verification with her husband's name preceded by her title. His theory was that a circulator is required to be an elector and there is no presumption to that effect unless he has signed his full Christian name as required for signers of a petition by a portion of section 32-713, R. S. Supp., 1967. That portion provides that an elector signing an initiative petition shall personally affix his surname and Christian name in full. W. C. Fitzwater and A. J. Treutler, as circulators, signed verification affidavits on the petitions circulated by them, using their initials rather than their full Christian names. There were 851 signatures disqualified by the respondent on this ground. Evidence in the district court established that the signatures of these circulators as signed were used and generally accepted in their home communities as their legal signatures.

A proviso of section 32-713, R. S. Supp., 1967, permits even the ordinary signer of a petition to use his generally accepted legal name in the community. It should be noted also that the verification affidavit signed by a circulator states under oath that he is a legal and qualified voter of the State of Nebraska. No such affidavit is required of an ordinary signer and the disqualification of a nonregistered elector is also specifically removed by a proviso of section 32-713, R. S. Supp., 1967, itself where the signing elector files with the petition an affidavit setting forth the fact that he is a qualified elector. Certainly the affidavit of the circulator meets that requirement.

The same statute, section 32-713, R. S. Supp., 1967, specifically provides: "Any person signing any name other than his own to any petition, or knowingly signing his name more than once for the same measure at one election, or who is not, at the time of signing or circulating the same, a legal voter and qualified to sign or circulate the same, or any person who shall falsely swear to any signature upon any such petition, or any officer or person willfully violating any provision of sections 32-702 to 32-713, shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the Nebraska Penal and Correctional Complex not exceeding two years, or by both such fine and imprisonment." In the light of such criminal sanctions and the specific constitutional provisions preserving the right of initiative, presumptions must be in favor of legality rather than illegality.

We hold that where the circulator of an initiative petition has signed and sworn to a properly executed statutory form of affidavit that he or she is a legal and qualified voter of the State of Nebraska, there is a presumption that he or she is a qualified elector in the absence of affirmative evidence to the contrary. This presumption does not disappear simply because he or she has not signed his or her full Christian name.

The district court validated the 851 signatures obtained by W. C. Fitzwater and A. J. Treutler and this action was clearly proper.

The district court limited its consideration to the signatures on the petitions circulated by Mr. Fitzwater and Mr. Treutler. There were 320 additional signatures on petitions which were rejected by respondent under the same objections, but as to which there was no specific testimony as to the legal name of the specific signing circulator. We, therefore, validate an additional 320 signatures which were not counted nor considered by the district court.

The respondent rejected all petitions circulated by one John Sims. These contained over 1,000 signatures, of which 755 were conceded by the respondent to be valid except for the fact that they were circulated and verified by John Sims. The basis for the challenge was that John Sims himself had signed two similar petition forms, one as a resident of Grand Island and the other as a resident of Omaha. These forms were circulated by others. The respondent contends that since Sims violated the law as a signer of other petitions, his sworn statement as a circulator of petitions should be regarded as false even though there is no evidence of fraud or irregularity on the part of Mr. Sims in his circulation of the petition. We cannot agree. Cases indicating that where there has been proven fraud in the obtaining of one or more petitions by a circulator, all petitions obtained by him should be disqualified are not applicable. As the district court found: "Whatever mistake he made as an individual signer should not taint the petitions circulated by him."

In Cobb v. Burress, 213 Ark. 177, 209 S. W. 2d 694 (1948), the court specifically rejected an argument such as the respondent makes here. In that case, the court refused to disqualify parts of a petition where there was no proof that those parts contained nongenuine signatures even where the alleged misconduct of the individual was as a circulator.

If presumptions are to be indulged in, the presumption ought to be that acts performed in the circulation of petitions are legal rather than fraudulent. See, State ex rel. Ayres v. Amsberry, *supra;* In re Initiative Petition No. 281, State Question No. 441 (Okl.), 434 P. 2d 941 (1967).

The respondent conceded that 755 of the signatures obtained by Mr. Sims were otherwise valid, but contends that they should be invalidated on a vague presumption that the sworn affidavit of the circulator is false. We see no justifiable reason to disfranchise elec-

tors in the exercise of their constitutionally reserved right of the initiative on such grounds.

Where there is no evidence of fraud or irregularity on the part of the circulator in his circulation of the initiative petitions, evidence that he, as an individual, signed two other petition forms for the same measure does not destroy the presumption of validity of his affidavit as a circulator nor justify the disqualification of concededly valid signatures obtained by him as circulator.

We confirm the action of the district court in validating 755 signatures obtained by John Sims as circulator.

The respondent also challenged signatures in which the address of the signer was a city or village which was not located in the county stated in the preamble of the petition page. There were 191 signatures appearing in Sarpy County petitions where the signer indicated an Omaha address. The theory of the objection is that Omaha is in Douglas County and a Douglas County resident cannot sign a Sarpy County petition. As the lower court found, it is a well-known fact of which the court can probably take judicial notice, that there are many who have Omaha post office addresses who actually live in Sarpy County. In any event, there was ample evidence adduced by the relator to establish this fact and there was no attempt to controvert that evidence. Neither was there any evidence that any signer of these petitions was not a resident of Sarpy County. We confirm the action of the district court in validating 191 Sarpy County signatures rejected by the respondent.

Two categories of objections made by the respondent relate to an incomplete or missing date opposite a particular signature, or to the date having been written by someone other than the signer. In practically every instance of an incomplete or missing date, the deficiency occurred on a signature and date line situated between two correctly stated and identical dates, and for the most part, the same circumstances were involved in the cases of the date having been written by someone

other than the signer. As the trial court found: "* * * the incomplete date followed, for example, June 3, 1968 and was itself followed by June 3, 1968, which would make it readily apparent that the missing or incomplete date was in fact June 3rd." The date of signing an initiative petition is obviously important because a signer must be an elector on that date. The problem of what presumptions shall apply in the construction of statutory provisions which are constitutionally permitted to "facilitate" the exercise of the initiative power reserved to the people has often been considered by the courts. As this court said in State ex rel. Ayres v. Amsberry, *supra;* "The amendment under consideration reserves to the people the right to act in the capacity of legislators. The presumption should be in favor of the validity and legality of their act. The law should be construed, if possible, so as to prevent absurdity and hardship and so as to favor public convenience."

The decisions almost universally hold that the power of initiative must be liberally construed to promote the democratic process and that the right of initiative constitutionally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to is exercise. Farley v. Healey, 62 Cal. Rptr. 26, 431 P. 2d 650 (1967); Cochran v. Black, 240 Ark. 393, 400 S. W. 2d 280 (1966); Potash v. Molik, 230 N. Y. Supp. 2d 544, 35 Misc. 2d 1 (1962).

Section 32-705, R. S. Supp., 1967, ends with the following language: "All signatures secured in a manner contrary to the provisions of sections 32-702 to 32-713 shall not be counted. Clerical and technical errors in a petition shall be disregarded if the forms herein prescribed are substantially followed."

The respondent argues that the statutorily prescribed forms are mandatory and inferentially that the language was intended to apply only to clerical and technical errors in the form of a petition and not to the manner of execution. We think the language of the

statute is definite and speaks for itself. The district court was correct in holding that the objection was a technical objection where the actual date of signing was readily apparent. It should be noted here also that in the verification of the circulator, required by section 32-705, R. S. Supp., 1967, the circulator must swear under oath to two specific facts. These are that each person whose name appears on the petition sheet personally signed the petition in the presence of the affiant, and that the date to the left of each signature is the correct date on which the signature was affixed to the petition. All other matters in the required verification are on belief.

On an otherwise validly executed initiative petition form, where the actual and exact date on which the signature of an elector was signed is readily apparent, the omission or faulty rendition of the date should be treated as a clerical or technical error and constitutes substantial compliance with the statute. See, State v. Several Parcels of Land, 78 Neb. 225, 110 N. W. 753; Potash v. Molik, *supra;* Haraway v. Armstrong, 95 Colo. 398, 36 P. 2d 456. The district court validated 804 signatures involving dates in this category. That action is affirmed.

The district court also validated 154 signatures involving addresses of signers where ditto marks were used for a part or all of the address, or where portions of the address were written by someone other than the signer. Ditto marks have a clear and definite meaning and their use on an initiative petition cannot be held objectionable. Thompson v. Vaughan, 192 Mich. 512. 159 N. W. 65; Halgren v. Welling, 91 Utah 16, 63 P. 2d 550; Dawson v. Meier (N. D.), 78 N. W. 2d 420. As to complete post office addresses see Bartling v. Wait, 96 Neb. 532, 148 N. W. 507. The action of the district court in validating these signatures is also affirmed.

At this point, the total number of signatures found to be valid is 49,533, which is in excess of the 48,640 re-

quired. Many categories of objections and challenges as to several thousand additional signatures remain. We find no necessity to consider these nor the issues raised in the relator's cross-appeal.

One final issue remains to be considered. The respondent contends that the statutory requirement that an itemized verified statement of contributions and expenses be filed at the time the initiative petition is presented for filing is mandatory and essential to the sufficiency of the petition. The argument is that the statute should be strictly construed to require not only that a statement be filed at the exact time specified, but that it must be full and complete in every detail at that time.

Section 32-704, R. R. S. 1943, provides in part: "Prior to obtaining any signatures to the petition, a copy of the form to be used shall be filed with the Secretary of State, together with a sworn statement containing the name or names of every person, corporation or association sponsoring the petition or contributing or pledging contribution of money or other things of value for the purpose of defraying the cost of the preparation, printing, or circulation thereof. Upon the presentation of such petition for filing, the Secretary of State shall determine its sufficiency. The person presenting the petition shall, at the same time, file with the Secretary of State an itemized verified statement containing the names and addresses of all persons, associations of persons, and corporations contributing money or other thing of value toward, and receiving money or other thing of value for the preparation, circulation, or printing thereof, showing the total amount contributed, pledged, or received by each."

We note first that no time limit nor any date for filing an initiative petition is specified by either the Constitution nor any statute. The right of initiative is not restricted to any particular time. When an initiative petition bearing sufficient valid signatures is filed with the Secretary of State, the Constitution requires him to sub-

mit the measure proposed at the first general election held not less than 4 months after such petition shall have been filed. The statute requires the Secretary of State to determine the sufficiency of the petition upon its presentation for filing. If a petition is sufficient, the only thing determined by the date of filing is the election at which it shall be submitted to the electors of the state.

Neither section 32-704, R. R. S. 1943, nor any other section of the statutes dealing with initiative petitions provide for any action to be taken by the Secretary of State in the event the itemized verified statement is not filed or is incomplete or unsatisfactory. It should also be noted that the requirement for filing the second verified statement follows, rather than precedes, the requirement that the Secretary of State shall determine the sufficiency of the petition.

The respondent relies heavily upon the case of State ex rel. Winter v. Swanson, *supra*. In that case this court held that the filing of a copy of the form of petition to be used and of the first sworn statement was mandatory. That case, however, involved a complete failure to file both the copy of the form of petition to be used and the preliminary sworn statement. In that case, this court stated: "It is clearly the duty of this court to give a statute an interpretation which meets constitutional requirements if it can be reasonably done." This court then stated that it was the intent of the Legislature that only information known to the relators at the time the form of petition was filed was contemplated as being required in the sworn statement.

In the case before us, there is no evidence whatever as to what information, in addition to that disclosed, was known to the affiant who made and filed the itemized verified statement on July 3, 1968. It is also tacitly conceded that the supplemental itemized verified statement filed on August 28, 1968, met every requirement of section 32-704, R. R .S. 1943, except as to the time of filing.

It would seem apparent that the purpose of the statutory provision with respect to the second verified statement provided for in section 32-704, R. R. S. 1943, was to make available to the public, in advance of the election, information as to what individuals or corporations had financially supported or benefited by the petition campaign and the amounts involved. August 28, 1968, was several weeks before the respondent was required to furnish election officials certified copies of ballot titles, and publish copies of titles and texts of the matters to be submitted.

The case of State v. Snell, 168 Or. 153, 121 P. 2d 930 (1942), we believe to be determinative of this issue. The Oregon Supreme Court held, under constitutional provisions almost identical with ours, that: "A substantial compliance with the statute in filing the statement of contributions and expenditures is all that is required." The court cited with approval both Nebraska cases of State ex rel. Ayres v. Amsberry, *supra,* and State ex rel. Winter v. Swanson, *supra,* and said with respect to an Oregon statute similar to ours, requiring the filing of statements of contributions and expenditures in connection with initiative or referendum petitions: "Accordingly, this court ought not to give it such construction as to make it a hindrance to and burden upon the exercise of the rights conferred by section 1 of Article 4 of the constitution."

It should be noted also that the Oregon statute specifically provided: "If such verified statement is not filed, as herein required, the secretary of state shall not place the measure petitioned for on the official ballot." Our statute has no provision of any kind as to the effect of failure to file.

The district court in the case at bar, while it found that the itemized financial statement submitted on July 3, 1968, at the time of filing of the petition, was not complete, nevertheless found that "with the supplemental statement filed on August 28, 1968, the Court finds these

statements contain the information known to the petitioners at the time of filing and constitute substantial compliance with the requirement." That finding was correct.

We hold that a substantial compliance with section 32-704, R. R. S. 1943, in filing the itemized verified statement of contributions and expenditures is all that is required.

The power to tax is essential to the continued existence of a state. A constitutional amendment which would destroy or completely emasculate that power might well be itself unconstitutional. That issue is not presently here.

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

AFFIRMED.

SPENCER, J., dissenting.

I join in the dissent of Newton, J., and personally dissent from the majority opinion herein for three reasons, each of which alone is sufficient to reverse the granting of mandamus herein: First, I do not believe that the initiative process may be used to limit the power of the legislative branch of government to provide for the proper financing of the state government; second, the petition herein failed to comply with the necessary procedure to permit the placing of this issue on the ballot; and, third, the petition filed does not contain a sufficient number of legal signatures to place the issue on the ballot.

The Enabling Act of April 19, 1864, requires: "That the constitution when formed shall be republican, and not repugnant to the constitution of the United States and the principles of the Declaration of Independence; * * *."

Essentially there are only three principle means of taxation adequate to support our state government: Taxation of property, income taxes, and sales taxes. The state has already been excluded from levying taxes on

property for the support of state government, so only income taxes and sales taxes remain. This immediately raises the question: If the income tax is eliminated, is the sales tax sufficient to sustain a republican form of government? I do not believe it is without raising the rate so high that it would be oppressively burdensome. In my judgment we have now reached the point where we must meet this issue. It is obvious that a republican form of government, as we understand it, cannot be maintained without adequate taxation. I therefore maintain, for the reasons cited by Newton, J., in his dissent, that to use the initiative procedure herein is violative of the restriction imposed upon us by the Enabling Act, and consequently is unconstitutional.

On the second point, section 32-704, R. R. S. 1943, provides in part: "The person presenting the petition *shall, at the same time,* file with the Secretary of State an itemized verified statement containing the names and addresses of all persons, associations of persons, and corporations contributing money or other thing of value toward, and receiving money or other thing of value for the preparation, circulation, or printing thereof, showing the total amount contributed, pledged, or received by each." (Italics supplied.)

The sponsor of the initiative petition herein on July 3, 1968, filed a statement which could not conceivably be considered in compliance with the law. The district court found it "was certainly not complete." Section 32-704, R. R. S. 1943, also provides for the filing of a preliminary itemized verified statement prior to the obtaining of any signatures on the petition. The case of State ex rel. Winter v. Swanson, 138 Neb. 597, 294 N. W. 200, dealt with this latter situation. That case held: "We think the constitutional provision authorizing the legislature to enact laws to facilitate the operation of the initiative power means that it may enact reasonable legislation to prevent fraud or to render intelligible the purpose of the proposed law or constitutional amend-

ment. See State v. Amsberry, 104 Neb. 273, 177 N. W. 179. Any legislative act which tends to insure a fair, intelligent, and impartial result on the part of the electorate may be said to facilitate the exercise of the initiative power. We believe the provisions of the act before us meet these requirements.

"The requirement that the form of the petition be filed with the secretary of state before the petitions were circulated is calculated to advise the electorate in advance as to the exact provisions of the proposal through publicity resulting from its filing. By this means the proposal is rendered intelligible and the possibilities of fraud greatly reduced. The requirement that the name of every person, corporation or association sponsoring the petition or contributing or pledging contributions to defray the cost of preparation, printing and circulation of petitions be filed is likewise a safeguard against fraud and deception. We think the legislature was authorized to enact the mentioned requirements under its granted authority to facilitate the exercise of the initiative power.

"Relators contend that the questioned provisions of the statute are directory and not mandatory. It seems to us that none of the features of a directory statute is present in this case. It would seem to us that an anomalous situation would be created if statutory safeguards against the perpetration of frauds and deceptions were held to be directory. Such requirements must by their very nature be mandatory, or the purposes of the legislature will be completely defeated. We hold that the provisions of the statute herein discussed are mandatory and that the failure of relators to comply therewith justifies the action of the secretary of state in refusing to file the same."

On July 26, 1968, the Secretary of State rejected the petition because of the inadequacy of valid signers, and for the further reason that the person presenting the petition failed to file a satisfactory itemized verified

statement, as provided by section 32-704, R. R. S. 1943. On August 12, 1968. petitioner attempted to amend his verified statement. This statement also was clearly inadequate and made no pretense of giving the amount contributed by individual donors. On August 28, 1968, the day the case went to trial in the district court, petitioner again filed a supplemental itemized statement which is properly itemized, which incidentally lists several corporate contributors. To hold that petitioner has substantially complied with the law is, at the very least, abortive of that term. Certainly the majority opinion has for all intents and purposes overruled the case of State ex rel. Winter v. Swanson, 138 Neb. 597, 294 N. W. 200, and deleted the words "at the same time" from the statute.

The third reason the petition should be stricken is that there are insufficient signatures to justify its submission. I do not agree with the majority opinion that the filings on July 5, 1968, were timely for submission on November 5, 1968. It is not necessary to go to Arkansas for authority. If we followed the law of this jurisdiction, the filings on July 5 would be excluded. One of the earliest decisions of this court on the question of time passage is McGinn v. State, 46 Neb. 427, 65 N. W. 46, 50 Am. S. R. 617, 30 L. R. A. 450. That case was concerned with the determination of the effective date of a statute under Article III, section 27, Constitution of Nebraska, which is as follows: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, * * *." In that case this court discussed the matter of computation of time at great length and determined in the computation of time by months, calendar months are to be counted rather than months of uniform number of days. This court there determined that where a legislative act was approved on April 8, 1893, the 3 months terminated at midnight on the 8th day of July 1893, so that the act became effective on the 9th day of July, or the day after

the expiration of the full 3-months period. Article III, section 2, Constitution of Nebraska, provides that the Secretary of State shall submit the initiative measure at the first general election held *not less than* 4 months *after* said petition shall have been filed. Here, the last day of the first month would be August 5; the last day of the second month, September 5; the last day of the third month, October 5; and the last day of the fourth month, November 5. Consequently, November 5 would not be 4 months *after* July 5. The four months do not expire until midnight November 5. As we said in the early case of Glore v. Hare, 4 Neb. 131: "We can no more extend the time one day than six months."

To me, the language of the Constitution is clear and mandatory. In my judgment the majority opinion has rewritten that provision of the Constitution. I would exclude the 1,979 signatures filed on July 5, 1968. The majority opinion gives 49,533 signatures as valid. Excluding only these 1,979 signatures filed July 5, 1968, would give a total of 47,554, or approximately 1,100 below the required number.

Section 32-705, R. S. Supp., 1967, requires each petition circulator to swear that he informed each elector before he affixed his signature of the legal effect and the nature of the petition being signed. W. C. Fitzwater was produced as a witness at the trial. He circulated several petitions found by the trial court to contain 471 valid signatures. From his testimony it is evident he did not himself understand the legal effect and the nature of the petitions he was circulating. On cross-examination he did not even know whether a statute or a constitutional amendment was involved. Obviously he could not have complied with the statute. If he did not himself understand the petition he could not have explained its nature and legal effect to the signers. Consequently, the 471 purportedly valid signatures secured by him should be excluded.

One John B. Sims actively circulated several peti-

tions over a period of several months, securing more than 1,000 signatures. The trial court found 755 of these to be valid. Sims clearly violated many of the provisions governing the filing of initiative petitions. Specifically, he personally signed two different petitions and gave a Grand Island address for one signature and an Omaha address for the other. He obviously knew that he could not be an elector in both Hall and Douglas counties at the same time. At the very least, Sims, who verified all of his petitions, must be held to know the contents of those verifications. On the evidence produced, it must be held that Sims fraudulently signed the petitions.

In Barkley v. Pool, 103 Neb. 629, 173 N. W. 600, we held: "When the certificate of a circulator of a referendum petition under the initiative and referendum act is impeached on the ground of fraud, the probative value of such certificate is destroyed, and none of the names appearing on such petition will be counted unless affirmatively proved to be genuine." I would therefore refuse to count the 755 names secured by Sims unless and until they were affirmatively proved to be genuine. This was not done. Consequently, these 755 names should not be included in the total of valid signatures.

There are many of the petitions which were signed more than once by the same signers. It is of course possible that these were instances where the signer had forgotten that he had signed a previous petition, and I am inclined to give the signer the benefit of the doubt in those instances. Two of these petitions, however, circulated by Marvin E. Dennis in Lancaster County, cannot be so easily explained. One of the petitions contains 15 signatures, the other 20. Two of the signers on both petitions were identical. Both of them signed each petition on July 2, 1968. Both of them live in the same neighborhood in Lancaster County. On one of the petitions, the two signatures are together, and on the other they are separated by one other signature. It would

be highly illogical to assume from an examination of these petitions that either of the individuals or the circulator would have forgotten that they had signed another petition for the same circulator on the same day. I would disqualify both of the petitions and exclude the 35 signatures appearing thereon.

Section 32-713, R. S. Supp., 1967, so far as material herein, provides: "Each signer shall at the time of signing, personally affix his surname, and Christian name in full, except that the middle name or initial may be omitted, and if the Christian name is an initial only, the signer shall so state below the name at the time of signing; * * * the date of signing and residence, street and number, or if no street or number exists then a designation of a rural route, or the voting precinct and city or village."

The Secretary of State made 524 objections based upon a missing or an incomplete date, and 280 objections on dates which were written in by parties other than the signer. He also objected to 106 names where the addresses were written by someone other than the signer of the petition. None of these 910 signers complied with the law, and the challenge by the Secretary of State should have been sustained. These objections were all overruled by the majority opinion herein.

The date of signing is important because the signer must be an elector at the time of signing. The correct address is important because it is needed to identify the signer and to make it possible to determine if he is in fact an elector at the time of signing. To permit the counting of these signatures is to repeal the statute. To permit individuals other than the signer to write the date and the address is to make it more difficult to detect fraud in the petitions. The ultimate effect of the majority ruling herein is to require the Secretary of State to accept every petition presented unless he personally investigates every one of the 59,000 plus signa-

tures to ascertain if those signers personally signed the petition.

The Secretary of State also rejected 48 signatures because ditto marks appeared where the address should have been written. The portion of section 32-713, R. S. Supp., 1967, set out above requires each signer of the initiative petition to endorse thereon his residence and city or village. This does not seem to be a burdensome or unreasonable requirement. Even though ditto marks can be interpreted to mean "the same as above," as suggested by the majority opinion, I cannot agree that the requirements of our statute have been met. The statute requires each person to write his residence, street and number or the voting precinct, and city or village. This he must do, as I interpret the statute. This is not an unreasonable requirement because the use of ditto marks make it much more difficult to establish a forgery if one has occurred. If one person has written the name of a city several times, such writing would be more readily detectible than if that person had merely written in ditto marks. In State ex rel. Jensen v. Wells, 66 S. D. 269, 281 N. W. 357, the South Dakota court held that unless specifically permitted by law, the signers of a petition could not use ditto marks in the date column. It seems to me that this is the only logical rule to be applied in a procedure as important as an initiative petition.

A recapitulation of the objections listed above indicates to me that 4,198 of the challenges made by the Secretary of State should have been sustained. The majority opinion finds 49,533 valid signatures. Subtracting 4,198 would leave only 45,335, based on the figures used. A minimum of 48,640 valid signatures was required. The petition filed was therefore 3,305 short of enough to qualify, and the Secretary of State was correct in refusing to accept the filing.

NEWTON, J., dissenting.

I join in the dissent of Spencer, J., regarding the time

within which an initiative petition must be filed prior to the election at which the issue is submitted to the electors. I am also in agreement with that portion of the dissent of Spencer, J., which is based upon the failure of plaintiff to comply with that portion of section 32-704, R. R. S. 1943, which requires that an itemized verified statement containing the names and addresses of all persons, associations of persons, and corporations contributing money or other thing of value toward, and receiving money or other thing of value for the preparation, circulation, or printing thereof, showing the total amount contributed, pledged, or received by each.

Article III, section 4, Constitution of Nebraska, specifically provides that legislation may be enacted to facilitate the operation of the initiative and referendum provisions. The requirement that such a verified statement be filed is a regulation contemplated by the foregoing provisions. Its purpose is to enlighten the electorate at the earliest possible moment of the identity and nature of the parties supporting the proposed constitutional amendment and by such identification to give some insight into the motives of such proponents.

That such a statement was not filed in the present instance is beyond dispute. The lower court erroneously found that this requirement had been complied with substantially and to the best of relator's ability. The fallacy therein is readily demonstrable. The statement filed contained information showing *total* contributions and expenditures amounting to several thousand dollars, but did not itemize these contributions and expenditures or give the names of the contributors and recipients. It is sought to excuse this oversight on the ground that such information may not have been then available, yet it is obvious that if the relator was able to arrive at the total figures submitted, he must then have had knowledge of the various items comprising such totals.

Furthermore, the requirement for the filing of such verified statement has been a law of this state for many

years. It was necessarily known to relator when he first contemplated promoting the initiative petition. He was fully aware that it was necessary to wind up the petition circulation campaign in time to gather and present the information required in the verified statement. His neglect to do so is no excuse.

It is contended that the insufficient verified statement actually filed may be amended from time to time to comply with the statutory requirements and such amendments were actually permitted many weeks after the petitions were presented for filing. The majority opinion condones this. Under the theory so adopted, the statement was subject to amendment right up to the day of the election. Such a construction defeats the purpose of the statute and serves to deny the electorate an insight into the forces behind the petition campaign.

The case of State ex rel. Winter v. Swanson, 138 Neb. 597, 294 N. W. 200, deals with a failure to file a similar statement required to be filed prior to the circulation of the petitions. It was there held that the filing of such statement was mandatory and not directory. The same is necessarily true regarding the statement to be filed with the petition.

It would appear that there is a much more fundamental matter presented by the present situation than any that has been thus far considered. The truth of the statement that "the power to tax is the power to destroy" is unquestioned. Conversely, the power to prevent taxation is just as surely the power to destroy government. No government, be it federal, state, or local, can exist without revenue; and governmental revenue is synonymous with taxation.

The powers reserved to the people by initiative and referendum acts have long been regarded as sacrosanct and subject only to constitutional restrictions. The Nebraska Constitution does not explicitly limit the initiative power in any respect and on its face such power

appears to be all-inclusive and illimitable. Yet, logically, such cannot be the case.

The primary forms of taxation relied upon by state governments are the property, income, and sales taxes. When the power to levy such taxes is destroyed, it is possible that some other forms of taxation could be substituted; yet it is doubtful that they would be adequate to meet modern governmental needs. In Nebraska we have recently deprived the state of the power to levy property taxes. We are now viewing an effort to abolish the income tax, and if such effort is successful, it would foreshadow an attempt to abolish the sales tax. The various forms of taxation are always opposed by the particular groups affected thereby. The property tax was opposed by property owners, the income tax is opposed by those with substantial incomes, and the sales tax by lower and middle-income groups.

It may be said that while we still have one of the major tax forms available, there is no actual present threat to state government. This begs the question. If the initiative power, carried to its ultimate conclusion in regard to state taxation, can present such a threat, then the fundamental or underlying question is presented *now*.

The Enabling Act of Congress admitting Nebraska to the Union authorizes and requires the formation of a state constitution and a state government. "Under the provisions of sec. 4 of art. IV of the federal constitution the United States is required to guarantee a republican form of government to every state. * * * 'The guaranty necessarily implies a duty on the part of the States themselves to provide such a government.'" Opinion to the Governor, 95 R. I. 109, 185 A. 2d 111. The Nebraska Constitution provides for a republican form of government, for a bill of rights, and for the separation of powers. It authorizes the executive branch to place the powers of government in operation, and vests legislative authority in the Legislature, including the power

to raise the necessary revenue of the state by taxation. If the initiative power is to be construed to permit the abolition of all taxes for state purposes, it is obviously in conflict with large segments of the state Constitution. The Constitution contemplates a working government duly financed by revenue derived from taxation. Without such revenue, the entire government would be brought to a standstill and rendered inoperative.

Ordinarily the courts will refrain from testing the validity of a legislative act until after it has become effective. Perhaps it is wiser to do so in the present instance, but where an act is of such nature that its passage could present an immediate governmental crisis, it would seem that the better policy would be that of acting before an emergency is presented and the situation becomes acute.

"Each and every clause in a constitution has been inserted for some useful purpose." Anderson v. Tiemann, 182 Neb. 393, 155 N. W. 2d 322.

"It is a general rule of construction that a constitution should be construed as a whole and effect given to every part, if possible." 16 C. J. S., Constitutional Law, § 23, p. 91. See, also, State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1; Monaghan v. School District No. 1, 211 Or. 360, 315 P. 2d 797; Welsh, Governor v. Sells, 244 Ind. 423, 192 N. E. 2d 753; Kervick v. Bontempo, 29 N. J. 469, 150 A. 2d 34; County School Bd. of Prince Edward County v. Griffin, 204 Va. 650, 133 S. E. 2d 565; Mekota v. State Board of Equalization & Assessment, 146 Neb. 370, 19 N. W. 2d 633.

"In the interpretation of a constitution, its terms must be taken in their ordinary and common acceptation in such manner as to express the intent of its framers and of the people who adopted it." State ex rel. Johnson v. Marsh, 149 Neb. 1, 29 N. W. 2d 799.

Applying the foregoing rules, it seems that the Constitution should be construed as a whole and effect given to all portions thereof as nearly as possible. It

cannot be concluded that the initiative provision is to be given such force as to completely nullify other provisions in the Constitution or to destroy that government which the framers of the Constitution created and provided for. If essential governmental functions would be seriously impaired by the initiative and referendum process, the courts, in construing the applicable constitutional and statutory provisions, will assume that no such result was intended.

In the case of Hunt v. Mayor & Council of Riverside, 31 Cal. 2d 619, 191 P. 2d 426, it is said: "* * * referendum provisions of the Constitution and of charters and statutes should, as a general rule, be liberally construed in favor of the reserved power. * * * As opposed to that principle, however, 'in examining and ascertaining the intention of the people with respect to the scope and nature of those powers, it is proper and important to consider what the consequences of applying it to a particular act of legislation would be, and if upon such consideration it be found that by so applying it the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential and, perhaps, * * * indispensable, to the convenience, comfort, and well-being of the inhabitants of certain legally established districts or subdivisions of the state or of the whole state, then in such case the courts may and should assume that the people intended no such result to flow from the application of those powers and that they do not so apply.'"

In Simpson v. Hite, 36 Cal. 2d 125, 222 P. 2d 225, it is said: "The initiative or referendum is not applicable where 'the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential * * *.'"

Article III, section 2, Constitution of Nebraska, authorizes the use of the initiative for the adoption of

"constitutional amendments." The word "amend" means "To improve. To change for the better by removing defects or faults. * * * To change, correct, revise." Black's Law Dictionary (De Luxe 4th ed.), p. 106. It connotes the antithesis of the word "destroy." The clear wording of this section indicates the initiative may only be used to amend the Constitution and not to destroy either it or the government it has created.

SPENCER, J., joins in this dissent.

JIM PUCKETT, APPELLEE, V. FIRST NATIONAL BANK OF ATKINSON, NEBRASKA, A CORPORATION, APPELLEE, IMPLEADED WITH LEON D. PUTNAM, APPELLANT.
162 N. W. 2d 528

Filed November 15, 1968. No. 36803.

1. **Evidence: Trial.** Ordinarily the credibility of a witness is a question for the determination of the jury, and it is within their province to credit the whole of his testimony or any part of it which appears to them to be convincing, and reject so much of it as in their judgment is unworthy of credit.
2. ———: ———. In a law action, a verdict of a jury based on conflicting evidence will not be disturbed unless clearly wrong.

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

William W. Griffin, for appellant.

Paul L. Kubitschek and Tedd C. Huston, for appellee Puckett.

Deutsch & Hagen, for appellee First Nat. Bank of Atkinson.

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

MCCOWN, J.

This is an action to recover the balance due on an oral contract for mowing, raking, and baling hay. The de-

fendant alleged plaintiff had been overpaid and cross-petitioned for the amount of the overpayment. The action was initially commenced against the First National Bank of Atkinson, Nebraska, based upon a check issued by Leon D. Putnam dated November 28, 1964. After a series of motions, pleadings, and orders, Leon D. Putnam was made a defendant; the bank was dismissed from the case; and the action then proceeded solely against Leon D. Putnam. While the pleadings and the evidence would have justified submitting the issues of an accord and satisfaction, or an account stated, or a compromise and settlement, these issues were not submitted to the jury. The matter was submitted to the jury as an action on the oral contract, and on the answer and cross-petition of the defendant. The jury brought in a verdict for the plaintiff in the amount of $2,200 and the defendant has appealed.

The evidence of both parties confirmed that they had entered into an oral agreement on July 9, 1964, under which the plaintiff was to furnish equipment and labor, and mow, rake, and bale a large quantity of hay for the defendant. The plaintiff and his employees performed the work over a period of approximately 3 months and it was completed between October 10 and 15, 1964. The plaintiff received payments at various times which totaled $4,500 as of October 5, 1964. On November 28, 1964, some 6 weeks after the completion of the work, the defendant gave plaintiff a check for $2,200 which plaintiff accepted as full payment, but on which payment was stopped by the defendant and the check was not paid.

There is a direct conflict in the evidence as to the terms of the oral agreement. The plaintiff testified that he was to receive 18 cents per bale for the mowing, raking, and baling. The defendant testified that: "Well, it was to be ten cents per bale for mowing and raking; each bale to weigh one hundred pounds, and ten cents per bale for baling, if they weighed a hundred pounds;

or nine cents if they weighed ninety pounds; it is all written down, and it graduated on down, like sixty pound bales were to be six cents per bale and six cents for mowing and raking." This would be a graduated formula based on the weight of the bales.

The defendant testified that on November 28, 1964, he gave the plaintiff the check for $2,200 as final payment on the work done. He said the parties thought, without checking it out, that he had paid the defendant $2,000 prior to that time rather than the $4,500 actually paid, and that he had issued the $2,200 check with that in mind. He also testified that it was after November 28, 1964, when he discovered that the bales of prairie hay averaged only 30 to 40 pounds each and the alfalfa bales averaged from 40 to 45 pounds each, and that plaintiff's bale count was excessive. The defendant's cross-petition was for a claimed overpayment in the sum of $2,526.96.

The plaintiff's testimony was that he had baled 37,901 bales and that the total due at 18 cents per bale was $6,822, $4,500 of which had been received through October 5, 1964. The plaintiff also testified that on November 28, 1964, the defendant asked how much he owed and plaintiff told him $2,322.18. The defendant wanted to know what was the least amount the plaintiff would take and he said $2,200. All of this testimony came in without objection.

The defendant's only assignments of error are that the verdict is not supported by the evidence and is contrary to law. The basis for the challenge as to the sufficiency of the evidence rests on the contention that the plaintiff's own testimony on redirect examination was that "the contract was for eighteen cents, and I would give him 60 to seventy pound bales," but that the only evidence as to the weight of the bales was the defendant's evidence that the hay bales weighed only 30 to 40 pounds each and the alfalfa bales, 40 to 50 pounds each. The plaintiff denied that the oral agree-

ment provided any sliding scale of payments based on the average weight of bales produced, but testimony of the plaintiff's witnesses as to the weight of the bales was either excluded or stricken and there was no direct testimony as to their weight by any of plaintiff's witnesses.

The defendant asserts that because of this absence of specific testimony as to weight, there is no evidence to show that the oral agreement was performed in accordance with its terms. This contention assumes that the defendant's testimony as to the weight of the bales must be accepted as true, and that indirect or circumstantial evidence is insufficient to establish the plaintiff's case. It also assumes that no inferences of any kind can be drawn by the jury from the defendant's own conduct and his making the various "payments," including the check of November 28, 1964.

The defendant owned several thousand acres of ranch land and one of his employees had worked for him for more than 20 years. The work being done was ordinary common work on a ranch, with which the defendant was obviously familiar. The defendant's own testimony is that he was in the fields many times observing the work as it progressed; that he usually went out early in the morning and if it looked like the work was progressing properly, he let it go and if not he would go back; and that he went back many times. He observed the bales on these occasions. On one occasion he said he remarked to the plaintiff that the bales were light. His cattle had been in one or two fields during the baling, and ate some of the hay.

The plaintiff specifically testified that the various payments made to him by defendant were pursuant to the hay baling services and the agreement. He also testified that on November 28, 1964, at the time of the last "payment," both plaintiff and defendant made some figures and the amount due was figured at 18 cents a bale.

Under these circumstances, the jury was entitled to

find that the weight of the bales complied with the contract, or that the bales were accepted by the defendant as substantial performance of the contract, whatever its terms. The jury was not required to accept the testimony of the defendant that the bales only weighed 30 to 40 pounds simply because that was the only direct testimony as to weight. Neither was the jury required to disregard reasonable inferences or circumstantial evidence in conflict with such direct testimony.

The determination of the terms of the oral agreement and whether the plaintiff had performed all the conditions of the contract on his part were for the jury. No errors are assigned as to the instructions under which the issues were submitted to the jury. " 'Ordinarily the credibility of a witness is a question for the determination of the jury, and it is within their province to credit the whole of his testimony or any part of it which appears to them to be convincing, and reject so much of it as in their judgment is unworthy of credit.' " Kraemer v. New York Life Ins. Co., 134 Neb. 445, 278 N. W. 886.

In a law action, a verdict of a jury based on conflicting evidence will not be disturbed unless clearly wrong. Kraemer v. New York Life Ins. Co., *supra*.

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

AFFIRMED.

CARTER, J., dissenting.

This is an action to recover the amount due on an oral contract for mowing, raking, and baling hay. According to plaintiff's evidence, "The contract was for eighteen cents, and I would give him 60 to seventy pound bales." Several witnesses testified that the bales of hay weighed from 30 to 40 pounds. This evidence was in no manner disputed by the plaintiff. It cannot be questioned that the same amount of hay would produce more 40-pound bales than 60-pound bales. In accordance with plaintiff's own evidence, the contract was

not performed in accordance with its terms.

The majority opinion relies in part on the rule that it is within the province of the jury to reject the evidence of any witness. A jury may not reject the testimony of any or all witnesses. If this was true, practically every case could be disposed of on that theory. The general rule is: "Generally a verdict rendered contrary to, or in disregard of, evidence which was not improbable or inconsistent and was not contradicted or discredited will be set aside, while a verdict rendered in accordance with uncontradicted evidence will be sustained." 66 C. J. S., New Trial, § 70c, p. 222. See, also, Parrish v. Peoples, 214 Minn. 589, 9 N. W. 2d 225. But in the instant case if the jury disbelieved all the evidence of the defendant, there still remains no evidence to sustain a finding that plaintiff complied with the terms of his contract with reference to the weight of the bales. Certainly a want of credible evidence by the defendant does not establish a necessary element of the contract on which the plaintiff sues and has the burden of proof. Plaintiff's case is no more established after defendant and his witnesses testified than it was before even if they were disbelieved.

There is evidence that defendant gave plaintiff a check which was intended as full payment of the amount due under the oral contract. It is asserted that this is evidence of a compromise and settlement, an accord and satisfaction, or an account stated. The defendant denies that any such effect was had or intended. But the majority opinion asserts that the fact a check was given to the plaintiff is enough to sustain a judgment for the amount due on the oral contract. I concede that if the evidence was sufficient to sustain the judgment on any of the three stated theories, the plaintiff, in case of an adverse verdict, would have a proper basis for a new trial. But the trial court submitted nothing to the jury other than to find the terms of the oral agreement and the amount due under it. The evidence of an account stated, an accord and satisfaction, or settlement is

foreign to the issues, especially when as fragmentary as it was here, and results in a verdict that is contrary to the instructions and therefore contrary to law.

It is fundamental that a plaintiff may not plead one cause of action and recover on another. Nor may a court submit a case on one theory and the jury return a proper verdict on another. Allegations of the petition and proof thereunder must agree. Scovel v. Isham, 113 Neb. 238, 202 N. W. 869. Many cases other than the one cited support this rule.

This action was started against the First National Bank of Atkinson on a check given the plaintiff by the defendant. Defendant Putnam, the maker of the check, was subsequently joined as a party defendant. Later the First National Bank of Atkinson was dismissed from the action by agreement of the parties. The case continued against Putnam as an action on the check. The case was submitted by the trial court solely on plaintiff's claim of an oral contract for mowing, raking, and baling hay and defendant's counterclaim for overpayment. The petition was not amended as to defendant Putnam before or after the trial, and it is clear that the verdict and judgment are not sustained by the pleadings. Since neither party raised the issue on appeal, we assume that the parties acquiesced in the manner in which the case was submitted to the jury. Bennett v. Baum, 90 Neb. 320, 133 N. W. 439; Glissmann v. Bauermeister, 149 Neb. 131, 30 N. W. 2d 649. I shall treat the case as did the parties. It does account, however, for some evidence of accord and satisfaction, and settlement getting into the record which is wholly incompetent on the theory on which the case was submitted by the trial court.

The trial court instructed the jury that plaintiff must establish by a preponderance of the evidence the making of an oral contract with the defendant, that he has performed all the terms of the contract, that he has made demand for the amount claimed to be due, and that there is now due the amount claimed or some amount. In the

manner submitted, evidence of an accord and satisfaction, settlement, or any other cause of action is not material and the fact that it is contained in the record does not make it so. In other words, proof of an accord and satisfaction or settlement will not sustain a verdict in an action brought solely on the contract.

It is stated by the majority opinion that the fact the defendant was in and around the work on occasion is sufficient to sustain a finding that the bales weighed 60 pounds each. There is no evidence that defendant knew or acquiesced in the baling of smaller bales at the same price as the larger ones called for in the contract. It is clear that defendant has suffered a loss of approximately $2,250 by the reduced size of the bales alone. To say that defendant must suffer this loss merely because he was in and around the place where the contract was being performed states a rule of law with which I am wholly unfamiliar. His testimony is that he knew nothing of the light weight of the bales until after the check was given.

The verdict in the instant case was for $2,200, the amount of the check. It is plain that it was not for the total amount of the oral contract if it had been fully performed. The instructions having submitted the case on the oral contract alone and defendant's claim of overpayment, the recovery on the basis of an accord and satisfaction or settlement is contrary to the instructions. It is hornbook law that a verdict that is contrary to the instructions will be set aside. This has been the law since we have been a state. Meyer v. Midland Pacific R.R. Co., 2 Neb. 319. A verdict rendered contrary to law, as contained in the instructions, will be set aside, whether the instructions were right or wrong. Standiford v. M. H. Green & Co., 54 Neb. 10, 74 N. W. 263. When a jury violates its duty to find its verdict in accordance with the law as given in the instructions of the court, the court should set aside the verdict. Olson v. Shellington, 162 Neb. 325, 75 N. W. 2d 709. A new

trial should be allowed where material uncontradicted evidence has been disregarded by the jury. Hileman v. Maxwell, 97 Neb. 14, 149 N. W. 44. "Where the record clearly discloses that material testimony has been disregarded by the jury which, if considered and given due weight, would require a different verdict than that returned, a new trial will be granted." Davis v. Security Ins. Co., 139 Neb. 730, 298 N. W. 687. In this case, a plaintiff is permitted to recover on a theory not submitted to the jury and which the defendant disputes. I submit that this is error and that the judgment should be reversed and the cause remanded, and the case subsequently retried on all issues warranted by the pleadings and the evidence.

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

IN RE INTEREST OF GUY.
MICHAEL STEVEN GUY, A MINOR, APPELLANT, V. GORDON M. DOESCHOT, APPELLEE.
162 N. W. 2d 524

Filed November 15, 1968. No. 36861.

1. **Criminal Law: Evidence.** Circumstantial evidence is not sufficient to sustain a verdict unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the fact finder is the only one that can fairly and reasonably be drawn therefrom.
2. ———: ———. The test by which a jury shall determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt.

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. Reversed and remanded with directions to dismiss.

Frost, Meyers & Farnham and Duane J. Dowd, for appellant.

Donald M. Knowles and J. Thomas Rowen, for appellee.

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

McCOWN, J.

This action was initiated in the separate juvenile court of Douglas County, Nebraska, to declare 16-year-old Michael Steven Guy a "delinquent" child. The basis for the action was a charge of breaking and entering a grocery store. Guy was adjudicated delinquent and ordered committed to the Boys' Training School at Kearney, Nebraska.

On September 8, 1967, at approximately 2:45 a.m., Mrs. Mostek was awakened by the sound of glass breaking. Her home is approximately half a block from the Vey's Foodland Grocery Store. When she looked across the street, she observed "two boys" who both entered the store. One was blond and one had dark hair, and one was shorter than the other. She called the police. She again looked at the front of the store and saw both boys come out of the store. Later the boy with the blond hair went back into the store, and the boy with the dark hair was walking up and down in front of the store. After 2 or 3 minutes, the unidentified boy in front of the store ran south on Sunshine Drive toward Drexel Street. She watched him until some trees blocked her view. She could not see as far as the intersection of Sunshine Drive and Drexel Street. After a short period of time, she observed the police arrive with "a figure" in the car.

Meanwhile, two police officers in a cruiser had received the call to proceed to the store to investigate the burglary. The call was received at 2:50 a.m. The officers were proceeding west on Drexel Street, with the lights turned out. As they neared Forty-second Street, they observed someone running east on the sidewalk on the north side of Drexel Street. They turned the spot-

light on him and he stopped. The officers spoke to him briefly, placed him in the cruiser, and proceeded to the store. From the point at which the officers stopped the appellant, they could see the roof of the store about half a block away. When the officers arrived at the store, they joined other officers already at the scene and assisted in the arrest of another individual who was found in the store. No incriminating evidence of any kind was found on the appellant when he was searched. There is no evidence in the record as to whether the appellant's hair was blond or dark, nor whether he was taller or shorter than the individual who was arrested in the store.

The State moved to dismiss the case until a later date after a portion of the evidence had been introduced, and for a continuance at the time the State rested. Counsel for the State said that the State did not think it could prove its case without the testimony of the other individual arrested in the store and that that testimony would not be available until a later time. The continuance was denied. The appellant introduced no evidence and moved for dismissal. The motion was overruled and the adjudication of delinquency and order of commitment followed.

The appellant contends that the evidence is insufficient to sustain the judgment, and that the standard of proof in juvenile cases based on a charge of crime must be beyond a reasonable doubt rather than by a mere preponderance of the evidence. We deem it unnecessary to discuss the constitutional issue of the burden of proof required in juvenile court. Under either a civil or criminal standard of proof, the evidence was insufficient. The unexplained presence of an individual on a public sidewalk in the vicinity of the place where a crime has been committed at a time shortly afterward is insufficient to carry the burden of proof, no matter which standard is applied in juvenile court.

In a civil case, Raff v. Farm Bureau Ins. Co., 181 Neb.

444, 149 N. W. 2d 52, we said: "Plaintiff may establish his case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence is not sufficient to sustain a verdict unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom."

"Where several inferences are deducible from the facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover." Popken v. Farmers Mutual Home Ins. Co., 180 Neb. 250, 142 N. W. 2d 309.

"The test by which a jury shall determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt." Hoffman v. State, 162 Neb. 806, 77 N. W. 2d 592. See, also, Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539.

An adjudication of delinquency based on a specific charge of misconduct should not be affected by facts, conclusions, or inferences outside the record, nor on the mere fact that some unfavorable circumstances are not satisfactorily explained. A juvenile is surely entitled to a presumption of innocence on a specific charge of misconduct, whether the juvenile court is governed by civil or criminal standards of proof in delinquency proceedings.

The evidence here is insufficient to support the judgment. Appellant's motion to dismiss should have been sustained. The judgment is therefore reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

CARTER, J., dissenting.

On September 8, 1967, about 2:45 a.m., a Mrs. Mostek was awakened by the sound of breaking glass. She saw two boys in a nearby grocery store and called the police. One boy was apprehended in the store. The other boy ran from the scene. The police picked up the defendant while apparently running from the scene of the crime. I submit that these circumstances sustain a finding that defendant was a participant in the crime. A boy was seen running from the store and the police brought defendant back from the direction in which the boy was seen running, all of which occurred within a few minutes of 2:45 in the early morning. Even if defendant had been charged with a crime, the circumstantial evidence was sufficient to sustain a finding of guilt by a jury.

The majority opinion relies upon the rule that circumstantial evidence to be sufficient to sustain a verdict must be of such a nature and so related to each other that the conclusion reached is of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. This is a rule of circumstantial evidence going to the weight of the evidence that is applicable only to the jury. After a jury returns a finding of guilt, the only issue before this court is whether or not the evidence was sufficient to sustain a finding of guilt.

In Hoffman v. State, 162 Neb. 806, 77 N. W. 2d 592, this court, in a criminal case based largely on circumstantial evidence, said: "Under this rule, in the first instance, it is a function of the jury to weigh the circumstantial evidence and to test it by the following rule found in Morgan v. State, supra, and repeated in Kitts v. State, supra: 'The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution, is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of his guilt.'

* * * If the jury does so find, that finding may not, as a matter of law, be disturbed on review by this court if the evidence supporting the finding sustains some rational theory of guilt." In State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265, we said: "The jury considered the evidence and concluded that it was sufficient to find the defendant guilty beyond a reasonable doubt and, in so doing found that the facts were consistent with each other and with his guilt, and that they were inconsistent with any reasonable hypothesis of innocence. Under the facts and circumstances shown, the foregoing questions constituted issues of fact for the jury and not this court."

In our most recent decision on this point, Spencer, J., speaking for the court, said: "Crimes such as murder are usually secretive, and it is the unusual case which occurs in the presence of witnesses. Consequently, there can always be some doubt as to whether a defendant should be convicted on circumstantial evidence. As we said in State v. Ohler, supra: 'To justify a conviction on circumstantial evidence it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence.'

"In State v. Ohler, supra, we restated what has long been the rule in this jurisdiction: 'After a jury has considered the evidence in the light of the foregoing rules and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt.'" State v. Williams, *ante* p. 257, 159 N. W. 2d 549.

But this is not a criminal case and there was no jury. The trier of the facts found that defendant was a participant in the crime. On appeal, the only question for determination is whether or not the evidence was

sufficient to sustain the trial court's finding. I submit that it was.

Mrs. Mostek was awakened by the sound of breaking glass. She saw two boys in the Vey's Foodland Grocery Store and called the police. One of the boys was apprehended by the police at the scene of the crime. Mrs. Mostek saw one boy run south. The police picked up the defendant approximately one-half block from the store. He was running hard at the time although he had turned east. He was within one-half block of the store and within sight of the roof of the store. The store was entered about 2:45 a.m., and defendant was picked up by the police within minutes of that time. While Mrs. Mostek was unable to identify the boys, defendant fitted the general description of one of the boys she saw in the store. No other boys were found in the neighborhood. That defendant was in flight is not questioned and his explanation that he was "out for a walk" at 2:45 in the morning in close proximity to a store that had been recently burglarized is lacking in credibility under the circumstances. The police testified that they apprehended defendant about 2 minutes after receiving the call to go to Vey's Foodland Grocery Store. I submit that the foregoing evidence, although circumstantial, was sufficient to sustain the finding of the trier of the facts that defendant was a participant in the robbery and, consequently, a delinquent. I fail to see how any impartial, reasonable man could fail to find the defendant a participant in the burglary under the foregoing circumstances.

I submit that this court is in error in testing the evidence by the rule applicable only to juries in weighing the evidence and in holding further that the evidence does not support a finding that defendant was a delinquent.

It is for these reasons that I respectfully dissent.

WHITE, C. J., joins in this dissent.

NEWTON, J., concurring in part and dissenting in part.

I concur with the majority opinion to the extent that I do not believe the evidence in this case is sufficient to sustain the finding and judgment of the trial court.

I disagree with the legal basis upon which the majority opinion is founded. In this respect, I concur with the dissenting opinion of Carter, J.

CLAIR COOMES, APPELLEE, V. ROLAND DRINKWALTER ET AL., APPELLANTS.
162 N. W. 2d 533

Filed November 15, 1968. No. 36862.

1. **Replevin: Livestock: Evidence.** In a replevin action involving branded livestock, where the plaintiff's recorded brand is on an animal and is older than defendant's brand on the animal, it is prima facie evidence of ownership in the older brand, and places the burden on the defendant to establish his right to put his brand upon the animal.
2. **Replevin: Parties.** A single action of replevin against two or more defendants, each of whom is in the exclusive possession of a portion of the goods and chattels replevied, presents a clear case of misjoinder of parties and causes of action.
3. **Replevin.** The object of an action of replevin is to recover specific personal property, and liability for value of property accrues only if a return of the property cannot be had.
4. **Replevin: Parties.** One who claims title to or the right to the possession of property replevied, adversely to the plaintiff, is not a necessary party.
5. ———: ———. A party who claims to be the owner of goods which are in controversy in an action of replevin may intervene in the case, upon filing a petition before judgment alleging his ownership.
6. ———: ———. The person in possession of the property sought to be replevied is ordinarily the proper and only necessary party defendant.
7. **Actions.** In the absence of substantial prejudice, a misjoinder of causes of action or defenses is not a ground for reversal.

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

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

Michael V. Smith and Everett A. Anderson, for appellee.

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

NEWTON, J.

This is an action in replevin and the present appearance is the second appearance of this case in this court. See Coomes v. Drinkwalter, 181 Neb. 450, 149 N. W. 2d 60.

The facts in this action are substantially the same as those presented in the original action and will not be herein reiterated.

At the second trial, a verdict was returned and judgment entered for plaintiff for a return of the property replevied and damages in the sum of 1 cent. The principal contention of the defendants is that the evidence is insufficient to sustain the verdict. On the first appearance of this case in this court, it was held that: "In a replevin action involving branded livestock, where the plaintiff's recorded brand is on an animal and is older than defendant's brand on the animal, it is prima facie evidence of ownership in the older brand, and places the burden on the defendant to establish his right to put his brand upon the animal." Coomes v. Drinkwalter, *supra*. In addition to the prima facie case appearing from the evidence of plaintiff, there was other direct evidence identifying the property as plaintiffs and in the judgment of this court, the evidence is amply sufficient to sustain the verdict of the jury.

Roland Drinkwalter, his son Kenneth Drinkwalter, and his sister Jean Drinkwalter were all made parties defendant to this action. Each filed a demurrer on the ground that there was a misjoinder of causes of action. The demurrers were preserved in their separate answers. The petition on its face did not reflect a mis-

joinder of parties or causes of action and was not subject to demurrer. The objection of a misjoinder, however, was made in the separate answers filed by the defendants which is permissible. In the case of Cooper & Cole Bros. v. Cooper, 90 Neb. 209, 133 N. W. 243, it was held that where the fact that the defendants were not jointly liable did not appear on the face of the petition, the allegation of a misjoinder was properly made in the answer as a separate defense in connection with a defense on the merits. In the present case, it was the contention of defendants that each had exclusive ownership of a portion of the cattle and insofar as the rights of the defendants, exclusive of those of the plaintiff, are concerned this fact is borne out by the uncontroverted evidence. Defendants' theory is that since the various animals were claimed by three different persons that the causes of action against the three different defendants could not be joined. Ordinarily this would be true. "A single action of replevin against two or more defendants, each of whom is in the exclusive possession of a portion of the goods and chattels replevied, presents a clear case of misjoinder of parties and causes of action." Patchin v. Rowell, 86 Conn. 372, 85 A. 511.

However, replevin is a possessory action. "The object of an action of replevin is to recover specific personal property, and liability for the value of the property accrues only if a return of the property cannot be had." Clark v. Oldham, 166 Neb. 672, 90 N. W. 2d 329.

One who claims title to or the right to the possession of property replevied, adversely to the plaintiff, is not a necessary party. Annotation, 145 A. L. R. 905.

"A party who claims to be the owner of goods which are in controversy in an action of replevin may intervene in the case, upon filing a petition before judgment alleging his ownership." Welborn v. Eskey, 25 Neb. 195, 40 N. W. 960.

"The person in possession of the property sought to be replevied is ordinarily the proper and only necessary

party defendant, * * *." 77 C. J. S., Replevin, § 90, p. 57. See, also, Bellows v. Goodfellow, 276 Mich. 471, 267 N. W. 885; Koch v. Mack Motor Truck Corp., 201 Md. 562, 95 A. 2d 105.

The evidence in this case, as advanced by the defendants, shows that Roland Drinkwalter acquired the cattle in question, placed upon them his own, his son's, and his sister's brands, pastured them on his own land part of the time, and arranged for the pasturing of the cattle on the land of a neighbor where he, Roland Drinkwalter, exercised supervision over them the balance of the time. It is apparent that Roland Drinkwalter was the party in actual possession of the cattle, notwithstanding that his sister and son may have claimed some form of constructive possession by reason of their claim of ownership of a portion of the animals. As the party in actual possession of the replevied property, Roland Drinkwalter was the only necessary party and although his son and sister may have been entitled to intervene under such claim of ownership, their presence in the action was not necessary to a determination of the right to possession thereof.

Under the circumstances here, no damages having been awarded, it is apparent that the alleged misjoinder did not result in substantial prejudice to any of the parties. "In the absence of substantial prejudice, a misjoinder of causes of action or defenses is not a ground for reversal." 5A C. J. S., Appeal & Error, § 1684, p. 757. See, also, Stafford v. Drewry (Tex. Civ. App.), 32 S. W. 2d 255; British America Assur. Co. v. Shores, 206 Okl. 300, 243 P. 2d 343; In re Fischer's Estate, 196 Wash. 41, 81 P. 2d 836.

Defendants also challenge the sufficiency of service of summons upon the minor Kenneth Drinkwalter. It appearing that the minor is not a necessary party to this action, it is apparent that the question presented is irrelevant.

Other questions raised by the defendants are found to

be without merit and the judgment of the trial court is affirmed.

AFFIRMED.

MOLLIE A. KEHM, APPELLEE, V. EUGENE DUMPERT, REAL, FULL, AND TRUE NAME UNKNOWN, APPELLANT, REVIVED IN NAME OF WALTER A. DUMPERT, ADMINISTRATOR OF THE ESTATE OF EUGENE DUMPERT, DECEASED, APPELLANT.
162 N. W. 2d 520

Filed November 15, 1968. No. 36916.

1. **Juries.** It is the settled law of this state that error cannot be predicated upon the overruling of a challenge to a juror for cause, when the record does not disclose that the complaining party has exhausted all his peremptory challenges.
2. **New Trial: Continuance.** A motion for a new trial on the ground of surprise is properly overruled where a request for a continuance for that reason was not made at the trial.
3. **Negligence: Automobiles.** It is negligence as a matter of law for a motorist to drive so fast on the highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his headlights.
4. **Appeal and Error: Trial.** In the absence of a motion for a directed verdict on the issue of liability, the plaintiff cannot complain of the failure of the trial court to withdraw that issue from the jury.
5. **Trial: Witnesses.** In jury cases, jurors are the sole judges of the credibility of witnesses and of the weight to be given their testimony. They have the right to credit or reject the whole or any part of the testimony of any witness in the exercise of their judgment.
6. **Trial: Evidence.** If there is any evidence to support a jury's verdict, it is not the court's function to weigh the evidence to determine whether it would have returned a different verdict.
7. ———: ———. When the evidence is in conflict and is such that reasonable minds can draw different conclusions from it, a jury question is presented.
8. ———: ———. In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of the successful party and he

should have the benefit of every inference that can reasonably be deduced from the evidence.

Appeal from the district court for Fillmore County: JOSEPH ACH, Judge. Reversed and remanded.

Kier, Cobb, Luedtke, Swartz & Wieland, for appellant.

Johnston, Grossman & Johnston, for appellee.

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

NEWTON, J.

This is a personal injury action. On trial to a jury, a verdict was returned for the defendant. A motion for new trial was subsequently filed which was sustained by the court.

Plaintiff Mollie A. Kehm had attended a dance on the night of October 2, 1965, with one Emil Krupicka. On leaving the dance, which was held at the Legion Club in Exeter, Nebraska, the couple went to a restaurant and on finding it closed, they drove west on U. S. Highway No. 6 to a filling station and restaurant. Finding that this was also closed, they drove on past for a ways, then decided to turn around and go home. Emil Krupicka was driving an automobile owned by him. According to his testimony, he stopped at a country lane just across some railroad tracks. He said he pulled off onto the shoulder of the road intending to wait until traffic had cleared before turning, that his right-hand signal lights were on, but he did not actually enter the lane. Defendant testified he approached the Krupicka car from the rear, his lights were turned down and he did not observe the Krupicka car until he was within about 50 feet of it. He conceded that at least one of the Krupicka tail lights was on, but is not certain whether the other was or not. He denied that any signal lights were operating on the Krupicka car at the time. He stated he slowed down to about 25 miles per hour but could not stop in time to avoid striking the car. Another car was

approaching from the west; the Krupicka car was on the blacktop pavement about 2½ feet from the edge of the pavement and defendant passed on the right-hand side with the left wheels of his car on the pavement and the right wheels on the shoulder of the road. He said that as he passed the Krupicka car, it turned somewhat to the right toward the lane, with the result that the left-rear end of defendant's car struck the extreme right-front fender and the corner of the bumper on the Krupicka car. Damage done to the Krupicka car was very slight, consisting of a small indentation in the bumper and three or four very shallow gouges in the extreme front end of the fender. Defendant drove on to an intersection, turned around, and came back at which time he stated the Krupicka car was in the lane facing north. This is denied by Krupicka. Some conversation then occurred. Krupicka stated that he asked the plaintiff if she was injured and that she replied in the negative. On the following day plaintiff said she became ill and consulted her doctor. She contended that she sustained a whiplash injury and an aggravation of a previous arthritic condition in her spine. Her doctor verified the nature of her injuries, attributed them to the accident, and stated that she was permanently partially disabled. Plaintiff stated that prior to the accident she had been in good health, but admitted that a few months after this accident, she was in another accident in which she sustained injuries similar to the ones she contended she received in the accident presently being considered.

Defendant had the plaintiff examined by Dr. Harold R. Horn, an orthopedic surgeon, a few days before trial. At that time Dr. Horn could find no abnormalities and testified that she was not suffering from any disability. Dr. Horn further stated that plaintiff had consulted him in 1961 about trouble she was having with her back and side at which time she stated that she had had such trouble for a period of many years; that the backache radiated around to her lower chest and anterior ab-

domen; and that she had fallen more of late. In December 1960, she had tripped on a dance floor, during the following January, she fell down a flight of basement steps, had fallen on the ice, and also fell on getting up in the morning. Plaintiff denied that she had ever seen or consulted Dr. Horn although he gave the address which had been given to him by her in 1961 and produced X-rays taken of her at that time.

Plaintiff seeks to sustain the granting of a new trial on several grounds. She stated that the trial court erroneously failed to sustain challenges for cause to certain jurors. The record does not disclose the proceedings had in regard to the picking of a jury or that plaintiff exhausted all of her peremptory challenges. In this respect, it was determined in Brumback v. German Nat. Bank of Beatrice, 46 Neb. 540, 65 N. W. 198, that: "It is the settled law of this state that error cannot be predicated upon the overruling of a challenge to a juror for cause, when the record does not disclose that the complaining party has exhausted all his peremptory challenges." Plaintiff further stated that the granting of the motion for new trial should be sustained because she was surprised by the evidence of Dr. Horn regarding her previously consulting him in 1961. No motion for a continuance on this ground was made by the plaintiff, but she elected to permit the case to go to the jury. She cannot now complain. In Remington Typewriter Co. v. Simpson, 83 Neb. 848, 120 N. W. 428, this court held: "A party will not be entitled to a new trial for surprise occasioned by his adversary's evidence when he could have procured all available evidence to refute it by procuring a short continuance of the trial, but fails to ask for such continuance." In Jensen v. John Hancock Mutual Life Ins. Co., 145 Neb. 409, 16 N. W. 2d 847, it was held: "A motion for a new trial on the ground of surprise is properly overruled where a request for a continuance for that reason was not made at the trial." In Countryman v. Ronspies, 180 Neb. 76, 141

N. W. 2d 425, it is said: "A party may not proceed with trial without objection and speculate on the outcome of the jury's verdict and, if unfavorable, obtain a reversal on a ground upon which he might have but did not move for a mistrial at the time."

Plaintiff also contended that the verdict of the jury is not sustained by the evidence. In this connection it appears, by the defendant's own testimony, that he failed to drive at such a speed and to maintain such a lookout as would have enabled him to stop in time to avoid the car in which plaintiff was riding as a guest passenger. This court has repeatedly stated that it is negligence as a matter of law for a motorist to drive so fast on the highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights. See, Robins v. Sandoz, 177 Neb. 894, 131 N. W. 2d 648; Bartosh v. Schlautman, 181 Neb. 130, 147 N. W. 2d 492. Defendant failed to give any excuse or reason for his failure to see the Krupicka car in time to stop and did not contend that the facts of this case bring it within the exceptions to the foregoing rule. It must, therefore, be concluded that although plaintiff did not move for a directed verdict on the question of liability, the evidence is such that a verdict for the defendant on the question of liability cannot be sustained. In this regard, it may be well to point out that in submitting the issue of negligence to the jury, the trial court did not commit error. In the absence of a motion for a directed verdict on the issue of liability, the plaintiff cannot complain of the failure of the trial court to withdraw that issue from the jury. See, Robinson v. Meyer, 165 Neb. 706, 87 N. W. 2d 231; Zavoral v. Pacific Intermountain Express, 178 Neb. 161, 132 N. W. 2d 329.

The final question presented is whether or not the verdict of the jury can be justified by reason of a failure to satisfy the jury on the question of damages. As heretofore noted, the plaintiff and her doctor testified to injuries and disabilities which they claimed plaintiff

had sustained in the accident. In rebuttal, defendant relied upon plaintiff's denial of any injury directly after the accident occurred and upon the testimony of Dr. Horn stemming from his examination of plaintiff immediately prior to trial and 6 years prior thereto in 1961. This evidence is directly contradictory of plaintiffs regarding the state of her health prior to the accident, indicates that she was, as early as 1961 and for many years prior thereto, suffering from back troubles, and in view of her denial of ever having consulted Dr. Horn may have seriously impeached her testimony.

Where it is a question of setting aside a verdict, the evidence should be considered in the light most favorable to the party obtaining the verdict. See, Robison v. Troy Laundry, 105 Neb. 267, 180 N. W. 43; Thompsen v. Miller, 177 Neb. 530, 129 N. W. 2d 498. In jury cases, jurors are the sole judges of the credibility of witnesses and of the weight to be given their testimony. They have the right to credit or reject the whole or any part of the testimony of any witness in the exercise of their judgment. If there is any evidence to support a jury's verdict, it is not the court's function to weigh the evidence to determine whether it would have returned a different verdict. When the evidence is in conflict and is such that reasonable minds can draw different conclusions from it, a jury question is presented. See Chaloupka v. State, 176 Neb. 746, 127 N. W. 2d 291. It was further held in that case that: "In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party. * * * Every controverted fact must be resolved in favor of the successful party and he should have the benefit of every inference that can reasonably be deduced from the evidence."

Under such circumstances, it appears that the jury may well have rendered a verdict for the defendant on the question of damages, and that defendant is entitled to retain the benefit of that verdict. The judgment of

the district court is reversed and the cause is remanded.

REVERSED AND REMANDED.

McCOWN, J., concurring in result.

I disagree with the repronouncement of a flat and rigid rule that it is negligence, as a matter of law, for a motorist to drive so fast on the highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights. The rule was never intended as an automatic rule of thumb nor a rigid formula to be applied regardless of circumstances. It is already subject to so many exceptions that it is often difficult to tell where the rule ends and the exceptions begin.

Where the exceptions embrace (as they do) those situations where reasonable minds might differ as to whether the motorist was exercising due care under the particular circumstances, it is difficult to justify the retention of the old "general rule." See, Guynan v. Olson, 178 Neb. 335, 133 N. W. 2d 571; Bartosh v. Schlautman, 181 Neb. 130, 147 N. W. 2d 492.

All sorts of conflicts are apparent in retention of the rule. For example, a motorist driving on the interstate highway at night with low-beam headlights at anything close to the 75-mile per hour speed limit, would be guilty of negligence as a matter of law; while if he is charged with negligence in exceeding the 75-mile speed limit, the jury is simply instructed that violation of the speed limit is not, in and of itself, negligence, but may be evidence of negligence.

It seems obvious that the general rule in its old form no longer fits present circumstances of traffic and highway regulations.

SPENCER, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH B. CANNITO ET AL., APPELLANTS.
162 N. W. 2d 260

Filed November 15, 1968. No. 36917.

1. **Criminal Law: Witnesses.** An in-court identification by a witness to whom the accused was exhibited before trial and in absence of defense counsel is inadmissible, unless an independent origin of the identification has been established.
2. **Criminal Law: Searches and Seizures.** The exclusionary rules of search and seizure are subject to an impeachment exception that at most is narrow.

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

Dier & Ross, for appellants.

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

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

SMITH, J.

A jury found defendants guilty of robbery. Chief complaints on appeal concern admission of items into evidence. The items are (1) in-court identifications by witnesses in spite of their previous observations of defendants while defendants were in custody and without counsel, and (2) pistols seized in an unreasonable search, the court having applied the impeachment exception to the exclusionary rules of search and seizure.

The identifications in question are found in testimony of Larry Arnold and Rodney Bundy, employees of a Safeway store in Kearney, Nebraska. Reliability of the identifications is affected by circumstances of the robbery. While Arnold was carrying customers' groceries outside the store, two strangers, subsequently identified as the defendants, approached him. The meeting occurred shortly after close of business at 9 p.m., September 2, 1967. Arnold and defendant Konder discussed

whether it was too late for Konder to buy a loaf of bread. The conversation ended with Konder's request to see the manager, and the three men entered the store. Defendants quickly announced their purpose.

During the robbery Arnold lay on the floor near defendant Cannito. A few feet away but out of Arnold's sight, Bundy upon Konder's demand removed money from the safe. The elapsed time was 5 to 10 minutes. A verbatim record of descriptions given by Arnold and Bundy prior to October 2 was not made.

After the robbery but before September 9, 1967, Bundy traveled to Fairfax, Missouri, where he stated that two suspects exhibited to him had not robbed the store. On September 9 he and Arnold observed defendants in custody at Kimball, Nebraska. There was no lineup. Defendants then had no counsel, and they did not waive their right to counsel. They subsequently moved for an order that identification of them by Arnold or Bundy before a jury would be inadmissible. At the hearing a record of Bundy's testimony on October 2 at defendants' preliminary hearing was received in evidence and the motion was overruled. In January 1968, Arnold and Bundy identified defendants in presence of the jury.

An in-court identification by a witness to whom the accused was exhibited before trial and in absence of defense counsel is inadmissible, unless an independent origin of the identification has been established. United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149. The identifications made by Arnold and Bundy had origins independent of the Kimball meeting. The rulings of the district court were correct.

Two pistols had been seized by the sheriff of Kimball County in an unreasonable search of defendants' motel room at Kimball on September 9, 1967. References to the pistols which the court had suppressed from evidence began in the State's evidence-in-chief. The pistols in the description of the sheriff were a .38 revolver with a brown handle and a .22 revolver with a black handle. An

eyewitness to the robbery had seen the light brown handle of a snubnosed .38 pistol and the darker handle of another pistol.

Konder on direct examination testified to an alibi without mentioning firearms. On cross-examination he admitted ownership on September 9, 1967, of a .38 pistol with a black handle and a .22 pistol that was "grayish-grayish black" or a "nondescript color." The State in rebuttal produced both pistols. After laying foundation and eliciting testimony that the handle of the .22 pistol was black, the State offered them in evidence for purposes of impeachment. They were received over objection.

The exclusionary rules of search and seizure are subject to an impeachment exception that at most is narrow. See, Walder v. United States, 347 U. S. 62, 74 S. Ct. 354, 98 L. Ed. 503; Note, 34 U. Chi. L. Rev. 939. Its range is determined from evidence in light of needs for exclusionary rules with teeth and for accuracy in fact finding. With some doubt we conclude that the ruling of the district court was correct.

Other assignments of error are not good. The judgments are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROGER LEE TUCKER, APPELLANT.
162 N. W. 2d 774

Filed November 22, 1968. No. 36911.

1. **Constitutional Law: Criminal Law.** The constitutional provision prohibiting cruel and unusual punishment was intended to prohibit torture and agonizing punishment. It does not abridge the Legislature's power of selection of such kind of punishment as it deems most effective in the suppression of crime.
2. **Statutes: Criminal Law.** The Legislature has the power to define crimes and to fix penalties; and this power, exercised within constitutional limits is not subject to review by the courts.

3. **Constitutional Law: Statutes.** If a litigant desires to question the constitutionality of a statute he must raise the issue in the trial court and give that court an opportunity to pass on it.

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

Paul E. Galter, for appellant.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and KOKJER and ACH, District Judges.

KOKJER, District Judge.

The defendant, Roger Lee Tucker, was charged with unlawfully operating a motor vehicle when his operator's license had been revoked and had not been reinstated, and that this was his second offense under the applicable statute. He entered a plea of nolo contendere, whereupon he was found guilty and sentenced to jail for 6 months, ordered to pay the costs of prosecution, and it was further ordered that he was not to operate a motor vehicle for a period of 2 years after his discharge from jail or the payment of the costs, whichever is later. The sentence is one specifically authorized by statute.

On appeal the only assignment of error is that the district court erred in sentencing the defendant pursuant to a statute which it is claimed was unconstitutional on two grounds and thus void. The first ground asserted is that the statute provides for cruel and unusual punishment. The second is that it violates the provision for distribution of powers between legislative, judicial, and executive departments of government in that the Legislature is claimed to have invaded the judicial department when it provided for a fixed penalty.

It has been held that while a constitutional provision prohibiting "cruel and unusual punishment" was intended to prohibit torture and agonizing punishment, it was never intended to abridge the selection by the

law-making power of such kind of punishment as it deemed most effective in the suppression of crime. Geurin v. City of Little Rock, 203 Ark. 103, 155 S. W. 2d 719.

This court has held that a statute which provided not only for imprisonment but that when the imprisonment is to be without labor, the sentence may require the convict to be fed on bread and water only, the whole or any part of the term of imprisonment, does not violate Article I, section 9, of our Constitution, prohibiting cruel and unusual punishment. State ex rel. Nelson v. Smith, 114 Neb. 653, 209 N. W. 328.

The second ground asserted by the defendant is also found to be untenable. This court said in the case of State ex rel. Nelson v. Smith, *supra:* "The legislature is clothed with the power of defining crimes and misdemeanors and fixing their punishment; and its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts."

Another defect in defendant's position here is that the constitutional question was not properly raised. If a litigant desires to question the constitutionality of a statute he must raise the issue in the trial court and give that court an opportunity to pass on it. State v. Schwade, 177 Neb. 844, 131 N. W. 2d 421.

The judgment is affirmed.

AFFIRMED.

UNION COLLEGE, A CORPORATION, APPELLANT, V. BOARD OF EQUALIZATION OF THE COUNTY OF LANCASTER, NEBRASKA, ET AL., APPELLEES.
162 N. W. 2d 772

Filed November 22, 1968. Nos. 36931, 36932, 36933, 36934.

1. **Taxation: Exemptions.** Property owned and used exclusively for educational purposes, and not owned or used for financial

gain or profit to the owner or user, is exempt from taxes. § 77-202, R. R. S. 1943.

2. ———: ———. The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation. A use which is not direct, but remote, will not qualify for exemption.

3. ———: ———. Property used primarily for the purpose of providing student employment is not exempt as property used exclusively for educational purposes.

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

Christensen, Glynn & Hendricks, for appellant.

Paul L. Douglas and Floyd A. Sterns, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and HUBKA and GARROTTO, District Judges.

BOSLAUGH, J.

These cases involve the question of whether real property owned by Union College is exempt from taxation. The trial court held the property to be not exempt and Union College has appealed. The cases have been consolidated in this court for briefing, hearing, and decision upon the stipulation of the parties.

Union College is a nonprofit, liberal arts college operated by the Seventh-Day Adventist Church at Lincoln, Nebraska. It has been in operation for 75 years and has an enrollment of approximately 1,100 students.

The evidence shows that approximately 80 percent of the students at Union College have some part-time employment. Although Union College does not require that its students be employed, the students are encouraged to engage in work while enrolled at the college. It is a part of the philosophy of the college that each student should: "* * * 'gain a proper regard for the dignity of labor and participate in character building work experiences.' The college believes that a joint study and work effort will help accomplish this objec-

tive." Employment also furnishes financial assistance for many students.

About 10 percent of the students at Union College have off-campus employment. Of the 70 percent which have work on the campus, about 30 percent work in 5 industries operated by the college. These are known as the Bookbindery, Broom and Mop Works, Furniture Manufacturers, Press, and Laundry. The college claims that the property used for the operation of these industries should be exempt.

The industries are not operated to provide vocational education as such. The students receive no scholastic credit for the work which they perform, but their work is rated and a record is kept of that information.

The students who are employed in the industries receive a normal wage which is credited to the student's account at the central office. The industries also employ nonstudent labor and salesmen. The managers of the industries are members of the faculty but do not teach any subjects at this time.

During the 10-year period ending in 1965 the industries had total sales of more than $9,250,000 of which about 4 percent represented intracampus sales. During this same period the industries produced a net operating gain of approximately $256,000, but some $816,000 was reinvested in the industries.

The Legislature has exempted: "Property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user." § 77-202 (1) (c), R. R. S. 1943. The question in these cases is whether the property used in the operation of the industries is "used exclusively for educational * * * purposes."

The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation. Doane College v. County of Saline, 173 Neb. 8, 112 N. W. 2d 248. A use which is not

direct, but remote, will not qualify for exemption.

In Nebraska Conf. Assn. Seventh Day Adventists v. Board of Equalization, 179 Neb. 326, 138 N. W. 2d 455, this court said: "The use of land to increase the income to a school, or for the sole purpose of providing compensable work for students, is an incidental use of property that does not bring it within the terms of the Constitution and statutes providing for exemption from taxation as property owned and used exclusively for educational, religious, charitable, or cemetery purposes, even though such property is not used for private financial gain or profit." See, also, Hilger v. Harding College, 231 Ark. 686, 331 S. W. 2d 851.

The evidence in these cases establishes that the industries are operated and maintained primarily for the purpose of providing student employment. This purpose, although laudable, is an incidental and not direct use of property for educational purposes.

The judgment of the district court in each case holding the property to be not exempt is correct and is affirmed.

AFFIRMED.

SMITH, J., concurring in result.

The majority opinion contrasts with opinions that have exempted these properties: A laundry training inmates of an institution and producing considerable revenue in competition with wholly commercial laundries. A nursing home of a society sometimes charging more than cost in competition with homes operating for private profit. One thousand acres of land owned by a boys ranch that also had 1,600 acres of rented land, 27 horses and ponies, 396 head of cattle, and housing for only 18 boys. The headquarters building, except the caretaker's apartment, of a woman's club. A Scottish Rite Temple. House of the Good Shepherd v. Board of Equalization, 113 Neb. 489, 203 N. W. 632; Evangelical Lutheran Good Samaritan Soc. v. County of Gage, 181 Neb. 831, 151 N. W. 2d 446; Lariat Boys Ranch v. Board of Equaliza-

tion, 181 Neb. 198, 147 N. W. 2d 515; Lincoln Woman's Club v. City of Lincoln, 178 Neb. 357, 133 N. W. 2d 455; Ancient & Accepted Scottish Rite v. Board of County Commissioners, 122 Neb. 586, 241 N. W. 93, 81 A. L. R. 1166.

The alternative here ought to be either reversal based on stare decisis or affirmance based on disapproval of the above cases. The latter which I now think preferable would slow the alarming increase of such indirect subsidies. The court, however, chooses not only to deny these claims of Union College but also tacitly to approve the previous cases. I therefore vote against the majority opinion but for the result. See, generally, Newcomer, "The Growth of Property Tax Exemptions," 6 Nat. Tax J. 116; Abel, "Public and Public Welfare Property Tax Exemption in West Virginia," 55 W. Va. L. Rev. 171; Comment, 44 Yale L. J. 1075; Notes, 64 Harv. L. Rev. 288, 21 Tul. L. Rev. 147.

PAUL LUCHT, DOING BUSINESS AS PAUL LUCHT BODY SHOP, APPELLEE, V. AMERICAN PROPANE GAS CO., A CORPORATION, ET AL., APPELLANTS.

162 N. W. 2d 891

Filed December 6, 1968. No. 36728.

1. **Evidence: Trial.** In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence.** The general rule where a party is responsible for a dangerous instrumentality is that he is charged with the duty to take suitable precautions to avoid injury or damage to persons or property rightly in its proximity, and a failure to do so is negligence.
3. **Negligence: Evidence.** In an action based on negligence to which the comparative negligence rule has application, wherein the evidence shows beyond reasonable dispute that the plain-

tiff's negligence was more than slight in comparison with that of the defendant, the action should be dismissed.

4. **Trial: Appeal and Error.** For an error of law occurring at the trial to be considered by this court, the alleged error must be properly presented to the trial court and properly preserved. Otherwise, the appellant is precluded from raising it on appeal.

5. **Trial.** Instructions given to a jury must be construed together, and if when considered as a whole they properly state the law, that is sufficient.

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

John E. Dougherty, for appellants American Propane Gas Co. and Phillips Petroleum Co.

Fraser, Stryker, Marshall & Veach, for appellant Transport Repair Service, Inc.

Eisenstatt, Morrison, Higgins, Miller, Kinnamon & Morrison and McCormack, McCormack & Brown, for appellee.

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

SPENCER, J.

This is an action for damages sustained to property of the plaintiff in an explosion and fire, which occurred November 11, 1963, on the premises of the plaintiff when plaintiff subjected a propane tank truck, delivered to him for painting, to intense heat in a bake oven as part of the painting and drying process. A jury returned a verdict against all defendants in the sum of $86,200. Defendants perfected appeals to this court.

In determining the sufficiency of evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be de-

duced from the evidence. Thompsen v. Miller, 177 Neb. 530, 129 N. W. 2d 498.

Applying the criterion above, we determine the facts to be as set out herein: American Propane Gas Company, a corporation, hereinafter referred to as American, delivered the truck, which was propelled by propane gas, to Phillips Petroleum Company, a corporation, hereinafter referred to as Phillips, for repair and painting. The truck in question carried liquid propane gas in two side-by-side cargo tanks, with a smaller supply tank on top which was used to propel it. After Phillips had completed the repair work, McCord, the district maintenance supervisor for Phillips, had the truck delivered to plaintiff to be painted because Phillips did not have the facilities to do the work.

Before it delivered the truck to Phillips, American pumped out all of the liquid gas in the two cargo tanks on the truck but, having no facilities to do so, did not steam clean or purge them. After Phillips' employees delivered the truck to plaintiff's premises, the plaintiff observed that one of the petcocks on the truck was frosted, which indicated to him that the tank still had some gas in it. Plaintiff then called McCord, told him about the petcock, and advised him that he would not paint the truck unless it was purged. He also told McCord that since the exterior of the truck was rough it should be sandblasted. Neither plaintiff nor Phillips had the facilities to sandblast or purge the vehicle. It is plaintiff's testimony that McCord instructed him to send the truck to Transport Repair Service, a corporation, hereinafter referred to as Transport. It is McCord's testimony that he instructed plaintiff to obtain a bid on the sandblasting and purging.

Exhibit 67 is an invoice furnished by plaintiff, dated November 7, 1963. This invoice indicates that plaintiff was to bill Phillips for the sandblasting and purging as well as for the painting. Plaintiff delivered the truck to Transport. Subsequently, Transport's foreman called

plaintiff and told him they would not sandblast the truck unless it was purged. Plaintiff told him that was what it was sent down for, and asked the cost. The foreman could not give plaintiff an estimate. Later, plaintiff obtained a bid by telephone from Reuben Johnson, Transport's president. Plaintiff communicated this bid to McCord, who thought it was too high. McCord told plaintiff he would have to check it out with his employers, which he did. In the interim, McCord happened to see Johnson at a restaurant, and asked him about the bid and was told he could take it or leave it. On this occasion, Johnson told McCord that Transport would not sandblast the truck without purging it. Subsequently, McCord received authority to accept the bid. He attempted to contact the plaintiff, who was out of the city. When he could not do so, he called Transport's foreman by telephone and told him to go ahead with the job. The next day McCord told plaintiff he had instructed Transport to go ahead with the job.

McCord did not have possession of the truck after it was delivered to plaintiff. McCord had no contact with Transport after he told Transport's foreman to go ahead with the job, or with plaintiff after he relayed this information to him, until after the explosion. He did not see the truck after plaintiff delivered it to Transport. When he told Transport's foreman to go ahead with the job, it was his understanding the truck would be purged, because he had been told Transport would not sandblast the truck without purging it and that plaintiff would not paint it unless it was purged. The bid which he had submitted to his superiors was for both jobs.

After Transport sandblasted the truck, its foreman called plaintiff and told him the truck was ready. Plaintiff sent an employee to bring the truck back to his shop, but did not receive a work order or ascertain what work Transport had done. This was sometime Friday afternoon, November 8, 1963. The employee who painted the

truck testified that when he began work that afternoon, he detected the odor of gas. It smelled like rotten eggs. He could smell gas even when the truck was not running. Neither this employee nor the plaintiff checked to see if the truck had actually been purged. The evidence is undisputed that this fact could have been readily determined by turning a petcock.

The lower portion of the truck was painted on Saturday and driven into the bake oven for a period of 15 minutes to dry the paint. This bake oven is heated to 180 degrees for the drying process. Monday, November 11, 1963, the painting on the truck was completed and it was backed into the bake oven about 11:15 a.m. When the painter returned from lunch, about 1 p.m., he heard a hissing noise coming from the furnace room. He ran to that room and turned the switch which controlled the flame of the furnace. He then said to his foreman, "I think there's something wrong," and the explosion occurred. Less than a minute elapsed between the time the painter heard the hissing noise and the explosion. It was this employee's testimony that at the time he drove the truck into the bake oven he knew it contained some form of gas.

After the explosion, in the presence of plaintiff, Johnson, Transport's president, told the fire captain that the truck had been purged. It is undisputed that the truck had not been purged, and that Transport did not inform plaintiff or his employees of this fact.

American and Phillips moved for directed verdicts at the close of the evidence, and after the verdict, for judgments notwithstanding the verdict. These motions were overruled. It is apparent that the trial court believed that these defendants had a nondelegable duty to furnish plaintiff with a truck which had been purged in a proper manner for painting. We do not question the duty in the usual situation to furnish a truck which had been purged in a proper manner for painting or to direct attention to the fact that the truck had not been purged.

The general rule where a party is responsible for a dangerous instrumentality is that he is charged with the duty to take suitable precautions to avoid injury or damage to persons or property rights in its proximity, and his failure to do so is negligence. Adapted from Rose v. Buffalo Air Service, 170 Neb. 806, 104 N. W. 2d 431. That is not the situation we have in the present case.

Granting that a propane transport is a dangerous instrumentality, this case is readily distinguishable from those where a duty may be nondelegable. We do not agree with the plaintiff's conclusion that the evidence justifies a finding that American and Phillips had the duty to be certain Transport had purged the truck before the plaintiff picked it up. Plaintiff, by his own actions, relieved these defendants of that responsibility. When the truck was delivered to plaintiff in the first instance, plaintiff discovered that it had not been purged. He then advised McCord, the representative of these defendants, that he would not paint it until it had been purged. Thereafter, he was not relying on American or Phillips to see that the truck was purged. Rather, plaintiff, being fully informed, undertook to secure a bid to purge and to sandblast the truck. Whether he contacted Transport at McCord's suggestion or not is immaterial on the facts herein. Plaintiff had the truck delivered to Transport and personally secured a bid for both the sandblasting and the purging. He then incorporated the bid he received from Transport in the cost estimate he furnished to McCord. When Transport had ostensibly finished the sandblasting and the purging, plaintiff picked up the truck on the assumption that it had been sandblasted, which was evident, and that it had been purged, which, while not so evident, could have been checked by merely turning a petcock.

Plaintiff was well acquainted with the propensities of gas. He knew it was explosive. His employee smelled gas after the truck was returned to plaintiff's premises. Both plaintiff and his employee knew that the truck

would be placed in the bake oven with a constant temperature of 180 degrees.

What is the negligence of the defendants, American and Phillips, which would justify the submission of the case against them to the jury? We find none. Plaintiff knew that these defendants had not had possession of the truck after he delivered it to Transport, and he knew that they expected it to be purged before it was either sandblasted or painted. He had included the cost of both the sandblasting and the purging, which was one figure, in the cost estimate he furnished to defendants. The record does not indicate that these defendants even knew that the plaintiff had picked up the truck from Transport until after the explosion. As to them, we are satisfied the evidence justifies the conclusion that the plaintiff had relieved them of any duty to see that the truck actually was purged.

If by any process American and Phillips could be guilty of some negligence, we are convinced that as to them the plaintiff would be guilty of contributory negligence as a matter of law. In an action based on negligence to which the comparative negligence rule has application, wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant, the action should be dismissed. Rogers v. Shepherd, 159 Neb. 292, 66 N. W. 2d 815. The motions for directed verdicts and later for judgments notwithstanding the verdict, filed by American and Phillips, should have been sustained.

As between the plaintiff and Transport we have a different problem. On the facts, as the jury must have determined, if Transport had purged the truck, the explosion would not have occurred. Transport alleges eight assignments of error. We condense them, as follows: The court should have found plaintiff guilty of contributory negligence sufficient to bar a recovery; the court erred in giving instructions Nos. 15 and 18; and

the court erred in failing to instruct upon the doctrine of assumption of risk.

The trial court overruled Transport's motion for a directed verdict, and submitted the issue of contributory negligence to the jury. On the facts as we determine them, we are convinced that a jury question was presented. As set out hereinafter, while plaintiff may have failed to exercise ordinary care it cannot be said as to Transport that he is guilty of negligence as a matter of law. The trial court fully instructed the jury on the issue of comparative negligence.

Transport assigns as error in this court the giving of instruction No. 15, but did not do so in its motion for new trial. For an error of law occurring at the trial to be considered by this court, the alleged error must be properly presented to the trial court and properly preserved. Otherwise, the appellant is precluded from raising it on appeal. Hancock v. Parks, 172 Neb. 442, 110 N. W. 2d 69.

Transport contends that instruction No. 18 requires a higher degree of care on the part of defendant than was required. The instruction in essence states that a degree of care commensurate to the danger involved is required when one is dealing with propane gas to avoid injury and damage. When instruction No. 18 is read in its entirety, it appears to us to be a proper instruction on the facts of this case. Instructions given to a jury must be construed together, and if when considered as a whole they properly state the law, that is sufficient. Bunselmeyer v. Hill, 179 Neb. 140, 137 N. W. 2d 354.

Transport argues that it was entitled to an instruction on assumption of risk. No requested instruction was submitted on this point. While plaintiff had full knowledge of the danger, he had every reason to believe that Transport had purged the truck. He had delivered it to Transport for that purpose. He had been told that Transport would not sandblast the truck unless and until it was purged, and the bid he received was for

both jobs. When plaintiff was called and told that the truck was ready, it was readily apparent that it had been sandblasted and it was not too unreasonable for plaintiff to believe that it had also been purged. It is of interest that Transport's president, even after the explosion, thought that the truck had been purged. The failure of the plaintiff to inspect the truck on its return from Transport is at most a failure to exercise ordinary care. It is not a question of assumption of risk, but rather one of contributory negligence requiring an instruction on comparative negligence. This issue was fully submitted by the trial court. Transport's assignments of error cannot be sustained.

The judgment of the district court is reversed as to American Propane Gas Company and Phillips Petroleum Company, and the action is dismissed as to them. The judgment of the district court is affirmed as to Transport Repair Service, Inc.

AFFIRMED IN PART, AND IN PART REVERSED AND DISMISSED.

BILLIE K. HOOPER, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.
163 N. W. 2d 117

Filed December 6, 1968. No. 36854.

1. **Pensions: Public Officers and Employees.** The words "other proper municipal authorities" used in section 15-1006, R. S. Supp., 1963, include the fire chief of a city of the primary class.
2. ———: ———. Section 15-840, R. R. S. 1943, is not an exclusive remedy for a fireman entitled to benefits under the Firemen's Pension Act.
3. **Pensions: Actions.** A declaratory judgment proceeding is permissible to determine rights and benefits under section 15-1006, R. S. Supp., 1963.
4. **Pensions: Public Officers and Employees.** Under section 15-1006, R. S. Supp., 1963, of the Firemen's Pension Act, a fireman receives injuries while in the line of duty if he contracts disease while in the discharge of duty.

5. **Trial: Appeal and Error.** Where there is irreconcilable conflict on a material issue this court will, in determining the weight of 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.
6. **Pensions: Public Officers and Employees.** Permanent and total disability under section 15-1006(1), R. S. Supp., 1963, is the inability to do the work said fireman or policeman was doing at the time of his accident or other disabling act.

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

Ralph D. Nelson and Jack B. Lindner, for appellant.

Nelson, Harding, Leonard & Tate and David D. Tews, for appellee.

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

SPENCER, J.

Plaintiff, who was employed by defendant city as a fireman, brought this action for a declaratory judgment to determine pension rights under sections 15-1001 to 15-1007, R. S. Supp., 1963. The trial court found plaintiff became temporarily disabled on October 7, 1965, for work as a fireman because of a heart condition received in the line of duty, and was permanently and totally disabled on January 31, 1966. City perfected an appeal to this court from the judgment entered thereon.

Plaintiff was employed by defendant city from October 1, 1952, to December 9, 1965. On May 13, 1965, plaintiff and several other off-duty firemen were called to assist with a fire in a business establishment at 1326 P Street. This fire was described as a tough one because of heavy concentration of smoke and ammonia fumes coming from the basement. Plaintiff went into the basement, where the fire was located, without a mask since none was available to him. He subsequently became ill, vomited, and experienced severe chest pains, with

radiation of the pain into his arms and neck. He rested a few minutes and tried to resume his activities, but the pain persisted and he was sent home. This was the first time he had ever experienced this type of chest pain, which city's medical expert from a later examination and the history described as angina pectoris. These pains abated after a short time, but subsequent thereto he had several bouts with both chest pains and nausea.

On five fire calls between May 15 and early October 1965, plaintiff experienced these chest pains in increasing intensity. He consulted a doctor on September 2, 1965, because of them. An electrocardiogram taken on that occasion did not disclose any unusual condition. The diagnosis given him was intercostal neuritis. He was given pills for treatment, but they did not help. While on duty during the day of October 6, 1965, he again experienced chest pains. That night he was on duty and slept at the fire station. He awoke about 1:30 a.m., October 7, with severe prolonged chest pains and an attack of nausea. He was permitted to return home by his superior about 4 a.m. He consulted a doctor about 6 a.m., and was ordered to the hospital. The diagnosis was myocardial infarction. He remained in the hospital for 15 days.

From the time of plaintiff's admission to the hospital on October 7, 1965, until December 9, 1965, he remained on the payroll of the defendant, but was paid his regular salary in the form of sick leave pay. His employment was terminated December 9, 1965, when his sick leave expired. On January 31, 1966, his doctor advised plaintiff that he had made his maximum recovery but would not permit him to return to his employment as a fireman. In February 1966, he took employment for a brief time as a guard at the Nebraska State Penitentiary. After 3 or 4 weeks he took employment with the Lincoln school system as a bus driver.

Plaintiff at no time received benefits of any nature under the Firemen's Pension Act. He personally re-

quested these benefits from the chief of the fire department and the city attorney. The firemen's union made a request for benefits for him from the fire chief, who is the executive head of the department. His attorneys subsequently made a written demand on the chief. The city attorney had Mr. Hooper examined for evaluation purposes 13 days subsequent to December 9, 1965, when his sick leave terminated. Benefits were denied on the theory that his disease did not arise out of his employment.

The nature of his duties, so far as material herein, are described by the city job description established in May 1964, as follows: "Work involves responsibility for the protection of life and property through firefighting activities usually performed under close supervision. Work requires performance of hazardous tasks under emergency conditions which may involve strenuous exertion under such handicaps as smoke and cramped surroundings." A desirable ability is: "Sufficient physical strength and agility and freedom from serious physical defects as indicated by a physical examination and the ability to perform arduous tasks under adverse conditions."

Plaintiff's two medical experts and the city's medical expert agree that plaintiff sustained a myocardial infarction, but could not fix the exact time that this myocardial infarction occurred. City's medical expert testified that there is evidence to support the conclusion that plaintiff's heart damage occurred on October 7, 1965, when he experienced prolonged chest pains during the early morning hours at the fire station. Plaintiff's treating physician testified that his employment was a factor in causing the myocardial infarction, and that absent this employment plaintiff would not have had any heart damage. He testified positively that there was a direct relationship between his duties as a fireman and the cause of the infarction. Both plaintiff's medical experts and the city's medical expert were of the opinion that

plaintiff had coronary arteriosclerosis for a considerable period of time prior to October 7, 1965, and that the myocardial infarction was a consequence of the arteriosclerosis. It was the opinion of plaintiff's medical experts that plaintiff's preexisting coronary condition was definitely aggravated by his employment, and materially contributed to his myocardial infarction. City's medical expert was equally positive that the myocardial infarction was not a result of his employment, although he did admit that emotional and mental stress were factors in the progression and aggravation of arteriosclerosis.

City sets out nine assignments of error, which we condense to two main categories: (1) The jurisdiction of the court over the subject matter; and (2) whether plaintiff's disease was contracted in the line of duty.

The jurisdictional question was first raised by an oral motion after plaintiff had concluded his case-in-chief. City's attack is predicated on the fact that plaintiff had not requested the Lincoln city council to grant a hearing under section 15-1006, R. S. Supp., 1963, to determine liability for permanent total disability. Section 15-1006, R. S. Supp., 1963, so far as material herein, provides: "(1) In case any such fireman or policeman shall become permanently and totally disabled from accident or other cause for the work said fireman or policeman was doing at the time of said accident or other disabling act, while in the line of duty, such fireman or policeman shall forthwith be placed upon the roll of pensioned firemen or policemen, at the rate of fifty per cent of his regular pay as defined in section 15-1001 paid monthly; * * * (3) In case of the temporary total disability of a fireman or policeman received while in the line of duty, he shall receive his salary during the continuance of such disability for a period not to exceed twelve months; Provided, if it shall be ascertained by the city council or other proper municipal authorities within twelve months that such disability has become permanent, then his salary shall cease and he shall be entitled to the bene-

fits of the provisions with reference to pensions in case of total and permanent disability contained in subsections (1) and (2) of this section."

The only reference to city council or other proper municipal authorities in the entire pension act is found in subsection (3), of section 15-1006, R. S. Supp., 1963. The determination to be made by them is whether or not temporary total disability received in the line of duty has become permanent. There was no hearing to determine any type of disability because city refused to recognize any employment-connected disease or disability, whether temporary or permanent. Consequently, plaintiff was paid no salary after October 7, 1965, within the meaning of the pension act, but was required to use up his accumulated sick leave.

City relies on Schaub v. City of Scottsbluff, 164 Neb. 805, 83 N. W. 2d 775, to sustain its position. That case, however, is distinguishable from the instant one on the facts. There, Schaub was admittedly only partially disabled on September 11, 1953, when he sustained a wrist injury. This became temporary total disability on April 4, 1954, after surgery, and remained so until August 1954, when he returned to work although still partially disabled. He continued to perform his duties until November 15, 1954, when he again became temporarily totally disabled. The city refused Schaub's request for pension rights on the theory that he could return to work and was not permanently disabled.

Here, plaintiff was hospitalized October 7, 1965, and never thereafter was able to return to work as a fireman. He was given sick leave pay from that date until his sick leave expired December 9, 1965, at which time his employment was terminated. City had plaintiff examined by its medical expert on December 22, 1965, or within 2 weeks thereafter. Plaintiff at no time received any disability benefits because city contended that his disability was not incurred in the line of duty. On January 26, 1966, city's personnel director, in an interoffice

memorandum, certified that plaintiff's employment was terminated because he was: "Not able to return to job after illness not contributed to job." While this is an interoffice memorandum, it shows the city's position on the disability.

Plaintiff requested his pension rights from the fire chief, who was the executive officer of the fire department, and also from the city attorney. The firemen's union requested benefits for him from the chief, and his attorney requested such benefits for him in writing. At all times the city has consistently maintained that the plaintiff's disability was not connected with his employment. This action was filed September 6, 1966, and the pleadings indicate that it was contested on the theory set out in city's answer, "* * * that the defendant's employment was not in any manner connected with his disability, if any."

What is meant by the words, "or other proper municipal authorities"? City argues they refer only to the mayor. Plaintiff argues in a city of the primary class they include the fire chief who is the official in charge of or responsible for all of the activities of the fire department. In this respect, it is of interest that the statute involved in Schaub v. City of Scottsbluff, *supra*, which was section 35-203, R. R. S. 1943, covering cities of the first class, provided for a determination by the board of fire and police commissioners or other proper municipal authorities. That case interpreted "other proper municipal authorities" as there used to mean the city council. With cities of the primary class, however, the provision is the city council or *other* proper municipal *authorities*. Obviously, this refers to authorities other than the city council. Without defining exactly who all may be included in this classification, we do hold it includes the executive head of the department involved, the fire chief.

City argues that the court acquired no jurisdiction over the subject matter because an original action for

declaratory judgment is not a proper remedy herein. Its position is that a fireman claiming disability benefits under the pension act must file a claim against the city pursuant to the provisions of sections 15-840 and 15-842, R. R. S. 1943, and if dissatisfied with the disposition of it, his remedy is limited to an appeal by petition in error to the district court.

Section 15-840, R. R. S. 1943, provides: "All claims against the city must be presented in writing with a full account of the items, verified under oath of the claimant or his agent, that the same is correct, reasonable, just and unpaid; and no claim shall be allowed unless presented, verified as herein provided, and read in open council. The vote of each councilman upon the allowance of any claim shall be entered upon the minutes. No claims arising on contract or tort exceeding the sum of twenty-five dollars shall be allowed until the same shall have been read in open council, and the name of the claimant, the amount and nature of the claim published once in a daily newspaper published and of general circulation in the city. Not more than ten words shall be used in stating the nature of such claim."

Section 15-842, R. R. S. 1943, provides: "No warrant shall issue for the payment of any such claim until the appeal is finally determined. In order to maintain an action for an unliquidated claim it shall be necessary, as a condition precedent, that the party file in the office of the city clerk within thirty days from the time such right of action accrued a statement of the amount of the claim, giving full name of the claimant, the time, place, nature, circumstances and cause of the injury or damage complained of. No appeal bond shall be required of the city by any court in case of appeal by the city, and judgment shall be stayed pending such appeal."

Section 25-21,150, R. R. S. 1943, provides, so far as material herein: "Any person * * * whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have deter-

mined any question of construction or validity arising under the * * * statute, ordinance, * * * and obtain a declaration of rights, status or other legal relations thereunder."

Dayton v. City of Lincoln, 39 Neb. 74, 57 N. W. 754, is of interest on the question as to whether or not plaintiff was required to file a claim against the city herein. There, the plaintiff brought an original action for damages to property by reason of change of grade in a street. The city raised the jurisdictional question because no claim had been filed with the city. With exceptions not material herein, the statute involved in that case is substantially the same as those cited by city herein. The holding in that case, particularly the discussion of the limitation of the filing date, is sufficient to show that on an unliquidated claim of this nature, other proceedings are possible.

It cannot be denied that there are many complicated questions of statutory construction and interpretation involved in the rights claimed by the plaintiff herein. We determine that under the facts of this case a declaratory judgment action was a proper procedure.

We now reach the fact question, whether plaintiff's disease was contracted in the line of duty. In Campbell v. City of North Platte, 178 Neb. 244, 132 N. W. 2d 876, which involved a fireman who died of coronary artery disease, we held that under the provisions of the Firemen's Pension Act for a city of the first class, a fireman received injuries while in the line of duty if he contracts disease while in the discharge of his duty. This is equally true under section 15-1006, R. S. Supp., 1963.

The dispute herein arises on the causal connection between the conditions of the employment and the disease which caused the disability. City predicates its position on the fact that medical science does not know the primary cause of arteriosclerosis. City states: "The etiology is officially listed as 'unknown.'" City argues that it is only possible to name certain factors which are

believed to contribute to its causation. It is undisputed that plaintiff had several of the factors listed as possible contributors, such as regular tobacco intake and high serum cholesterol. These would have no causal relationship to the employment. It is also undisputed that plaintiff was subjected to abnormal stress and strain. All of the medical experts agree that physical and emotional stress is one of the contributing factors to arteriosclerosis, and plaintiff's medical experts testified to a direct causal relationship between plaintiff's heart condition and his employment.

Except for the testimony of city's medical expert that there was no causal connection herein, this case is a stronger one on the facts than Campbell v. City of North Platte, *supra*. Here, plaintiff experienced sharp chest pains on every serious fire call after they first occurred on May 13, 1965, at the 1326 P Street fire. City's medical expert, from the history, diagnosed these pains as angina pectoris. One of plaintiff's medical experts testified one might have angina pectoris and not have any heart damage. The electrocardiogram of September 2, 1965, did not disclose heart damage. All medical experts, however, agree that as of October 7, 1965, plaintiff had a myocardial infarction, but disagree on the causal relationship with his employment.

In this state of the record, we are aided in determination of the issue by the rule that where there is irreconcilable conflict on a material issue, this 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, 182 Neb. 51, 152 N. W. 2d 103.

City's medical expert testified that the arteriosclerotic condition existed over a long period of time. Still, we are met with the fact that the heart damage or myocardial infarction was not present on September 2, 1965,

but was present after plaintiff experienced prolonged chest pains on October 7, 1965. It is a reasonable conclusion that whatever condition existed was aggravated sufficiently to produce the heart damage. One of plaintiff's medical experts identifies the conditions of employment as the aggravating cause. Whether the employment caused the heart attack or aggravated a preexisting condition thereby causing it, makes little difference in the determination of the issue herein. In either event, the heart damage was causally connected with plaintiff's employment.

City argues that plaintiff was not totally disabled. City's medical expert testified that he would permit the plaintiff to return to his employment to determine that question. Both of plaintiff's medical experts were equally positive that it would be too great a risk to permit plaintiff to return to fire fighting. City further argues that plaintiff is not totally disabled because he is able to drive a school bus, and cites Schaub v. City of Scottsbluff, 164 Neb. 805, 83 N. W. 2d 775, which holds: "A fireman is permanently and totally disabled under the Firemen's Pension Act when the disability from which he suffers renders him permanently unable to obtain, hold, or do any substantial amount of remunerative work, either in his previous occupation or in any other established and recognized field of employment for which he is fitted."

The statute in effect at the time of Schaub v. City of Scottsbluff, *supra* (§ 15-1006(1), R. R. S. 1943), read as follows: "In case any such fireman or policeman shall become permanently and totally disabled, from accident or other cause, while in the line of duty, such fireman or policemen shall forthwith be placed upon the roll of pensioned firemen or policemen * * *."

In 1963, that statute was amended to read as follows: "In case any such fireman or policeman shall become permanently and totally disabled from accident or other cause *for the work said fireman or policeman was doing*

at the time of said accident or other disabling act, while in the line of duty, such fireman or policeman shall forthwith be placed upon the roll of pensioned firemen or policemen * * *." § 15-1006(1), R. S. Supp., 1963. (Italics supplied.)

It is evident that the Legislature by this amendment undertook to define what it meant by permanent total disability, and restricted it to the work said fireman or policeman was doing at the time of said accident or other *disabling* act. The holding in Schaub v. City of Scottsbluff, *supra,* is therefore not applicable herein.

For the reasons given, the judgment herein should be and hereby is affirmed.

AFFIRMED.

FLORENCE COOK, ADMINISTRATRIX OF THE ESTATE OF HARVEY COOK, DECEASED, ET AL., APPELLANTS, V. CHRISTENSEN SAND AND GRAVEL COMPANY OF FREMONT, A PARTNERSHIP, ET AL., APPELLEES.

163 N. W. 2d 105

Filed December 6, 1968. No. 36903.

1. **Workmen's Compensation.** In an action under the Workmen's Compensation Act the burden is on the claimant to establish by a preponderance of the evidence an accident arising out of and in the course of his employment and the disability resulting therefrom.
2. ———. Objective symptoms of an injury are those which may be observed by others as distinguished from those which are apparent only to the injured person. An objective symptom may be any symptom which indicates a deleterious change in the bodily condition of the injured person.
3. ———. The requirement that objective symptoms of an injury be produced at the time of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown.
4. ———. The word "accident" as used in the Workmen's Compensation Act means an unexpected or unforeseen injury happen-

ing suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.

5. ———. Claimant has the burden of proof to establish that such unexpected or unforeseen injury was in fact caused by the employment.

6. ———. Recovery cannot be had for disability or death due to natural causes but occurring while the employee is at work, nor for disability or death resulting from a natural progression of a preexisting condition.

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

Sidner, Gunderson, Svoboda & Schilke, for appellants.

D. Nick Caporale and Schmid, Ford, Snow, Green & Mooney, for appellees.

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

NEWTON, J.

This is a workmen's compensation action brought by Florence Cook individually and as administratrix of the estate of Harvey Cook, deceased, hereinafter referred to as plaintiff, against Christensen Sand and Gravel Company, a partnership, hereinafter referred to as defendant.

On April 12, 1965, Harvey Cook was employed by defendant as a truck driver. At about 10 a.m. he was directed to haul a load of sand from defendant's plant to the construction site of the Fel-Tex Plant at Fremont, Nebraska. Defendant's concern was not unionized and Harvey Cook was not a union man. It appears that upon arrival at the Fel-Tex Plant, which was a union job, Harvey Cook was interrogated in an unfriendly manner by certain individuals employed at the Fel-Tex construction site about his union status. He succeeded in unloading the material in his truck, but did not return to defendant's plant. Upon discovering this, Richard Weir, defendant's manager, drove to the Fel-Tex construction site, arriving at about 2 p.m., he found Harvey Cook

sitting in his truck which was surrounded by heavy machinery in such a manner that it could not leave. He found Harvey Cook to be in an agitated and nervous condition. Harvey Cook stated: "They've got me locked in * * *." Mr. Weir succeeded in getting the truck extricated and it was returned to defendant's plant by Harvey Cook who there stated to another employee: "They wouldn't let me dump my load. * * * They broke the aerial off my truck." He was still in a highly nervous condition. At approximately 3 to 3:30 p.m., Harvey Cook arrived with a load of coarse gravel or rock on a farm near Dodge, about 30 miles distant. At about this time, he ate a peanut butter sandwich which was the only food he had since his morning meal. On arrival at the farm, he proceeded to unload the gravel which was not difficult since his truck is what is commonly referred to as a dump truck. While doing so, he experienced a severe abdominal pain. A doctor was called and he was taken to the Dodge County Community Hospital in Fremont. He died on the following day, April 13, 1965. The primary cause of death was a perforated duodenal ulcer accompanied by peritonitis and complicated by emphysema and an impaired heart.

There was conflicting evidence as to the foregoing events alleged to have occurred at the Fel-Tex construction site, but in our view, the foregoing substantially reflects what actually occurred.

The medical evidence in this case is definitely conflicting. On trial to a single judge of the compensation court, to the court en banc, and on review in the district court, it was found in each instance that plaintiff had failed to sustain her burden of proof. The primary question presented is whether the perforation of Harvey Cook's ulcer and his resultant death had a causal connection with his employment or simply resulted from a natural progression or erosion of the ulcer from which he had been suffering for some time.

The medical experts agreed, or at least there is no

dispute, in regard to the following circumstances: The perforated duodenal ulcer to which Harvey Cook was subjected was an ulcer of long standing and he had suffered from it for at least 3 years. Generally speaking, the cause of ulcers is not known, but people who suffer from them have an unusually high hydrochloric acid and pepsin content in their stomachs around the clock and over an extended period of time. These acids eat away the walls of the stomach or intestine and unless checked, they may eventually result in perforation, with a severe pain being experienced immediately upon perforation. Emotional stress can increase the level of the acid and pepsin in the stomach and the ingestion of food also results in an increase in the level of these secretions. An ulcer which is constantly bathed in pepsin and hydrochloric acid would ordinarily progress in size and depth. Emotional stress may be a factor in the development and progression of ulcers.

Plaintiff called Dr. Alexander T. Harvey, a specialist in internal medicine, and Dr. Harry A. Jakeman, a specialist in general surgery. These were the attending physicians at the time of Harvey Cook's illness. In answer to hypothetical questions, both doctors testified that a contributing cause of the perforation of Harvey Cook's ulcer was the emotional stress resulting from the events which had previously occurred at the Fel-Tex construction site. They felt that Harvey Cook's ensuing nervous condition and the mental stress to which he had been subjected were the immediate cause of the perforation. They conceded, however, that the ulcer was one of long standing; that of necessity he was one of the individuals who was subject to a high stomach level of pepsin and hydrochloric acid around the clock, over a very extended period of time; and that the ulcer might well have perforated at any time notwithstanding the stress to which Harvey Cook had been subjected. It was also conceded that because there is no way of knowing what occurred in Harvey Cook's abdominal tract on the

day in question, there was no way of positively ascertaining the exact condition which resulted in the perforation at the time it occurred. Dr. Harvey was not questioned about the peanut butter sandwich which Harvey Cook had ingested a very short time before he became ill, but Dr. Jakeman testified that the ingestion of this sandwich could also have been a contributing factor.

Defendant called Dr. John Courtney, who specializes in general surgery, and Dr. Harold N. Neu, who specializes in internal medicine. Both of these doctors testified that in their opinions, there was no causal relationship between the events which occurred at the Fel-Tex construction site and the decedent's death. Dr. Courtney stated: "The ulcer is there. The stress and strain, * * * does not make it perforate. The thing that causes it to perforate is that it has eroded deeply enough into the tissues, and then when—usually after a meal, after the taking in of some food into the stomach, without any emotion or with emotion, it perforates. * * * Emotion doesn't bring on the perforation. It's the condition of the ulcer at the stage where it's ready to perforate. And usually, as I say now, some food is taken in, and then she leaks." He further testified that although the ulcer could have perforated as the result of emotional stress, in his opinion, it did not; that the ingestion of food stimulates stomach activity and in this case, this was the most likely cause of the perforation. He insisted that it is pure speculation to attribute the perforation to the emotional stress sustained by Harvey Cook. Dr. Neu stated that such emotional stress could not, in a period of 3 or 4 hours, cause sufficient adrenal activity to bring about a sufficient digestion of internal tissue to result in a perforation of the ulcer although neither emotional stress nor the ingestion of food would be good for an ulcer. He did not, however, consider the eating of a sandwich as a cause of the perforation, but apparently attributed this to a natural progression of the ulcerous condition.

In resolving this case, the following rules set forth in the case of Schoenrock v. School Dist. of Nebraska City, 179 Neb. 621, 139 N. W. 2d 547, should be borne in mind: "In an action under the Workmen's Compensation Act the burden is on the claimant to establish by a preponderance of the evidence an accident arising out of and in the course of his employment and the disability resulting therefrom.

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

"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."

Section 48-151, R. R. S. 1943, provides: "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, with or without human fault, and producing at the time objective symptoms of an injury. The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment." It further provides: "The terms shall not be construed to include disability or death due to natural causes but occurring while the employee is at work, nor to mean an injury, disability or death that is the result of a natural progression of any preexisting condition." It is no longer necessary, under the Nebraska statutes, to prove the occurrence of an event external to the body as

a cause of injury. See Harmon v. City of Omaha, *ante* p. 352, 160 N. W. 2d 189.

As will be noted, the medical evidence is definitely conflicting in regard to whether or not the emotional stress to which Harvey Cook had been subjected can be considered as a cause of his ulcer perforating. Opinion evidence rarely, if ever, bears the degree of certainty of other types of evidence and frequently involves speculation to a greater or lesser degree. In the present instance, it is known that Harvey Cook suffered from a chronic ulcer; that to produce that ulcer, he must necessarily have been susceptible to an abnormally high amount of hydrochloric acid and pepsin in his stomach around the clock over a period of several years; that the natural progression of his ulcer had reached the point where it could perforate at any time; and that it did happen to perforate during the course of his employment. If, as the medical experts agree, he had this high pepsin and acid content in his stomach at all times and this was the factor that caused the final erosion and perforation of the ulcer as is also agreed, it does not seem logical that the addition of a somewhat increased quantity of pepsin and hydrochloric acid due to emotional stress could possibly result in any material change in the rapidity with which the ulcerous spot was being eroded and that the perforation of the ulcer must be attributed to a natural progression of his preexisting condition. In addition, on the basis of the medical evidence, it would appear that because of the ulcer perforating at the time that it did, it could just as reasonably have been attributed to the ingestion of the peanut butter sandwich as to the emotional stress heretofore mentioned. In our view, plaintiff has failed to sustain the burden of proof and the judgment of the district court should be affirmed.

AFFIRMED.

ELEANOR C. SHOMAKER, APPELLEE, V. WILLIAM LAWRENCE SHOMAKER, APPELLANT.

163 N. W. 2d 102

Filed December 6, 1968. No. 36939.

1. Divorce. Ordinarily, the right to receive alimony and the duty to pay it terminates at the death of either of the parties where the decree is silent on the subject.
2. ———. An allowance of alimony in gross is a final judgment, not subject to modification, which survives the death of the judgment debtor and is payable in full regardless of the death or remarriage of the judgment creditor.
3. ———. A decree for child support in a divorce action is always subject to review and modification regardless of the particular language of the award.
4. ———. A judgment in a divorce action in which alimony and child support are combined is subject to modification and is not an allowance of alimony in gross.
5. ———. To the extent that Beard v. Beard, 57 Neb. 754, 78 N. W. 255, may be in conflict with this opinion it is overruled.

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

Hunter, Venteicher & Kasher, for appellant.

Hotz, Hotz, Moylan & Kellogg, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and STUART, District Judge.

BOSLAUGH, J.

Eleanor C. Shomaker obtained a limited divorce from William Lawrence Shomaker, the defendant, in 1957. The judgment was affirmed as modified by this court in Shomaker v. Shomaker, 166 Neb. 164, 88 N. W. 2d 221.

The custody of the three minor children was awarded to Mrs. Shomaker and the defendant was ordered to pay $15,000 per year to Mrs. Shomaker for the first 5 years, $10,000 per year for the next 5 years, $7,500 per year for the next 5 years, and $2,500 per year for the next 10 years. There were other provisions in the judg-

ment relating to the property of the parties but they are not important in this case.

In 1960, Mrs. Shomaker filed an application to modify the judgment in the divorce action by increasing the amount of the payments to be made by the defendant. After hearing, this application was dismissed by the trial court.

In 1965, Mrs. Shomaker established a revocable trust and assigned any "cause of action for unpaid support monies" to the Omaha National Bank as trustee.

After Mrs. Shomaker's death on March 13, 1966, the bank moved to revive the judgment in the divorce action. The trial court ordered the judgment revived in the name of the bank, and the defendant has appealed.

There were no unpaid installments due at the time of Mrs. Shomaker's death. The controversy in this case concerns only payments to become due after the death of Mrs. Shomaker.

The case turns on the question of whether the judgment survived the death of Mrs. Shomaker. The general rule is that the right to receive alimony and the duty to pay it terminates on the death of either of the parties where the decree is silent on the subject. Masters v. Masters, 155 Neb. 569, 52 N. W. 2d 802. But an allowance of "alimony in gross" is a final judgment, not subject to modification, which survives the death of the judgment debtor and is payable in full regardless of the death or remarriage of the judgment creditor. Ball v. Ball, *ante* p. 216, 159 N. W. 2d 297.

The judgment in this case provided that the payments to be made to Mrs. Shomaker were "for the full support and maintenance of plaintiff and the three children of the parties hereto, including the education of the children through high school and college."

A decree for child support in a divorce action is always subject to review and modification regardless of the particular language of the award. Griess v. Griess, 161 Neb. 1, 71 N. W. 2d 513; Caporale v. Hale, 169 Neb.

751, 100 N. W. 2d 847; Gibson v. Gibson, 147 Neb. 991, 26 N. W. 2d 6; Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51; Connett v. Connett, 81 Neb. 777, 116 N. W. 658.

Since the judgment in this case combined alimony with child support, the judgment was always subject to modification and was not an allowance of alimony in gross. To the extent that Beard v. Beard, 57 Neb. 754, 78 N. W. 255, may be in conflict with this opinion it is overruled.

Upon the death of Mrs. Shomaker, her right to the custody of the children ended. Clarke v. Lyon, 82 Neb. 625, 118 N. W. 472, 20 L. R. A. N. S. 171. See, also, In re Guardianship of Peterson, 119 Neb. 511, 229 N. W. 885. Although the defendant's duty to support the remaining minor child continued, he was no longer obligated to pay child support as required by the judgment in the divorce action.

The defendant's liability for future payments under the judgment in the divorce action terminated upon the death of Mrs. Shomaker. The order of the trial court reviving the judgment in the divorce action in the name of the bank was erroneous and must be reversed.

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.

OVERLAND-WOLF, INC., APPELLANT, V. MICHAEL J. KOORY, JR., ET AL., APPELLEES.
162 N. W. 2d 889

Filed December 6, 1968. No. 36943.

Mortgages: Property. Ordinarily, when a mortgagee becomes the owner of the fee, the former estate is merged in the latter. But the mortgagee may keep his mortgage alive when it is essential to his security against an intervening title. If there was no expression of his intention in relation to the matter at

the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself.

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

Beber, Richards & Polack and Steven J. Riekes, for appellant.

Nanfito & Nanfito, John W. Delehant, Jr., and Robert J. Huck, for appellees.

Heard before WHITE, C. J., BOSLAUGH, SMITH, and MCCOWN, JJ., and HUBKA, ACH, and GARROTTO, District Judges.

BOSLAUGH, J.

This is an action by Overland-Wolf, Inc., to foreclose a real estate mortgage. The defendants are the Blair Company; Royalwood Estates Joint Venture; and Michael J. Koory, Jr., and Lucille A. Koory. The controversy arises out of the construction of a residence by Dale L. Stofferson upon Lot 89 in Royalwood Estates, a subdivision in Douglas County, Nebraska.

On April 29, 1965, the Stoffersons purchased Lot 89 and executed and delivered their note and mortgage in the amount of $2,300 to Royalwood Estates Joint Venture. On the same date the Stoffersons obtained a construction loan from H. A. Wolf Company, Inc., and delivered their note and mortgage in the amount of $24,000 to the Wolf Company.

On May 26, 1965, the Stoffersons conveyed Lot 89 to Associated Builders Co., Inc. Dale L. Stofferson is the president and sole stockholder of Associated Builders Co., Inc. On January 28, 1966, Associated Builders Co., Inc., mortgaged the property to Michael J. Koory, Jr., and Lucille A. Koory for $1,600.

The Wolf Company mortgage was recorded May 10,

1965; the Koory mortgage, February 4, 1966; and the Royalwood mortgage, July 22, 1966.

After the residence had been constructed, the Stoffersons were unable to sell the property for an amount sufficient to pay the three mortgages. On September 8, 1966, H. A. Wolf Company, Inc., entered into an agreement with Associated Builders Co., Inc., and Dale L. Stofferson concerning the property.

The agreement recited that Associated Builders Co., Inc., was the owner of five properties mortgaged to the Wolf Company and that Associated was unable to pay the mortgages in accordance with the notes. The agreement provided that Associated would convey the five properties to the Wolf Company or its nominee; that Stofferson would negotiate contract sales of two of the properties with part of the proceeds to be paid to other creditors of Stofferson; that the mortgage on Lot 89 would be extended to May 31, 1967, and Stofferson would pay 7 percent interest on the note monthly; that the deed to Lot 89 would be placed in trust until May 31, 1967, but would be delivered to the Wolf Company or its nominee on June 1, 1967, if the property had not been otherwise sold by Stofferson; and that "Wolf agrees that acceptance by it of the deeds referred to above, and Stofferson's services in negotiating the Land Contract sales referred to in paragraphs #2 and #3 will relieve Associated and/or Stofferson of their indebtedness to Wolf."

Stofferson conveyed the properties to a nominee of the Wolf Company and negotiated the contract sales as provided in the agreement. No interest on the note was paid after September 1, 1966, and the deed to Lot 89 was recorded on September 14, 1966.

Lot 89 has since been conveyed to the Blair Company, another nominee of the Wolf Company. The plaintiff, who is the successor to the Wolf Company and an assignee of the mortgage, commenced this action on June 9, 1967, to foreclose the $24,000 mortgage. The defend-

ants Koory and Royalwood Estates Joint Venture alleged that the plaintiff's mortgage had been satisfied and extinguished by merger and sought foreclosure of their mortgages.

The trial court found that the plaintiff's mortgage was not a lien upon the property and that the petition should be dismissed; that the Koory mortgage was the first lien upon the property; and that the Royalwood Estates Joint Venture mortgage was the second lien upon the property. The trial court ordered foreclosure of these mortgages. The plaintiff's motion for new trial was overruled and it has appealed.

The case turns on the question of whether the plaintiff's mortgage was extinguished by merger. The case was submitted upon the theory that the conveyance to the plaintiff's nominee was equivalent to a conveyance to the plaintiff.

Ordinarily, when a mortgagee becomes the owner of the fee, the former estate is merged in the latter. But the mortgagee may keep his mortgage alive when it is essential to his security against an intervening title. If there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself. Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N. W. 2d 545. See, also, Wyatt-Bullard Lumber Co. v. Bourke, 55 Neb. 9, 75 N. W. 241; Topliff v. Richardson, 76 Neb. 114, 107 N. W. 114; Citizens State Bank v. Petersen, 114 Neb. 809, 210 N. W. 278; Edney v. Jensen, 116 Neb. 242, 216 N. W. 812.

It is the intention of the mortgagee that is controlling. Before there can be a merger the evidence must show that the Wolf Company intended that there be a merger. In the absence of such evidence, the lien of the plaintiff's mortgage remains effective.

The evidence in this case indicates that the property

was of sufficient value to satisfy the lien of the plaintiff's mortgage but not all three mortgages. Under such circumstances it would be to the advantage of the Wolf Company to preserve the lien of its mortgage. It would be presumed that the Wolf Company would intend to avoid the burden of the Royalwood and Koory mortgages.

The agreement dated September 8, 1966, between the Wolf Company, Associated Builders, and Stofferson does not show that the Wolf Company intended that a merger take place. The agreement provides for an extension of the mortgage to May 31, 1967, and for the Stofferson deed to be placed in trust until May 31, 1967. Although the deed was recorded on September 14, 1966, Stofferson testified that he continued to try to sell the property until June 1, 1967, and refused to release the deed from trusteeship prior to that date.

The plaintiff contends that the agreement to "relieve Associated and/or Stofferson of their indebtedness to Wolf" had reference to personal liability only and that the deed was not accepted as payment of the indebtedness. The agreement does not provide for cancellation or release of the mortgage, and Stofferson admitted that he had not requested that the note be returned to him or that the mortgage be released.

The evidence does not show that the plaintiff's mortgage was extinguished by merger. That part of the judgment of the district court which finds that the plaintiff's mortgage no longer constitutes a lien upon the property is reversed and the cause remanded with directions to enter a judgment finding that the mortgage of the plaintiff is a first lien upon the property prior to the liens of the Royalwood and Koory mortgages, and granting foreclosure. In all other respects the judgment of the district court is affirmed.

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

STATE OF NEBRASKA, APPELLEE, V. VIRGIL D. RILEY, APPELLANT.
163 N. W. 2d 104

Filed December 6, 1968. No. 36950.

1. **Post Conviction.** In a post conviction proceeding petitioner has the burden of establishing a basis for relief.
2. **Post Conviction: Appeal and Error.** A motion to set aside a judgment of conviction or a sentence in a post conviction proceeding cannot serve the purpose of appeal to secure a review of the conviction.
3. ———: ———. A motion for a hearing under the Post Conviction Act is not a substitute for an appeal.

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

Virgil D. Riley, pro se.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and HUBKA and GARROTTO, District Judges.

HUBKA, District Judge.

This is a proceeding under the Post Conviction Act, sections 29-3001 to 29-3004, R. S. Supp., 1967.

The defendant Virgil D. Riley, on September 30, 1966, was convicted by a jury of the crime of burglary, the district court for Lancaster County, Nebraska, found the defendant to be a habitual criminal, and on December 8, 1966, sentenced the defendant to the Nebraska Penal and Correctional Complex for a term of 10 years. An appeal was taken by the defendant to the Supreme Court and the judgment and sentence of the district court was affirmed on December 1, 1967. State v. Riley, 182 Neb. 300, 154 N. W. 2d 741. Throughout all of the proceedings the defendant was represented by counsel.

In defendant's motion to annul judgment and vacate sentence, he alleges that during the trial a deputy sheriff

of Lancaster County, Nebraska, testified under oath that he arrested the defendant. Defendant further alleges that he was not arrested by the deputy sheriff but arrested by the police officers of the Lincoln police department.

The district court found that there was no denial or infringement of the rights of the defendant as to render the judgment and sentence void or voidable under the Constitution of the State of Nebraska or the Constitution of the United States, and that the defendant was entitled to no relief.

Defendant on appeal contends that the testimony of the deputy sheriff was fabricated and incriminating and led the jury to convict the defendant, and that the defendant did not have a fair trial.

A petitioner for post conviction relief is required to allege facts which if proved would constitute an infringement of his constitutional rights. State v. Fitzgerald, 182 Neb. 823, 157 N. W. 2d 415; State v. Clingerman, 180 Neb. 344, 142 N. W. 2d 765.

In a post conviction proceeding petitioner has the burden of establishing a basis for relief. State v. Raue, 182 Neb. 735, 157 N. W. 2d 380; State v. Sagaser, 181 Neb. 329, 148 N. W. 2d 206.

The defendant did not offer any evidence to the court during the trial that the officers of the Lincoln police department arrested the defendant. There is no suggestion from the record that the testimony of the deputy sheriff was substantially incorrect nor does the record indicate or suggest that the deputy sheriff committed perjury.

A motion to set aside a judgment of conviction or a sentence cannot serve the purpose of an appeal to secure a review of the conviction. State v. Newman, 181 Neb. 588, 150 N. W. 2d 113; State v. Clingerman, *supra*.

A motion for a hearing under the Post Conviction Act is not a substitute for an appeal. State v. Erving, 180 Neb. 680, 144 N. W. 2d 424.

The judgment of the trial court is affirmed.

AFFIRMED.

WILLIAM E. GIBBS, APPELLEE, V. LARRY C. JOHNS, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLANT.
163 N. W. 2d 110

Filed December 6, 1968. No. 36979.

1. **Administrative Law: Appeal and Error.** An appeal to the district court to review the revocation of a motor vehicle operator's license by the Director of Motor Vehicles under the Implied Consent Act is a judicial proceeding.
2. **Pleading: Trial.** The failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation.
3. ———: ———. An objection to the introduction of any evidence on the ground that the petition fails to state a cause of action is a recognized practice in this state; and if the petition is totally defective, the objection should be sustained.
4. ———: ———. Where the objection is not made until after the trial has commenced, the petition will be liberally construed in the light of the entire record and sustained if possible. If the essential elements of the plaintiff's case may be implied from the petition by reasonable intendment, it will be held sufficient.
5. ———: ———. Any error or defect in the pleadings which does not affect the substantial rights of the adverse party must be disregarded.

Appeal from the district court for Antelope County: GEORGE W. DITTRICK, Judge. Reversed and remanded with directions.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellant.

Vincent J. Kirby, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and SCHMIDT, District Judge.

BOSLAUGH, J.

The plaintiff's license to operate a motor vehicle was revoked by the Director of Motor Vehicles after notice and hearing under the Implied Consent Act. § 39-727.09, R. R. S. 1943. The plaintiff perfected an appeal to the district court and filed a petition alleging that the action of the director was "arbitrary and contrary to law" and, therefore, void.

The defendant director filed a general denial, and at the trial objected to the introduction of any evidence on the ground that the petition failed to state a cause of action. The objection was overruled and the trial proceeded. The plaintiff testified in his own behalf. The defendant offered no evidence. The trial court found generally for the plaintiff and vacated the order of the director. The defendant's motion for new trial was overruled and he has appealed. The only question presented is the sufficiency of the petition.

The proceeding before the director is administrative in nature, but an appeal to the district court to review the action of the director is a judicial proceeding. The statute requires the appellant to file a petition in the district court and provides that the district court shall hear the appeal as in equity and determine anew all questions raised before the director. § 60-420, R. R. S. 1943.

The failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation. Gerard v. Steinbock, 169 Neb. 828, 101 N. W. 2d 194. An objection to the introduction of any evidence on the ground that the petition fails to state a cause of action is a recognized practice in this state; and if the petition is totally defective, the objection should be sustained. Gerard v. Steinbock, *supra*.

Where the objection is not made until after the trial has commenced, the petition will be liberally construed and sustained if possible. Welch v. Adams, 87 Neb. 681, 127 N. W. 1064; Elvidge v. Brant, 131 Neb. 1, 267 N. W.

169. The petition will be liberally construed in the light of the entire record; and if the essential elements of the plaintiff's case may be implied from the petition by reasonable intendment, it will be held sufficient. Dickinson v. Lawson, 125 Neb. 646, 251 N. W. 656; Bradway v. Higgins, 152 Neb. 724, 42 N. W. 2d 627; Goger v. Voecks, 156 Neb. 696, 57 N. W. 2d 621. Any error or defect in the pleadings which does not affect the substantial rights of the adverse party must be disregarded. § 25-853, R. R. S. 1943; Dickinson v. Lawson, *supra*.

The difficulty in this case is that the petition alleged no facts to show why the action of the director was arbitrary. Counsel for the plaintiff stated to the trial court that the transcript of the proceedings before the director, which was filed with the petition, had been made a part of the petition, but the petition contains no reference to the transcript.

This court is of the opinion that the petition was totally defective and that the defendant's objection should have been sustained. The judgment is reversed and the cause remanded with directions to grant the plaintiff leave to amend.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. GLORIA EVA OLIVA, APPELLANT.

163 N. W. 2d 112

Filed December 13, 1968. No. 36825.

1. **Criminal Law: Evidence.** Regarding an admission or confession, the defendant may request a hearing on and a determination of voluntariness, but in the absence of such request, defendant cannot complain of the failure of the court to hold such a hearing and make such determination.
2. **Criminal Law: Appeal and Error.** An objection to the admission of evidence cannot be considered by this court for some reason not properly and timely raised at the trial.
3. **Criminal Law: Trial.** The rule that a defendant is entitled, on

request therefor, to an independent hearing and determination by the court on the question of the voluntariness of an admission or confession is not applicable regarding statements spontaneously made and volunteered in the absence of any in-custody interrogation when such facts have been duly established and remain uncontradicted or denied.

4. **Criminal Law: Right to Counsel.** A request for counsel does not per se disable an accused from thereafter waiving counsel.
5. **Criminal Law: Constitutional Law.** The Fifth Amendment does not say that a man shall not be permitted to incriminate himself, or that he shall not be persuaded to do so. It says no more than that a man shall not be "compelled" to give evidence against himself.

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

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

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

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

NEWTON, J.

The defendant Gloria Eva Oliva was charged with and convicted of second degree murder in connection with the death of her uncle, Ralph Major. Defendant, her husband, and their children resided in the north portion of Omaha, Nebraska. Her uncle had lived with them off and on for 6 years. On the evening of January 10, 1967, defendant and her husband left the home. At the time, other persons present, in addition to the children, were Ralph Major and a family friend Alfred Oberle, Jr. The uncle was expected to stay and care for the children, but shortly thereafter he left the house carrying two sacks and Oberle stayed to look after the children. About midnight, or soon thereafter, defendant returned, looked around, and stated that her uncle had stolen her son's radio. She further said she was going to South Omaha to get the radio and again left the house.

Defendant and her husband stated they made rent collections in the area where they resided for their landlord and on such occasions defendant's husband carried a .22-caliber pistol. According to defendant, the pistol was loaded alternately with solid bullets and birdshot. On this evening, they took the gun because they were making some collections. Later in the evening, Mr. Oliva gave it and the money collected to defendant who put both in her purse before returning home. She had the gun and the money when she went to South Omaha, not having left these items at her home while there.

She caught a ride to South Omaha with an acquaintance and succeeded in locating her uncle at Marlow's Cafe about 2 a.m. on January 11. She called him out and as they walked up the street, she demanded the radio. He denied taking it and then admitted he had sold or pawned it. She demanded to know who had it. He refused to tell her and an argument ensued. She then shot him; he fell and she shot twice more; and she then walked away and caught a taxicab to her home. The first shot was heard and the last two witnessed by a man sitting in a parked car in front of the cafe. On the way home, she showed the gun to the taxicab driver and told him: "I just shot a guy over a hot radio," and "Here's the persuader I used to shoot the man with."

Police arrived at the scene almost immediately. Ralph Major was removed to the hospital but was dead on arrival. The autopsy report indicated death resulted from a gunshot wound in the chest. The bullet was recovered as was also some birdshot from other wounds. In Ralph Major's right shirt pocket, officers found a pocketknife with two blades open.

The police officers located defendant's home through the taxicab driver, knocked at the door, and were admitted by defendant. When asked if she knew Ralph Major, defendant said: "Yes, I shot him." She then got the pistol and showed it to the officers. It had one empty shell casing jammed in the cylinder but was

otherwise fully loaded. She informed the officers that she had reloaded the gun and thrown the expended shells outside. She also demonstrated how she had shot Ralph Major and said: "I shot the son of a bitch. I hope he dies." This testimony was not objected to.

Defendant, on arriving home, told Alfred Oberle, Jr., when asked if she got the radio: "No, I shot him." She was arrested and the officers drove her to the home of a woman who sometimes cared for defendant's children where defendant asked her to stay with the children and said: "I shot Ralph." When asked why, she said: "Well, he beat me up. * * * He knocked me down and was kicking me." The police version of this statement is that she simply said: "I have to have Gloria come over and babysit. They are taking me to jail. I just shot Ralph." After conveying the babysitter to defendant's home, two of the officers drove defendant to police headquarters. One officer testified that enroute, defendant stated: "I shot the son of a bitch, and I hope he dies." This was objected to for lack of foundation. One officer positively stated he did not ask her any questions and the other said he could not recall asking her any questions while in the car. This is not contradicted by defendant.

At the police station, a "Rights Advisory Form" was filled out. Defendant was booked and informed of the death of her uncle at which time she stated: "I killed the s.o.b. on his birthday, what do you know about that!" This testimony was not objected to.

At the police station, Sergeant Dragoun again informed defendant of her rights, filled out a second "Rights Advisory Form," and asked if she wanted to make a statement at that time. She said she wanted to make a telephone call and then called her husband informing him that she had shot Ralph. On refusing to make a statement, she said: "I will call an attorney," but she did not do so, was given a cup of coffee, and taken to a cell.

When defendant's husband arrived, defendant was again given the full Miranda warnings and asked if she

wished to make a statement. After talking with her husband, who was present at all times during the questioning, she specifically waived the presence of an attorney and agreed to give a statement. She then told of the events preceding and following the shooting and of the shooting itself substantially as above set forth. She did not refer to any of the statements alleged to have been made in the presence of the police at her home, at the babysitters, in the patrol car, or at the police station. Defendant stated she shot her uncle after he knocked her down and kicked her. On motion to suppress, the jury was excused and a hearing had at the conclusion of which the court found the statement was voluntary and overruled objections to it.

The defendant testified on the motion to suppress and before the jury. She denied ever receiving the Miranda warnings until after the statement was given. She admitted she never asked for a lawyer; that there was no force used; that her husband was present when she was questioned; and that she answered the questions pursuant to his advice. When asked if she answered voluntarily, she replied: "He asked the questions and I answered them." There is evidence to the effect that defendant had recently been in a mental institution due to excessive drinking. She stated, however, that she knew what she was doing on the morning of January 11, 1967, understood the nature and consequences of her acts, and knew right from wrong.

In her testimony, defendant stated she was 29 years of age and reiterated the occurrences of the night of January 10 and the following morning. She maintained that her uncle had struck and kicked her, had threatened her, and that he had taken the knife from his pocket. She conceded the statement given at the police station was correct except for the "Rights" matter, admitted she told Oberle and the babysitter she had shot her uncle, and that she reloaded the gun and showed it to the officers. She did not deny making the statements in her home,

in the patrol car, and at the police station which were attributed to her by the officers.

Defendant assigns as error the admission of the statement made in the police cruiser car enroute to the police station, the admission of the general statement taken at the police station, the admission of a photograph of the deceased, and the sustaining of an objection to evidence of the deceased's reputation for violence. We find these assignments to be without merit.

Defendant contends that the statement "I shot the son of a bitch, and I hope he dies," was admitted in violation of the rule of Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, in that the trial court did not specifically rule on its voluntariness. It may be pointed out that two other similar statements made at defendant's home and at the police station were admitted without objection. As to this particular question, defendant's objection of a lack of foundation was overruled. Defense counsel admitted that the police reports were very detailed and that he had repeated access to them prior to trial. He was aware of this item of evidence, but did not move to suppress it or request a hearing on its admissibility either before or during trial although his familiarity with this procedure was demonstrated by his use of such motion in regard to the complete statement taken from defendant.

Jackson v. Denno, *supra,* states: "Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness * * *." The defendant may request a hearing on and a determination of voluntariness, but in the absence of such request, defendant cannot complain of the failure of the court to hold such a hearing and make such determination. See, United States v. Frazier (6th Cir.), 385 F. 2d 901; Woody v. United States (D. C. Cir.), 379 F. 2d 130; People v. Payton, 82 Ill. App. 2d 51, 227 N. E. 2d 87. In the present case, defendant's

objection on the ground of a lack of foundation was properly overruled. A proper foundation had been established. The circumstances under which the statement had been made and the fact it was voluntary had been shown and remain undisputed in the record. Had defendant wished to further challenge the voluntariness of the statement or desired a Jackson v. Denno hearing and determination on the issue, it was her privilege to ask for it or to move to suppress this evidence. Having done neither, she cannot now properly complain. "An objection to the admission of evidence cannot be considered by this court for some reason not properly and timely raised at the trial." Fugate v. State, 169 Neb. 420, 99 N. W. 2d 868.

Two police officers testified to the circumstances under which the remark was made. Their evidence shows that although defendant was then in custody, she was not being interrogated in any manner but volunteered the statement quoted above just as she had done earlier when she made the same indentical statement in her home prior to being taken into custody. This evidence is undisputed and defendant has not at any time testified to or produced evidence to the contrary.

Under such circumstances is Jackson v. Denno applicable? Jackson v. Denno and Miranda were both motivated by the court's desire to correct abuses found to exist as a result of *in-custody interrogation* of persons suspected of criminal activities. The object to be attained in both decisions was to insure the voluntariness of confessions admitted in evidence. Miranda specifically declares that it is not applicable to questioning during the investigatory stage nor to "volunteered statements of any kind." In Jackson v. Denno, *supra*, the court points out: "This is not a case where the facts concerning the circumstances surrounding the confession are undisputed and the task is only to judge the voluntariness of the confession based upon the clearly established facts * * *. Here there are substantial facts in dispute:

* * *." Here too, as in Miranda, the court clearly indicated its purpose was to prevent "* * * the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,' * * *." Neither Jackson v. Denno nor Miranda contain the least hint that they were intended to apply to statements shown by the undisputed evidence to have been not only voluntary, but spontaneously made and *volunteered* in the complete absence of any interrogation, and which defendant does not deny were voluntary. There is not one scintilla of evidence presented, nor is it now urged, that defendant was threatened, coerced, or taken advantage of in any manner. It is obvious that defendant's counsel did not ask for a hearing on the question of the admissibility of this evidence because he realized the evidence was admissible. Now defendant seeks to take advantage of a situation brought about by her having elected not to press for a hearing. The pursuance of such tactics is neither to be rewarded nor approved.

Defendant asserted that the statement given at the police station was inadmissible because she had once indicated she would not answer questions and would call an attorney. She contended that she did not later adequately waive her right to have an attorney present when questioned. The circumstances do not bear her out. The evidence on the giving of the warning required in Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, was conflicting but sufficient to sustain the trial court's determination of voluntariness following the separate hearing on the question. Defendant admitted she had access to the telephone, called her husband, who was with her throughout the questioning and advised her to answer, and that

she never asked for a lawyer. She does not deny answering the questions voluntarily. She admitted she was fully aware of what she was doing at the time and that no force was used.

Here there was no lengthy questioning or incarceration. She was not held incommunicado. No serious contention was made that she was subjected to promises, threats, intimidation, coercion, or physical abuse, or ill-treated in any manner nor is it seriously contended that defendant was of deficient mentality or unaware of the circumstances. Miranda requires only that a request for counsel be respected and interrogation cease. "* * * a request for counsel does not per se disable an accused from thereafter waiving counsel."

"* * * the Fifth Amendment does not say that a man shall not be permitted to incriminate himself, or that he shall not be persuaded to do so. It says no more than that a man shall not be 'compelled' to give evidence against himself." State v. McKnight, 52 N. J. 35, 243 A. 2d 240. See, also, Hill v. State (Tex. Crim.), 429 S. W. 2d 481; Jennings v. United States (5th Cir.), 391 F. 2d 512; State v. Godfrey, 182 Neb. 451, 155 N. W. 2d 438.

Objection is made to the admission of exhibit No. 14, a photograph of the body of Ralph Major, on the ground of insufficient identification. Officers Coyan and Bober went to the morgue together for the purpose of taking pictures of the body. Coyan took two pictures which were admitted in evidence, identified the subject as the body of Ralph Major, and stated that Bober then took other pictures. Bober stated he then took exhibit No. 14 with the same camera, but was not, at the time he took the picture, aware of whose body it was. It is a reasonable inference that they photographed the same body, but in any event, we find nothing of a prejudicial nature in regard to this picture.

Defendant's final objection is that the court sustained an objection when Gloria Jean Dreifurst was questioned regarding the reputation of Ralph Major for violence.

She stated she had known Ralph Major for a couple of years, but did not indicate the nature or extent of her acquaintance with him. She was not asked and did not state that she knew his general reputation in the community for violence. Clearly a proper foundation for the question was not laid and no error occurred.

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

AFFIRMED.

BOSLAUGH and MCCOWN, JJ., concurring in result.

SPEEDWAY TRANSPORTATION, INC., A NEBRASKA CORPORATION, APPELLANT, V. DARWIN L. DETURK, APPELLEE.
163 N. W. 2d 283

Filed December 13, 1968. No. 36880.

1. **Trial: Appeal and Error.** In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably drawn therefrom.
2. **Trial: Negligence.** Where reasonable minds may differ as to conclusions or inferences to be drawn from the evidence, and where there is a conflict in the evidence as to whether or not it establishes negligence or contributory negligence and the degree thereof, such issues must be submitted to a jury.

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

Walsh, Walentine, Miles & Katskee, for appellant.

Kanouff & Edstrom, for appellee.

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

MCCOWN, J.

This is an action for damages arising out of a motor vehicle accident. The jury returned a verdict against

the plaintiff on its petition and for the defendant on his counterclaim in the sum of $15,496.79.

The accident occurred at approximately 4:30 a.m., March 9, 1966, a short distance east of the intersection of U. S. Highway No. 30A and a gravel road known as the Weston Road in Saunders County, Nebraska. There are two truck stops located immediately east of the intersection, one on the north side of the highway and the other on the south side. U. S. Highway No. 30A runs east and west and is generally level at this location. The area was well-lighted from both truck stops at the time of the accident. The vehicles involved were both tractor-trailer units 50 feet long or more. Both units were loaded with livestock on their way to the Omaha market. The weather was somewhat foggy in spots and was damp, but there was nothing in the weather conditions which would obstruct the vision in the area in which the accident occurred. The truck stop on the north side of U. S. Highway No. 30A, to the east of the intersection, extends approximately 390 feet east and west along the highway and is an open level gravel surface without individual or separated driveways and can be entered or left at any point along the highway. The driver of the plaintiff's livestock tractor-trailer unit had stopped at the truck stop on the north side of the highway for a cup of coffee and had parked his unit in the station grounds south of the pumps. His unit was headed east. There was at least one other truck unit, and possibly two, parked between the plaintiff's unit and the north edge of the highway. When the plaintiff's driver returned to his unit, he checked his load and lights, started ahead, turned to the south after clearing the unit parked beside him, and headed out of the station grounds. He stopped at the north edge of the highway, looked, saw no traffic, and pulled his unit onto the highway to proceed east to Omaha.

Meanwhile, the defendant's tractor-trailer unit was proceeding easterly on U. S. Highway No. 30A at a speed

of between 45 and 50 miles per hour. The headlights of defendant's unit were on low-beam, and the fog lights were also on, as well as running lights. His load of cattle weighed approximately 32,000 pounds. He first noticed the plaintiff's unit coming onto the highway ahead of him at a time when the front of the plaintiff's vehicle was approximately half-way across the west-bound lane and headed southeast, and when he was approximately 200 feet from it. The defendant put on his brakes, but the load of cattle shifted and shook the unit. He testified that he knew he could not get stopped, so he decided to take the shoulder on the south side of the road in an effort to get around the plaintiff's unit. The defendant's unit was almost completely off on the shoulder when it went by the plaintiff's vehicle. The left side of defendant's unit struck the right front of plaintiff's unit as it went by. Some wooden stakes on the right front side of the plaintiff's trailer were damaged, one tire under the plaintiff's tag axle was blown out, and the right-hand outside mirror of the cab was knocked off. There was no damage to the rear end or the side of the rear half of plaintiff's trailer.

After the impact, the defendant's unit continued easterly on the shoulder and in a shallow ditch. Defendant attempted to control and return the unit to the highway, but it turned over on its side, slid along, and came to rest on the south edge of the highway some 111 feet east of the point where plaintiff's unit had stopped. The plaintiff's unit was still at a slight angle on the highway. The left rear wheels were near the centerline, but the front wheels were at the south edge of the pavement. The front end of the vehicle was some 35 feet east of the debris left by the impact and the debris was approximately at the rear wheels.

Plaintiff's driver testified that he never saw the defendant's vehicle until he saw the headlights in his mirror just a moment before the defendant's truck went by him.

The plaintiff's assignments of error generally challenge the sufficiency of the evidence to support the verdict. The plaintiff also contends it was entitled to a directed verdict on plaintiff's petition and also to a directed verdict dismissing defendant's counterclaim. The basis for the contention is essentially that the defendant was guilty of more than slight negligence as a matter of law. Such contentions rest on the most favorable inferences that can be drawn from the evidence in favor of the plaintiff. However, it was the defendant who won the verdict of the jury. 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. Graves v. Bednar, 171 Neb. 499, 107 N. W. 2d 12. See, also, Nisi v. Checker Cab Co., 171 Neb. 49, 105 N. W. 2d 523.

Where reasonable minds may differ as to conclusions or inferences to be drawn from the evidence, and where there is a conflict in the evidence as to whether or not it establishes negligence or contributory negligence and the degree thereof, such issues must be submitted to a jury. See Owen v. Moore, 166 Neb. 239, 88 N. W. 2d 768.

Where a party has sustained the burden and expense of trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of the verdict unless there is prejudicial error in the proceeding by which it was secured. Cullinane v. Milder Oil Co., 174 Neb. 162, 116 N. W. 2d 25.

Where the driver of a vehicle entering a highway from a private road or driveway looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence. The duty to look for approaching vehicles implies the duty to see that which is in plain sight. Kohrt v. Hammond, 160 Neb. 347, 70 N. W. 2d 102.

The controverted facts, as well as the conclusions and

inferences to be drawn from them here, were decided by the jury in favor of the defendant and there is competent evidence to support the verdict.

The plaintiff assigns error generally to the majority of the instructions given. The scatter-gun challenge is dependent on the validity of the claim that defendant was guilty of more than slight negligence as a matter of law. This claim is without merit. One assignment deserves comment. Instruction No. 21 inadvertently included as an element of damage the fair and reasonable value of loss of use of defendant's trailer as well as the tractor. The evidence, however, was that the cost of repair exceeded the value of the trailer, which was a total loss. The evidence before the jury was the value of the trailer immediately before the accident and its value thereafter, and instruction No. 21 specifically included this value as an element of damage. There was no evidence before the jury as to the value of loss of use of the defendant's trailer, and instruction No. 19 had already instructed the jury that it must be governed solely by the evidence before it. The defendant's stipulated and proven damages total slightly more than the jury verdict, without including any amount for loss of use of the trailer nor for defendant's personal injuries. The plaintiff makes no complaint as to the amount of the verdict, but objects only to the instruction. We think it apparent that the inadvertent error in the instruction did not mislead the jury nor did it allow anything on account of the element improperly submitted.

The instructions taken together thoroughly and competently cover the matters at issue on both the petition and the counterclaim, and there was no prejudicial error. The judgment of the district court was correct and is affirmed.

AFFIRMED.

FRANK JENKINS, APPELLANT, V. WATSON-WILSON TRANSPORTATION SYSTEM, INC., APPELLEE.
163 N. W. 2d 123

Filed December 13, 1968. No. 36941.

1. **Contracts: Evidence.** Parol evidence is inadmissible to vary a written agreement complete on its face.
2. ———: ———. The terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof.
3. **Trial: Appeal and Error.** Where there is irreconcilable conflict on a material issue this court will, in determining the weight of evidence of the 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.

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

Robert C. Vondrasek, for appellant.

William E. Morrow, Jr., and Swarr, May, Royce, Smith, Andersen & Ross, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and KOKJER and ACH, District Judges.

SPENCER, J.

This is an action for an accounting. Plaintiff claims additional compensation due him under a written contract between the parties. Defendant counterclaimed for excess advances made on behalf of plaintiff. Judgment was rendered for the defendant on its counterclaim for $2,583.23, and plaintiff has perfected an appeal to this court.

Plaintiff, a truck driver and the owner of truck-tractors and trailers, entered into an agreement with defendant, a common carrier, for the transportation of freight, pursuant to the terms of a written contract. The contract required plaintiff to furnish a complete unit, consisting of a tractor and a trailer, employees for the unit,

and to pay all fuel tax payments, road taxes, equipment use fees or taxes, equipment license fees, driver's license fees, and other fees assessed on the equipment used by him in the performance of the contract. The agreement provided that defendant could pay the taxes and fees, and charge plaintiff with those applicable to his equipment.

Plaintiff made several hundred trips under the contract. The only issue involved herein is whether or not 28 trips performed on a certain government contract held by defendant were included within the terms of the written contract between the parties. These trips were made between August 1965, and November 1966, and involved the hauling of missiles or high-explosive radioactive materials. The trips required a special trailer which plaintiff was unable to furnish. The only portion of plaintiff's equipment used on these 28 hauls was a tractor. A trailer provided by the defendant was either one of its own or one belonging to the government.

The first time defendant was aware plaintiff was claiming additional money on the 28 hauls was the latter part of March 1967. Defendant had paid the amount it believed to be due after the hauls. Plaintiff was permitted by defendant to cancel the contract on March 28, 1967. For hauls made pursuant to the contract plaintiff was to receive a certain percentage of the revenue paid to the carrier on the hauls. On all of the regular hauls the plaintiff was furnished a bill of lading which indicated the amount of revenue being paid to defendant carrier. There were no bills of lading on any of the 28 trips in question. Defendant paid plaintiff on a per-loaded mile rate on each of these trips. Plaintiff made no effort to ascertain the amount of revenue received by defendant until the termination of the written contract. Plaintiff claims he was underpaid $14,390.43 on the 28 hauls.

Plaintiff premises his action on the rule that parol evidence is inadmissible to vary a written agreement complete on its face. Seminole Bond & Mtg. Co. v. Investors

Realty Co., 127 Neb. 193, 254 N. W. 732. The parol evidence rule relates to parol agreements made prior to or contemporaneous with a written agreement. It does not apply to parol agreements made after a written agreement, which is the situation here.

As we said in Andrews v. Wilke, 181 Neb. 398, 148 N. W. 2d 924: "The terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof."

Plaintiff concedes that his equipment was inadequate for the 28 trips which are in question here. It is undisputed that a special trailer had to be provided for his tractors to make the hauls. The evidence is also undisputed that there was conversation about these trips previous to the first one. Plaintiff contends no agreement was reached. He characterized the discussions as merely talk around the office, and stated that he never knowingly agreed to accept any compensation other than that provided in the contract. Defendant's office manager for the special products division testified that before the first trip he and the plaintiff agreed on $1 a mile. When the mileage was figured, it was 1,840 miles, and plaintiff agreed to accept $1,800 for the trip. Defendant's witnesses testified to other conversations with the plaintiff, which he denied. His testimony on cross-examination is as follows: "Q. Did you ever sit down at a desk with Mr. Reinhardt and discuss how much pay you were going to get for one of those trips? A. We talked of it, yes. Q. Where did that discussion take place? A. In Mr. Reinhardt's office. * * * Q. What was the discussion about the $925 one way? A. He said that is what he was going to pay me. Q. What did you say? A. Well, I was working for the guy, what could I say? Q. What did you say? A. Evidently I said all right, but at the time I had no idea what they were—the revenue on the loads, either. Q. But you did know that you were not furnishing a trailer? A. Yes, sir."

While the trips were hazardous, plaintiff was paid at

least double the prevailing rate. He accepted the payments made on the 28 trips over a period of 15 months. He made no complaint he was underpaid on any of the trips until more than 4 months after the last trip was made. This was the week he terminated his contract with the defendant. The trial court observed the witnesses and concluded that the 28 trips were not included within the terms of the written contract, but were handled pursuant to oral agreements. We see no reason to determine otherwise. Where there is irreconcilable conflict on a material issue this court will, in determining the weight of evidence of the 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. Hooper v. City of Lincoln, *ante* p. 591, 163 N. W. 2d 117.

Defendant, pursuant to the written contract, purchased licenses for and paid taxes on plaintiff's equipment for the 1967 license year. Plaintiff terminated the agreement March 28, 1967. Defendant transferred as many of the licenses as it could use to other equipment and prorated the cost of the licenses transferred. Plaintiff does not dispute the amount of the charges, but urges that he only had the use of the balance of the licenses for one quarter of the year, and that he is being charged for the full license year. Defendant transferred as many of the licenses as it could use, and the ones for which plaintiff was charged could not be returned or used. The trial court properly charged plaintiff with these fees under the written contract between the parties.

For the reasons stated above, the judgment herein should be and hereby is affirmed.

AFFIRMED.

IN RE INTEREST OF PAMELA SUE TRAXLER ET AL., CHILDREN UNDER EIGHTEEN YEARS OF AGE.
JOHN S. MINGUS, APPELLEE, V. LAWRENCE TRAXLER ET AL., APPELLANTS.
163 N. W. 2d 126

Filed December 13, 1968. No. 36957.

1. **Infants: Parent and Child: Actions.** In a proceeding brought under sections 43-205 and 43-206, R. R. S. 1943, it is essential to the jurisdiction of the court that service of summons be had on the person or persons having the custody or control of the child, or with whom the child may be when the action is commenced.
2. ———: ———: ———. Section 43-209, R. R. S. 1943, requires that where facts are set forth in a proper proceeding to terminate parental rights, the summons or proper notice must be endorsed that the proceeding is one to terminate parental rights.

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

Mitchell, Taylor & Beatty, for appellants.

John S. Mingus, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and HUBKA and GARROTTO, District Judges.

SPENCER, J.

This is an appeal from orders of the district court for Buffalo County in which the children of the appellants were found to be dependent and neglected. Larry Lee Traxler, Melvin Louis Traxler, and Doyle Vernie Traxler were removed from the custody of appellants and placed with the Buffalo County welfare department without power of adoption. Pamela Sue Traxler, Patty Ann Traxler, and Richard Duane Traxler were removed from the custody of their parents and the order placed them forthwith in the Nebraska Childrens Home Society at Omaha, with full power of adoption without further order of court.

As the questions herein involve procedure and due process, it will serve no purpose to detail the evidence except to state that appellants were poor managers of their home and family finances. Their home was dirty and disorderly, the children were overly dirty and sometimes malodorous, and their school attendance records left very much to be desired. The court, however, found: "* * * there is love in existence between the parents and the children, which I see exists here. I have nothing to indicate anything to the contrary. I also find that there is no particular moral *terpitude* involved."

The petition herein was filed January 5, 1968. The prayer was in the following language: "* * * that a hearing be had on this matter; that the said children *by* adjudicated neglected and/or dependent children and children in need of special supervision and that the Court take such correction or remedies as allowed under Chapter 43, Section 208, Revised Statutes of Nebraska, 1943 as amended. That due to circumstances said children should be taken into immediate custody as allowed by law and time set for hearing." On the same day, the district judge entered an order directing that the children be taken into custody by the Buffalo County sheriff forthwith and delivered to the Buffalo County welfare department for temporary placement in foster homes during the pendency of the action. No summons was ever issued in this case.

A subpoena was issued and served on both the parents on January 5, 1968, commanding them to be present in court on January 23, 1968, to answer charges in a case pending in court wherein the Traxler children were alleged to be neglected or dependent children in need of special supervision. The order placing the custody of the children in the Buffalo County welfare department was also served on the appellants on January 5, 1968.

Section 43-206, R. R. S. 1943, requires that upon the filing of the petition a summons with a copy of the petition attached shall issue, requiring the person who has

custody of the children to appear personally. The appellants herein, at the time of the filing of the petition, had the actual physical custody of the children. While the ex parte order entered by the court divested them of custody, it was still necessary that a summons be served upon them. A subpoena is not a summons within the meaning of this statute. A subpoena may be issued requiring the appearance of any person whose presence is necessary who does not have custody of the children.

As we said in Morimoto v. Nebraska Children's Home Society, 175 Neb. 174, 121 N. W. 2d 26: "In a proceeding brought under sections 43-205 and 43-206, R. R. S. 1943, it is essential to the jurisdiction of the court that service of summons be had upon the person or persons having the custody or control of the child, or with whom the child may be when the action is commenced."

It is also to be noted that section 43-209, R. R. S. 1943, requires that where facts are set forth in a proper proceeding to terminate parental rights, the summons or proper notice must be endorsed that the proceeding is one to terminate parental rights. There was no such endorsement herein. The prayer of the petition, which is set out above, does not request a termination of parental rights but only requests special supervision and remedies to correct the situation then existing. In view of our holding, it is not necessary to discuss any of the other matters raised by appellants.

For the reasons stated, this action is reversed and the cause is remanded for proper proceedings in accordance with this opinion.

REVERSED AND REMANDED.

SOPHIE ERICKSON, APPELLANT, V. MARGARET A. NEWELL, NOW KNOWN AS MARGARET A. MORTON, ET AL., APPELLEES.
163 N. W. 2d 286

Filed December 13, 1968. No. 36977.

1. **Contracts: Bills and Notes.** Instruments payable on demand include those in which no time for payment is stated.
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.

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

Keith I. Frederick and Schmid, Ford, Snow, Green & Mooney, for appellant.

Shrout, Nestle & Caporale, for appellees.

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

NEWTON, J.

This is an action to foreclose a real estate mortgage brought by Sophie Erickson, as plaintiff, against Margaret A. Morton, nee Newell, hereinafter referred to as defendant, and her husband. The trial court dismissed plaintiff's petition. We reverse the judgment and remand the cause.

Defendant, a Nebraska resident, is a niece of the plaintiff who resides in Illinois. On June 18, 1962, plaintiff forwarded the sum of $10,000 to defendant. In August of that year, plaintiff came to Nebraska and paid off a first mortgage on defendant's home in the sum of $14,460.46. It is conceded that defendant had received other sums from plaintiff at various times.

The same day the mortgage on defendant's home was paid, the parties had a promissory note drawn which was in the principal sum of $25,000 and payable to plaintiff. No due date was inserted in the note. It drew in-

terest at 6 per cent per annum from date until paid. At the same time, a real estate mortgage was drawn as security for the sum due on the note. Plaintiff was named as grantee in the mortgage which conveyed defendant's home. Both instruments were executed by defendant and delivered to plaintiff.

The mortgage contained the following clause: "In the event of the death of said, Sophie Erickson, mortgagee any unpaid balance due on this mortgage from said mortgagor, Margaret A. Newell shall be concelled (sic)." It provided that it should be payable as follows: "One hundred ($100.00) Dollars on the 2nd day of January, 1963 and the sum of $100.00 Dollars on the 2nd day of each and every month thereafter. * * * with interest thereon at 6% per cent per annum, payable monthly all according to the tenor and effect of a certain promissory note * * *." It also contained the standard clause printed therein requiring the mortgagor to pay taxes and assessments on the mortgaged property and to keep it insured in the sum of $25,000 with loss payable to the mortgagee. Failure to so insure, or to pay principal and interest when due, or to pay taxes and assessments before they became delinquent rendered the entire indebtedness due and collectible at the option of the mortgagee.

Defendant paid the 1962 taxes and all subsequent taxes were paid by plaintiff. Defendant paid the sum of $100 each month but nothing further to apply on interest or taxes. It is her contention that according to her understanding with plaintiff, the sum of $100 payable each month was to cover principal, interest, and taxes. She contended that the note and mortgage were ambiguous and was permitted, over plaintiff's objections, to introduce parol evidence in support of her claim that the $100 per month payments were to cover all payments due and accruing on the note and mortgage.

It will be noted that interest at 6 per cent per annum would amount to $1,500 per annum or $125 per month, an amount exceeding the payments defendant said were

to be made monthly. In addition, taxes for the years involved ran from $481.38 to $606.21. Insurance was maintained at $16,000 rather than $25,000, apparently without a mortgage clause.

The determining factor in this case is that dealing with the applicability of the parol evidence rule. Is the contract ambiguous or incomplete? The note does not contain a due date. Section 3-108, U. C. C., provides: "Instruments payable on demand include those * * * in which no time for payment is stated." The note is therefore a demand note for $25,000, drawing interest at 6 per cent per annum until paid. The mortgage provided the manner and time of payment. Because it provided for monthly payments, with interest payable monthly, it is deemed ambiguous. Clearly had the mortgage provided in the same language for the payment of $5,000 annually, with interest also payable annually, its meaning would be clear and unequivocal. Interest payments, as well as principal payments, would be required. Defendant seeks herein to vary the terms of a written instrument which is clear and complete, and in regard to which neither fraud nor mistake are alleged. "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, 182 Neb. 590, 156 N. W. 2d 149.

It is apparent that even if defendant's contention regarding payment of interest were to be conceded, plaintiff would still be entitled to foreclosure for defendant's failure to pay taxes. Also, defendant is in violation of the clause requiring her to carry insurance on the property in the sum of $25,000, payable in the event of loss to the mortgagee.

The situation revealed by the record in this case re-

quires the judgment entered by the trial court be reversed and the cause remanded.

REVERSED AND REMANDED.

THEODORE J. ZIEMBA, APPELLEE, V. L. C. JOHNS, DIRECTOR OF MOTOR VEHICLES OF NEBRASKA, APPELLANT.
163 N. W. 2d 780

Filed December 20, 1968. No. 36945.

1. **Administrative Law: Criminal Law: Motor Vehicles.** The same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other and the outcome of one action is of no consequence to the other.
2. ———: ———: ———. A defendant's plea of guilty to a criminal charge of operating a motor vehicle while under the influence of alcohol does not preclude the subsequent revocation of his driver's license in the administrative proceedings before the Director of Motor Vehicles under the provisions of the Implied Consent Act.

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

Clarence A. H. Meyer, Attorney General, James J. Duggan, and Herbert T. White, for appellant.

Paul E. Watts, for appellee.

Byron J. Norval, for amicus curiae.

Heard before WHITE, C. J., BOSLAUGH, SMITH, and MCCOWN, JJ., and HUBKA, ACH, and GARROTTO, District Judges.

MCCOWN, J.

The Director of Motor Vehicles revoked appellee's

license to operate a motor vehicle under the provisions of the Implied Consent Act. On appeal to the district court, that court found for the appellee, and the Director of Motor Vehicles has appealed.

The issue is whether a plea of guilty to a criminal charge of drunken driving under section 39-727, R. R. S. 1943, is sufficient to establish the reasonableness of a refusal to submit to a chemical test for alcohol in an administrative proceeding under the Implied Consent Act.

On December 4, 1966, appellee was arrested for operating a motor vehicle while under the influence of intoxicating liquor. He was advised of the requirements of the Implied Consent Act and informed of the consequences of refusal. He refused the test. The arresting officer filed his affidavit with the appellant pursuant to section 39-727.08, R. R. S. 1943. Thereafter, on March 23, 1967, after proper notice, the appellant held a hearing to determine whether the appellee's refusal to take the test was reasonable or unreasonable.

Appellee's claim of reasonableness was based on the fact that on February 7, 1967, in the municipal court of Omaha, the appellee had pleaded guilty to the criminal charge of operating a motor vehicle while under the influence of intoxicating liquor; had paid a fine of $100; and had his driver's license suspended for 6 months by that court.

The hearing officer for the appellant ruled that the later plea of guilty to the criminal charge was not a reasonable ground for refusal to submit to the chemical test for alcohol. On March 27, 1967, the appellant entered an order revoking the driver's license of appellee for the mandatory 1-year period from that date.

The appellee contends that a plea of guilty to a criminal charge of operating a motor vehicle while under the influence of alcohol ought to obviate the administrative proceeding under the provisions of the Implied Consent Act because that law is merely an implementation of

the criminal drunk driving statutes. We cannot agree.

It is well established that the same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other and the outcome of one action is of no consequence to the other. See, Gottschalk v. Sueppel, 258 Iowa 1173, 140 N. W. 2d 866; Bowers v. Hults, 42 Misc. 2d 845, 249 N. Y. Supp. 2d 361; Marbut v. Motor Vehicle Department, 194 Kan. 620, 400 P. 2d 982.

In Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N. W. 2d 75, 88 A. L. R. 2d 1055, this court held that the fact of acquittal of the criminal charge did not preclude the subsequent revocation of defendant's license in the civil proceedings before the Director of Motor Vehicles. We said: "The fact of acquittal of a criminal charge of operating a motor vehicle while under the influence of alcoholic liquor does not have any bearing upon a proceeding before the director for the revocation of a driver's license under the provisions of law separate and distinct from criminal statutes." Not only the proceedings, but the crucial factual issues to be determined in each, are separate and distinct, even though they may both arise out of the same general circumstances.

Although the appellee acknowledges the Prucha holding, he attempts to distinguish it on the ground that the case at bar involves a plea of guilty rather than an acquittal. The ground for the attempted distinction is the contention that the sole purpose of the Implied Consent Act was to assist in marshalling evidence to obtain a conviction under the criminal statutes. Therefore, it is argued that a plea of guilty in the criminal case removes the only useful purpose of the chemical test under

the Implied Consent Act. If the only purpose of the Implied Consent Act was to aid in obtaining a criminal conviction, then, whenever a conviction was obtained without the evidence of the chemical test, it would follow that no useful purpose was served by the Implied Consent Act in that case. Neither the statutes nor the cases support that contention.

Hazlett v. Motor Vehicle Department, 195 Kan. 439, 407 P. 2d 551, is directly in point here. The trial court in that case found that the subject was so apparently drunk that chemical test evidence would have served no useful purpose in a criminal case. The officers did not even need a chemical test to bolster their evidence, nor would it have had any real influence on the matter of the criminal prosecution or verdict. The Kansas Supreme Court referred to the Marbut case, *supra,* as establishing the separate nature of the two proceedings and said: "From the distinct and separate nature of the two proceedings it is clear that whether or not the results of the chemical test would have served a useful purpose in a prosecution for driving while under the influence is not an issue to be resolved in a proceeding to determine the reasonableness of a refusal to submit to the test. It follows that the contention that the results of the chemical test would serve no useful purpose cannot be sustained as a reasonable ground for refusal to submit to the test."

We think it clear that the civil license revocation provided for under the Implied Consent Act was intended to protect the public from the irresponsible driver and not merely to punish the licensee. See Durfee v. Ress, 163 Neb. 768, 81 N. W. 2d 148 (point system of license revocation). We find no justification in the statutes for holding that an unreasonable refusal, constituting a complete violation of the Implied Consent Act, should somehow later be transformed into a reasonable refusal simply because the subject has been convicted and punished under a criminal statute. Neither do we find any

basis in the statutes for distinguishing between a conviction based on a plea of guilty and a conviction after trial.

We hold that a defendant's plea of guilty to a criminal charge of operating a motor vehicle while under the influence of alcohol does not preclude the subsequent revocation of his driver's license in the administrative proceedings before the Director of Motor Vehicles under the provisions of the Implied Consent Act.

For the reasons stated, the judgment of the trial court is reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM DEITLOFF ET AL., APPELLEES, V. CITY OF NORFOLK, APPELLANT.
163 N. W. 2d 586

Filed December 20, 1968. No. 36947.

1. **Eminent Domain: Witnesses.** In condemnation proceedings, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation.
2. ———: ———. The owner of real estate which is taken in condemnation proceedings and who is familiar with its value can testify as to its value.
3. ———: ———. Generally, either lay or expert witnesses may be allowed to testify as to the value of a tract of land taken or the value of the remainder thereof immediately before and immediately after the taking if proper foundation is laid showing they have an acquaintance with the property and are informed as to the state of the market, the weight and credibility of their testimony being for the jury.
4. **Appeal and Error: Evidence.** Under ordinary circumstances, expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony.
5. **Eminent Domain: Damages.** The amount of damages sustained by a landowner for the taking of land by eminent domain for a public improvement and the difference in the fair and reason-

able market value of the remainder of the land before and after the taking 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.

6. **Eminent Domain: Appeal and Error.** In a condemnation act, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong.
7. **Eminent Domain: Witnesses.** In a condemnation action, the weight and credibility of testimony of either lay or expert witnesses regarding value of land taken or value of remainder immediately before and immediately after the taking is for the jury.
8. **Appeal and Error: Trial.** Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.
9. **Constitutional Law: Eminent Domain.** Article I, section 21, Constitution of Nebraska, provides that the property of no person shall be taken or damaged for public use without just compensation therefor.
10. **Constitutional Law: Eminent Domain: Damages.** Whenever an owner of property damaged by the construction of some public improvement is entitled to compensation by the Constitution or statutes of the state, the measure of his compensation is the same as in the case of a partial taking, namely, the decrease in the market value of his land.

Appeal from the district court for Madison County: GEORGE W. DITTRICK, Judge. Affirmed.

Jewell & Otte, for appellant.

McFadden & Kirby, for appellees.

Heard before WHITE, C. J., BOSLAUGH, SMITH, and MCCOWN, JJ., and HUBKA, ACH, and GARROTTO, District Judges.

GARROTTO, District Judge.

This is an action of reverse condemnation for the damage caused to the property of the plaintiffs-appellees, hereinafter referred to as plaintiffs, by construction of a large earthen flood control dam or dike about 13 feet in height which was constructed adjacent to the land of

the plaintiffs by defendant-appellant City of Norfolk, hereinafter referred to as defendant.

Plaintiffs are the owners of a 2-acre tract of land about 2 miles north of Norfolk, in Madison County, Nebraska, upon which property there are a modern three bedroom home and a modern two bedroom home. The defendant built a dam or dike across the road from plaintiffs' property for flood control purposes leaving plaintiffs' property between the dike and the North Fork River. Appeal was taken from the award of the appraisers appointed by the county court to the district court for Madison County.

The defendant filed its answer alleging that it was the owner of the fee title to the property on which the dam was erected. Defendant denied any restriction to the natural drainage to the North Fork River, and further denied that plaintiffs sustained any damage as the result of the construction of said dike.

William Deitloff, one of the owners and a party plaintiff, testified that the construction of the dike would, in times of major flood, cause the water to back up and flood his property. He further testified that the value of his property before the construction of the 13-foot dike was $28,500 and that the value of the property immediately afterwards was $19,500.

Walter Gutzmann, a licensed real estate broker, testified on behalf of the plaintiffs as to the value of the improvements on plaintiffs' property and the value of plaintiffs' property before and after the construction of the dike. He further stated that prior to the construction of the dike, he had seen as much as 60 acres under water on the west side of U. S. Highway No. 81 and that the highest he had seen the water was in 1944 and 1960.

Mr. Gutzmann, who has been an expert in real estate appraisals and values in and around Norfolk for 27 years, testified that he knew the location of the real estate owned by the plaintiffs, its improvements, the location of roads and highways running to and past the prop-

erty, and also the location of the North Fork River immediately to the north and west of the property in question. This witness further testified that the construction of the dike diminished the value of the property. The major elements he took into consideration in arriving at the diminution in value were: (1) The obstruction of the natural flow of water; (2) the undesirability of the place due to the construction of the dike; (3) that one must cross over the top of the dike to approach the property; and (4) the sandwiching of the property between the river and the dike. Mr. Gutzmann also stated he had taken into consideration: The dike's interference with air; fear of flood; difficulty in obtaining a loan; and difficulty in selling the property.

Mr. Gutzmann further testified that in his opinion the value of the property in question before the construction of the dam was $26,500 and after said construction its value was $18,000.

The defendant called as its witness Stuart Hales, a real estate expert who testified he was acquainted with the terrain, the North Fork River, and the area in general; that the construction of the embankment had no effect, one way or another, upon the market value of the land. He further testified that the mere location of the property in relationship to the river would act as a diminishing influence on the overall value of the property.

The court sustained the motion of the plaintiffs that the jury be permitted to view the premises and the terrain involved. The jury did so in charge of the court's bailiff.

The jury returned a verdict in favor of the plaintiffs in the sum of $8,500. Judgment was entered on the verdict.

The motion of defendant for judgment notwithstanding the verdict, or, in the alternative, for new trial was overruled by the court and the defendant appealed to this court.

It was agreed by the parties that the only issue to be considered was the diminution in the value of the plaintiff's property.

In its brief the defendant sets forth seven assignments of error as a basis for reversal of the judgment entered by the trial court: (1) and (2) that the trial court erred in overruling defendant's motion to dismiss after the plaintiffs rested and again after all parties rested; (3) that the trial court erred in overruling defendant's motion to strike the testimony of Walter Gutzmann; (4) that the trial court erred in submitting the issue of increased flood hazard to the jury as contained in instruction No. 9; (5) that the verdict of the jury and judgment of the trial court are not sustained by sufficient evidence; (6) that the verdict of the jury and the judgment of the trial court are contrary to the evidence; and (7) that the verdict of the jury and judgment of the trial court are contrary to law.

We take up first assignments of error Nos. (1), (2), and (3). As related heretofore, the evidence of the plaintiffs when they rested their case consisted in the main of the testimony of one of the owners of the property, William Deitloff, and Walter Gutzmann, the real estate expert. Mr. Deitloff testified as to his ownership of the property with his wife; that he was well acquainted with the area for a number of years; that he purchased it 13 years previous to the time of trial; and that he built the two homes thereon. He built the first house 11 years and the second 9 years previous to construction of the dike. He knew the value of his property before and after the construction of the dike. He stated the value before said construction was $28,500 and $19,500 afterwards, or a diminution of $9,000.

This court, in a long line of cases has repeatedly held that: "The owner of real estate which is taken in condemnation proceedings who is familiar with its value can testify as to its value." Pieper v. City of Scottsbluff, 176 Neb. 561, 126 N. W. 2d 865.

In Twenty Club v. State, 167 Neb. 37, 91 N. W. 2d 64, this court said: "In condemnation proceedings where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation."

Mr. Gutzmann testified as to his long acquaintance with the area and of his 27 years of experience in selling, appraising, and valuing real estate in the area of Norfolk and in Madison County. He gave his opinion that the value of plaintiffs' property before the dike was constructed was $26,500 and immediately thereafter was $18,000, a diminution of $8,500.

In Lansman v. State, 177 Neb. 119, 129 N. W. 2d 569, this court at page 125 said: " 'Generally, either lay or expert witnesses may be used to testify as to the value of a tract of land taken or the value of the remainder thereof immediately before and immediately after the taking if proper foundation is laid showing they have an acquaintance with the property and are informed as to the state of the market, the weight and credibility of their testimony being for the jury. * * * Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony.' Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328." See, also, Burnett v. Central Nebraska P. P. & I. Dist., 125 F. 2d 836 (1942); Samuelson v. Central Nebraska P. P. & I. Dist., 125 F. 2d 838 (1942).

From a perponderance of the evidence we find that a sufficient foundation was laid for the testimony of both witnesses Deitloff and Gutzmann and we therefore find that the trial court was not in error in overruling defendant's motion to dismiss when plaintiffs rested.

Defendant's case consisted mainly of the testimony of Mr. Stuart Hales, who also qualified as an expert in values of land in the area. His testimony was received by the court. He testified in substance that the con-

struction of the dike did not affect the value of plaintiffs' land. Such testimony was in direct conflict with that of plaintiffs' witnesses. This conflict created a question of fact for the jury.

In Lansman v. State, *supra,* this court said: "The amount of the damages sustained by a landowner for the taking of land by eminent domain for a public improvement, and the difference in the fair and reasonable market value of the remainder of the land before and after the taking, 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. See, State v. Wixson, 175 Neb. 431, 122 N. W. 2d 72; State v. Dillon, 175 Neb. 444, 122 N. W. 2d 223; Pieper v. City of Scottsbluff, supra."

In view of the foregoing, we find no error in the lower court's overruling of defendant's motion to dismiss after all parties had rested and in overruling the motion to strike the testimony of Walter Gutzmann.

In assignment of error No. (4), the defendant claims that the court erred in submitting the issue of increased flood hazard to the jury in the court's instruction No. 9.

In the first paragraph of the instruction the court properly instructed the jury as to the quantum of evidence necessary to find that the dike prevented the flow of water to the south and increased the flood hazards to plaintiffs' property. It also instructed the jury as to the measure of recovery. The court then proceeded to instruct the jury that in determining the damage, it should take into consideration only the depreciation of said real estate which it found from the evidence had been caused by increased flood hazards and every non-speculative element of annoyance and disadvantage resulting therefrom.

In paragraphs 3 and 4 of the instruction, the court specifically restricted the jury in its consideration of the element of fear and the obstruction of light, air, or view. Said paragraphs state as follows: "Mere fear as

such cannot be made the basis upon which to predicate depreciation in the market value of land. Only that fear which may be considered as an element in fixing value is that of danger from increased flood hazards, the present or potential existence of which is grounded in authentic observation and experience, or in scientific investigation, and which fear circumscribes activity or limits freedom of use in the area of the present or potential danger. * * * You are not to take into consideration the obstruction of light, air or view as an element or elements of damage, and you are not allowed to consider evidence relating thereto."

Paragraph 5 of the instruction in substance instructed the jury to find for the defendant in the event the plaintiffs had failed to sustain the burden of proof.

In Dunlap v. Loup River Public Power Dist., 136 Neb. 11, 284 N. W. 742, 124 A. L. R. 400 (1939), at page 17, this court said: "Mere general fears from the presence of a transmission line cannot be made the basis upon which to predicate any depreciation in market value, for ill-defined fear that at some unknown time in the future some misfortune may come to man or beast by reason of the transmission line cannot enter into the consideration of those who are required to fix the amount of the damages. But, on the other hand, if such fears be reasonable, not speculative nor ill-defined, but founded on practical experience, and if such fears are entertained so generally as to enter into the calculations of all who propose to buy or sell, can it logically be said that they do not depreciate the market value of the property? * * *

" 'The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property.' Chicago, R. I. & P. R. v. O'Neill, 58

Neb. 239, 78 N. W. 521." (Citing other cases.)

In Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N. W. 833 (1941), the court, in a condemnation proceeding, held: "Anything connected with the land that would influence the market value of the land in the mind of a good faith intending purchaser would be an element for consideration in determining damage."

In Lane v. Burt County Public Power Dist., 163 Neb. 1, 77 N. W. 2d 773 (1956), it is stated: "The only fear which may be considered as an element in fixing value is that of danger, present or potential, existence of which is grounded in authentic observation and experience, or in scientific investigation, and which fear circumscribes activity or limits freedom of use in the area of present or potential danger, and which tends to lessen the market value of the land."

We have examined instruction No. 9 together with all of the other instructions given by the court. We are unable to find any appreciable error which seems to us to be prejudicial to the defendant.

Assignments of error Nos. (5) and (6) charge that the verdict of the jury and judgment of the court are not sustained by the evidence and are contrary to the evidence.

We have heretofore made reference to a substantial part of the evidence adduced in the lower court from which it may be seen, together with the viewing of the premises by the jury, that there was sufficient evidence before the jury and that the verdict of the jury and judgment of the court were not contrary to the evidence. There was a conflict in the evidence and the jury was properly instructed as to all the law applicable.

In Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 325, 13 N. W. 2d 168, this court said: "When the evidence is conflicting the verdict of the jury will not be set aside, unless it is shown to be clearly

wrong." See, also, Grimm v. Elkhorn Valley Drainage Dist., 98 Neb. 260, 152 N. W. 374.

In Lansman v. State, *supra,* this court said: " 'Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.' Graves v. Bednar, supra. See, also, Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913; Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758."

An examination of all the instructions under the rule mentioned above discloses that they fairly and correctly stated the law applicable under the evidence in the instant case.

In State v. Wixson, 175 Neb. 431, 122 N. W. 2d 72, this court said: "In a condemnation action the weight and credibility of testimony of either lay or expert witnesses regarding value of land taken or value of remainder immediately before and immediately after taking is for the jury." See, also, Connor v. State, 175 Neb. 140, 120 N. W. 2d 916.

In Graves v. Bednar, 171 Neb. 499, 107 N. W. 2d 12, this court said: "In Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557, we held: 'It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. * * * It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong.' "

In Lilienthal v. Platte Valley Public Power & Irr. Dist., 134 Neb. 281, 278 N. W. 492, this court said: "The jury had the opportunity of seeing the premises in question, and their view thereof may be considered as evidence upon which they based their verdict. A verdict based on the evidence, where the jury have been permitted to view the premises, will not be disturbed

unless clearly wrong. Fremont, E. & M. V. R. Co. v. Meeker, 28 Neb. 94, 44 N. W. 79."

Finally, in its seventh assignment of error the defendant asserts that the verdict of the jury and the judgment of the court are contrary to law.

Article I, section 21, Constitution of the State of Nebraska, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."

In 4 Nichols on Eminent Domain, Property Damaged but not Taken, § 14.4, p. 735, it is stated: "Whenever an owner of property damaged by the construction of some public improvement is entitled to compensation by the constitution or statutes of the state, the measure of his compensation is the same as in the case of a partial taking, namely, the decrease in the market value of his land." Citing City of Omaha v. Kramer, 25 Neb. 489, 41 N. W. 295, 13 Am. S. R. 504; Chicago, K. & N. Ry. Co. v. Hazels, 26 Neb. 364, 42 N. W. 93; Omaha & N. P. R.R. Co. v. Janecek, 30 Neb. 276, 46 N. W. 478, 27 Am. S. R. 399; City of Plattsmouth v. Boeck, 32 Neb. 297, 49 N. W. 167; Lowe v. City of Omaha, 33 Neb. 587, 50 N. W. 760; Chicago, B. & Q. R.R. Co. v. O'Connor, 42 Neb. 90, 60 N. W. 326; Chicago, R. I. & P. Ry. Co. v. O'Neill, 58 Neb. 239, 78 N. W. 521; Harris v. Lincoln & N. W. Ry. Co., 91 Neb. 755, 137 N. W. 865; Stocking v. City of Lincoln, 93 Neb. 798, 142 N. W. 104, 46 L. R. A. N. S. 107.

In 1 Orgel, Valuation Under Eminent Domain, § 61, p. 281, it is said that when an easement is taken which still leaves the owner with property rights of material and measurable value, the condemnor need not pay for the entire value of the fee simple. But in these cases—such as in the cases where an electric power company runs wires over the owner's property—compensation is based, not on the separate value of the easement but rather on the damage to the owner's entire property attributable to the taking of the easement and to the

prospective use which the taker will make of it.

In Gruntorad v. Hughes Bros., Inc., 161 Neb. 358, 73 N. W. 2d 700, the court said at page 367: "If the property of appellants is damaged as claimed by them it results from a public use for which the city was liable by virtue of the constitutional provision that private property may not be taken or damaged for a public purpose without compensation. Art. I, § 21, Constitution of Nebraska."

In Baum v. County of Scotts Bluff, 169 Neb. 816, 101 N. W. 2d 455, it was said: "One whose property is damaged by the construction of a public improvement by the state or a subdivision thereof, has been damaged for a public use within the meaning of Article I, section 21, of the Constitution. Negligence is not a necessary element to be proved in maintaining an action for such damage." See, also, Richmond County v. Williams, 109 Ga. App. 670, 137 S. E. 2d 343 (1964).

We find no prejudicial error in the record. The judgment of the trial court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The concept of damage in the constitutional sense is distinctly different when the flow of a watercourse is affected. See 2 Nichols, Eminent Domain (3d Ed.), § 6.446, p. 607. The problem of the liability of a municipality or other governmental subdivision in connection with flood protection measures, such as those involved here, has received widely varying treatment. See Annotation, 5 A. L. R. 2d 57.

This court has previously held that whatever may be done by an upper riparian landowner in the protection and improvement of his land may be done by a legally organized sanitary drainage district. See Cooper v. Sanitary Dist. No. 1, 146 Neb. 412, 19 N. W. 2d 619. In that case, as in this one, there was evidence that the plaintiff's land would be, and had been, flooded by the watercourse in a state of nature. There was specific

evidence in the Cooper case that the plaintiff's land would have been flooded for a longer time and to a greater depth if the flood control works of the defendant had never been constructed. This court said in the Cooper case: "* * * the burden is upon the plaintiffs to show the extent of the increased overflow and the amount of damages arising therefrom. There is no attempt made in the present record to make such an allocation of damages. This fact, coupled with our finding that plaintiffs' land would have been flooded whether the works of the defendant were built or not, is sufficient to defeat the judgment."

In the present case, not only is it established that no flooding whatever has occurred since the defendant's construction, but there is a complete absence of any evidence to show the possible or probable extent of any future increased overflow, the additional amount of time it would remain on plaintiff's land, or the increased damage, if any, that it might cause.

Evidence that the market value of plaintiff's land has decreased and that the decrease is related to governmental construction on lands other than the plaintiffs should not be sufficient to establish a taking or damaging of plaintiff's property under Article I, section 21, of the Constitution of Nebraska.

RICHARD H. ABERNATHY, JR., ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPELLANTS.

163 N. W. 2d 579

Filed December 20, 1968. No. 36978.

1. **Estoppel: Municipal Corporations.** Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of a governmental function, but exceptions can be made where right and justice so demand.
2. **Taxation.** It is the settled policy of our law to guard against double taxation in all cases where it can be avoided.

3. **Municipal Corporations.** Where part of the territory of a sanitary and improvement district is annexed by a city, either the district or the city must institute action as soon as it becomes evident that an agreement cannot be reached.

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

Edward M. Stein, Donald L. Knowles, and Francis R. Pane, for appellants.

John W. Delehant, Jr., and Robert J. Huck, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and SCHMIDT, District Judge.

SPENCER, J.

This action involves the collection of a 5-mill levy by a sanitary and improvement district on property annexed by the city of Omaha. The levy and resultant tax were found to be void and unenforceable as to plaintiffs.

Prior to July 1, 1965, Prairie Hills Addition, a subdivision in Douglas County, was wholly within the boundaries of Sanitary and Improvement District No. 43 of Douglas County, hereinafter referred to as district. On July 1, 1965, an annexation ordinance of the city of Omaha, hereinafter referred to as city, became effective for a portion of Prairie Hills Addition which included plaintiffs' property. No agreement was entered into between the district and city adjusting the boundaries and dividing the assets and liabilities of the district, as provided in section 31-766, R. R. S. 1943. District levied no tax in 1965, but in July 1966, more than a year after the annexation, it levied a tax of 5 mills upon all the real and tangible personal property within the district, including the portion annexed by city on July 1, 1965. This was the first and only general mill levy certified by the district. City also levied its 1966 tax upon the annexed property. On September 6, 1966, city annexed further territory of district, and city and district there-

after agreed upon a merger. The merger of district and city became effective January 20, 1967, and city has succeeded to all assets of the district.

Plaintiffs brought this action on their own behalf and on behalf of all the owners of real and tangible personal property within the area annexed July 1, 1965. A temporary restraining order was issued March 29, 1967, enjoining the county treasurer from paying over the tax, and by agreement of the parties was continued in effect during the pendency of this litigation.

City urges that section 77-1727, R. R. S. 1943, does not grant authority to restrain the collection of the tax herein. The statute is as follows: "No injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof, nor to restrain the sale of any property for the nonpayment of any such tax, nor shall any person be permitted to recover by replevin, or other process, any property taken or restrained by the county treasurer for the nonpayment of any tax, except such tax or the part thereof enjoined in case of injunction, be levied or assessed for illegal or unauthorized purpose." The tax herein is within the exception, and the injunction was properly granted.

District and city have now been merged and city has succeeded to all the assets of the district. Should city be permitted to benefit at the expense of some of its taxpayers by its own dereliction of duty? It is the beneficiary of its failure to comply with the obvious intent of the law governing its annexation of July 1, 1965. It included the annexed property on its own tax rolls and then took no action of any nature to comply with section 31-766, R. R. S. 1943, for a period of 18 months.

Section 31-766, R. R. S. 1943, provides, so far as material herein: "If only a part of the territory within any sanitary and improvement district * * * is annexed by a city or village, the district acting through its trustees and the city or village acting through its governing

body may agree between themselves as to the equitable division of the assets, liabilities, maintenance or other obligations of the district for a change in the boundaries of the district so as to exclude the portion annexed by the city or village * * *. If the district and city or village do not agree upon the proper adjustment of all matters growing out of the annexation of a part of the territory located within the district, either the district or the annexing city or village may apply to the district court of the county where the major portion of the district is located for an adjustment of all matters growing out of or in any way connected with the annexation of such territory, and after a hearing thereon the court may enter an order or decree fixing the rights, duties and obligations of the parties; Provided, that in every case such decree or order shall require a change of the district boundaries so as to exclude from the district that portion of the territory of the district which has been annexed. Such change of boundaries shall become effective on the date of entry of such decree. Only the district and the city or village shall be necessary parties to such an action. The decree when entered shall be binding on both parties the same as though the parties had voluntarily agreed thereto."

City now urges that the boundaries of the property involved herein were not changed until the decree of the district court was entered July 20, 1967, on the merger of district and city. City certainly considered the boundaries changed when it included the property on its own tax rolls and taxed it for 1966. Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of a governmental function, but exceptions can be made where right and justice so demand. See Sanitary & Improvement Dist. v. City of Ralston, 182 Neb. 63, 152 N. W. 2d 111.

The property in question was taxed by both district and city for the same services, solely because of the failure of either body to comply with section 31-766, R.

R. S. 1943. It is a settled policy in our law to guard against double taxation in all cases where it can be avoided. Peters Trust Co. v. Douglas County, 113 Neb. 596, 203 N. W. 1001.

Section 31-766, R. R. S. 1943, contemplates that district and city will promptly attempt to work out an agreement or a proper adjustment, and if they cannot agree then one of them will apply to the district court for an order or decree fixing the rights, duties, and obligations of the parties. In Sanitary & Improvement Dist. v. City of Ralston, 182 Neb. 63, 152 N. W. 2d 111, we said: "Section 31-766, R. R. S. 1943, 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." "Promptly" means "expeditiously." We hold that either district or city, after an annexation of part of the territory of a sanitary and improvement district, must institute action as soon as it becomes evident an agreement cannot be reached.

In this respect, it is to be noted that section 31-764, R. R. S. 1943, covering the annexation of all of a district, requires the trustees of the district to submit a written accounting of all assets and liabilities within 30 days. Section 31-765, R. R. S. 1943, also involving the annexation of an entire district, provides that the merger shall be effective within 30 days of the date of the annexation ordinance unless its validity is challenged by court proceedings. Obviously, section 31-766, R. R. S. 1943, must be construed in the light of the intent of the two preceding sections, 31-764 and 31-765, R. R. S. 1943.

On the facts in this case, we consider that done which should have been done, and will not permit city to benefit from its dereliction of duty by collecting a double general levy on the subject property for the same period of time. We hold the 5-mill levy herein to be void and unenforceable as to the property covered by the annexation ordinance of July 1, 1965.

The judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES HEISER, APPELLANT.
163 N. W. 2d 582

Filed December 20, 1968. No. 36982.

1. **Arrest: Probable Cause.** An arrest based upon probable cause derived from facts and circumstances within an officer's knowledge or of which he has reasonably trustworthy information sufficient to warrant a man of reasonable caution in believing an offense has been, or is, being committed, may be made without a warrant.
2. **Arrest: Searches and Seizures.** A search and seizure incident to a lawful arrest is not violative of the Fourth Amendment.
3. **Attorney and Client: Witnesses.** Ordinarily it is proper for counsel to comment on the failure of the opposing side to produce or use available and competent witnesses, where the circumstances justify an unfavorable inference from such omission.
4. **Prosecuting Attorneys: Witnesses.** The State is not required to call all material witnesses to an offense.
5. ———: ———. The failure of the State to call a witness to prove a fact material to its case raises no inference unfavorable to the State when it appears that the witness is not within its reach.
6. **Attorneys at Law: Trial.** The trial court has a wide discretion in determining the latitude permitted in the argument of counsel.
7. **Criminal Law: Appeal and Error.** Errors in the trial of a criminal case, in order to require a reversal of conviction, must be harmful to a substantial right of the defendant.

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

A. James McArthur, for appellant.

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

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

NEWTON, J.

Defendant Charles Heiser was convicted of the unlawful possession of marijuana. His motion for a new trial was overruled and he has appealed to this court.

The evidence of the State may be summarized as follows: Defendant and one Richard Evans were roomers in a house at 2010 F Street in Lincoln, Nebraska, owned and occupied by Ronald Jahde. About 11 p.m. on November 17, 1967, Officer Ivan L. Waples of the Lincoln police department was informed by Karen Andrews that a marijuana party was being conducted by defendant at the address mentioned. She gave the officer a small container of marijuana. Karen Andrews was an employee of the municipal court in Lincoln and Officer Waples had been acquainted with her for about 1 month. Officers Waples, Jacobson, Merritt, and Ideen arrived at defendant's place of residence sometime after midnight on the morning of November 18, 1967. Officer Jacobson went to the back door and the other three knocked on the front door. Defendant came to the door, looked out through the glass in the door, was shown an officer's badge, and was thus informed that his callers were the police. Defendant asked what they wanted and on being told they wanted to come in, asked if they had a search warrant. He was told that they did not. Defendant refused to open the door. He was observed through the glass to run back toward the kitchen which was also lighted. Officer Jacobson, looking through the glass in the back door, saw defendant enter the bathroom, heard a window being opened, and saw the defendant reach out and place two containers on the garage roof, then pick them up and throw them out on the lawn. The containers contained marijuana. In the meantime, Karen Andrews, who, with several other people, was in the house, unlocked and opened the front door and admitted

the officers, one of whom went to the back door, unlocked it, and admitted Officer Jacobson. Jacobson entered and placed defendant under arrest. The odor of burnt marijuana was detected in the house. Captain Sellmeyer and other officers arrived. The captain requested of defendant permission to search the house. Defendant gave permission and unlocked one of the upstairs rooms for the officers. Another small container containing marijuana was found in a dresser in defendant's room.

At the police station, defendant was fully warned of his rights, waived them, and voluntarily answered questions put to him by Captain Sellmeyer. He admitted having thrown the marijuana containers out the window and that he had been giving marijuana parties.

Defendant testified in his own behalf. His evidence is in contradiction of the police version. He denied that marijuana had been smoked in the house and any knowledge of any of the marijuana found. He also denied having given permission for a search of the house and having made any admissions to Captain Sellmeyer.

Defendant urges three assignments of error: First, the admission of exhibit 3, which was the marijuana container found in defendant's dresser drawer, on the ground that it was the fruit of an illegal search; second, that exhibit 3 was erroneously withheld from the jury and exhibit 5, which was a photograph of the kitchen table with the marijuana containers and other objects thereon and which had been excluded from evidence, was permitted to go to the jury; and third, that defendant's counsel, in argument, was erroneously prevented from commenting on the State's failure to call Karen Andrews as a witness.

According to evidence adduced by the State, the police had been informed by a private citizen, who was known to one officer, of the defendant's possession of marijuana and had furnished a sample of it to the officer. Prior to the entry of the police into defendant's home, he was seen

by the arresting officer to throw two packages, later ascertained to contain marijuana, from a window. The police were admitted by a guest of defendant and detected the odor of burnt marijuana in the house. Defendant was arrested. Defendant was then given the Miranda warnings and was asked for permission to search the house. He gave that permission and even unlocked the door to one room on request of the officers. It is true that defendant denied much of this evidence, but it is sufficient to justify the court and jury in concluding that the search was not an illegal one.

The police had information from an informant they considered reliable of defendant's illegal activity and the arresting officer saw defendant attempt to dispose of a quantity of marijuana. The circumstances were sufficient to convince a person of reasonable caution that an offense was being committed and to justify defendant's arrest. An arrest based upon probable cause derived from facts and circumstances within an officer's knowledge or of which he has reasonably trustworthy information sufficient to warrant a man of reasonable caution in believing an offense has been, or is, being committed, may be made without a warrant. See, State v. Perez, 182 Neb. 680, 157 N. W. 2d 162; State v. Cook, 182 Neb. 684, 157 N. W. 2d 151. A search and seizure incident to a lawful arrest is not violative of the Fourth Amendment. See, Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409; Reed v. United States, 364 F. 2d 630 (9th Cir.); United States v. Tucker, 380 F. 2d 206 (2d Cir.).

Defendant's second assignment of error is baseless. It appears that the court reporter committed an error in indexing the exhibits referred to. There was no actual mixup in the exhibits given the jury for consideration. The indexing error has been corrected by the filing of a supplemental bill of exceptions.

In argument to the jury, defense counsel made the following statement: " 'The State has the burden of

producing all material witnesses to the alleged offense; and if you find that the State has not produced a material witness you may presume from that failure that any such witness would have given testimony damaging to the State's case.'" Objection to this remark was sustained. Evidence introduced by the State had shown the witness referred to, Karen Andrews, to be residing in the State of California and outside the jurisdiction of the court. Ordinarily it is not improper for counsel to comment on the failure of the opposing side to produce or use available and competent witnesses, where the circumstances justify an unfavorable inference from such omission. See 23A C. J. S., Criminal Law, § 1099, p. 174. In the present instance, it appears the court ruled correctly on several different grounds. The statement made was an incorrect statement of the law regarding the requirement that the State produce all material witnesses. The State is not required to call all material witnesses to an offense. See, Bloom v. State, 95 Neb. 710, 146 N. W. 965; 23 C. J. S., Criminal Law, § 1017, p. 1094. The failure of the State to call a witness to prove a fact material to its case raises no inference unfavorable to the State when it appears that the witness is not within its reach. See, 22A C. J. S., Criminal Law, § 594, p. 373; People v. Gutierrez, 128 Cal. App. 2d 387, 275 P. 2d 65; People v. Peyton, 25 Ill. 2d 392, 185 N. E. 2d 163.

The trial court has a wide discretion in determining the latitude permitted in the argument of counsel. See, State v. Burchett (Mo., 1957), 302 S. W. 2d 9; Bizup v. People, 150 Colo. 214, 371 P. 2d 786.

Errors in the trial of a criminal case, in order to require a reversal of conviction, must be harmful to a substantial right of the defendant. See Franz v. State, 156 Neb. 587, 57 N. W. 2d 139. Here the undisputed evidence disclosed the witness to be out of the jurisdiction of the court and unavailable; her evidence would have been only of a cumulative nature and apparently

detrimental to defendant. There could be no prejudice in restricting comment by defendant's counsel.

No error appearing, the judgment of the trial court is affirmed.

AFFIRMED.

MARGUERITE H. JOHNSON, APPELLEE, V. MARVIN J. JOHNSON, APPELLANT.
163 N. W. 2d 596

Filed December 20, 1968. No. 36985.

1. **Husband and Wife: Divorce.** Condonation is forgiveness, express or implied, for a breach of marital duty with the implied condition that the offense shall not be repeated. It is dependent upon future good conduct and a repetition of the offense revives the wrong condoned.
2. **Divorce: Appeal and Error.** A divorce action is triable de novo upon the issues presented by the appeal.

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

Kerrigan, Line & Martin, for appellant.

Sidner, Gunderson, Svoboda & Schilke, for appellee.

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

NEWTON, J.

This is a divorce action. Marguerite H. Johnson, plaintiff, brought this action against Marvin J. Johnson, defendant, praying for a divorce, alimony, custody of a 16-year-old son, and child support. The trial court awarded a divorce to plaintiff on the ground of cruelty, gave her custody of the minor son, ordered defendant to pay $30 per week child support, made a division of the property owned by the parties, and decreed that defendant should pay $4,500 permanent alimony, payable at the rate of $125 per month. Plaintiff was also al-

lowed an attorney's fee and costs were taxed to defendant.

The evidence of the plaintiff in this case consisted primarily of statements that can only be termed generalities and conclusions; yet, there would appear to be sufficient competent evidence to sustain the decree of divorce granted to plaintiff. Plaintiff was 52 years of age and defendant 58 years of age at the time of the divorce. He is an electrician conducting his trade independently. Both are in good health. They had been married for a period in excess of 30 years, during a part of which time the plaintiff also had worked and was working 3 nights a week in a bar at the time of the hearing. The amount of her wages is not disclosed. Defendant's earnings according to his 1966 tax return were $6,526.78 net.

Plaintiff had previously obtained a divorce at some undisclosed time and the parties then became reconciled and lived together until the present action was instituted. Plaintiff's evidence indicated that there were almost constant arguments between the parties during the period of their marriage and that defendant habitually used very abusive language toward her and, also, on frequent occasions, physically abused her. The verbal and mental abuse generally was corroborated by the 16-year-old son and he testified to one or two specific incidents occurring since the reconciliation. Defendant contends that because they lived together as man and wife up until the date of the separation, all offenses committed by defendant against plaintiff were condoned; however, it is well established that condonation is forgiveness, express or implied, for a breach of marital duty with the implied condition that the offense shall not be repeated. It is dependent upon future good conduct and a repetition of the offense revives the wrong condoned. Fletcher v. Fletcher, 182 Neb. 549, 156 N. W. 2d 1.

The parties owned a certain amount of property and

for the purposes of this opinion, we will, for the most part, accept the values placed upon the various items by the plaintiff: A house at 633 East Linden Street in Fremont, Nebraska, was valued at $8,250; a house in Scribner, Nebraska, at $8,250; a lot in Grand Island, Nebraska, at $240; a 1963 Mercury automobile at $800; a 1964 Ford pickup, less amount of lien upon it, at $400; defendant's bank account, less the amount of plaintiff's account, at $880; an equity in a house at 635 East Eleventh Street in Fremont, Nebraska, at $6,310; defendant's accounts receivable, less accounts payable, at $2,500; and in addition to this, there were household goods upon which no value was placed. Plaintiff also contended that defendant's electrical business had a sale value of $5,000. This, however, seems highly improbable since defendant did not maintain a place of business and operated solely as an individual. It is difficult to conceive that this was a saleable business. The trial court awarded to defendant the house at 633 East Linden Street in Fremont, Nebraska, the Ford pickup, his bank account, and accounts receivable. All other property was awarded to the plaintiff in addition to the $4,500 permanent alimony. It appears that plaintiff handled all of the money obtained by the parties, took care of the bookkeeping and accounting, and handled all business transactions other than those connected with the electrical business. She customarily placed her own earnings in an individual account and defendant's earnings in a joint account, the latter being used for the payment of all family expenses. She took title to all real estate purchased in her own name, with the exception of the house at 635 East Eleventh Street in Fremont, Nebraska, which was jointly owned. She also took title in her own name to the Mercury automobile. She maintained that she spent $7,650 of her own funds on the properties acquired, claiming that this money was obtained primarily through earnings, with the addition of $1,500 in cash given to her by an uncle and E Bonds

given to her by an aunt which amounted to $1,687.42. The only corroboration she had for the $1,500 alleged to have been received from the uncle is a check in that amount drawn on her personal account and put in the joint account of the parties. It scarcely need be pointed out that since she was handling all of the funds earned by the defendant, as well as her own, the original source of this $1,500 is somewhat in doubt. The government bonds alleged to have been received from her aunt were E Bonds as evidenced by a deposit slip and in view of the fact that E Bonds are not transferable or assignable, the source of this money would also appear to be somewhat in doubt. On the whole, it appears that the trial court may have been overly generous with the plaintiff in the division of property and in fixing permanent alimony. In many instances, the trial court is in a peculiarly advantageous position in dealing with such matters and ordinarily an appellate court is reluctant to interfere with the wide discretion vested in the trial court in regard to such matters. In the present instance, however, we find that the amount of permanent alimony should be reduced to the sum of $2,500 and that in all other respects, the judgment of the trial court should be affirmed. A divorce action is triable de novo upon the issues presented by the appeal. Jablonski v. Jablonski, 173 Neb. 544, 114 N. W. 2d 1.

An allowance for an attorney's fee in this court is made to the plaintiff in the sum of $300.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. LEON J. HASCHKE ET AL., APPELLEES, V. PAUL DUESMAN ET AL., APPELLANTS, IMPLEADED WITH ALFRED HASSENSTAB, APPELLEE.
163 N. W. 2d 594

Filed December 20, 1968. No. 36998.

1. **Schools and School Districts: Words and Phrases.** The term

"district officers" as used in section 79-464, R. R. S. 1943, includes members of the school board or board of education.

2. **Schools and School Districts.** Unless the governing provision specifically provides otherwise, the appointment of a member of a school board or board of education in a Class III school district is for the period to the beginning of the next school year.

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

Walker, Luckey & Whitehead, for appellants.

Wagner & Johnson and Raymond E. Baker, for appellees.

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

SPENCER, J.

This is an action in mandamus to compel appellants, members of the board of education of School District No. 67 of Platte County, Nebraska, also known as the school district of Humphrey, a Class III school district, to place the names of two petitioners upon the ballot at the regular election to be held April 2, 1968, as candidates for members of the board of education.

A peremptory writ of mandamus was granted placing petitioners upon the ballot. Petitioners were elected members of the board of education for the term expiring the first Monday in May 1969. Supersedeas was granted, and appellants have perfected their appeal to this court. Appellees heretofore filed a motion to dismiss, on which we reserve ruling. We make no ruling on the merits of the motion but meet the ultimate issue.

In 1967, appellant Vincent Mausbach and appellant Donald Kallweit were duly appointed by the members of the board of education to fill vacancies created by the resignation of elected members of the board whose terms expired on the first Monday in May 1969. The question is whether the board had the power to appoint for the unexpired term or only the power to appoint

until the beginning of the next school year, which would have been the first Monday in May 1968.

Appellees rely on section 79-464, R. R. S. 1943, which reads as follows: "District officers appointed to fill vacancies shall hold their office until the beginning of the next school year. Officers elected at a special meeting shall serve for the remainder of the unexpired term and until their successors are elected and qualified."

Appellants call attention to section 79-807, R. R. S. 1943, which reads in part as follows: "The boards of education of Class III school districts shall have power to select their own officers and make their own rules and regulations not inconsistent with any statute applicable to such districts."

Appellants also call attention to section 32-1045, R. R. S. 1943, which is in part as follows: "Every officer elected or appointed for a fixed term shall hold office until his successor is elected or appointed, and qualified, unless the statute under which he is elected or appointed expressly declares the contrary."

It is appellants' position that section 79-464, R. R. S. 1943, is not applicable because the term "district officers" refers to and is restricted to the president, a vice president, secretary, and treasurer, who are the officers provided by sections 79-808 and 79-809, R. R. S. 1943. We do not so narrowly interpret the statute.

We call attention to section 79-462, R. R. S. 1943, which is as follows: "Every school district office shall become vacant by the death, resignation, removal from office, or removal from the district of the incumbent, by his absence from the district for a continuous period of sixty days at one time, or by his absence from more than two consecutive regular meetings of the board, unless excused by a *majority of the remaining members of the board.*" (Italics supplied.)

The history of the provisions governing Class III schools would indicate that appellants too narrowly define the term "officers." Previous to 1949, the dis-

trict officers of a school district were the moderator, the director, and the treasurer. These three officers also constituted the entire board. In 1949, the Sixty-first Session of the Legislature, by Legislative Bill 1 (Laws 1949, c. 256, p. 689), recodified, revised, adopted, and established a code of laws relating to schools, and classified the various districts.

Section 1 of Article I of the act, which is section 79-101, R. R. S. 1943, defined the term "school board or board of education" as the governing body of any school district.

Section 4 of Article I of Chapter 79 (Laws 1949, c. 256, p. 692), which became section 79-104, R. R. S. 1943, and was repealed in 1965, provided as follows: "All officers of existing school districts shall retain their offices until the expiration of their respective terms. All moderators and directors of existing school districts shall become presidents and secretaries respectively of their districts. Where the classification made by section 79-102 requires *additional* members of the board (the new act provided for six board members for this class district), the same shall be elected at the first annual school meeting or school election held after the effective date of this act." (Italics supplied.) It is obvious that the term "officers" as used therein included board members.

It is also to be noted that section 79-464, R. R. S. 1943, which had been section 79-309 of the previous statute, was incorporated under subheading (e) of Article IV of Chapter 79 (Laws 1949, c. 256, p. 723). This subheading is titled "Officers." It is further to be noted that section 79-463, R. R. S. 1943, empowering the district board or board of education to fill by appointment any vacancy that may occur in its number, is also included under the subhead "Officers."

Section 79-509 of the previous act was section 80 of L.B. 1 and became section 79-441, R. R. S. 1943. In L.B. 1 it is included under subheading (d), "District Board." A reading of section 80 in context indicates the term

"officers" includes board members as well as the president, vice president, secretary, and treasurer, because previous to L.B. 1 the board was solely composed of the moderator, director, and treasurer, who were the only officers and board members.

Previous to the recodification in 1949 of the school law, Class III districts having cities of the first class within their boundaries were covered by section 79-2505, R. S. 1943. It is of interest that such section provided, in the event of a vacancy among members of the board of education, their appointment should continue for the unexpired term. This provision was carried into section 236 of L.B. 1 and became section 79-803.02, R. R. S. 1943. We can only surmise if the Legislature had wanted the provision to be effective for all Class III school districts, it would have so provided.

The judgment herein should be and hereby is affirmed.

AFFIRMED.

LINDA DRAKE, APPELLANT, V. ALAN DRAKE, APPELLEE.

163 N. W. 2d 598

Filed December 20, 1968. No. 37003.

Contempt: Motions, Rules and Orders. In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of purposes for which the order was entered.

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

Andrew J. McMullen, for appellant.

Kenneth S. Gotobed, for appellee.

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

SMITH, J.

The district court in this divorce suit adjudged Linda Drake, plaintiff, in contempt for failure to produce the children of the parties in court. It subsequently ordered forfeiture of a cash bond posted by her to secure such an appearance. Alan Drake, defendant and cross-petitioner, was awarded an absolute divorce and custody of the children. Linda on appeal requests dismissal of the charge of contempt, exoneration of her bond, and a new trial on all issues raised by petition and cross-petition.

The parties and their two children, ages 1 and 2, were permanently residing at Kearney, Nebraska, in 1967. Linda and the children left Nebraska on October 11, ostensibly to visit her parents in California. She commenced this suit November 14, alleging that she and the children were then residing at Sun Valley, California. All hearings in district court were attended by her counsel, Andrew J. McMullen.

The contempt proceeding is related to a hearing on December 7, 1967. Counsel agreed to take depositions of the parties at Kearney on January 16, 1968, and to commence trial January 22. The court on Linda's motion for temporary allowances fixed no sum certain except $100 attorney's fees and costs. The order in the journal of the court reads: "* * * the Court finds that defendant should furnish the means for * * * (Linda) to be returned to Nebraska, together with the children of the parties; * * * IT IS * * * ORDERED * * * as above found." The verbatim record of the hearing reads: "MR. GOTOBED (counsel to Alan): * * * We would like to have the Court order that the wife return with the children so he can see them occasionally * * * and we are willing to pay the children's expenses and wife's expenses back here. * * * would it be a proper way to arrange for the ticket here in Kearney and tell her that she could pick up the ticket?" McMullen apparently agreed to Alan's depositing the ticket at the Los Angeles station.

Linda returned without the children. She testified January 22, 1968, that she was unaware of a court order for their return. Her testimony generated a short colloquy between the court and McMullen, a 10-minute recess, and an order of contempt. The journal reads: "Plaintiff having failed to bring said children into the jurisdiction it is ordered that she be confined to * * * Jail as guilty of contempt * * * until she clear herself * * *. If the plaintiff desires to be released to get said children back into Nebraska she may post a $500.00 bond to guaranty her return by a date fixed by the Court with said children." Linda was confined to jail until January 27, when she was released on her cash bond of $500.

Testimony of Gotobed on February 16, 1968, is illuminating. Linda, who had received no money from Alan for travel expenses, returned to Kearney in January without use of the railroad ticket. Several days after January 22 the Kearney station agent mentioned a refund due Alan for the unused ticket. The verbatim record following Gotobed's testimony reads: "The Court finds that the bond should be ordered * * * forfeited, unless the Plaintiff appears personally before this Court to be reincarcerated." The journal reads: "The Court * * * finds that the plaintiff should be ordered to be present in Court with the children of the parties on the 4th day of March, 1968, in accordance with the order * * * on the 7th day of December, 1967; the Court further finds that the bond of the Plaintiff in the sum of $500.00 should be ordered forfeited if the plaintiff shall fail to appear with the children of the parties. IT IS * * * ORDERED * * * AS ABOVE FOUND."

Linda did not physically appear in district court March 4, 1968, and the court ordered forfeiture of the bond. Trial of other issues ended April 1, and the court then awarded Alan judgment on his cross-petition.

In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond

a reasonable interpretation in light of purposes for which the order was entered. See Terminal R. R. Assn. v. United States, 266 U. S. 17, 45 S. Ct. 5, 69 L. Ed. 150.

Gotobed implied that Alan had surrendered the railroad ticket to obtain a refund soon after January 22, 1968. Since Alan's obligation was a continuing one, the surrender under a reasonable reading of the court orders excused subsequent nonproduction of the children. Any additional sanction on a hypothesis of contempt for disobedience on January 22 would be excessive. The contempt proceeding interfered with attendance of Linda at the trial of issues raised by petition and cross-petition, and the interference constituted unfair prejudice.

The judgment is reversed and the cause remanded with directions to (1) vacate the bond forfeiture and exonerate the bond, (2) grant a new trial on issues other than contempt, and (3) proceed in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1969

STATE OF NEBRASKA, APPELLEE, V. HERBERT BEASLEY, APPELLANT.

163 N. W. 2d 783

Filed January 10, 1969. No. 36914.

1. **Criminal Law: Constitutional Law.** In all criminal prosecutions an accused has the right to appear and defend in person. Art. I, § 11, Constitution of Nebraska.
2. **Criminal Law: Right to Counsel.** In the absence of unusual circumstances a defendant in a criminal case who is sui juris and mentally competent has the right to conduct his defense in person without the assistance of counsel.
3. **Criminal Law: Jury.** Opportunity for prejudice or disqualification of jurors does not raise a presumption that they exist.
4. **Criminal Law: Searches and Seizures.** Evidence obtained prior to and independent of an alleged illegal search is admissible.
5. **Criminal Law: Evidence.** Under the circumstances in this case, the pretrial identification of the defendant from photographs was not prejudicial.
6. **Criminal Law: Arrest.** A peace officer may arrest a person without a warrant if he has reasonable cause to believe that such person has committed a felony. § 29-402.02, R. S. Supp., 1967.

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

William J. Riedmann, for appellant.

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

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

BOSLAUGH, J.

The defendant, Herbert Beasley, was convicted of robbery and sentenced to 10 years imprisonment. His motion for new trial was overruled and he has appealed. The principal assignments of error relate to the sufficiency of the evidence and the action of the trial court in permitting the defendant to represent himself.

There is evidence from which the jury could find that the defendant robbed the King Loan Company in Omaha, Nebraska, on October 11, 1967. The robbery took place at about 9:30 a.m. while the secretary-cashier of the loan company was alone in the office. She had just counted the cash and prepared a cashier's statement when the defendant entered the office. The defendant held a gun on the secretary-cashier and obtained one 50-dollar bill, four 20-dollar bills; 29 ten-dollar bills, 23 five-dollar bills, 27 one-dollar bills, 22 quarters, 28 dimes, 70 nickels, and 50 pennies. As the defendant left the office he met the manager and assistant manager who were returning to the office. The robbery was then reported to the police.

From the loan company the defendant went to a used car lot about 2 blocks away. There the defendant asked to try out a car. After the defendant and the used-car dealer drove around several blocks the defendant asked to be taken to the downtown area so that he could see about getting money from a bank. On the trip downtown a report of the robbery was heard on the car radio. The defendant gave the dealer a five-dollar bill for his time and got out of the car at Twentieth and Harney Streets. The dealer recognized the defendant from the description broadcast over the radio, and notified the police.

The defendant was arrested in front of the bus station at Eighteenth and Farnam Streets at about 10:15 a.m. The officer made a quick search for weapons and dis-

covered that a large bulge in the defendant's right front pocket was a roll of 27 one-dollar bills. The defendant was then taken to the police station and searched and found to have one 50-dollar bill, four 20-dollar bills, 29 ten-dollar bills, 22 five-dollar bills, 27 one-dollar bills, 23 quarters, 27 dimes, 70 nickels, and 49 pennies in his possession.

The defendant was positively identified by the secretary-cashier of the loan company, the assistant manager of the loan company, and the used-car dealer. The evidence is clearly sufficient to sustain the judgment.

An assistant public defender appeared for the defendant at the preliminary hearing in the municipal court. In the district court the defendant refused the assistance of counsel and insisted that he be allowed to represent himself.

The Constitution and statutes of Nebraska provide that an accused may defend himself. Art. I, § 11, Constitution of Nebraska; § 7-110, R. R. S. 1943. It is generally recognized that in the absence of unusual circumstances a defendant in a criminal case who is sui juris and mentally competent has the right to conduct his defense in person without the assistance of counsel. State v. Thomlinson, 78 S. D. 235, 100 N. W. 2d 121, 77 A. L. R. 2d 1229.

In this case the trial court permitted the defendant to represent himself but required an assistant public defender to be present in the courtroom as an advisor to the defendant. This practice was approved in State v. Walle, 182 Neb. 642, 156 N. W. 2d 810.

The defendant now contends that the trial court was in error in permitting the defendant to defend himself because he was not mentally competent. At the time of sentencing, the defendant admitted that he had been confined in a state hospital in Ohio but stated that he had received no treatment there and had volunteered to go there as a "TV man." There is no other evidence of mental incompetence. The record as a whole at this

time does not show that the defendant was mentally incompetent to refuse the assistance of counsel.

The defendant has been convicted of five felonies and has had some acquaintance with court procedure. The trial court did everything possible in an effort to persuade the defendant to accept the assistance of counsel. Upon the present state of the record there is no basis to conclude that the trial court should have forced counsel upon the defendant.

The defendant claims that he was prejudiced by the fact that some members of the jury may have been in the courtroom at the time of arraignment and might have been prejudiced by something that was said at that time. The defendant insisted upon being tried to a jury selected from the current panel and refused the suggestion of the trial court that the trial be continued until a new panel had been called. The record does not contain the voir dire examination of the jurors and there is nothing in the record upon which the defendant can base a claim of prejudice at this time. See Kitts v. State, 153 Neb. 784, 46 N. W. 2d 158. Opportunity for prejudice or disqualification of jurors does not raise a presumption that they exist. Medley v. State, 156 Neb. 25, 54 N. W. 2d 233.

At the time of the robery the defendant was carrying a fiber or cardboard suitcase which he placed in a locker at the bus station before his arrest. His motion to suppress the suitcase was sustained. The defendant now complains that the witnesses for the State should not have been allowed to mention the suitcase in their testimony. The testimony by the employees of the loan company and the used-car dealer concerning the suitcase carried by the defendant was entirely separate from the later seizure and search by the police. See Aiuppa v. United States, 393 F. 2d 597. The defendant's complaint is without merit.

After the robbery, the secretary-cashier of the loan company was taken to the police station where she identified a photograph of the defendant. The defendant now

claims that this procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." See Simmons v. United States, 390 U. S. 377, 88 S. Ct. 967, 19 L. E. 2d 1247.

The secretary-cashier of the loan company observed the defendant at the loan company for 10 or 15 minutes. She positively identified the defendant at the trial and testified that the identification was based upon her observation of him at the loan company. We think that the procedure in this case did not result in any prejudice to the defendant.

The defendant contends that his arrest was illegal. A peace officer may now arrest a person without a warrant if he has reasonable cause to believe that such person has committed a felony. § 29-404.02, R. S. Supp., 1967. The arresting officer in this case was advised that a robbery had taken place; he had been given a description of the robber; and he had been advised that the robber was in the downtown area. The defendant fitted the description given to the arresting officer, and the officer was justified in asking the defendant to submit to identification. In conducting a limited search for weapons, the officer discovered that the defendant was carrying a large amount of currency. The evidence shows probable cause for the arrest. The defendant's contention is without merit.

It is unnecessary to consider the other matters discussed in the defendant's brief. The judgment of the district court is affirmed.

AFFIRMED.

JEANETTE ZUCKER ET AL., APPELLANTS, V. LEONARD J. MONOHAN ET AL., APPELLEES.
163 N. W. 2d 786

Filed January 10, 1969. No. 36922.

1. **Negligence.** Negligence is actionable only if it approximately caused or contributed to the injury for which recovery is sought.
2. **Negligence: Trial.** In a case involving issues of negligence where different minds may draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury.

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

Homer E. Hurt, Jr., for appellants.

Emil F. Sodoro, Jon S. Okun, and Richard P. Jeffries, for appellees.

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

SPENCER, J.

This is an action by Jeanette Zucker for damages for personal injuries, and Zucker's Enterprises, Inc., for property damages. Jeanette Zucker, who will hereinafter be referred to as plaintiff, was a passenger in an automobile purchased by her husband and used for family purposes but registered in the name of Zucker's Enterprises, Inc. A jury returned a verdict for the defendants, and plaintiffs have perfected an appeal to this court.

On June 17, 1965, at approximately 9:15 a.m., the automobile operated by plaintiff's 18-year-old son was traveling east on West Dodge Street, approaching One Hundred Fourteenth Street, in Omaha, Nebraska. At that time a truck owned and operated by Henry J. Wheeler, which had been westbound, was properly stopped immediately north of the center of West Dodge Street for the purpose of making a left turn onto One Hundred Fourteenth Street. At that same time, a delivery truck, operated by defendant Leonard J. Monohan and owned

by Robert Bartels, was stopped at a stop sign on the south side of One Hundred Fourteenth Street.

There is a downgrade approaching One Hundred Fourteenth Street from the west, although the area at One Hundred Fourteenth Street is relatively level. The testimony would indicate that the crest of the hill is some one-quarter to one-half mile to the east. From exhibit 8, which is a view from the scene to the west, the distance would appear to be less than three city blocks.

The testimony of plaintiff's witnesses would indicate that as plaintiff's car approached One Hundred Fourteenth Street, Leonard J. Monohan, who will hereinafter be referred to as defendant, drove his truck onto West Dodge Street directly in front of the plaintiff's automobile, forcing the driver to slam on the brakes of the car, and throwing it into a skid. Plaintiff's car skidded 171 feet and struck the front end of the parked Wheeler truck. No contact was made between plaintiff's vehicle and the truck operated by defendant.

The testimony on behalf of the defendants would indicate that defendant stopped at the stop sign which is approximately 15 feet south of the intersection. Defendant testified that he looked to the right and observed the Wheeler truck which was stopped for a left turn; that he then looked behind the Wheeler truck; then, after looking to the right, looked for traffic to the left or from the west, and observed that there was no traffic from that direction; and that he again looked toward the Wheeler truck before starting to move. He then shifted the truck into second gear and started his forward motion, and at that time observed the Zucker car approaching in the outside eastbound lane. At that time, the Zucker car was halfway up the hill. He immediately stopped his truck the second time. It is defendant's testimony that he stopped his truck as soon as he observed the plaintiff's vehicle, and that he is positive that no part of his truck was out on West Dodge Street. On cross-examination, he testified that no part of his truck

was on the West Dodge Street highway, but that even if it were, it would not be more than 2 or 3 feet. It is defendant's testimony that when he heard the screech of brakes he was stopped, and thereafter he continuously observed the Zucker vehicle as it was driven across the center lane and into the Wheeler truck.

Defendant testified that after the accident he waited for traffic to clear, and then drove his truck across West Dodge Street. On cross-examination, he testified as follows relative to a conversation with the deputy sheriff who investigated the accident: "Q. When you went over there, did you talk to him? A. Yes, sir. Q. What was the extent of that conversation? A. He asked me if I was the driver of this truck and I said, 'Yes', and he said, 'Did you pull out in front of this vehicle that just had the accident?' and I said, 'No', I said, 'I don't know why the vehicle ever pulled way over into the oncoming lanes when they had plenty of room to pass in front of me', and he said, 'I don't, either, but I had better get your name', and I therefore gave him my driver's license and he released me. Q. Then you went on about your work? A. Yes, sir."

Although plaintiff alleges 12 assignments of error, the only question involved in this appeal is the sufficiency of the evidence to sustain the verdict. Plaintiff, who did not move for a directed verdict, now insists that defendant's testimony establishes his own negligence as a matter of law. This is premised on defendant's testimony that no part of his truck was on West Dodge Street, but even if it were, it would not be more than 2 or 3 feet. There is no merit to this contention. Even if it might be assumed defendant was guilty of some negligence, the issue of proximate cause is one for the jury. Negligence is actionable only if it proximately caused or contributed to the injury for which recovery is sought. Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683.

We do not deem it necessary to a clear understanding of this issue to review the evidence in detail. We think

we have sufficiently set out enough of the defendant's evidence to demonstrate that a jury question was presented. In a case involving issues of negligence, where different minds may draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury. Young v. Stoetzel, 159 Neb. 624, 68 N. W. 2d 186; Flanagin v. DePriest, 182 Neb. 776, 157 N. W. 2d 389.

Five of plaintiff's assignments of error are directed to portions of the instructions submitting questions relative to the negligence, if any, of the driver of the automobile in which plaintiff was riding. Definitely there was a jury question on this issue. Ignoring the testimony of the defendant, plaintiff's car laid down skid marks of 171 feet on dry pavement, and hit a truck with sufficient force to move it back at least 4 feet. The force of the impact is evident from the damages to the Zucker automobile. The jury was privileged to consider the physical facts as well as the testimony of the witnesses, and undoubtedly concluded that the sole proximate cause of plaintiff's injury and damage was the negligence of her son who was driving the automobile in which she was riding.

There is no merit to any of plaintiff's assignments of error. The judgment herein should be and hereby is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JACKSON HUNTER, APPELLANT.
163 N. W. 2d 879

Filed January 10, 1969. No. 36960.

1. **Criminal Law: Evidence.** A photograph to be admissible in evidence must be a direct reproduction of the person, place, or thing which it purports to represent before it is competent as evidence.

2. ———: ———. In a charge of attempted burglary it is proper to receive in evidence burglary tools found on or near a building from which the defendant was observed fleeing.

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

Shrout, Nestle & Caporale, for appellant.

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

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

STUART, District Judge.

The defendant, Jackson Hunter, was charged with attempted burglary. After trial to a jury, he was found guilty and sentenced to the Nebraska Penal and Correctional Complex for a period of not less than 6 years nor more than 8 years.

The record discloses that on June 5, 1967, at approximately 1:30 a.m., the night watchman of the Weslake Bar in Omaha, Nebraska, heard noises on the roof as though someone were chopping the roof. Police were called; two arrived shortly thereafter; and each policeman walked parallel with the building on opposite sides of the structure. Upon reaching a point near the rear of the bar one officer observed two men, one man fleeing from the bar and the defendant in mid-air flight 4 or 5 feet from the building and 2 or 3 feet from the ground. The other officer observed the two men a split second later. Upon alighting, the defendant fled and the officers, after warning, each shot at him. The defendant was struck in the right leg, fell, and was apprehended. Each officer testified that he continuously observed the defendant from the time the officer first saw the defendant until the time of defendant's' apprehension.

The defendant was taken to the hospital. After his removal from the vicinity a detective sergeant arrived at approximately 1:50 a.m., and during his investigation

found an axe lying near two holes in the roof and a crowbar lying 6 or 8 feet northwest of the building. During all this time it was pouring rain. Approximately 9 hours thereafter a police photographer took four pictures including one showing the two holes in the roof of the building near the northwest corner.

The defendant assigns as error the admission in evidence of the four photographs. The photographer testified that the pictures were fair and reasonable representations of what he observed at the time of the taking of each of the pictures. At the trial the detective sergeant was allowed to mark on the picture of the roof the spot where he found the axe and was allowed to mark on the picture of the rear portion of the bar the approximate place that he found the crowbar. There was no evidence to the effect that conditions changed in any way from the time of the original investigation until the time of the taking of the photographs, other than that the rain stopped and daylight came. In view of the extreme difficulty of taking photographs at the time of the original investigation, we are of the opinion that the court was correct in the exercise of its discretion in the admission in evidence of these photographs taken during the following daylight hours. A photograph proved to be a true representation of the person, place, or thing which it purports to represent is competent evidence of anything of which it is competent and relevant for a witness to give a verbal description. Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873; Fugate v. State, 169 Neb. 420, 99 N. W. 2d 868; Pribyl v. State, 165 Neb. 691, 87 N. W. 2d 201. The photographs were properly admitted in evidence.

The defendant next assigns as error the admission of the axe and crowbar in evidence, and cites in support thereof People v. Fontana, 356 Ill. 461, 190 N. E. 910. In this connection it should be pointed out that there was direct testimony that there was no hole in the roof of the building in which the bar was located less than 30 min-

utes before the alleged crime; that there two holes in the roof immediately after the alleged crime; and that the axe was found beside the hole in the roof and the crowbar was found near the building within 30 minutes after the alleged crime. The defendant was seen falling toward the ground at a point where the only building nearby from which he could have jumped was the structure housing the bar. Since the Fontana case the Illinois Supreme Court has distinguished it and now sets forth the rule as follows: "We have held that burglary tools found in a building in which accused was caught or from which he fled are competently received in evidence." People v. Santucci, 24 Ill. 2d 93, 180 N. E. 2d 491. Also in People in Craddock, 30 Ill. 2d 348, 196 N. E. 2d 672, the Illinois Supreme Court again held that when defendants were seen fleeing from burglarized premises and the burglary tools in question were found by the owner of the business in the premises shortly after defendants fled, the burglary tools were admissible in evidence. This assignment of error has no merit.

For the reasons given, we have concluded that there is no error in the record herein and the judgment of the trial court should be and is affirmed.

AFFIRMED.

MERRITT INGRAM, APPELLANT. V. WILLIAM BRADLEY, DOING BUSINESS AS STARLITE DRIVE INN THEATRE, ET AL., APPELLEES.

MARTHA INGRAM, APPELLANT, V. WILLIAM BRADLEY, DOING BUSINESS AS STARLITE DRIVE INN THEATRE, ET AL., APPELLEES.

163 N. W. 2d 875

Filed January 10, 1969. No. 36974.

Workmen's Compensation. Where the conditions of the plaintiffs' employment environment accentuate the natural hazard from a severe windstorm, which increased hazard contributed to the

injury, it is an injury arising out of the employment, and is compensable under the Workmen's Compensation Act.

Appeal from the district court for Antelope County: GEORGE W. DITTRICK, Judge. Reversed and remanded.

Kryger & Kryger and Brogan & Monen, for appellants.

Deutsch & Hagen, for appellees.

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

MCCOWN, J.

Plaintiffs' claims for workmen's compensation benefits were denied by the single judge Workmen's Compensation Court and by the district court. The apparent basis for the denial was that the injuries were caused by a severe wind and rain storm and, therefore, did not arise out of the employment.

Merritt and Martha Ingram, husband and wife, were both employed at the defendant's outdoor theatre, southeast of Neligh, Nebraska. On June 3, 1966, they arrived at the theatre a few minutes after 7 p.m. Mr. Ingram, as usual, turned on the lights, opened the entrance gate, and closed the exit gate. Mrs. Ingram reported first to the snack bar building where she picked up the money to take to the ticket booth. There was approximately $400 to $500, and the money was Mrs. Ingram's responsibility. Both of the Ingrams then went to their station at the ticket booth of the theatre. Their usual procedure was for Mr. Ingram to work outside the booth, handing tickets and money back and forth between Mrs. Ingram at the ticket window and the patrons in the automobiles. It was required that at least one of them be in the booth at all times.

The ticket booth itself was a small 6 x 8 foot frame building. It was moveable, mounted on 4 x 4 foot skids, and had no foundation. It had been built of new and used lumber in 1953 or 1954. It had glass in the upper portion of three sides and the door was on the fourth

side. Two of the glass windows were cracked and the window on the west had been broken into four pieces since the previous fall. The management had been notified of the condition, but nothing had been done. Mr. Ingram had put scotch tape on this window to hold it. The booth was equipped with 2 or 3 chairs, a cash register, and a couple of fans. There was no telephone or other means of communication between the booth and the main building called the "snack bar."

The "snack bar" was a concrete block building which housed food service facilities, projection booth, and rest rooms. This building is located about 155 feet northwest of the screen. The screen was some 88 or 89 feet west of the ticket booth. Four other employees and the manager were on duty at the snack bar building at the time.

When the Ingrams arrived at work, they saw a cloud moving in from the northwest. They noticed nothing unusual about it. After the preparations for the evening's business were completed, Mr. Ingram was sitting outside the ticket both. It started to rain, and he stepped inside the booth with Mrs. Ingram. No patrons had yet arrived. Shortly thereafter, the Ingrams discussed whether or not it would be safer to go to their car, which was parked some 40 feet away. Moments later, the ticket booth was blown over. The Ingrams ended up in the debris of the ticket booth on the edge of the road to the southeast of where the booth had been. The wooden theatre screen was blown down at approximately the same time.

Mrs. Ingram suffered severe facial lacerations from glass which required over 92 stitches. Her nose was nearly severed and she sustained a compound nasal fracture. There was considerable tissue loss, retraction and scarring about the eye, tearing of one eye, and impairment of vision. She also sustained a comminuted fracture of the left leg, as well as contusions and abrasions. Her injuries required extensive hospitalization and the uncontradicted medical testimony was that she

sustained a 25 percent permanent disability of the body as a whole as a result of the accident.

Mr. Ingram suffered a laceration of the right wrist with scarring, was hospitalized 2 days, but did not sustain any permanent disability.

Except for the screen and the ticket booth, there was no other damage to the theatre area or to the snack bar building, except for one window in a combination door. No one else in the theatre area, the City of Neligh, nor the vicinity was injured by the storm. The telephones and electricity were off for a short time in Neligh; a considerable number of tree limbs were blown down generally over the town; and some television antennas were down. No storm warnings were given by the weather bureau. The sheriff of Antelope County and the police chief of Neligh saw no occasion to give any severe weather warnings to the weather bureau or other agencies, and although they thought the storm was severe, they saw nothing unusual about it as a summer storm. They had seen at least one storm that severe in the past 3 or 4 years.

Plaintiffs' claims were consolidated for all purposes for trial. Thereafter, the district court found against the plaintiffs and affirmed the judgment of the Nebraska Workmen's Compensation Court dismissing plaintiffs' petitions.

The basic issue here is whether the plaintiffs' injuries arose out of their employment. The defendants rely heavily on the case of Gale v. Krug Park Amusement Co., 114 Neb. 432, 208 N. W. 739, 46 A. L. R. 1213, and on Crow v. The Americana Crop Hail Pool, Inc., 176 Neb. 260, 125 N. W. 2d 691, which reaffirmed the holding of the Krug Park case. Those cases established that "injuries resulting from exposure to the elements, such as abnormal heat, cold, snow, lightning, or storms, are generally classed as risks to which the general public is exposed, and as not coming within the purview of workmen's compensation acts, unless the record dis-

closes a hazard imposed upon the employee by reason of the employment greater than that to which the public generally is subjected."

There are obvious factual distinctions between the case at bar and either of the two cases referred to. There may even be some question as to whether the storm here was sufficiently severe and unusual as to be abnormal. Even as to a storm classed as an act of God, the general rule is: "* * * if an employee, by reason of his employment, is exposed to a risk of being injured by storm 'which is greater than the risk to which the public in that vicinity is subject, or if his employment necessarily accentuated the natural hazard from the storm, which increased hazard contributed to the injury,' it is an 'injury arising out of the employment, although unexpected and unusual.'" 6 Schneider, Workmens Compensation Text (Perm. Ed.), § 1552, p. 78.

As stated in 1 Larson, Workmen's Compensation Law, § 8.00, p. 51: "All courts agree that injury due to lightning, windstorms, earthquake, freezing, sunstroke, and exposure to contagious diseases arises out of the employment if the employment increases the risk of this kind of harm."

A definite exception to the doctrine which permits recovery only when a hazard is imposed upon the employee, by reason of the employment greater than that of the general public, has been developed. That exception has been adopted by a large number of courts. "Although the original force, such as hurricane, lightning, or earthquake, did not arise out of the employment under the increased-risk test, the injury may be compensable to the extent that it results from physical contact, produced by that force, with some part of the working environment. In less abstract terms, while claimant cannot recover for the effects of the direct impact of the tornado on him, he can recover if the tornado blows down a wall which in turn falls on him." 1 Larson, Workmen's Compensation Law, § 8.30, p. 60. A

recent expression of the contact with the premises rule is stated in Whetro v. Awkerman (Mich.), 160 N. W. 2d 607. Such cases generally stem from Caswell's Case (1940), 305 Mass. 500, 26 N. E. 2d 328.

Although phrased in terms of the increased risk test, many courts have long recognized the rule that where an employee, by reason of his duties, is exposed to a special or peculiar danger from the elements by reason of his employment, and sustains an unexpected injury by reason of the elements, the injury constitutes an accident arising out of and in the course of his employment. See, Annotation, 83 A. L. R. 234, and cases there cited.

"The test has been said to be 'not whether the injury was caused by an act of God,' but 'whether the one injured was by his employment specially endangered by the act of God.'" 6 Schneider, Workmens Compensation Text (Perm. Ed.), § 1552, p. 78.

Even under the increased risk test of the Krug case, the plaintiffs here were exposed to a greater hazard than the general public, because the general public was not in a 6 x 8 foot frame ticket booth, with cracked windows, and skids for foundations during a severe windstorm. It is noteworthy that none of the other employees in a more substantial building on the same premises, nor any member of the general public in the area, was injured by the storm. It is also clear that the plaintiffs' injuries were caused by direct contact with the glass and boards of the structure in which they were required to be and not simply by the direct impact of the windstorm on their bodies.

The physical condition of the structure where the plaintiffs' employment required them to be directly increased the natural risk of injury from the storm, and that increased risk contributed to the injuries. Their employment brought the plaintiffs to that place. Under such circumstances, their injuries arose out of their employment.

We hold that where the conditions of the plaintiffs' employment environment accentuate the natural hazard from a severe windstorm, which increased hazard contributed to the injury, it is an injury arising out of the employment, and is compensable under the Workmen's Compensation Act.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

SYSTEM MEAT COMPANY, A WYOMING CORPORATION, APPELLEE, V. B. M. STEWART ET AL., APPELLEES, RICHARD KEKEISEN ET AL., INTERVENERS-APPELLANTS.
163 N. W. 2d 789

Filed January 10, 1969. No. 36984.

1. **Compromise and Settlement.** The general standard for court approval of a proposed settlement by a corporation is fairness in the best interests of the corporation.
2. ———. Elements for a court to consider in determining whether a proposed settlement by a corporation is fair include (1) nature of the claim proposed for settlement, (2) probability of success in event of litigation of the claim, and (3) reasonableness of the business judgment exercised by the board of directors.

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

Malcolm D. Young and Marvin L. Holscher, for interveners-appellants.

Atkins, Ferguson & Nichols, for appellee System Meat Co.

Wright, Simmons & Hancock, for appellees Stewart et al.

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

SMITH, J.

The district court approved an agreement for settlement made by defendants and plaintiff over objections of intervening stockholders of plaintiff. The question on appeal by objectants is whether the agreeement was fair.

Plaintiff, a packinghouse corporation, commenced this suit, claiming that a transaction between its former president Peter F. Smith and defendant B. M. Stewart was fraudulent. Plaintiff implicated defendant System Investment Corporation, "SIC," and System Investment Corporation of Nebraska, "SICN," both of which were controlled by their majority stockholder, Stewart. Smith had purchased 729 head of cattle with funds of plaintiff. At the time of suit in February 1961 the animals were commingled with 4,200 head of cattle owned by defendants. Under an order for protection of plaintiff during pendency of suit, defendants paid specified proportions of proceeds from cattle sales into court.

Objectants intervened May 1, 1961, to prevent voluntary dismissal of plaintiff's claim. On October 16, 1961, plaintiff and defendants filed the settlement agreement, and the next day the district court approved. Objectants appealed. We reversed the judgment because the hasty hearing had deprived objectants of reasonable opportunity to try the issue of fairness. System Meat Co. v. Stewart, 175 Neb. 387, 122 N. W. 2d 1.

Plaintiff did not participate in proceedings on remand. Objectants and defendants at a pretrial conference January 20, 1966, agreed that the only issue was whether the proposed settlement was fair. On motion of objectants the district court ordered production of (1) books of account, canceled checks, and minutes of corporation meetings of plaintiff, and (2) all other business records pertaining to items of claims set forth in the settlement agreement. No one complied, and no evidence condoned noncompliance. The court held evidentiary hearings on the issue of fairness on April 7, 1966, and on November

21, 1967; and on March 8, 1968, it approved the agreement. The court found that the agreement fairly provided for reasonable settlement of all controversies between the parties. It concluded that objectants had no right to vacation of the 1961 judgment which it "reinstated."

The settlement agreement was contingent upon court approval on or before October 19, 1961. It set forth one claim of plaintiff for $103,144.31 and many items of setoff for $47,308.57. All were to be allowed in full. Plaintiff was to take judgment for $55,835.74 besides costs and $3,948 interest. The judgment was to be satisfied out of the proceeds in registry of court, and any balance was to be paid to SIC. During the pendency of the first appeal plaintiff and defendants received all the proceeds in registry of court in accordance with the settlement agreement. The judgment of October 19, 1961, had not been superseded.

No room existed for controversy over fairness of the amount claimed by plaintiff. Smith had purchased 729 head of cattle for $103,144.31 with company funds. He fraudulently executed and delivered to Stewart a bill of sale for the animals under date of December 2, 1960.

One item of the setoff was $5,700 for damage on November 29, 1960, to cattle described in the bill of sale from Smith to Stewart. The damages had occurred while W. J. Digby was transporting the animals in his trailer to SIC. Assignment of the claim under the agreement was made to plaintiff by Keith Williams, a lawyer and executive vice president of SIC and SICN. He conceded that plaintiff had not been at fault. A letter from him to Digby May 8, 1961, in regard to the loss reads:

"Find enclosed duplicate invoice in the amount of $4,490.00 for our livestock loss when your trailer deck collapsed. * * * this invoice has gone a great length of time and I know of no reason whatsoever why it isn't taken care of. * * * We would like to get our affairs with * * * (plaintiff) settled up and these cattle were orig-

inally involved. However, this claim and our loss resulting therefrom has nothing whatsoever to do with * * * (plaintiff) and it is way over due. Please, therefore, let us have your remittance by return mail."

Another item of setoff was $19,500, the amount of a judgment against plaintiff in an action for replevin of packinghouse equipment. The judgment had been assigned August 23, 1961, to Stewart for $17,000 and his assumption of "responsibility for * * * maintenance * * * of the equipment, formerly the responsibility of * * * (assignor)." The quotation is unexplained. A letter from Stewart April 1, 1966, concerning the assignment reads: "This purchase was made at a very substantial discount—but we only charged * * * (plaintiff) the exact amount of funds, not even including interest."

Other business relations are pertinent. Plaintiff in June 1959 shortly after incorporation began building a meat packing plant near Newcastle, Wyoming, at an estimated total cost of $450,000. Plaintiff borrowed $225,000 April 29, 1960, from the Colorado National Bank of Denver, giving a mortgage on the plant and the land. About June 1, 1960, a public offering by plaintiff of 150,000 shares of common stock for $750,000 was underwritten by Purvis & Company. The controlling stockholders of the underwriter, Nathan R. Kobey and Robert S. Mitchell, were law partners and general counsel to plaintiff. Kobey was secretary-treasurer of SIC and SICN, and he represented Stewart.

The setoff included $5,000 for cash advance and $2,801.08 for travel expenses of Stewart, Williams, Kobey, Mitchell, and three others. Plaintiff had paid similar charges of SIC in excess of $11,000, but the transactions went unmentioned in the agreement. One item was $2,500 for cash advance to Smith.

Plaintiff's preliminary prospectus dated June 1, 1960, stated the following opinions of management: (1) A packing plant near the source of supply had a competitive advantage. (2) Ranchers shipping live animals long

distances incurred substantial losses from transportation costs and shrinkage. Management recommended minimum working capital of $250,000. Whatever amount was anticipated and needed, it was not raised. Plaintiff's plant operated from September 1960 to February 4, 1961, when it closed.

Stewart was a man of property. On May 20, 1960, he owned 7,200 shares of common stock in plaintiff, having purchased them for $36,000. He guaranteed the mortgage note to the Colorado bank, and he pledged collateral security for his promise. He deposited bonds with Purvis & Company to secure issuance of the underwriting. L. A. K. Ranch, which was well known, was owned by SIC.

Smith and Stewart on December 2, 1960, the date of the bill of sale, signed a curious agreement. The securities pledged by Stewart to the Colorado bank were to be returned free and clear to him no later than December 27, 1960. In event of nonperformance the entire balance on the mortgage note of plaintiff to the bank would fall due immediately. They also agreed that upon return of the bonds on deposit with Purvis & Company to Stewart he would pay plaintiff $103,144.31.

The Colorado bank in March 1964 assigned the note and mortgage to SIC for $107,765.28. SIC took default judgment in January 1966 for $100,000 plus $38,000 accrued interest and $5,000 attorney's fees. At sale on foreclosure in February SIC purchased plaintiff's plant and land for $50,000. The plant and land lay adjacent to L. A. K. Ranch.

The evidence of investigation and negotiation leading up to the settlement agreement is vague and the absence of business records, remarkable. No one except objectants investigated whether plaintiff had claims based on transactions other than the bill of sale. The settlement agreement was signed by Richard Shaw, a lawyer and president of plaintiff in October 1961, with approval of counsel. Shaw's independence of Stewart was estab-

lished. Shaw knew nothing, however, from which a trier of fact might reasonably estimate probability of success in litigation of the setoff. The financial future of plaintiff appeared bleak to Shaw unless management recovered assets quickly.

The general standard relating to court approval of a proposed settlement by a corporation is fairness in the best interests of the corporation. Elements to be considered include (1) nature of the claim proposed for settlement, (2) probability of success in event of litigation of the claim, and (3) reasonableness of the business judgment exercised by the board of directors. See System Meat Co. v. Stewart, *supra*. See, also, Winkelman v. General Motors Corp., 48 F. Supp. 490; Schleiff v. Chesapeake & Ohio Ry. Co., 43 F. R. D. 175; Krinsky v. Helfand, 38 Del. Ch. 553, 156 A. 2d 90; Levey v. Babb, 39 Misc. 2d 648, 241 N. Y. S. 2d 642; Note, 54 Harv. L. Rev. 833.

The nonparticipation of plaintiff in proceedings on remand may have affected control. See Note, 63 Harv. L. Rev. 1426. The possibility is not argued, and we attempt no analysis. We also decline to pass on the reasonableness of business judgment exercised on behalf of plaintiff in October 1961. Conditions then and later were strikingly dissimilar. The location of fairness or unfairness in time is March 8, 1968, when the district court approved. We are persuaded that the settlement agreement was unfair.

The judgment is reversed and the cause remanded with directions to dismiss the application for approval of the settlement agreement.

REVERSED AND REMANDED WITH DIRECTIONS.

LOREN MILLER, APPELLEE, V. INDUSTRIAL HOSPITAL ASSOCIATION, A CORPORATION, APPELLANT.
163 N. W. 2d 891

Filed January 10, 1969. No. 37023.

1. **Insurance.** A schedule limiting the benefits payable under an insurance policy must be made known to the insured before it can be effective.
2. ———. Provisions in an insurance policy limiting recovery under the policy are generally defensive in character and must be pleaded and proved by the insurer.
3. ———. An insurance contract prepared by the insurer which contains provisions reasonably subject to different interpretations will be liberally construed in favor of the insured.
4. **Health.** An acute manifestation of a chronic condition is a manifestation sharp or severe in character with a rapid onset and of such pronounced symptoms that the probable existence of a given malady is thereby very plainly shown.

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

Neighbors & Danielson, Holtorf, Hansen & Kortum, and Leland K. Kovarik, for appellant.

Wright, Simmons & Hancock, for appellee.

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

BOSLAUGH, J.

The plaintiff, Loren Miller, was employed as a laborer by Morrison-Knudsen Co., Inc., on a construction project in Banner County, Nebraska. On April 22, 1963, the plaintiff and two other men were pulling a pump from a well by hand, using pipe wrenches to grip the pipe. While one of the men was moving his wrench to a new position on the pipe, the plaintiff experienced a sharp pain in his lower back. As a result of this incident, the plaintiff became disabled and required medical and hospital treatment.

The plaintiff commenced an action under the Workmen's Compensation Act, but it resulted in an order of

dismissal. While that action was pending on the plaintiff's motion for rehearing, the parties entered into a lump-sum settlement.

The plaintiff then brought this action to recover his expenses under a group hospital and medical insurance policy issued to the Morrison-Knudsen Co., Inc., by the defendant, Industrial Hospital Association.

A jury was waived and the action tried to the court. The trial court found generally for the plaintiff and that he should recover the sum of $3,153.93 from the defendant. The defendant's motion for new trial was overruled and it has appealed.

The issues presented relate to the language of the policy. The defendant contends that the conditions, restrictions, and exclusions in the policy prevent the plaintiff from recovering his expenses.

The policy contains a provision which limits payment for medical and hospital expenses to the maximum of "* * * the Association's established fee schedule current at the time the expenses were incurred * * *." The defendant contends that the plaintiff is required to prove the fee schedule before the plaintiff can recover benefits under the policy.

The plaintiff attached a copy of the policy to his petition, and a copy of the policy was received in evidence, but there was no fee schedule attached to the policy. The defendant failed to plead or prove a fee schedule and the record does not show that such a schedule existed.

A schedule limiting the benefits payable under an insurance policy must be made known to the insured before it can be effective. Urick v. Western Travelers Accident Assn., 81 Neb. 327, 116 N. W. 48. Such provisions are generally defensive in character and must be pleaded and proved by the insurer. See, Bolduc v. New York Fire Ins. Co., 244 Minn. 192, 69 N. W. 2d 660; Anderson v. Connecticut Fire Ins. Co., 231 Minn. 469, 43 N. W.

2d 807. In this case the burden of pleading and proving the fee schedule was on the defendant.

The evidence shows that the plaintiff suffered from chronic instability of the low back due to a transitional vertebra at the lumbosacral level. This was a developmental defect which was congenital and predisposed the plaintiff to injury and pain on certain types of motion and strain.

The policy provides coverage for: "Non-occupational personal injuries and diseases. (Non-occupational injuries shall include injury or illness covered by Workmen's Compensation Acts, Employer's Liability Acts and also shall exclude injury or illness of work, service, or labor being engaged in for monetary gain of employee.)"

The plaintiff was injured while helping lift the well pipe on April 22, 1963. The injury was not covered by the Workmen's Compensation Act as the law existed at that time, but the defendant claims that it was an occupational injury or an "injury or illness of work, service, or labor being engaged in for monetary gain of employee." The plaintiff argues that his illness was the congenital condition which became manifest as a result of the effort of labor. The policy specifically covers chronic conditions which become acute and acute sickness occurring during the hours of employment.

An insurance contract prepared by the insurer which contains provisions reasonably subject to different interpretations will be liberally construed in favor of the insured. Kent v. Dairyland Mut. Ins. Co., 177 Neb. 709, 131 N. W. 2d 146. We think the evidence in this case is sufficient to sustain a finding that the plaintiff's injury was nonoccupational within the meaning of the policy.

The policy further provides that: "* * * neither preexisting chronic conditions nor chronic conditions becoming manifest during the first six months of coverage under this agreement are covered hereby." A rider attached to the policy provides that coverage shall extend to chronic conditions which become acutely manifest

during the first six months of coverage "* * * but which were not active or under medical care or supervision during the six months immediately preceding the date of initial coverage * * *."

There was evidence that the plaintiff was treated for back pain on January 16, 1963, and on March 8, 1963, which was within the 6 months immediately preceding the date of initial coverage. However, the treating physician testified that the January and March incidents were separate injuries from which the plaintiff recovered, and that the chronic condition of the plaintiff's back did not become known until an X-ray examination was made on June 7, 1963.

The phrase "acutely manifest," as used in a similar policy, was construed to mean a manifestation sharp or severe in character with a rapid onset and of such pronounced symptoms that the probable existence of a given malady is thereby very plainly shown. Smith v. Industrial Hospital Assn., 194 Or. 525, 242 P. 2d 592.

Although the plaintiff was treated for back pain during the 6 months immediately preceding the date of initial coverage, there was no indication to the plaintiff or the treating physician of the existence of the chronic condition at that time. The evidence will sustain a finding that the chronic condition of the plaintiff's back did not become acutely manifest until after April 22, 1963, and such condition was not active or under medical care or supervision prior to that date.

The judgment of the district court is correct and is affirmed. The plaintiff is allowed the sum of $600 for the services of his attorney in this court.

AFFIRMED.

JOHN J. ZYCH ET AL., APPELLANTS, V. STANLEY G. ZYCH ET AL., APPELLEES, IMPLEADED WITH MARY KAPUSTKA, APPELLANT.
163 N. W. 2d 882

Filed January 10, 1969. No. 37036.

1. **Deeds: Undue Influence.** Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence, but there must be a solid foundation of established facts on which to rest the inference of its existence.
2. ———: ———. In an action to set aside a deed on the ground of undue influence, the burden is on the plaintiff to establish that the grantor was subject to such influence; that the opportunity to exercise it existed; that there was a disposition to exercise it; and that the result appears to be the effect of such influence.
3. **Trusts: Evidence.** So reluctant are the courts to engraft trust by parol on the legal title to real estate that there is perhaps no better established doctrine than the one which requires a high degree of proof in order to establish the trust by parol evidence.
4. **Words and Phrases: Statutes.** The word "representative" as used in section 25-1202, R. R. S. 1943, has been defined to include any person who has succeeded to the rights of the decedent, whether by purchase, descent, or by operation of law.
5. ———: ———. Our law is well established that any party so placed in litigation that he is called upon to defend that which he has obtained from a deceased person, and to make the defense which the deceased might have made if living, may be said to represent a deceased person within the contemplation of section 25-1202, R. R. S. 1943.

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

Ralph R. Bremers and Samuel A. Boyer, Jr., for appellants.

A. J. Whalen and Samuel J. Hunter, for appellees.

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

SPENCER, J.

This is an action to vacate and set aside two deeds.

The action was commenced by three children of Mary Zych Bojanski who died intestate in Douglas County, Nebraska, on October 24, 1964. Mary Bojanski had nine children, five of whom were defendants in this action. One daughter is not a party to the action and did not appear. One of the parties made a defendant appeared and testified for the plaintiffs, and is included as an appellant herein. The trial court dismissed the action at the close of plaintiffs' case, and appellants perfected an appeal to this court.

On May 1, 1940, the mother conveyed two parcels of real estate located in Omaha to Julia Borovac, one of the defendants. Subsequently, and on March 26, 1962, Julia Borovac reconveyed the same property to her mother and to Elizabeth R. Baade, another daughter, and to Frank J. Baade, the daughter's husband, as joint tenants. After the mother's death, and on April 9, 1965, Elizabeth R. Baade and her husband mortgaged the property to Commercial Savings and Loan Association, which is not a party to this action.

It is appellants' contention that the conveyance to Julia Borovac was in trust for the benefit of all of the children and was made because the mother was contemplating remarriage. It is appellants' further contention that the conveyance from Julia Borovac on March 26, 1962, was intended to continue that trust and was made at the insistence of the mother because Julia Borovac was then having marital trouble.

Plaintiffs' petition suggests fraud, undue influence, and a breach of trust. With reference to the 1940 deed, whatever may have been the arrangement between Julia Borovac and her mother, that arrangement as to Julia was terminated in 1962. At that time Julia Borovac reconveyed the property to her mother and to the Baades, who were living with the mother, as joint tenants. Most of the children knew of the existence of this joint tenancy deed at the time or shortly after its execution.

Plaintiffs argue that Julia Borovac and Elizabeth R. and Frank J. Baade exercised undue influence over the mother, Mary Zych Bojanski, for many years prior to her demise. They have wholly failed in their proof on this issue. Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence, but there must be a solid foundation of established facts on which to rest the inference of its existence. This is particularly true where, as in this instance, the parties were well aware of the existence of the contested deed shortly after its execution.

In an action to set aside a deed on the ground of undue influence, the burden is on the plaintiff to establish that the grantor was subject to such influence; that the opportunity to exercise it existed; that there was a disposition to exercise it; and that the result appears to be the effect of such influence. Sampson v. Sissel, 151 Neb. 521, 38 N. W. 2d 341. Unfortunately for plaintiffs, their own evidence indicates that the mother was capable of handling her own affairs and according to their allegations, forced Julia Borovac, who they accuse of undue influence, to transfer the property in question because she was then having marital trouble. If there was undue influence, it must be proved to have been operative at the time of the execution of this joint tenancy deed. There is not one scintilla of proof to this effect.

It was plaintiffs' responsibility to prove by clear and convincing evidence that the 1962 deed which created the joint tenancy was intended as a deed in trust. In McCormick v. McCormick, 150 Neb. 192, 33 N. W. 2d 543, the court, speaking of trusts of this character, said: "So reluctant are the courts to engraft a trust by parol on the legal title to real estate that there is perhaps no better established doctrine than the one which requires a high degree of proof in order to establish the trust by parol evidence."

A disinterested witness testified that the mother had told her on many occasions over the years "that her

property would go nine ways." This is evidence of an intent on the part of the mother to treat her children equally in the distribution of her estate, but it does not raise a sufficient inference to create an implied or constructive trust under the 1962 deed. There is no other evidence in the record which could possibly sustain the plaintiffs' burden and impress that intent on the joint tenancy deed.

It is true that some of the plaintiffs testified to conversations with the Baades subsequent to the mother's death in which the Baades indicated that they intended to divide the property nine ways. This testimony, however, was never connected with the execution of the 1962 deed. Bernice Bojanski testified to a conversation with Elizabeth R. Baade in which Elizabeth stated she intended to divide the property. Mary Kapustka testified that Frank J. Baade told her the property would be split right down the middle. She also testified that Julia Borovac told her the property would be divided but that John and Ted Zych would not participate, and "Elizabeth would get the most."

Plaintiffs complain that they were not permitted to testify to any conversations between their mother and themselves concerning the deeds in question. The trial court excluded these conversations as inadmissible under the provisions of section 25-1202, R. R. S. 1943. It is plaintiffs' position that the defendants were not the representatives of the deceased and therefore the testimony was admissible.

The word "representative" as used in the statute from its very first interpretation has been defined to include any person who has succeeded to the rights of the decedent, either by purchase, descent, or by operation of law. Wamsley v. Crook, 3 Neb. 344; Kroh v. Heins, 48 Neb. 691, 67 N. W. 771. The exclusion of the conversations was proper. Our law is well established that any party so placed in litigation that he is called upon to defend that which he has obtained from a deceased per-

son, and to make the defense which the deceased might have made if living, may be said to represent a deceased person within the contemplation of section 25-1202, R. R. S. 1943. See McEntarffer v. Payne, 107 Neb. 169, 185 N. W. 329.

For the reasons given the judgment herein should be and hereby is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHNATHAN CALDWELL, APPELLANT.
STATE OF NEBRASKA APPELLEE, V. MARVIN DILLWOOD, APPELLANT.
164 N. W. 2d 213

Filed January 17, 1969. Nos. 36870, 36871.

1. **Appeal and Error.** Errors assigned but not argued will be considered waived.
2. **Criminal Law: Appeal and Error.** Mere irregularity in criminal procedure which does not affect the substantial rights of an accused does not warrant reversal.
3. **Trial: Appeal and Error.** If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case, unless proper instruction has been requested by the party complaining.

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

A. Q. Wolf and Thomas D. Carey, for appellants.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellee.

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

STUART, District Judge.

The defendants Johnathan Caldwell and Marvin Dill-

wood were each charged with robbery. The cases were joined for trial, and upon trial the jury returned verdicts of guilty as to each defendant, and each defendant was subsequently sentenced to a term of years in the Nebraska Penal and Correctional Complex. The defendants appeal. We affirm the judgments.

The defendant Marvin Dillwood was convicted previously of burglary, which conviction was affirmed by this court. State v. Dillwood, *ante* p. 360, 160 N. W. 2d 195. That case is separate and distinct from this case.

On June 3, 1967, the Mallory Hardware Store at Thirty-third and Parker Streets in Omaha, Nebraska, was robbed by two masked Negro men, one of whom was wearing dark glasses. During the robbery, one of the robbers was shot by Mr. Mallory with a .22 caliber rifle. The robbers ran from the store. Police were called and shortly thereafter the defendants were arrested at the home of defendant Dillwood's aunt located at 3060-3062 Parker Street some 3 blocks from the site of the robbery. There were fresh blood stains on the door stoop of 3060 Parker, and upon entering the house the officers found the defendants hiding in separate upstairs bedrooms. The officers also found paper money, with fresh blood stains on it, between the pages of a Bible and a pair of dark sunglasses with what appeared to be blood stains on them concealed in a chair. Defendant Dillwood was drooling blood and water from the mouth, and had two bullet wounds in his right cheek, one near the mouth and the other below his right ear. In addition, other evidence was introduced tending to incriminate defendants.

The defendants assign as error the overruling of their objections to the admission of evidence in numerous different instances. However, defendants do not urge the commission of error by any specific ruling by the court, nor do they show wherein they have been prejudiced by any such rulings. Errors assigned but not argued will, under the rules of this court, be considered waived. Re-

vised Rules of the Supreme Court, Rule 8a2(3); Turpit v. State, 154 Neb. 385, 48 N. W. 2d 83; Mason v. State, 132 Neb. 7, 270 N. W. 661; Maher v. State, 144 Neb. 463, 13 N. W. 2d 641; Moore v. State, 148 Neb. 747, 29 N. W. 2d 366; Hameyer v. State, 148 Neb. 798, 29 N. W. 2d 458.

Defendants complain that Daniel Lang, a witness for the State, was allowed to testify when his name had not been endorsed on the information. The trial court, in the proper exercise of its discretion, allowed the State to endorse the name of this witness on the information, but the actual endorsement was never made. The total testimony of this witness was that he was a deputy sheriff and that he attempted to serve a subpoena on one Alice White, whose name was endorsed on the information as a witness for the prosecution, but that he was unable to do so. The defendants did not ask for a continuance to meet this witness' testimony, and the record does not disclose that the defendants were in any way prejudiced. At most it was a mere irregularity. A mere irregularity in criminal procedure, which does not affect the substantial rights of an accused, does not warrant reversal. Griess v. State, 121 Neb. 467, 237 N. W. 405; 24A C. J. S. Criminal Law, § 1887, p. 872.

Each defendant, in his own behalf, testified in part that defendant Caldwell had shot defendant Dillwood and that they then had gone to 3060 Parker Street for assistance. At the conclusion of defendant Caldwell's testimony the defense requested the court to take judicial notice and to advise the jury that under such facts defendant Caldwell would be subject to prosecution for carrying a concealed weapon. The court refused, and the defendants assign this refusal as error. The court allowed each defendant to testify that he attempted to conceal himself when he saw the police surrounding the house because he was afraid of being arrested as a consequence of the incident of shooting which each had recited and in addition that defendant Dillwood was then on bond on a burglary charge. The court fully instructed

the jury on this alibi. The defendants requested no additional instructions. Clearly, the alibi issue and defendants' explanation for hiding at the time of arrest were presented to the jury under the court's instructions. "If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case, unless proper instruction has been requested by the party complaining." State v. Brown, 179 Neb. 386, 138 N. W. 2d 465. See, also, State v. Archbold, 178 Neb. 433, 133 N. W. 2d 601; Cox v. State, 159 Neb. 811, 68 N. W. 2d 497, 66 A. L. R. 2d 293.

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

AFFIRMED.

WHITE, C. J., participating on briefs.

EDWARD FORMAN, APPELLANT, V. EARL ANDERSON, APPELLEE.

163 N. W. 2d 894

Filed January 17, 1969. No. 36961.

1. **Automobiles: Statutes.** A purchaser who receives possession of a motor vehicle without obtaining the certificate of title thereto, as required by our statutes, acquires no title or ownership therein.
2. ———: ———. The purpose of the act relating to transfers and titles to motor vehicles is to provide a means of identifying motor vehicles, to ascertain the owner thereof, to prevent theft of motor vehicles, and to prevent fraud.
3. **Automobiles.** A certificate of title to a motor vehicle is generally conclusive evidence in this state of ownership of the vehicle.
4. **Automobiles: Negligence.** The contributory negligence of a wife operates to bar recovery of damage by both husband and wife for negligent injury to an automobile owned by them jointly.
5. ———: ———. When an automobile is owned jointly and one

of the two coowners entrusts its use to the other, any negligence of the owner driving the automobile is imputed to the other owner in an action brought by the owners as plaintiffs against a third party for property damage to their jointly owned automobile.

6. ———: ———. Where one common owner makes arrangements for the other owner to drive for both, the former is liable for the driver's negligence.

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

Snell & Winkle, for appellant.

Ray C. Simmons, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and HUBKA and GARROTTO, District Judges.

GARROTTO, District Judge.

The appellant, Edward Forman, hereinafter referred to as plaintiff, commenced this action in the district court for Platte County, Nebraska, to recover damages to his 1963 Rambler automobile and for personal injuries sustained by plaintiff's wife, Barbara Forman, who at the time of the collision was operating said automobile in a northerly direction on Twenty-ninth Avenue in Columbus, Nebraska.

Defendant Earl Anderson was operating his 1962 Ford automobile in a westerly direction on Twenty-seventh Street at the time of the collision between the two cars at the intersection of Twenty-seventh Street and Twenty-ninth Avenue in the City of Columbus, Nebraska, on December 24, 1965.

Defendant Anderson filed a cross-petition charging the plaintiff's wife with negligence of a degree which would defeat her recovery and charging further that the negligence of Barbara Forman was imputed to her husband, the plaintiff herein.

Both parties waived trial by jury and the cause was tried to the court. After hearing the evidence, the court

on November 24, 1967, found the defendant was negligent in the operation of his automobile and that such negligence was the proximate cause of the injuries to plaintiff's wife. The court also found that plaintiff's wife was also negligent, that her negligence contributed to the accident, and that such negligence was more than slight when compared with the defendant's negligence.

The court on December 7, 1967, entered judgment for the defendant on plaintiff's petition and for the plaintiff on defendant's cross-petition. The court dismissed both the petition and cross-petition.

On February 7, 1968, the court overruled plaintiff's motion for new trial. Plaintiff appeals to this court.

As a basis for reversal of the judgment of the district court, plaintiff asserts that said court erred in the following respects: (1) In finding that an innocent non-negligent plaintiff's cause of action for loss of consortium, expenses, and damages is barred by the contributory negligence of his spouse; (2) in declaring a certificate of title to a motor vehicle is conclusive as to ownership; and (3) in failing to determine the plaintiff's interest in the 1963 Rambler.

The evidence among other things discloses that the plaintiff, Edward Forman, purchased the 1963 Rambler car in question in July of 1963; that at the time of its purchase Barbara Forman was not present; that only the plaintiff was present; and that the record title was placed in the names of Edward and/or Barbara Forman. In fact, it was agreed by the parties at the trial that the record title was in Edward and/or Barbara Forman. The inference that the title was ordered placed in the names of Edward and/or Barbara Forman, at the request of plaintiff, Edward Forman, is therefore reasonable and is supported by the evidence.

There was evidence from both the plaintiff and his wife, Barbara Forman, that the funds used to purchase said Rambler automobile were funds inherited by plaintiff from his father and that none of said funds came

from Barbara. However, there was also evidence that the parties had a joint bank account and that the funds used were withdrawn by check from said joint account. All expenses such as automobile insurance, fuel, and repairs were also paid from said account.

All of the foregoing evidence was apparently offered by plaintiff for the purpose of showing that in spite of the fact that title was in both plaintiff and his wife, that in truth and in fact, the ownership of the automobile was in plaintiff only, and therefore not having been in the car either as driver or passenger at the time of the collision he would be entitled to recover resulting damages.

The parties agreed at the trial that the automobile was being used in a family purpose.

This court has adhered to a strict interpretation of statutes pertaining to the ownership of motor vehicles.

In Turpin v. Standard Reliance Ins. Co., 169 Neb. 233, 99 N. W. 2d 26, this court said: "The purpose of the act relating to transfers and titles to motor vehicles is to provide a means of identifying motor vehicles, to ascertain the owners thereof, to prevent theft of motor vehicles, and to prevent fraud.

"A certificate of title to a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle."

It seems the plaintiff is endeavoring to come within the exception created by the word "generally." The act of the plaintiff in placing the title in the names of both himself and his wife was done freely and voluntarily by the plaintiff. There was no showing of a mistake of fact, or of any coercion or fraud. There is no valid reason for eliminating or removing Barbara Forman's name from the title nor is there any showing that it was ever the intention of the plaintiff that he was to be the sole owner of the car. The entire transaction was the usual everyday situation whereby a husband or wife or both make a purchase of a home, household furniture, or

other personal property for the common use of the family.

Section 60-105, R. R. S. 1943, provides among other things: "No person * * * acquiring a motor vehicle * * * shall acquire any right, title, claim, or interest in or to such motor vehicle * * * until he shall have had issued to him a certificate of title to such motor vehicle. * * * No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle * * * unless evidenced by a certificate of title * * * duly issued, in accordance with the provisions of this act."

In view of the foregoing we conclude that there is no merit to plaintiff's second and third assignments of error.

Plaintiff in his first assignment of error states that the court erred in finding that an innocent nonnegligent plaintiff's cause of action for loss of consortium, expenses, and damages is barred by the contributory negligence of his spouse.

In support of his contention, the plaintiff cites a number of cases. An examination of these cases discloses that factual situations vastly different from the facts in the instant case are involved and it would serve no useful purpose to review them in this opinion.

This court in Doleman v. Burandt, 160 Neb. 745, 71 N. W. 2d 521, said: "Plaintiff objects to instruction No. 3 which states that if the jury finds that the plaintiff, William C. Doleman, was guilty of negligence that said negligence would be imputed to plaintiff Celia Porter Doleman, co-owner of the automobile. We believe this instruction states a correct rule in this particular case in which the co-owners are plaintiffs in an action to recover damages to their automobile. When the automobile is owned jointly and one of the two co-owners entrusts its use to the other, he must accept the risk of damage to his own property caused by the negligence or contributory negligence of his co-owner. Otherwise, we might have the anomalous situation of one co-owner re-

covering for damages to the jointly owned property even in a case where there was concededly contributory negligence in sufficient degree to bar recovery by the co-owner who was driving.

"We adopt this rule only in the above situation where the action is brought by the co-owners as plaintiff against a third party. It would not necessarily apply in all cases, especially where the co-owners are parties defendant and one owner operating the car. In such a case the question of imputable negligence would still require proof of the relationship of principal and agent, joint enterprise, or some community of interest. Snyder v. Russell, 140 Neb. 616, 1 N. W. 2d 125; Hansen v. Lawrence, 149 Neb. 26, 30 N. W. 2d 63."

In Matheny v. Central Motor Lines, Inc., 233 N. C. 681, 65 S. E. 2d 368 (1951), the court said: "The fact that the plaintiff was co-owner and occupant of the automobile, and that it was being driven at the time by her husband with her consent for the common benefit and purpose of both would seem to establish the essential elements of a joint enterprise.

"As such co-owner of the automobile in which she was riding, the plaintiff had equal rights to direct and control its movement, * * * and was in law chargeable with the responsibility for the negligent operation of the automobile."

In Paine v. Chicago & N. W. Ry. Co., 217 Wis. 601, 258 N. W. 846 (1935), the court said: "Where a husband and wife, * * * joint owners of the automobile, which each frequently drove when the other was present, * * * returning from a card party * * * there was joint adventure and a mutual agency requiring that the negligence of the driver be imputed to the co-owner."

In Neiman v. Watkins, 204 Pa. Super. 13, 201 A. 2d 238 (1964), the court said: The contributory negligence of a wife operates to bar recovery of damages by both husband and wife for negligent injury to an automobile owned by them in the entireties. * * *

" 'Under the entireties theory of property held by husband and wife, the husband clearly should be precluded from any recovery for his own act of negligence.' Id. at 456, 144 A. 2d at 488." In that case, the argument was made that the adoption of this rule would bar not only the negligent husband but the innocent wife who, under the entireties theory, is also the owner of the whole property. The court answered this as follows: "This undoubtedly is so but, again, principles of public policy should exclude her recovery. It would be anomalous indeed to say, on the one hand, that the husband may not recover for damage caused to his entire interest in the property by his own act and, on the other hand, to conclude that the wife, nevertheless, may recover for the same entire interest which precluded the husband."

In Clark v. Hampton, 83 N. H. 524, 145 A. 265, 61 A. L. R. 1171 (1929), the court said that where one common owner makes arrangements for the other owner to drive for both, the former is liable for the driver's negligence.

In Lasnetske v. Parres, 148 Colo. 71, 365 P. 2d 250 (1961), the court said that any negligence of a husband in operation of a jointly owned automobile, driving his wife home from her employment, where his wife could not operate an automobile, was imputable to his wife where they were both gainfully employed and contributed their respective earnings to maintenance of household. The court there instructed the jury that: " 'You are instructed that if you find and believe from a preponderance of the evidence that the plaintiff Lennie Parres was guilty of negligence, then the plaintiff Doloris Parres was also guilty of negligence because she was a joint owner of the automobile and the automobile was being used for their joint convenience * * *.' " See, also, 27 Am. Jur. 2d, Husband and Wife, § 452, p. 380; 41 C. J. S., Husband and Wife, § 401c, p. 895; Restatement 2d, Torts, § 494, p. 554.

Based upon the evidence, the facts, and the foregoing

authorities, we conclude that the findings and judgment of the district court are correct and are therefore affirmed.

AFFIRMED.

WHITE, C.J., and SPENCER, J., and HUBKA, District Judge, concur in result.

IN RE APPLICATION OF W. R. FRANK, TRUSTEE. SCOTTSBLUFF IMPROVEMENT ASSOCIATION, A CORPORATION, APPELLANT, V. CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
164 N. W. 2d 215

Filed January 17, 1969. No. 36969.

1. **Municipal Corporations: Zoning.** A zoning ordinance constitutes the exercise of a governmental and legislative function and a city council adopting a rezoning ordinance which amends a general zoning ordinance acts in a legislative capacity.
2. **Municipal Corporations: Actions.** An appeal or error proceeding does not lie from a purely legislative act by a public body to which legislative power has been delegated.
3. ———: ———. The only remedy in such cases is by collateral attack, that is, by injunction or other suitable action.
4. ———: ———. Review by error proceeding is allowed under section 25-1901, R. R. S. 1943, only when a tribunal acts judicially.

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

Lovell & Raymond, for appellant.

Loren Olsson and Lester A. Danielson, for appellees.

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

NEWTON, J.

This is an error proceeding taken from the action of the mayor and council of the city of Scottsbluff in adopting a rezoning ordinance. The action was dismissed by the trial court and we affirm the judgment.

It appears that there is a jurisdictional feature present which prevents our considering this cause on its merits. A zoning ordinance constitutes the exercise of a governmental and legislative function and a city council adopting a rezoning ordinance which amends a general zoning ordinance acts in a legislative capacity. See, Johnston v. City of Claremont, 49 Cal. 2d 826, 323 P. 2d 71; Besselman v. City of Moses Lake, 46 Wash. 2d 279, 280 P. 2d 689; McQuail v. Shell Oil Co., 40 Del. Ch. 396, 183 A. 2d 572; D'Angelo v. Knights of Columbus Bldg. Assn., 89 R. I. 76, 151 A. 2d 495; In re Clements' Appeal, 2 Ohio App. 2d 201, 207 N. E. 2d 573; Anthony v. City of Kewanee, 79 Ill. App. 2d 243, 223 N. E. 2d 738.

In Williams v. County of Buffalo, 181 Neb. 233, 147 N. W. 2d 776, we held that an appeal or error proceeding does not lie from a purely legislative act by a public body to which legislative power has been delegated. We further stated that the only remedy in such cases is by collateral attack, that is, by injunction or other suitable action.

In Longe v. County of Wayne, 175 Neb. 245, 121 N. W. 2d 196, this court held that review by error proceeding is allowed under section 25-1901, R. R. S. 1943, only when a tribunal acts judicially. Such is not the case here.

The judgment of the trial court is affirmed.

AFFIRMED.

IN RE APPLICATION OF FLORENCE G. CLARK ET AL. FLORENCE G. CLARK ET AL., APPELLANTS, V. VIOLET SWEET ET AL., APPELLEES.

163 N. W. 2d 881

Filed January 17, 1969. No. 36980.

Schools and School Districts: Appeal and Error. The provisions of section 27-1301.01, R. S. Supp., 1967, do not apply to appeals

taken from the action of a freeholder board. § 79-403, R. R. S. 1943.

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

Julius D. Cronin and Edward E. Hannon, for appellants.

Wilson, Barlow & Watson, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and SCHMIDT, District Judge.

SCHMIDT, District Judge.

This is an appeal from a judgment of the district court for Holt County. The judgment dismissed an appeal taken to that court from a rejection by a freeholder board of a freeholders' petition. For the purposes of the hearing in the district court on the motion to dismiss the appeal the parties stipulated the facts to be as follows:

"That on October 23, 1967 the Board provided by Section 79-403 Reissue Revised Statutes of Nebraska for 1943, as amended, consisting of the County Superintendent, County Clerk and County Treasurer of Holt County, Nebraska held a public hearing on the freeholder petition of Florence G. Clark and Francis J. Clark to transfer certain land from School Districts Number 22, 86 and 25 of Holt County, Nebraska, and attach the same to School District Number 44 of Holt County, Nebraska. Immediately following that hearing, the Board denied said petition and its action of denial was duly entered on the records of said Board on October 23, 1967. That thereafter, Florence G. Clark and Francis J. Clark filed with the County Clerk of Holt County, Nebraska within 20 days after October 2, 1967, a Notice of Appeal and a Bond in said matter; and a transcript of the proceedings had before such Board was filed with the Clerk of the District Court of Holt County, Nebraska on November 13, 1967. It was further stipulated that the

petitioners did not serve a copy of said Notice of Appeal upon the objectors Violet Sweet and Arthur Fuelberth who had filed with the Board prior to said public hearing written objections to said freeholder petition, nor upon their attorney Gene D. Watson who had appeared and represented said objectors at the public hearing before the Board on October 23, 1967, or upon anyone else, within twenty days after October 23, 1967. On November 28, 1967 the petitioners' attorney mailed to Gene D. Watson, the attorney for the objectors, a copy of the Notice of Appeal, Appeal Bond and Petition on Appeal. It was further stipulated by the parties that for the purposes of said Motion to Dismiss Appeal, the petitioners did all other acts and things necessary to perfect their appeal, and the only issue presented was whether the petitioners were required by the applicable Statutes of the State of Nebraska to serve a copy of the Notice of Appeal upon the objectors or upon their attorney of record within twenty days from October 23, 1967, to confer jurisdiction upon the District Court of Holt County, Nebraska."

The only question for decision here is whether the provisions of section 27-1301.01, R. S. Supp., 1967, apply.

Appellees argue as follows: (1) Section 79-403, R. R. S. 1943, provides that appeals shall be taken in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of a claim against the county; (2) section 23-135, R. R. S. 1943, provides that when the appeal is from the disallowance of a claim, notice of appeal must be served on the county clerk within 20 days; (3) section 23-136, R. R. S. 1943, provides that when the appeal is from the allowance of a claim, the notice of appeal must be served within 10 days; (4) Reiber v. Harris, 179 Neb. 582, 139 N. W. 2d 353 (1966), holds that the 20-day period set out in section 23-135, R. R. S. 1943, applies to appeals under section 79-403, R. R. S. 1943; (5) section 23-137, R. R. S. 1943, provides that appeals to the dis-

trict court from the allowance or disallowance of a claim shall be entered, tried, and determined in the district court the same as appeals from justice courts; and (6) sections 23-135 and 23-137, R. R. S. 1943, are in pari materia with section 27-1301.01, R. S. Supp., 1967.

Appellees concede that the 10-day provision in section 27-1301.01, R. S. Supp., 1967, does not apply as it is in conflict with the 20-day notice provision in section 23-135, R. R S. 1943, and contend section 27-1301.01, R. S. Supp., 1967, would have been complied with if the notice had been given in 20 days.

Appellees, in effect, ask us to apply part of section 27-1301.01, R. S. Supp., 1967, but not the 10-day part. We hold that it does not apply at all. There is all the more reason to say that it does not apply just in part.

We hold that it does not apply at all: (1) For the reason(s) stated in Schurmann v. Curtiss, *ante* p. 277, 159 N. W. 2d 554 (1968); and (2) for the reason that the statute by its terms applies only to appeals from a decree, judgment, or order of a justice of the peace or county court. It does not purport to apply to an appeal such as here. It would trap even the wary to read into the statute something that is not there.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

HAROLD H. ARNDT, ADMINISTRATOR OF THE ESTATE OF SHARON ARNDT, APPELLEE, V. CLYDE DAVIS ET AL., APPELLEES, IMPLEADED WITH AETNA CASUALTY AND SURETY COMPANY, GARNISHEE-APPELLANT.

163 N. W. 2d 886

Filed January 17, 1969. No. 37033.

1. **Insurance: Words and Phrases.** The word "permission" as used in the ordinary omnibus clause of an insurance policy means permission "express or implied."
2. ———: ———. The meaning of the word "permission" as used

in the omnibus clause of an insurance policy and in the Nebraska Motor Vehicle Safety Responsibility Act is synonymous.

3. ———: ———. Nebraska is committed to a broad rather than a narrow interpretation of the word "permission" and to a liberal construction of the omnibus clause to effectuate its purpose.

4. ———: ———. In interpreting the omnibus clause of an insurance policy, Nebraska is committed to the "liberal or initial permission" doctrine.

5. **Insurance.** Once initial permission has been given by the insured to the use of his motor vehicle by another, the person so using such motor vehicle becomes an insured under the terms of an ordinary omnibus clause contained in the insured's policy and remains such until such permission is terminated.

Appeal from the district court for Dawson County: HUGH STUART, Judge. Affirmed.

Maupin, Dent, Kay, Satterfield & Gatz, Donald E. Girard, and Gary L. Scritsmier, for garnishee-appellant.

Baskins, Baskins & Schneider, for appellee Arndt.

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

NEWTON, J.

This is a garnishment proceeding. One Clyde Davis was employed by Armour & Company as an outside salesman. In his capacity as salesman, Armour & Company furnished him with an automobile. Davis was offered a contract pertaining to the use of the automobile whereby he could, if he so elected, maintain full-time possession of the automobile and use it for personal as well as business purposes. If he used it for personal purposes, he was to be assessed with certain minimum charges for such use. On the other hand, he could elect not to use the automobile for his personal use and, if he so elected, the automobile was to be retained at the headquarters point of the company during all nonbusiness hours except when Davis was traveling overnight away from the headquarters point. Davis elected the second alternative and signed a contract accordingly.

On September 5, 1962, Davis was in Broken Bow, Nebraska, on the business of his employer. That evening, after working hours, he became intoxicated and made use of the automobile for social purposes. Sharon Arndt, plaintiff's decedent, was a guest passenger in the automobile. An accident occurred and she was killed. The administrator of her estate brought action against Davis and his employer Armour & Company. The case was dismissed as to Armour & Company on the ground that Davis was not acting within the scope of his employment at the time of the accident, but judgment was obtained against Davis.

Armour & Company carried automobile insurance on the fleet of automobiles used by it with the defendant Aetna Casualty and Surety Company. The policy contained an omnibus clause as follows: "The unqualified word 'Insured' includes * * * (2) under Coverages A and B, any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, *provided the actual use of the automobile is by the named Insured or with his permission* * * *." (Emphasis supplied). The primary question for decision is whether or not under this insurance policy defendant is liable to the plaintiff for payment of the judgment against Davis. In other words, was Davis, at the time of the accident, an insured under this policy? The trial court ruled that defendant was liable and entered judgment accordingly.

There is a considerable volume of law dealing with the interpretation of omnibus clauses such as the one presented in this case. It appears, generally speaking, that three different rules have been followed. The first is the so-called strict or conversion rule to the effect that the exact use of the automobile at the time and place of the accident must have been with the express or implied permission of the employer. The second is the moderate or minor deviation rule which permits recovery when the deviation from the permission

granted is of a minor nature. The third is the liberal or initial permission rule to the effect that if permission to use the automobile was initially given, recovery may be had regardless of the manner in which the automobile was thereafter used. Proponents of this rule justify it on the ground that it is good public policy to protect persons injured in automobile accidents against uninsured motorists. They further justify the rule on the theory that the purpose of the omnibus clause is to broaden the coverage of the policy to cover all persons operating the insured automobile with the knowledge and consent of the insured owner and insist that once the owner has placed the automobile in the possession of the driver and consented to his operating the automobile, any deviation from the purposes for which the automobile was entrusted to the operator is immaterial. The first two rules mentioned appear to limit the insurer's liability primarily to the liability of the insured. The third or liberal rule goes beyond this and holds the insurer liable even in cases where the owner is not liable on the theory of respondeat superior, family purpose doctrine, etc. See Annotation, 5 A. L. R. 2d 600.

In regard to Nebraska law, it does not appear that any one rule has been strictly adhered to, but at the outset it should be recognized that resort for the determination of such cases need not be had to the Nebraska Motor Vehicle Safety Responsibility Act which, under certain circumstances, renders the insured liable when the motor vehicle is used by another with the express or implied permission of the insured. The word "permission" found in the ordinary omnibus clause is generally construed to include implied permission. See, 7 Am. Jur. 2d, Automobile Insurance, § 113, p. 425; State Farm Mutual Automobile Ins. Co. v. Kersey, 171 Neb. 212, 106 N. W. 2d 31. The statute is not always applicable and in any event, in view of the generally accepted definition of the word "permission" to include

implied permission, the omnibus clause and the statute are synonymous.

In the case of Witthauer v. Employers Mutual Casualty Co., 149 Neb. 728, 32 N. W. 2d 413, an employee who had deviated from the scope of his employment to the extent of driving his employer's truck to a cafe for lunch was ruled not to be covered by the omnibus clause contained in the employer's insurance policy. This case appears to have followed the strict or conversion rule.

In State Farm Mutual Automobile Ins. Co. v. Kersey, *supra*, the owner's daughter, who was a minor without an operator's license, had frequently requested permission to drive the family automobile and had been refused on all but two occasions. She was not specifically instructed not to drive the automobile, but knew that permission for her to do so was usually denied. She took the automobile and an accident ensued. In this case the court said that since neither express nor implied permission had been given the daughter to drive the automobile, she was not covered by the omnibus clause in her father's insurance policy. Here, too, the strict rule was followed.

In Protective Fire & Cas. Co. v. Cornelius, 176 Neb. 75, 125 N. W. 2d 179, an automobile dealer permitted an employee who was considering buying an automobile from his employer to take the automobile to work on it and try it out. The employee or prospective purchaser permitted his friend to drive the automobile and he rode with her. An accident occurred. The court held that although the friend had not been granted permission to use the automobile that the employee or prospective purchaser being in the automobile at the time of the accident was nevertheless using the car regardless of who operated the automobile and held the owner's insurance company liable under the omnibus provision. In this case, liability was based primarily upon the provisions of the Nebraka Motor Vehicle Safety Responsibility Act. It would appear that the same re-

sult would have been obtained had consideration been confined to the omnibus clause.

In the case of Metcalf v. Hartford Acc. & Ind. Co., 176 Neb. 468, 126 N. W. 2d 471, a corporation was the owner of the insured automobile. It was understood that the president of the company also used the automobile at times for personal and family uses. The president permitted his son to use the automobile but specifically instructed him that he was not to permit anyone else to operate it. The son let a friend drive the automobile and an accident occurred. The court stated that the words "use" and "actual use," when used in the omnibus clause of an insurance policy, would be treated as synonymous terms and further stated that a person who assists the user of an automobile in a permitted use by taking over the manual operation of the automobile is an additional insured within the meaning of the omnibus clause.

In the case of Farm Bureau Ins. Co. v. Allied Mut. Ins. Co., 180 Neb. 555, 143 N. W. 2d 923, it is stated that this court is committed to a broad rather than a narrow construction of the word "permission" and to a liberal construction of the omnibus clause to effectuate its purpose.

It can readily be seen that these Nebraska cases are not exactly in agreement, but it does appear from the later cases, namely the Cornelius, Metcalf, and Farm Bureau Ins. Co. cases that Nebraska is committed to the liberal or initial permission doctrine. Is that doctrine applicable under the facts of the present case or should an exception be noted due to the contract pertaining to the use of the automobile entered into between employer and employee? As a general rule, it is held that where a motor vehicle is used in violation of the express instructions of the owner-employer, the automobile is not being used with the express or implied permission of the insured owner-employer and the employee is not covered by the omnibus clause. See, 7 Am. Jur. 2d,

Automobile Insurance, § 124, p. 443; Annotation, 5 A. L. R. 2d, § 20, p. 651. Were we to so hold in the present action, we would be obliged to deny recovery from the defendant insurance company. It appears, however, that to deny such recovery and to hold in accordance with the foregoing rule of law would require a definite violation or qualification of the liberal or initial permission rule, for, in the present instance, Davis had initial permission to operate his employer's automobile. The contract that he entered into with his employer is obviously directed primarily to the use of the automobile when Davis was in the area of his employer's headquarters point. Nevertheless, the terms of the contract are broad in nature and would appear to cover the use of the automobile even when Davis was out on the road, away from the headquarters point overnight. It might be pertinent to consider the fact that even had Davis elected to sign the alternative contract permitting his personal use of the automobile, neither the insurance coverage nor the premium paid would have been altered in the least and the liability of the defendant insurance company would be clear. We then have a situation where the insurer is attempting to avoid liability by virtue of a circumstance that was not related to the issuance of the policy, the provisions it contained, or the premium charged.

Under defendant's theory, if it be accepted in a strict sense, at the end of the business day in Broken Bow, Davis would have had to leave the car parked adjacent to the last business house called upon. He would have had to walk or secure other transportation to his hotel or motel. He would have been obliged to do likewise were he to patronize a cafe, or to go to an evening show or other entertainment, or to attend church on Sunday morning, or to call at the home of a friend or acquaintance, or to do many other things that are normal, acceptable, and sometimes necessary, and which employers of salesmen who are out of town overnight generally

expect their employees to use the employer's automobile for. Davis, in the present instance, was obviously using the automobile for social purposes and the fact that he may have been on a party where he and others may have become intoxicated has a tendency to color the situation. Yet, the circumstances are really no different than would have existed had he, while having breakfast on a Sunday morning, observed an elderly, attractive, but somewhat crippled lady leaving the hotel on her way to church and volunteered to drive her to church, and had an accident either going to or coming back from the church. He would be similarly deviating from the strict terms of the contract that he had entered into with his employer. Not only is it highly unlikely that his employer intended such strict adherence to the terms of the contract, but to so construe it in the case of an employee who is out of town overnight with no other means of transportation except for his employer's automobile would verge on the impractical and the ridiculous. We, therefore, remain unconvinced that in this case we should either reject or qualify the "liberal" or "initial permission" rule heretofore adopted by this court.

In Konrad v. Hartford Accident & Indemnity Co., 11 Ill. App. 2d 503, 137 N. E. 2d 855, it is said: "An employee, to whom truck was assigned by employer on continuous basis without expectation he would return truck or truck keys to employer at end of working day about 5 p.m., was driving truck with 'permission' of employer, within automobile liability policy provision including as an insured any person using truck with permission of employer as named insured, when he was involved in collision causing injury to another person while driving truck after midnight for other than business purposes, even though employer had told him not to use truck for other than business purposes, and employee was an additional insured under policy, and fact that employee had taken truck to his home at about 5 p.m.

and had driven downtown after supper and returned home with truck at about 9:30 p.m. did not constitute effective termination or cut-off of permission. * * *

"Under automobile liability policy provision that policy shall insure person named therein and any other person using or responsible for use of motor vehicle with permission of insured, or under statutory omnibus clause, any use of vehicle made by person who received an unterminated permission to use motor vehicle is with permission though such use was not contemplated by named insured when he parted with possession of vehicle and such use constitutes a deviation from the permission (Ill. Rev. Stats. 1951, ch. 95½, § 58k)." See, also, Hanover Insurance Co. v. Franke, 75 N. J. Super. 68, 182 A. 2d 164.

Defendant further contends that attorney's fees cannot be allowed plaintiff in an action of this nature. We find that attorney's fees were properly allowed in the trial court. See, § 44-359, R. R. S. 1943; Glick v. State Automobile Ins. Assn., 127 Neb. 350, 255 N. W. 57; Metcalf v. Hartford Acc. & Ind. Co., *supra*.

The judgment of the trial court is affirmed and plaintiff is awarded attorney's fees for the services of his attorneys in this court in the sum of $650.

AFFIRMED.

MARJORIE REEDER, ADMINISTRATRIX OF THE ESTATE OF ROGER L. CHRISTENSEN, DECEASED, APPELLANT, V. LARRY RINNE, APPELLEE.

164 N. W. 2d 203

Filed January 17, 1969. No. 37039.

1. **Trial: Evidence.** In determining whether the plaintiff's evidence is sufficient to present a question for the jury it must be considered in the light most favorable to him, every controverted fact must be resolved in his favor, and he must have the benefit of every inference that can reasonably be drawn from the evidence.

2. **Automobiles: Negligence.** Gross negligence within the meaning of the motor vehicle guest statute is negligence in a very high degree; the absence of slight care in the performance of a duty; or an entire failure to exercise care.
3. **Negligence.** Whether gross negligence exists must be determined from the facts and circumstances in each case.
4. **Automobiles: Negligence.** Conditions, such as dust, which obscure the vision of a driver are not intervening causes and do not excuse the driver but require him to exercise a degree of care commensurate with the circumstances.
5. ———: ———. A driver whose vision is obscured should stop until visibility is restored, or reduce his speed so that he can stop immediately if necessary.
6. **Trial.** It is the duty of the trial court to instruct on the issues presented by the pleadings and evidence, whether requested to do so or not.

Appeal from the district court for Pawnee County: WILLIAM F. COLWELL, Judge. Reversed and remanded.

Francis M. Casey, for appellant.

Chambers, Holland, Dudgeon & Beam, for appellee.

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

BOSLAUGH, J.

This is an action for wrongful death brought by the administratrix of the estate of Roger L. Christensen, deceased. For convenience, the deceased will be referred to as the plaintiff.

The plaintiff died as the result of injuries sustained in an automobile accident on June 30, 1964. The plaintiff was injured while riding in a 1956 Ford automobile operated by the defendant, Larry Rinne.

The jury returned a verdict for the defendant. The motion of the administratrix for a new trial was overruled and she has appealed. The issues presented relate to the sufficiency of the evidence and the instructions to the jury.

The defendant contends that the evidence failed to

establish gross negligence as a matter of law. In determining this question the evidence must be considered in the light most favorable to the administratrix, every controverted fact must be resolved in her favor, and she must have the benefit of every inference that can reasonably be drawn from the evidence.

The accident happened at about 9 p.m. The plaintiff and the defendant had been to Summerfield, Kansas, and were going to Burchard, Nebraska. The defendant was driving north on State Highway No. 99, a gravel road, at about 55 miles per hour. It was dusk and the defendant testified that his headlights were on.

About ¾ of a mile south of where the accident happened, the defendant passed an automobile coming from the north. The defendant testified that it was "extremely dusty" at that time and "I couldn't see." As the defendant came over the top of a hill at the junction with State Highway No. 8 he saw a big cloud of dust ahead of him. The defendant testified that he slowed down to 40 or 50 miles per hour as he entered the cloud of dust.

Just before the impact the defendant saw the back end of a truck in front of him, applied his brakes, and turned to the left. The Ford automobile struck the left rear corner of the truck and went in under the box. The right side of the Ford automobile was caved in and the top was sheared off and bent toward the back.

The truck was a 1946 Chevrolet loaded with approximately 250 bushels of wheat. The truck driver testified that he was traveling at 40 to 45 miles per hour at the time of the impact; that it was a "terrible impact"; and that his first impression was that he had been hit by an airplane. After the accident it appeared that the back wheels of the truck were shifted on the frame.

The traveled portion of the highway was 28 feet wide at the point of impact. The left rear wheels of the truck were 9 feet west of the east edge of the highway at the point of impact. After the impact, the truck traveled 174 feet and overturned in the ditch along the east side

of the highway. The Ford automobile came to rest approximately 100 feet north of the truck.

Gross negligence within the meaning of the motor vehicle guest statute, section 39-740, R. R. S. 1943, is negligence in a very high degree; the absence of slight care in the performance of a duty; or an entire failure to exercise care. Callen v. Knopp, 180 Neb. 421, 143 N. W. 2d 266. Whether gross negligence exists must be determined from the facts and circumstances in each case.

There was evidence in this case from which the jury could find that the defendant entered the cloud of dust at a very high rate of speed. Although the defendant's testimony tended to minimize his rate of speed, the testimony of the truck driver and the physical facts indicate that the Ford automobile was traveling at a very high rate of speed.

After passing through one cloud of dust where he testified he could not see, the defendant proceeded into a second cloud of dust at a high rate of speed in apparent disregard of the fact that the cloud of dust was being caused by a vehicle preceding him. The evidence in this case presented a question for the jury as to whether the defendant was guilty of gross negligence. See, Goss v. Overton, 266 Mich. 62, 253 N. W. 217; Froh v. Hein, 76 N. D. 701, 39 N. W. 2d 11.

The administratrix contends that the instruction of the trial court on speed was erroneous and that an instruction should have been given as to the duty of a driver whose vision is obscured by dust.

The instruction on speed stated in part that the statute provides that no person shall drive a motor vehicle on a highway outside of a city at a rate of speed "exceeding 65 miles per hour between the hours of *sunset and sunrise,* and 60 miles per hour between the hours of *sunset and sunrise,* on any highway that is a part of the State Highway system." (Emphasis supplied.) The instruction was erroneous in that it stated two conflicting limits for the hours between sunset and sunrise and

failed to advise the jury as to the correct limit of 55 miles per hour between sunset and sunrise. § 39-723, R. S. Supp., 1963. However, it is doubtful that this error was prejudicial to the administratrix. The instruction included the further limitation that speed must not be greater than that which is reasonable, proper, and prudent under the conditions then existing, including the condition of the road, and also advised the jury that it is the duty of the driver to decrease speed when special hazards exist by reason of the weather or highway conditions.

The trial court gave no instruction which advised the jury that conditions, such as dust, which obscure the vision of the driver are not intervening causes and do not excuse the driver but require him to exercise a degree of care commensurate with the circumstances. Bosiljevac v. Ready Mixed Concrete Co., 182 Neb. 199, 153 N. W. 2d 864; Guynan v. Olson, 178 Neb. 335, 133 N. W. 2d 571; Huston v. Robinson, 144 Neb. 553, 13 N. W. 2d 885. A driver whose vision is obscured should stop until visibility is restored, or reduce his speed so that he can stop immediately if necessary. Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333.

It is the duty of the trial court to instruct on the issues presented by the pleadings and evidence, whether requested to do so or not. Zavoral v. Pacific Intermountain Express, 181 Neb. 40, 146 N. W. 2d 796. The failure of the trial court to instruct in regard to the effect of conditions which obscure the vision of a driver and the duty of a driver whose vision is obscured requires that the judgment be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

E. A. CAMFIELD ET AL., APPELLEES AND CROSS-APPELLANTS, V. JAMES G. OLSEN ET AL., APPELLANTS AND CROSS-APPELLEES.

164 N. W. 2d 431

Filed January 17, 1969. No. 37055.

1. **Contracts: Fraud.** An essential element of actionable false representation is justifiable reliance on the representation.
2. ———: ———. A disclaimer clause of a bargain is relevant to an issue whether claimant in fact relied on a false representation disclaimed in the clause.
3. ———: ———. A disclaimer clause of a bargain is ineffective to preclude a trier of fact from considering whether or not fraud induced formation of the bargain.
4. **Fraud: Damages.** A general measure of damages for fraud is compensation for loss occasioned by the fraud.

Appeal from the district court for Keith County: JOHN H. KUNS, Judge. Reversed and remanded.

McGinley, Lane, Mueller & Shanahan, for appellants.

Firmin Q. Feltz and Baskins, Baskins & Schneider, for appellees.

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

SMITH, J.

Sellers sued to foreclose buyers' equity of redemption under an installment contract for purchase of a motel. A cross-petition for damages alleged that sellers had induced formation of the contract by false representations of motel earnings and flooding. The district court found default of buyers under the contract and false representations of earnings alone. Ordering foreclosure by sale, it assessed buyers' damages in the nominal sum of $10 which it credited to them on the amount due sellers. Buyers ask us in de novo review on appeal to find false representations of flooding and to allow them substantial damages. The finding concerning false representations of earnings is assigned on cross-appeal for error.

The agreement was signed February 27, 1964, by E. A. Camfield and his wife, sellers, and by James G. and Helen E. Olsen, buyers. Olsens agreed to purchase real and personal property known as the Starlite Motel that fronted on the north side of U. S. Highway No. 30 in Ogallala, Nebraska. The price was $42,500, less $19,500 for conveyance of other lands from Olsens to Camfields, and the balance was payable in monthly installments.

Camfield, a real estate broker and auctioneer at North Platte, had been acquainted with Jesse and Ombolena Vath in the period 1955-1961 when Vaths had owned the motel. Representing other owners in 1961, Camfield cried an auction of the motel. He himself as owner sold it in 1962, reacquiring possession and title in joint tenancy with his wife November 1, 1963. Vaths operated the motel for Camfields until March 1, 1964, when Olsens took possession.

A response of Olsens to a newspaper advertisement had led to a trip February 7, 1964, by Camfield to Olsens' door. Their bargaining positions were disparate. James Olsen had attended school through grade 8. At age 55 and with some farming and ranching experience he was out of work. Helen had acquired no formal education beyond high school. Residing at Alma, Olsens were unacquainted with Ogallala, 120 miles away. Camfield and Olsens met on six occasions in February. Only one meeting, and that on the 16th, occurred at the motel, Olsens having arrived there the preceding evening to stay overnight.

The Olsen version of Camfield's representations is summarized as follows: Camfield said the motel had always been a "good money maker." Since November 1, 1963, he had pocketed $200 a month above all expenses which had included a monthly salary of $200 for Vaths' management. Vaths as owners had discharged a mortgage indebtedness of $19,000 out of income from the motel. Camfield pointed out books concerning motel operations, but he gently dissuaded Olsens from inspec-

tion of pertinent records. At the motel meeting he spoke of flooding. A 5-inch rain and failure of a dam or ditch north of Ogallala on Thursday, May 30, 1963, he said, had caused flooding of the motel. To his knowledge, which went back 15 years, no other flooding had happened there. He reassured Olsens that a "mound of dirt" built by him along the south boundary would prevent a recurrence. He exhibited the June 3, 1963, editions of the Keith County News which Olsens did not read. The newspaper contains a story as follows in part:

"Rains * * * to three inches were measured in the Ogallala area Thursday evening sending water over the curbs, flooding some business firms and basements in residential areas. * * * Winds of 70 miles per hour accompanied the downpour * * *. * * * basements were flooded and communications interrupted early Friday night when torrential rain and hail, lashed by violent shifting winds, struck Ogallala * * *. Observers called it the most violent storm of its kind in recent years."

Camfield's testimony is summarized as follows: He made no such representations of earnings, except the one about discharge of Vaths' indebtedness. He cautioned Olsens that he had lost money in operating the motel, and he laid relevant records in full view for examination. He fully disclosed the conditions of flooding that he had seen June 3, 1963, upon his arrival at the motel from Colorado. The newpaper story was read by Olsens.

Testimony of other witnesses is summarized as follows: Camfield at the auction in 1961 mentioned past flooding and present protection in the form of a "mound of dirt." The direction of flow, however, was southeast, not north. In 1961 motel guests, suitcases in hand and trousers rolled to the knees, waded out of their rooms through water a foot deep. Maxine Downin, a purchaser of the motel under contract from Camfields in March 1962, saw the premises flooded on five separate occasions that year. Rooms took water 8 to 12 inches deep, and registration cards recorded resulting refunds

to guests. Vaths themselves informed Olsens of flooding there in 1958 and 1960. Others associated flooding with every heavy rain.

Camfield's attorney, M. C. McCarthy, spent more than an hour explaining to Olsens the draft agreement before they signed. It contained a disclaimer clause made up of generalities and the following details: "Buyers * * * stayed at said Motel and personally and fully inspected and investigated the same * * * February 15 * * * and * * * 16 * * * and * * * have seen the news article in the Keith County News dated June 3, 1963, reporting the conditions resulting in the flooding of said Motel, and that said operators (Vaths) have told them that said Motel had been flooded on two previous occasions when said operators owned said Motel, but that Sellers, and Sellers hereby state that they, had no knowledge of any previous flooding of said Motel prior to June 3, 1963, and Buyers hereby acknowledge that said operators have instructed them on how they thought the Motel could best be cleaned up if another flood should occur * * *."

Estimates of actual value of the real and personal property ranged from $20,000 to $40,000. James Olsen and a real estate broker, assuming the property to have been as represented by Camfield in Olsens' testimony, estimated its value at $42,500.

An essential element of actionable false representation is justifiable reliance on the representation. Riddle v. Erickson, *ante* p. 122, 158 N. W. 2d 608; Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131; Trebelhorn v. Bartlett, 154 Neb. 113, 47 N. W. 2d 374. A disclaimer clause of a bargain is relevant to an issue whether claimant in fact relied on a false representation disclaimed in the clause. The disclaimer is, however, ineffective to preclude a trier of fact from considering whether or not fraud induced formation of the bargain. Martin v. Harris, 121 Neb. 372, 236 N. W. 914.

A general measure of damages for fraud is compensa-

tion for loss occasioned by the fraud. Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265. Compensation in many cases is the difference between value of property as represented and actual value. See, Dargue v. Chaput, 166 Neb. 69, 88 N. W. 2d 148; Welch v. Reeves, 142 Neb. 171, 5 N. W. 2d 275. See, also, Note, 47 Va. L. Rev. 1209.

We find for Olsens on the issues of false representations of earnings and flooding, and we assess damages at $10,000. The judgment of foreclosure was prejudicially erroneous in offsetting $10 instead of $10,000 on the amount due Camfield on the contract. The present status of the case in district court is not disclosed, no supersedeas bond having been given. If equitable remedy is inappropriate, the district court on remand is to render money judgment for $10,000 in favor of Olsens and against Camfield.

The judgment is reversed and the cause remanded for proceedings in accordance with this opinion.

REVERSED AND REMANDED.

FRANCES MCCALL, EXECUTRIX OF THE ESTATE OF JAMES D. MCCALL, DECEASED, APPELLEE, V. ELLEN J. WEEKS ET AL., APPELLANTS.

164 N. W. 2d 206

Filed January 24, 1969. No. 36853.

1. **Automobiles: Highways.** When automobiles collide in the center of an ordinary intersection of highways and there is no evidence of substantial difference in speeds of the vehicles, it is generally self-evident that they approached the intersection at approximately the same time and, under the rule that when two vehicles approach an intersection at approximately the same time, the driver on the left must yield the right-of-way to the vehicle on the right and which is traveling at a lawful rate of speed.
2. **Automobiles: Negligence.** A driver entering an intersection of two highways is obligated to look for approaching vehicles and to see any vehicle within the radius which denotes the limit of

danger, and a driver who enters an intersection and looks for approaching vehicles but fails to see one which is favored over him under the rules of the road is guilty of negligence.

3. ———: ———. Contributory negligence means any negligence of the plaintiff directly and proximately contributing to the cause of the accident.

4. **Damages: Negligence.** The right of a person suffering from a disease, who is injured by the reason of the negligence of another, to recover for all damages proximately resulting from the negligent act includes the right to recover for the aggravation of the preexisting disease.

Appeal from the district court for Valley County: WILLIAM F. MANASIL, Judge. Affirmed.

Wagoner & Grimminger, for appellants.

John R. Sullivan and John E. Dougherty, for appellee.

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

WHITE, C. J.

This is an appeal from a jury verdict and judgment for $18,000 in a personal injury automobile accident occurring at an open country intersection. We affirm the judgment.

The accident occurred at about 10:30 a.m. on August 25, 1964, a clear, dry day at an open intersection south of Ord, Nebraska. Ellen J. Weeks, hereinafter called defendant, was proceeding north and the plaintiff's decedent was driving west. Plaintiff's decedent had the directional right-of-way. The accident occurred at almost the exact center of the intersection and the front end of defendant's car collided with the left center of the automobile of plaintiff's decedent. There is evidence in the record that the defendant was traveling 35 to 40 miles per hour; that the view up to the fence lines on the southeast corner of the intersection were obstructed by trees and grass and weeds; and that the defendant did not observe the automobile of plaintiff's decedent until she was within two car lengths distance

from it. The automobile of plaintiff's decedent traveled about 30 feet from the point of impact and wound up against an R.E.A. pole in the vicinity of a ditch on the northwest corner. The defendant's automobile traveled slightly to the left or west and forward to the north about 15 feet.

The defendant attacks the giving of instruction No. 1 in which the court submitted the following allegations of negligence on the part of the defendant, Ellen J. Weeks: "(a) That defendant failed and neglected to keep and maintain a proper and sufficient lookout; * * * (c) That defendant failed, refused and neglected to give, grant and accord the plaintiff's machine the right-of-way * * *; (d) That defendant operated their automobile at a high, careless, reckless and negligent rate of speed, to-wit: at 35 to 40 miles an hour and at such a rate of speed that they could not stop, turn aside and avoid an accident; (e) That defendants failed to reduce speed when entering and crossing on intersections of highways." The above instruction submits the usual issues in open intersection cases. The evidence is that the defendant failed to see the decedent's automobile until she was two car lengths away from it and after she must have been in the intersection. Her own testimony as to a speed of 35 to 40 miles an hour as she entered the intersection and up to the point where she was two car lengths away is obviously sufficient to submit the issues of reasonable speed under the circumstances (subdivision d) and the failure to reduce speed when entering an intersection (subdivision e). As to subdivision (c) relating to right-of-way, the defendant herself testified and the evidence in this case leaves no other conclusion than that both automobiles reached the intersection at approximately the same time. As we have stated many times, when automobiles collide in the center of an ordinary intersection of highways and there is no evidence of substantial difference in speeds of the vehicles, it is generally self-evident that they approached the

intersection at approximately the same time and under the rule that when two vehicles approach an intersection at approximately the same time, the driver on the left must yield the right-of-way to the vehicle on the right and which is traveling at a lawful rate of speed. See, Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496; Cappel v. Riener, 167 Neb. 375, 93 N. W. 2d 36. As to subdivision (a), the evidence clearly sustains the question on lookout, probably the basic instruction in any open intersection case. A driver entering an intersection of two highways is obligated to look for approaching vehicles and to see any vehicle within the radius which denotes the limit of danger, and a driver who enters an intersection and looks for approaching vehicles but fails to see one which is favored over him under the rules of the road is guilty of negligence. Wolstenholm v. Kaliff, 176 Neb. 358, 126 N. W. 2d 178; Colton v. Benes, 176 Neb. 483, 126 N. W. 2d 652; Mills v. Bauer, 180 Neb. 411, 143 N. W. 2d 270.

The defendant complains of instruction No. 4 which submitted the issue of contributory negligence of the deceased. It is not necessary to reach that issue. The defendant's own version of the accident was that the decedent reached the intersection ahead of her; that he was on the right; and that she collided with the center of decedent's vehicle. There is no evidence that the automobile of decedent was traveling at an excessive or unreasonable rate of speed. The most that could be elicited from the defendant in her testimony on this point was that she saw the profile of the deceased just before the collision occurred. She gave no estimate of his speed. Consequently, there being no evidence of contributory negligence, there could be no prejudicial error in the giving of the instruction; however, we have also examined instruction No. 4 and when considered in conjunction with instruction No. 25 on comparative negligence, we come to the conclusion that there was no error in the instruction as given. Instructions should not be

considered out of context and must always be considered in conjunction with the other instructions given upon the subject involved.

The defendant complains of instruction No. 5 given by the court which reads in part as follows: " 'Contributory negligence' consists of doing the wrong thing at the time and place in question, or it may arise from doing nothing when something should have been done." Contributory negligence means any negligence of the plaintiff directly and proximately contributing to the cause of the accident. Ripp v. Riesland, 176 Neb. 233, 125 N. W. 2d 699. Negligence was otherwise properly defined, without objection, in instructions given by the court. This instruction attempts, in lay language, to paraphrase an essential meaning of the definition of negligence. While it would have perhaps been better to have used the standard language of our cases in defining contributory negligence, we can see nothing misleading or of a prejudicial nature in this instruction as given. This identical instruction was given in the case of Ripp v. Riesland, *supra,* and this court in commenting on this instruction pointed out that the error, if any, was more favorable to the defendant than to the plaintiff. We conclude that the giving of this instruction was without prejudicial error.

Defendant finally attacks the giving of instruction No. 27 with respect to damages and injuries. The entire instruction given is as follows: "You are instructed that the fact, if it be a fact, that plaintiff's decedent was at the time of the accident suffering from emphysema does not prevent the plaintiff from recovering in the cause for such injuries and damages as were proximately caused by an act or ommission (sic) on defendant's part.

"If you find from a prepondrance of the evidence that the accident aggravated any pre-existing condition coupled with his other injuries, plaintiff's estate would be entitled to recover the full amount for pain and suffering, however, if you find that the damages between

the pre-existing condition and the condition resulting from the accident can be proportioned, then you will only find such damages as the proportional amount you find was due to and proximately caused by the evidence in question.

"If however you find from all the evidence in this cause that the damages cannot be apportioned as to what was caused by the accident and what was caused by the pre-existing condition, then you are instructed the defendants are liable for the entire amount." The testimony in this case is that the plaintiff's decedent was suffering from a lung condition known as emphysema prior to the accident. A medical witness testified that he saw the plaintiff's decedent after the accident; that he was having marked difficulty breathing; that he had a purplish color about the skin which indicated that the skin was not receiving sufficient oxygen; that his face and jaws were enclosed in the bandages which made it difficult for him to talk; and that he was experiencing rather obvious pain and discomfort and apprehension concerning his breathing. He had a fracture of the jaw in three different places, one on each side and one just below the joint. He had a partial collapse of his left lung which was painful to him to breathe because he had some healing fractures of the left ribs. He had a 50 percent capacity of the left lung. This is known as a pneumothorax. He had ulcers along the lower and upper gum portions and also all over the pallet. These continued during the course of his treatment. His jaw had slipped out of place at different times. Neither of these fractures had healed. He suffered pain in several areas, mainly in the chest, and associated with the fractured ribs. The pain persisted during the entire course of treatment. He was having pain every time that he would breathe and it was difficult for him to catch his breath. The medical testimony was that the injuries that the man received in the accident aggravated his general condition to the point where he was suffering from total disability. To

summarize the medical testimony, the plaintiff's decedent in this accident suffered multiple fractures of the jaw and fractures of the ribs on the left side, producing a continuing persistent situation where he was totally disabled because of his inability to breathe and, from the pain in his jaw, his inability to properly masticate his food. This aggravation of the preexisting condition and disability continued until the time of the death of the plaintiff's decedent. There is no contention in this case that the verdict was excessive nor is there any medical testimony on behalf of the defendant whatsoever as to either the preexisting condition, the effect of the preexisting condition of emphysema, or its aggravation.

The defendant's argument, in effect, is that the language of the instruction concerning the apportionment between the preexisting condition and the injuries caused by the accident permitted recovery for injuries and damages that were not proximately caused by the accident. It is clear from reading the whole instruction that the jury was limited to permitting damages for pain and suffering arising from an *aggravation* of a preexisting injury which aggravation was proximately caused by the negligence of the defendant. The court, in attempting to relieve the defendant from liability for pain and suffering which was separable from that proximately caused directly by the accident or by way of aggravation of a preexisting injury did not, in any way, mitigate or reduce the affirmatively stated proposition that the plaintiff could only recover if it was shown by a preponderance of the evidence that the aggravation of a preexisting condition was proximately caused by the negligence of the defendant. The instruction, if anything, was more favorable to the defendant, in that this statement specifically excluded recovery for pain and suffering not caused by the accident or not by way of aggravation of a preexisting injury. We note that no request was made for an instruction covering the specific issue of aggravation or apportionment of damages. And, further, no assignment of

error or issue was raised as to the excessiveness of the verdict.

The proper rule is set out in 22 Am. Jur. 2d, Damages, § 122, p. 173: "In an action for damages for personal injuries caused by a wrongful act or omission, the injured person is entitled to recover full compensation for all damage proximately resulting from the defendant's act, even though his injuries may have been aggravated by reason of his pre-existing physical or mental condition, rendered more difficult to cure by reason of his state of health, or more serious, because of a latent disease, than they would have been had he been in robust health. The defendant cannot invoke the previous condition of the person injured for the purpose of escaping the consequences of his own negligence or reducing the damages for which he is liable. * * * The right of a person suffering from a disease, who is injured by reason of the negligence of another, to recover for all damages proximately resulting from the negligent act, includes the right to recover for an aggravation of that existing disease." See, also, 2 A. L. R. 3d, §§ 9, 12, pp. 422, 426; Nownes v. Hillside Lounge, Inc., 179 Neb. 157, 137 N. W. 2d 361; Morford v. Lipsey Meat Co., Inc., 179 Neb. 420, 138 N. W. 2d 653.

We come to the conclusion that there was no prejudicial error on the record and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEO NEWSON, APPELLANT.
164 N. W. 2d 211

Filed January 24, 1969. No. 36864.

1. **Criminal Law: Insane Persons.** A defendant in a criminal action is presumed sane until the defendant produces evidence of insanity at the time of the alleged crime. If any evidence is produced, the State must then sustain the burden of producing evidence and persuading the jury beyond a reasonable doubt

that the defendant was sane at the time of the crime.

2. **Trial.** The verdict of a jury will not be disturbed unless there is insufficient evidence to support the jury's findings.
3. **Criminal Law: Insane Persons.** In a criminal case where the issue of insanity is raised, the primary test is the capacity of the defendant to distinguish between right and wrong at the time of the commission of the offense.

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

Fred J. Montag, for appellant.

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

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

WHITE, C. J.

Appellant, Leo Newson, was tried under section 28-414, R. R. S. 1943, for the April 24, 1967, robbery of the Goodrich Dairy Store, 3702 South Twenty-fourth Street, in Omaha, Nebraska. At the close of the presentation of evidence by both the State and the defendant, the defendant moved for a directed verdict or a dismissal on the ground that it was conclusively demonstrated that he was insane at the time of the alleged commission of the offense. The motions were denied, the defendant found guilty, and judgment and sentence were pronounced thereon. The defendant appeals. We affirm the judgment.

In our jurisdiction, a defendant in a criminal action is presumed sane until the defendant produces evidence of insanity at the time of the alleged crime. If any evidence is produced, the State must then sustain the burden of producing evidence and persuading the jury beyond a reasonable doubt that the defendant was sane at the time of the crime. Thompson v. State, 159 Neb. 685, 68 N. W. 2d 267; Henton v. State, 131 Neb. 622, 269 N. W. 116; Snider v. State, 56 Neb. 309, 76 N. W. 574; Shannon

v. State, 111 Neb. 457, 196 N. W. 635; Plessman v. State, 130 Neb. 758, 266 N. W. 629; Fisher v. State, 140 Neb. 216, 299 N. W. 501. The verdict of the jury will not be disturbed unless there is insufficient evidence to support the jury's findings. Wilson v. State, 120 Neb. 468, 233 N. W. 461; Philbrick v. State, 105 Neb. 120, 179 N. W. 398; Fisher v. State, *supra*.

The question involved is whether, under the evidence, an issue of insanity was raised which justified the submission of the issue to the jury. Two experts testified with respect to defendant's condition at times before, during, and after the crime. The familiar rule in our jurisdiction is that the primary test is the capacity to distinguish between right and wrong at the time of the commission of the offense. Dr. Chester H. Farrell testified that in his opinion the defendant was a chronic schizophrenic and that he did not know the difference between right and wrong on the date of the crime and was therefore legally insane. Upon cross-examination, however, Dr. Farrell testified that a chronic schizophrenic may know the difference between right and wrong depending upon the state of his "emotional functioning" at the time.

Dr. Daryl Stephenson, a psychiatrist, was called as a witness by the State in rebuttal. Dr. Stephenson, after examination of the defendant, expressed an opinion that on May 24, 1967, one month after the alleged robbery, the defendant knew the difference between right and wrong and showed no overt manifestations of schizophrenia. This witness also testified, based upon daily observations and weekly visitations between May 24, 1967, and July 30, 1967, that the defendant was not suffering from delusions or hallucinations. Finally, Dr. Stephenson testified that he had previously examined the defendant during the spring and summer of 1966; that the defendant had schizophrenic reactions of a chronic nature at that time; but that he showed no extreme tendencies of paranoia, catatonia, or marked de-

pression or elation. Dr. Stephenson also confirmed the previous testimony of Dr. Farrell to the effect that it was possible for a person to manifest schizophrenic tendencies at certain times, but not at others; and that a person subject to hallucinations may not hallucinate all the time but may hallucinate at different periods. In addition to the expert testimony, the jury had an opportunity to observe the demeanor of defendant during his cross-examination. Also from the testimony of other actual witnesses to the crime involved, the jury had the opportunity to judge the defendant's appearance and conduct at the actual time of the robbery and relate it to the experts' testimony that was given in the case. We further point out that expert testimony is purely advisory in nature to jurors and is not binding on them. The court properly instructed the jury in this respect, and the court so properly informed the jury. The evidence, as a whole in this case, clearly raises the issue of the ininsanity of the defendant. The trial court properly instructed upon this issue, to which instruction there is no objection. The trial court's overruling of the defendant's motions for a directed verdict was correct in all respects.

The defendant also raised the issue of intoxication. The defendant and another witness testified quite extensively in this respect. The court properly instructed upon this issue raised by the defendant. See, Tvrz v. State, 154 Neb. 641, 48 N. W. 2d 761; Thompson v. State, 159 Neb. 685, 68 N. W. 2d 267; Daugherty v. State, 154 Neb. 376, 48 N. W. 2d 76.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES H. MCKEE, APPELLANT.

164 N. W. 2d 434

Filed January 24, 1969. No. 36889.

1. **Criminal Law: Indictments and Informations.** Generally, an information which alleges all of the facts and elements necessary to constitute the offense described in the statute is sufficient.
2. **Criminal Law: Venue.** In a prosecution for receiving stolen property under section 28-508, R. R. S. 1943, such prosecution may be laid in the county where a defendant either received or had such property, notwithstanding the theft was committed in another county.
3. **Criminal Law: Evidence.** In a prosecution for receiving stolen property, if the facts known to a defendant are such that a man of his age, intelligence, and experience would know that the property was stolen, the evidence is sufficient to justify a jury in finding that such defendant had guilty knowledge.

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

Schrempp, Rosenthal, McLane & Bruckner, Warren G. Albert, and James R. Welsh, 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.

This is a criminal prosecution under section 28-508, R. R. S. 1943, for receiving stolen property with the intent to defraud the owner. From a jury verdict of guilty and a judgment and sentence thereon, the defendant appeals. We affirm the judgment.

The defendant's first contention is that the information does not state the facts which constitute the offense of receiving stolen property, under the above statute. The information provides in part as follows: "James H. McKee late of the County aforesaid, on or about the

23rd day of May, A. D., 1967 in the County of Platte, and the State, aforesaid, then and there being, did then and there *feloniously receive goods of the value of over $100 that had been stolen, with the intent to defraud the owner thereof, the said James H. McKee knowing the said goods to have been stolen,* all contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska." (Emphasis supplied.)

The information is phrased in substantially identical language of the statute. The rule is when an information alleges all of the facts and elements necessary to constitute the offense described in the statute it is sufficient. Hans v. State, 147 Neb. 67, 22 N. W. 2d 385; McKenzie v. State, 113 Neb. 576, 204 N. W. 60; Chadek v. State, 138 Neb. 626, 294 N. W. 384. We note further that the defendant failed to move against the information by way of demurrer, motion to quash, or plea of abatement. Under the applicable statute, section 29-1812, R. R. S. 1943, the defendant has waived all defects that may be raised thereby. There is no merit to this contention.

The defendant complains that the venue of the case in Platte County, Nebraska, is improperly laid because the State has failed to prove that the act of receiving the stolen property occurred in Platte County, Nebraska. Our applicable statute, section 29-1307, R. R. S. 1943, specifically provides that the prosecution of the receiver of any personal property that shall have been feloniously stolen may be laid in the county where he received or *had such property,* notwithstanding the theft was committed in another county. The evidence shows that Ferer's Tobacco & Candy Company in Omaha, Nebraska, was burglarized and approximately 60 cases of cigarettes were taken. The company does not sell at wholesale to any retail outlets in Platte County, Nebraska, where this prosecution was initiated. The evidence is that the company's sole outlet for its product is in the area of Omaha, Nebraska. Each package of cigarettes is stamped

with the company's exclusively assigned state cigarette tax number of 28482. Each package of cigarettes received in evidence in this case was stamped by meter with the above number. The evidence also establishes that Ferer's Tobacco & Candy Company sells at wholesale to vending machine companies but that such vendors cannot sell at wholesale such cigarettes by the case but must put them in a machine for sale at retail. The evidence conclusively establishes that each package of cigarettes received in evdence was found in Platte County, Nebraska, in the possession of the defendant or had been traded for or had been purchased from the defendant by the person who had custody over these cigarettes. This evidence is obviously ample, under the precise wording of the statute, to establish proof of venue by the State in the county where the defendant "had such property." There is no merit to this contention.

Interwoven with the above argument is the next contention of the defendant that the evidence was insufficient to sustain the verdict. The evidence is that 60 cases of cigarettes were stolen from Ferer's Tobacco & Candy Company's plant in Omaha, Nebraska, on March 12, 1967. These cigarettes were received from the manufacturer and duly stamped by the Ferer Company in its Iowa plant before delivery to its Nebraska plant in Omaha for sale at wholesale in Nebraska. The company is licensed to stamp cigarettes for sale in the State of Nebraska, has an exclusively assigned number of 28482, and it is undisputed that each package of cigarettes was stamped by the company by means of its metering machine. As mentioned before, Ferer's Tobacco & Candy Company has no service outlets outside of the Omaha area and specifically no retail outlet in Platte County, Nebraska. It does sell at wholesale to vending machine operators who place them in a machine for sale at retail. All of the packages of cigarettes introduced in evidence, stamped with the company's number, were

found in the possession of the defendant or had been traded for or purchased from the defendant by persons who actually had the custody of the same. More specifically the cigarettes which were identified as exhibit 4 had been purchased by one Stewart E. Halpin, a Nebraska highway patrolman, at the Avenue Bar in Columbus, Nebraska, which in turn is owned by one Tom Reilly. Reilly, in turn, had obtained the cigarettes, which were identified as exhibit 16 in the evidence, by trading the defendant some old cigarette stock. One Raymond Liss had purchased the cigarettes which were identified as exhibits 17 to and including 20 from the defendant. These in turn bore the metering stamp of Ferer's Tobacco & Candy Company, from which the 60 cases had been stolen. The balance of the cigarettes which were received in evidence, consisting of metered stamped cigarettes of Ferer's Tobacco & Candy Company, identified as exhibits 5 to and including 12 were found in the basement of the defendant's home located at 2909 Fifteenth Street, in Columbus, Platte County, Nebraska.

The defendant complains that there is insufficient evidence to establish guilty knowledge or intent to defraud on the part of the defendant. The evidence shows that one Raymond Liss had purchased his business, Ray's Bar, from the defendant on May 1, 1967, in Platte County, Nebraska. Subsequent thereto Raymond Liss was contacted by the defendant in regard to purchasing some cigarettes at $2.25 a carton. Liss did not purchase any cigarettes from the defendant at that time. However, at a later date, Liss went to the defendant's home on some other business and the defendant again offered to sell him cigarettes this time at $2 a carton, and Liss purchased the cigarettes at this price. The wholesale price at the time on regular cigarettes was $2.74 a carton and $2.84 a carton for king-size cigarettes. The defendant had a regularly issued tobacco license. In State v. Henry, 174 Neb. 432, 118 N. W. 2d 335, our court stated, on passing

upon the sufficiency of evidence in this kind of a situation, as follows: "If the facts which were known to each defendant were such that a man of the age, intelligence, and experience of each defendant would know that the television sets were stolen, then the jury could find that each defendant had guilty knowledge." As we view the evidence it is amply sufficient to sustain the verdict. It shows that the exhibits, representing cigarettes, were the same cigarettes stolen from Ferer's Tobacco & Candy Company and also clearly shows that the defendant received or had said exhibits in Platte County, Nebraska. It further sustains the finding that these cigarettes were sold or attempted to be sold and possessed under circumstances leading to a reasonable inference of guilty knowledge on the part of the defendant that the property was stolen. There is no merit to this contention.

The defendant complains that the trial court erred in failing to instruct the jury that guilty knowledge at the time of receiving was a factor to be considered by the jury in reaching its verdict. That the court properly instructed as to the element of guilty knowledge or intent to defraud is clearly demonstrated by a recital of instruction No. 4 which reads in part as follows: "Your verdict in this case must be not guilty unless you are satisfied by the evidence beyond a reasonable doubt of the truth of all three of the following material elements:

"1. That the defendant James H. McKee *did receive* goods of the value of $100.00 or upward that had been stolen, *with intent to defraud the owner thereof.*" (Emphasis supplied.) It is difficult to see how the court could have instructed in clearer language that the jury was required to find beyond a reasonable doubt that the defendant received the goods; that they were stolen; and that he received them with the intent to defraud the owner thereof.

Finally the defendant complains that the jury verdict did not find the actual value of the goods received by him. As set out above in instruction No. 4, the court

specifically required the jury, in order to find guilt, that the value of the goods be of $100 or upward. Under the evidence and this instruction no finding of receiving stolen property in a value less than $100 could have been made consistent with a verdict of guilty. The only verdicts possible, as the court submitted the case, were guilty as charged, or not guilty. It must follow, since the jury found the defendant guilty under this instruction, that it necessarily had to find the value of the goods to be $100 or upward. Defendant cites section 29-2026.01, R. S. Supp., 1967, and Hogoboom v. State, 120 Neb. 525, 234 N. W. 422, 79 A. L. R. 1171, as authority for his position in this case. The statute and the case cited describe an offense entirely distinct and different from the offense charged in this information under section 28-508, R. R. S. 1943. The reason for the holdings under the authorities cited by the defendant is that the court must know for what offense it is necessary to pass judgment and sentence on. Such a situation is not present in this case nor in a prosecution under the statute. The statute involved here describes a specific offense, that of receiving stolen property of a value of more than $100 with the intent to defraud. It does not permit a determination as to degrees of guilt proportionate to the amount of property stolen. In the instructions given, or in the corresponding verdict received, there is nothing misleading or uncertain about the jury's determination of value or the necessary finding for the court to properly pass judgment and sentence.

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

AFFIRMED.

DALE BROKAW, APPELLEE AND CROSS-APPELLANT, V. EDWIN ROBINSON, APPELLANT AND CROSS-APPELLEE.

164 N.W. 2d 461

Filed January 24, 1969. No. 36902.

1. **Workmen's Compensation.** The "by accident" requirement of the Workmen's Compensation Act is satisfied, either if the cause was of an accidental character, or if the effect was unexpected or unforeseen, and happened suddenly and violently.
2. ———. In a workmen's compensation case such as this, the plaintiff has the burden of establishing by a preponderance of the evidence that exertion in his employment, in reasonable probability, contributed in some material and substantial degree to cause the injury.

Appeal from the district court for Pierce County: GEORGE W. DITTRICK, Judge. Affirmed.

Story, Carl & Parker, for appellant.

Jewell & Otte, for appellee.

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

MCCOWN, J.

This is a workmen's compensation case based upon a cerebral vascular accident, commonly known as a stroke. The plaintiff recovered an award before the single judge Workmen's Compensation Court; which was affirmed, with minor modifications by the Workmen's Compensation Court en banc; and later affirmed on appeal to the district court.

The plaintiff, Dale Brokaw, was 44 years old and was employed by the defendant to drive a truck hauling cattle and feed and also to do farm work. For several months prior to April 21, 1966, plaintiff had been working from 7 a.m. to about 9 or 10 p.m., in driving a truck and hauling feed and cattle. On April 21, 1966, he arrived at the defendant's farm for work at about 7 a.m. He drove to Foster, Nebraska, where he picked up Ray Krueger, a farmer, and went to a farm near Ewing

where they picked up two bulls whch Krueger had purchased. They then returned to Foster, weighed the bulls, and attached a portable cattle chute to the truck. The plaintiff went ahead to the Krueger farm alone while Krueger remained in Foster for 15 or 20 minutes. When the plaintiff arrived at the Krueger farm, the farmyard was muddy and there was a mudhole about 20 to 30 feet across. The gate of the pen where the bulls were to be placed was some 40 to 50 feet from the place where the truck was parked. The mudhole was between the gate and the truck. To unload, it was necessary to unhook the portable cattle chute from the truck and pull it through the mudhole to the gate and then back the truck to the chute. The portable chute had a steel tongue and frame with wooden sides and a plank floor. It was mounted on two rubber-tired wheels. It weighed 400 to 500 pounds. The plaintiff unhooked the chute from the truck and by pulling and jerking on the tongue had gotten it some 30 to 35 feet from the truck and 15 or 20 feet from the gate and in the mudhole, and couldn't get it any farther alone. At this time Mr. Krueger arrived from town and found the plaintiff leaning against the chute. The plaintiff was sweating, although it was a fairly cool day, and he seemed slower and not as lively to Mr. Krueger. The plaintiff told Krueger he couldn't stand much more of that, and that the chute pulled ten times as hard in the mud. Krueger and the plaintiff together got the chute to the gate and the plaintiff backed the truck to it and they unloaded the bulls.

The plaintiff testified that the time of Krueger's arrival was the first time that he felt dizzy or his right arm and leg felt numb. Krueger testified that when the plaintiff left the farm he said he was in a hurry, but he walked slowly. The plaintiff went to the defendant's home from the Krueger farm and after his noon meal, drove his truck to Sioux City, Iowa, for a load of feed to be delivered in Plainview, Nebraska. He didn't help load the feed. On the trip to Plainview, a rim on a wheel

broke. Plaintiff and the defendant, who had come along, and two men from a garage changed it. The plaintiff then drove the truck to Plainview, but the store was closed and he did not unload the feed. Defendant testified that on the trip from Plainview to the defendant's farm, the plaintiff told him that plaintiff's arm was "kind of going to sleep." The plaintiff went home from the defendant's farm, arriving about 9 p.m., and although his meal was ready, he didn't eat, but went directly to bed.

When the plaintiff awoke on April 22nd, he could not stand up nor talk very well. He was taken to the hospital and his condition diagnosed as a cerebral vascular accident with paralysis of the right arm and leg and facial paralysis.

Plaintiff had been in good health prior to April 21, 1966. None of the doctors could find any pathological or organic causes, such as constitutional weaknesses or known circulatory conditions.

Doctors Kopp and Schabauer attended the plaintiff at the time of his stroke and thereafter. Originally they obtained their history largely from the plaintiff's wife and father because of the plaintiff's inability to speak. His mental capacities were also impaired. Some months later, they received the more specific history previously outlined. Dr. Neis, a thoracic and cardiovascular surgeon examined the plaintiff some 2 months after his stroke. He had no information as to the plaintiff's exertions on the job except that he was driving a truck. All of the doctors agreed on the diagnosis as a cerebral vascular injury or accident. Dr. Neis' report said that he could find no cause, but wondered if he might have thrown an embolis. Dr. Kopp found no evidence of an embolism. He testified that, in his opinion, over-exertion of the kind previously described must be a contributing cause of the plaintiff's cerebral vascular accident. Dr. Schabauer testified that over-exertion may be a contributing cause, or stress can be a contributing or triggering factor to a stroke. He also testified that the

moving of the chute on muddy ground may have been a contributing or triggering factor, and that the physical activities over the weeks preceding the actual stroke can be considered an undue stress to the system and, therefore, can be considered with reasonable certainty as a contributing factor.

The defendant contends that mere exertion ordinarily incident to the employment cannot constitute an accidental injury and that exertion combined with a preexisting disease or condition does not constitute a compensable injury. We cannot agree.

Section 48-151(2), R. R. S. 1943, was amended in 1963. The word "injury" was substituted for the word "event" in the definition of "accident" in the Workmen's Compensation Act, and specific and significant language with respect to causation was added. That section now reads: "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, with or without human fault, and producing at the time objective symptoms of an injury. The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment."

The change in the workmen's compensation statute clearly removes the necessity of finding a single traumatic event as the cause of an injury. The "by accident" requirement of the Workmen's Compensation Act is now satisfied, either if the cause was of an accidental character, or if the effect was unexpected or unforeseen, and happened suddenly and violently. The problem in cases such as this is now causation, and whether an accidental injury arose out of and in the course of the employment. The statutory change has removed Ne-

braska from the minority of states which require a showing that the employment exertion which produced the result was in some way unusual in order to establish its accidental character. See, 1A Larson, The Law of Workmen's Compensation, §§ 38.00 to 38.61, pp. 519 et seq.; 5 Schneider, Workmen's Compensation Text (Perm. Ed.), § 1387, p. 117.

"An overwhelming majority of jurisdictions also find adequate accidental quality in the element of 'breakage' present in such injuries as cerebral hemorrhage, ruptured aneurysm, ruptured aorta, broken blood vessel, apoplexy, aortic regurgitation, hemorrhage in eye, and pulmonary hemorrhage." 1A Larson, The Law of Workmen's Compensation, § 38.20, p. 530. The statutory change has removed Nebraska from the minority position here also.

In a workmen's compensation case such as this, the plaintiff now has the burden of establishng by a preponderance of the evidence that exertion in his employment, in reasonable probability, contributed in some material and substantial degree to cause the injury. Obviously, the presence of a preexisting disease or condition would enhance the degree of proof required to establish that an injury arose out of and in the course of employment. In this case, there was no evidence that the plaintiff had any preexisting disease or condition which was material to a cerebral vascular injury or accident.

In Schwabauer v. State, 147 Neb. 620, 24 N. W. 2d 431, we said: "If a claimant has adduced competent evidence having probative value which preponderantly convinces the trier or triers of the fact that claimant had an accident and incurred a disability arising out of and in the course of his employment, notwithstanding the trier or triers of the fact may recognize a possibility or even a probability that this was not true, an award of compensation thereon is proper and on appeal therefrom must be sustained."

In Welke v. City of Ainsworth, 179 Neb. 496, 138 N.

W. 2d 808, we reiterated the language of the Schwabauer case and said also: "In the area of certain disabilities it is impossible for a reputable doctor to testify with absolute certainty that one cause and one cause alone is the reason for the disability. Medical diagnosis is not that exact a science. * * * To require a greater degree of proof in a workmen's compensation case than we would require in a tort action is, to say the least, thwarting the basic purpose of the workmen's compensation statute."

The evidence here preponderantly established that the cerebral vascular injury was unexpected or unforeseen, happened suddenly and violently, and produced at the time objective symptoms of an injury. We think the evidence also established that the plaintiff's injury, in reasonable probability, arose out of and in the course of his employment.

The one judge Workmen's Compensation Court, the Workmen's Compensation Court en banc, and the district court all found that the plaintiff was entitled to workmen's compensation benefits, and these findings were correct.

The plaintiff has cross-appealed on the ground that the district court failed to allow the plaintiff a reasonable attorney's fee in the district court.

Section 48-125, R. R. S. 1943, provides in part: "In the event the employer appeals to the district court from the award of the compensation court, or any judge thereof, and fails to obtain any reduction in the amount of such award, the district court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court."

The district court should have allowed a reasonable attorney's fee to be taxed as costs. Plaintiff is also entitled to an attorney's fee in this court. Plaintiff is, there-

fore, allowed a total attorney's fee of $1,250 for services in the district court and in this court.

Except as to costs, the judgment of the district court is affirmed.

AFFIRMED.

WHITE, C. J., dissenting.

The plaintiff's treatment doctor in this case testified as follows: "Q. Doctor, to get right down to it, you can't say why or how this man happened to have this stroke? * * * A. Medically speaking, pathologically speaking, no; I can't, probably God only knows why he did. * * * Q. Do you remember being asked this question in your deposition, 'Question, Whether the long hours or the moving of the chute or a combination of both, were a precipitating cause? Answer, I don't say that those conditions were directly a precipitating cause.' * * * Q. Do you remember those questions and those answers? A. Uh-huh." Lest these questions and answers be challenged as being out of context, I submit that the record fairly reflects a repetitious reiteration that this plaintiff's activities on his job *could* have been a precipitating or a contributing factor to the occurrence of the stroke.

In the majority opinion, much is made of the extremely heavy labor indulged in handling the chute. The treatment doctor testified as follows: "Q. Would you not have to know how much the chute weighed and how he pushed it and how much force was exerted? A. No. Q. And what type of man he was, whether he was strong or weak, my size or your size, how big he was? A. No. Q. Those things are not important? A. No, they are not important. We in the medical field are a little bit different than in a legal matter." As I interpret the record in this case it leads me to the following conclusions or observations: (1) The prevailing state of medical uncertainty as to the connection between antecedent effort with the cause of stroke, (2) that here the antecedent effort or strain merely could have been a precipitating

or contributing factor, (3) that the comparative long intervening period of time between the strain or effort and the occurrence of a stroke while the plaintiff was sleeping distinguishes this case from other types of cases where recovery has been allowed, and (4) the first appearance of a reconstructed history connecting the man's employment with this stroke appeared for the first time several months after the occurrence of the stroke and after the doctors had been treating the plaintiff for a considerable period of time. This is explained upon the theory that the plaintiff was incompetent to speak during this period of time. It leaves this area nebulous from the standpoint of proof, to say the least.

We should remember that our examination of this record here is de novo and we are required as fact finders to find affirmatively that this stroke was proximately caused, with reasonable medical certainty, from an accident arising out of the plaintiff's employment. Although the plaintiff's treatment doctors at different times in their examinations gave lip service to the ritual questions establishing the element of reasonable medical certainty, I submit that their testimony falls far short of any reasonable conclusion that the plaintiff has met the burden of proof required under our law. If we were reviewing this case simply to determine the sufficiency of the evidence to support the jury verdict, the question would be entirely different, and even on that basis, I believe there wolud be a grave question as to the sufficiency of this record.

I submit that the 1963 amendment to our Workmen's Compensation Act did not change, nor was it intended to change, the basic rules with respect to the burden of proof and the fact that the accident had to arise out of and in the course of employment to be compensable. The only substantive change made in the previous Workmen's Compensation Act by the 1963 amendment was to eliminate our previous and rather transitory judicial interpretation that "unexpected or unforeseen event" meant

only "an external" event. It was meant solely to delete the previous requirement that a claimant show injury from an external event such as a slip, trip, fall, or unusual exertion. The objective of the amendment to the statute was to eliminate these rather fortuitous requirements and to focus the primary attention in exertion and strain cases on factual matters of employment and medical causation. The intent to reinforce the requirements of proof is demonstrated in the following new language in the 1963 amendment: "There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury, that the injury was in fact caused by the employment." I submit that the injury to a plaintiff at the time and place sustained by such employee must be traceable to some employment circumstances, and second, that such circumstances must have happened suddenly and violently and produced *at the time* objective symptoms of an injury.

The statute as amended in 1963 provides: "The word accident * * * shall, * * * be construed to mean an unexpected or unforeseen injury happening *suddenly* and violently, with or without human fault, and producing *at the time* objective symptoms of an injury. The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment." It is significant that the 1963 Legislature, in enacting this amended statute, felt that the statutory requirement of suddenness must be preserved. Legislative Bill 498, introduced in the 1963 Nebraska Legislative Session, would have deleted the requirement of "suddenness" but was unanimously killed by the Judiciary Committee, to which both bills were referred, and the amended statute as set out above was ultimately reported out without a deletion of this language.

In my opinion the evidence in this case falls far short of meeting the requirement of being employment-caused or happening suddenly and violently and producing at the time objective symptoms of an injury. This case demonstrates the helplessness of an employer to be able to check and ascertain the facts surrounding the requirement of "producing at the time objective symptoms of an injury." The chute incident and the strain allegedly surrounding it were reconstructed almost 6 months after the time of the alleged "sudden happening."

I do not believe that the 1963 amendment to the Workmen's Compensation Act was intended, either expressly or covertly, to permit an enlargement of compensation liability into the area of health coverage during the time period of employment. In fact, a close reading of the statute and the history reveals that it was intended to reenforce the previous judicially announced requirements of proof in workmen's compensation cases where there was no observable or objectively identified accident external to the surface of the body.

Manual effort and lifting strain, of course, are inherent in the ordinary course of employment, as of course is clearly demonstrated in the type of employment present in this case. The door is now thrown open to the establishment of a hindsight connection between some effort on the job and a contemporaneously suffered stroke by the employee. The connection was sustained by medical testimony that this could have been a contributing or could have been a precipitating factor. I submit that this not only fails to meet the factual requirements of proof set out in our statute and in our judicial decisions but is contrary to the purposes and objectives of the Workmen's Compensation Act and the amendment in 1963 to the statute. It effectively prevents an employer or his insurer from being able to factually check or investigate the claimed accident occurring suddenly and violently and producing objective symptoms at the time of the injury. It is common knowledge that there is a

much greater incidence of stroke in men in their 50's and 60's. The query arises as to whether the holding of this court today allowing liability for a stroke under these circumstances would prevent employers from assuming the risk of employing otherwise competent men because of the tremendously enlarged liability for death and total disability arising from this type of "accident." Nor do I believe that the trial or decision in a compensation case should be converted into "medical speculation as to judicial credulity or judicial speculation as to medical credibility." The decision in the Workmen's Compensation Court was divided. I can come to no other conclusion but that this case has failed on factual proof under the most liberal interpretation that can be permitted of the Workmen's Compensation Act as amended in 1963.

STATE OF NEBRASKA, APPELLEE, V. EDWARD LEE LINCOLN, APPELLANT.

164 N. W. 2d 470

Filed January 24, 1969. No. 36976.

Criminal Law. For departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.

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

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

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

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

McCOWN, J.

Defendant, Edward Lee Lincoln, was found guilty by a jury on a charge of burglary. On appeal, the contention is that it was reversible error to instruct the jury on the issue of flight.

At about 3:15 a.m., on December 23, 1967, a window at the Borsheim Jewelry Store was broken and various items taken from the window display. The store is located at Sixteenth and Harney Streets in downtown Omaha. The display window was equipped with an ADT alarm system. Within a few seconds, the break alarm was reported and broadcast to the police. Within 10 to 20 seconds after the break alarm signal was received, a service man for the ADT Company left the company offices some 3 blocks from the scene of the crime. He proceeded west in an automobile through an alley between Harney and Farnam Streets. As he reached Fifteenth Street, he saw a car coming around the corner 1 block from the scene of the crime. The headlights were off and it was traveling about 30 miles per hour. There was no other traffic on the street at the time. The car passed directly in front of him heading north, and he saw there were two men in the car. It was a new 1968 bright red automobile. It had in-transit stickers on the front and rear windows and no license plates. Meanwhile, a police officer, at a time approximately 5 minutes before the burglary, had seen a red 1968 Chevy II with in-transit plates parked in an alley, some 2½ blocks from the Borsheim Jewelry Store, with its lights off. He backed the cruiser up and started down the alley, but the automobile pulled out at the other end of the alley. He stopped to check doors in the alley and spent a minute or two. Shortly after he left the alley, he received the alarm. He was only a few blocks from the store when the alarm was received. He went immediately to the scene, checked momentarily with other police officers, and proceeded north and west. At a point approximately 5 blocks from the jewelry store, at Seventeenth

and Capitol Streets, he saw the same automobile he had seen in the alley minutes before. He radioed for assistance in stopping the car, and followed it for a few blocks. When he turned on his red light and spotlight, the automobile pulled into a filling station and stopped. Property taken in the burglary was found in the car. The police officer arrested the defendant and his companion 4 minutes after the broken window activated the alarm.

It is apparently the defendant's position that because the automobile stopped almost immediately after the officer turned on his red light and spotlight, and there is no evidence as to the speed of the chase, there is no evidence of flight.

The term "flight" is often misused for the word "departure." Departure from the scene after a crime has been committed, of itself, does not warrant an inference of guilt. "Flight" may be established by a broad range of circumstances. We believe the proper rule to be that for departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt. See, 29 Am. Jur. 2d, Evidence, § 228, p. 279; State v. Sullivan, 43 N. J. 209, 203 A. 2d 177; State v. Bruton, 66 Wash. 2d 111, 401 P. 2d 340. See, also, II Wigmore on Evidence (3d ed.), § 276, p. 111; 1 Wharton's Criminal Evidence (12th ed.), 1969 Cum. Supp., § 205, p. 95.

The specific instruction given here was: "You are instructed that the voluntary flight of a person immediately or soon after the occurrence of a crime, with which the person so fleeing has been charged, is a circumstance, not sufficient of itself to establish guilt, but a circumstance nevertheless which the Jury may consider in connection with all the other evidence in the case to aid you in determining the question of the guilt or innocence of such person." That instruction was proper. See

Davis v. State, 171 Neb. 333, 106 N. W. 2d 490. While the necessity or advisability of giving the instruction in this case may be debatable, the circumstances present here were clearly sufficient to sustain an inference of flight as distinguished from mere departure from the scene of a crime.

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

AFFIRMED.

MORAN, District Judge, concurring in result.

I do not agree with the statement that the instruction was proper. I submit that it is defective in that it assumes there was flight. This was for the jury to determine, not the judge. The judge should have defined flight, left it to the jury to determine whether there was flight, and then given the instruction quoted. This is the substance of the instruction which was approved in State v. Sullivan, 43 N. J. 209, 203 A. 2d 177.

The error did not result in a substantial miscarriage of justice, and I am for affirmance of the judgment under the authority of section 29-2308, R. R. S. 1943.

ROY R. HULL, GUARDIAN OF THE ESTATE OF MYRTLE MARGARET HULL, AN INCOMPETENT, ET AL., APPELLEES, V. ROSS D. HULL ET AL., APPELLEES, L. W. WEBER ET AL., BIDDERS, APPELLANTS
164 N. W. 2d 455

Filed January 24, 1969. No. 37012.

1. **Judicial Sales.** The confirmation of judicial sales is left to the judicial discretion of the trial court. The discretion to be exercised is not arbitrary, however, but should be one which is sound and equitable in view of all the circumstances.
2. ———. An upset bid following a judicial sale and before confirmation should be considered only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all concerned and the stability of judicial sales permit its acceptance.

3. ———. An upset bid, made after the judicial sale and before confirmation, is relevant only to the extent that it bears upon the fairness of the judicial sale and the adequacy of the high bid obtained there.

Appeal from the district court for Burt County: GEORGE W. DITTRICK, Judge. Reversed and remanded with directions.

Keith Hopewell and Weber & Robinson, for appellants.

Fred S. Jack and Bernard T. Pipher, for appellees.

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

MCCOWN, J.

The appellants here were the successful bidders at a referee's sale of land in a partition action. At the hearing on objections to confirmation, the objections were sustained and the court reopened the sale. The property was sold in open court to another purchaser and that sale confirmed. The original successful bidders have appealed.

The partition action involved 120 acres of rolling farm land not suitable for irrigation, located near Tekamah, in Burt County, Nebraska. Myrtle Margaret Hull, an incompetent, who was represented in the partition action by Roy. R. Hull, her son and guardian, owned a one-third interest in the property. Roy R. Hull and his brothers, Ross D. Hull and Herbert C. Hull, each owned an undivided two-ninths interest in the property. These individuals, with two of their spouses, constitute the plaintiffs and defendants in the partition action. On December 28, 1967, the court ordered the referee to sell the property at public sale. On February 6, 1968, the referee conducted the public sale at the Burt County courthouse commencing at 2 o'clock p.m. The sale remained open for just under 2 hours. The sale had been advertised in several newspapers, including

some display advertising; on one radio station; and by posting and distribution of handbills. The sale was attended by approximately 100 persons. After some 17 separate bids, the appellants L. W. Weber and J. W. Weber, were the final and successful bidders on their bid of $45,500. They made the downpayment pursuant to the court's order of sale.

On March 1, 1968, Roy Hull and Herbert Hull filed objections to confirmation and offered to bid the sum of $46,800 for the property. Objections to confirmation were also filed on behalf of Myrtle Margaret Hull and by Ross Hull. All of the objections were based on the allegation that the property had sold for an inadequate price. The successful bidders filed their answer to the objections. On March 8, 1968, hearing on the referee's report of sale and the objections to confirmation was held and testimony taken. An expert real estate witness testified that, in his opinion, the $45,500 bid was an adequate and fair price for the property and that he considered it the top price for the land at the time. One of the successful bidders also testified that $45,500 was the very top price for the property. He also testified that the purchasers had obtained appraisals from appraisers representing various farm and insurance lending institutions. These appraisals were from five different individiual appraisers and ranged from $300 per acre to $375 per acre, or from $36,000 to $45,000.

At the hearing, Roy Hull offered a 5 percent increase on behalf of his brother, Herbert Hull. Except for the offers of Roy Hull or his brother, Herbert Hull, there was no testimony which contradicted the appellants' evidence that the property sold for a fair and adequate price at the time of the original sale.

The problem of balancing the duty to secure the highest possible price for property sold at judicial sales for the benefit of the owners, and at the same time maintain the stability of judicial sales has troubled courts for a long time. There are three doctrines which have been

adopted by various courts. According to one theory, the mere fact that a higher bid has been received is sufficient reason to refuse confirmation and reopen the bidding. According to another theory, the mere fact that a higher bid has been received is not a sufficient reason for refusal to confirm the sale. The courts which adhere to the former theory regard the receipt of a higher bid as conclusive evidence that the property was sold for an inadequate price, while the courts that adhere to the latter theory take the view that judicial sales are rendered more stable and better prices are obtained for property generally when sold at judicial sale, by making the highest bid which is accepted final. See Annotation, 152 A. L. R. 530.

According to the third doctrine, the entire matter of confirmation of judicial sales is left to the judicial discretion of the trial court. This doctrine has been adopted in Nebraska. See Siekert v. Soester, 144 Neb. 321, 13 N. W. 2d 139, 152 A. L. R. 527.

The discretion to be exercised is not arbitrary, however, but should be one which is sound and equitable in view of all the circumstances. The court must act in the interest of fairness and prudence, and with a just regard to the rights of all concerned and the stability of judicial sales. Michelson v. Wagner, 170 Neb. 28, 101 N. W. 2d 498.

As this court said in County of Lancaster v. Schwarz, 152 Neb. 15, 39 N. W. 2d 921: "If the sale was fairly conducted and the property sold for a reasonable and fair value under the circumstances, the court is ordinarily required in the exercise of its judicial discretion to confirm the sale. Inadequacy of price is not of itself sufficient to warrant a resale unless it appears that such resale would probably produce a higher price. Due regard must be given to the rights of the successful bidder and the stability of judicial sales generally."

The Schwarz case is cited as authority for the statement in 30A Am. Jur., Judicial Sales, § 109, p. 965: "An

upset bid should be considered, however, only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all concerned and the stability of judicial sales permit its acceptance. Thus, an upset bid, made after the judicial sale and before confirmation, is relevant only to the extent that it bears upon the fairness of the judicial sale and the adequacy of the high bid obtained there."

It should be noted at this point that Roy Hull and his brother, Herbert Hull, were both parties to the partition action and part owners of the property being sold. Roy Hull was also guardian of his mother, as well as the upset bidder on behalf of his brother, Herbert, and Roy Hull was present at the original judicial sale. It has been generally understood by the profession and enforced by the courts that for obvious reasons one who has been a bidder at the sale by himself or by an agent will not, as a general rule, be permitted to put in an upset bid. 30A Am. Jur., Judicial Sales, § 112, p. 967. While Roy Hull was not a bidder at the sale, he was present, and there can be no doubt that he and all parties to the action had more than ample notice of the sale and an opportunity to bid. There is no evidence of any kind to account for their failure to bid.

The circumstances here furnish an apt demonstration of the challenge to the stability of judicial sales condemned in County of Lancaster v. Schwarz, *supra*. It is also apparent, under the particular facts of this case, that the original sale was well advertised, fairly conducted, well attended, and that the price bid was an adequate and reasonable price and not an inadequate one. Even in those states which follow the doctrine that any higher bid is sufficient reason to refuse confirmation, it is on the basis that the higher bid is conclusive evidence that the property was sold for an inadequate price. Here the evidence is specifically to the contrary. The upset bid or bids from members of the family group

holding ownership interests in the property ought not to carry the same inferences as to reasonable or adequate value as the bid of a stranger. Where the upset bidder in such a group had full notice of the original judicial sale, and either attended it, or had full opportunity to do so, elements of estoppel may also be involved. All of the other evidence here establishes that the sale was regularly held and fairly conducted, and that the property was sold for a reasonable and adequate price. An upset bid such as this one should not outweigh all the other evidence, much less be treated as conclusive evidence to the contrary.

It is difficult to reconcile our many prior holdings on the issue except on the basis of equitable principles applied to specific factual circumstances. We believe, however, that under the evidence here, the property was sold at the original judicial sale for a reasonable and adequate price and that a just regard for the rights of all concerned and the stability of judicial sales require its acceptance.

We conclude that the trial court abused its discretion in refusing confirmation, sustaining the objections filed, and in reopening the bidding and confirming the sale to the upset bidder. We, therefore, vacate that portion of the order of March 8, 1968, confirming the sale of the north three-quarters of the northeast quarter of Section 9, Township 20 North, Range 10 East of the 6th P. M., Burt County, Nebraska, to Herbert C. Hull, and remand the cause to the district court with directions to overrule the objections filed to the referee's sale; to approve the referee's report, and confirm the sale made by him to L. W. Weber and J. W. Weber, as shown by the referee's report; and for such other and further orders as may become necessary to fully complete the referee's sale and the distribution of the proceeds resulting therefrom. Costs of this appeal are taxed to the objectors.

REVERSED AND REMANDED WITH DIRECTIONS.

HARVEY CRAIG, APPELLEE, V. BOARD OF EQUALIZATION OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLANTS.
164 N.W. 2d 445

Filed January 24, 1969. No. 37046.

1. **Constitutional Law: Taxation.** In order for the state Constitution of Nebraska to restrict plenary power of the Legislature to tax, the language of restriction must be clear.
2. ———: ———. A statute requiring a county to levy a property tax for purposes substantially local does not contravene the prohibition against state levy of a property tax for state purposes although the statute commingles state and local purposes.

Appeal from the district court for Douglas County: JAMES E. MURPHY, Judge. Reversed and remanded with directions.

Clarence A. H. Meyer, Attorney General, Homer G. Hamilton, and Calvin E. Robinson, for appellants.

Ross & O'Connor and McGowan & Troia, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and WILLIAM C. SMITH, JR., District Judge.

SMITH, J.

A county board of equalization levied property taxes in performance of duties imposed by statutes. Some of the statutory provisions allocated fiscal responsibilities to the county for care of its indigent residents in state institutions. The question is whether or not two of the levies violated this constitutional prohibition: "The state shall be prohibited from levying a property tax for state purposes." Art. VIII, § 1A, Constitution of Nebraska. The district court on a taxpayer's appeal from the county board of equalization adjudged the statutory provisions, former section 83-226 (Laws 1965, c. 478, § 15, p. 1545) and section 83-347, R. R. S. 1943, to be unconstitutional. Appeal to this court followed. We review evidence,

history of the constitutional section, operative statutes, previous legislation, and judicial gloss.

The levies were made in 1967 by the Douglas County Board of Equalization for ostensibly county purposes. The rates were .81 mill for "Beatrice State Home Fund" and 2.46 mills for "Mental Hospital Fund." Douglas County under the statutes owed the state (1) $685,539.63 for care of mentally handicapped wards in the home and (2) $2,082,009.24 for care of mentally ill patients (a) in Douglas County Hospital and (b) in state hospitals for the mentally ill.

A legislative bill in 1954 for a proposal to amend Article VIII of the Constitution read: "When a general sales tax, or an income tax, or a combination of a general sales tax and income tax, is adopted by the Legislature as a method of raising revenue, the State shall be prohibited from levying a property tax for state purposes." Senator Burney offered an amendment to add the words "General Fund" as follows: "* * * the state shall be prohibited from levying a property tax for state General Fund purposes." Floor debate on the offer was reported: "Duis: I object to the amendment inasmuch as it will be putting us half in and half out of the property tax field should a sales tax be enacted, * * *. * * * Tvrdik: Under this amendment of Senator Burney's, would that eliminate the special levies? Duis: * * * it would allow * * * special levies. Tvrdik: There is a possibility we would be continuing our special levies under it? Duis: That is right. * * * Burney: The funds excluded are * * * (presently irrelevant, special levies) and these levies for mental hospitals * * *. * * * Duis: * * * Is there anything that would prohibit the State Legislature from having the county make that levy on a county basis? Burney: It would be possible, I think; although Mr. James indicated to me that it might not be possible. In my own mind, I think it might not be possible. * * * Burney: * * * I do not want to write the Constitution so it must include the mental hospital fund * * *

and * * * others." The offer lost. Nebraska Legislative Journal (1954), LB 7, p. 101-104; Laws, 1954, c. 5, p. 64. The proposal was adopted as section 1A. The Attorney General took the position that the section prohibited the special levies. Rep. of Atty. Gen. of Neb. (1953-54) 406; Neb. Leg. Council, State and Local Finance (1962) 47, 241.

A provision obligating Douglas County for costs of care of indigent, mentally handicapped inmates of Beatrice State Home in this proceeding reads: "The superintendent shall certify * * * the amount, * * * due to such institution from the several counties, having inmates chargeable thereto, * * *. * * * The county board shall add such amount to the next county tax levy * * * and pay the amount received from said levy into the state treasury * * *." Laws 1965, c. 478, § 15, p. 1545, formerly § 83-226, R. R. S. 1943.

The fiscal responsibility of Douglas County for its indigent, mentally ill residents included (1) costs of direct care by the county and (2) average per capita costs of maintenance in state hospitals for the mentally ill. § 83-329.04, R. R. S. 1943; § 83-352, R. S. Supp., 1967. The latter costs were payable as follows: "The Director of Administrative Services shall * * * notify the county clerk * * * the amount, * * * such county owes for the care of such patients, * * * and charge the same to the county. * * * The county board shall add such amounts to the next county tax to be levied in the county, and pay the amount so levied into the state treasury, which amount the State Treasurer shall credit to the General Fund." § 83-347, R. R. S. 1943.

Previous legislation had allocated fiscal responsibilities in the above areas of public assistance. From 1885 to 1915 the superintendent of the Beatrice State Home paid expenses of transportation and clothing. For reimbursement the Auditor of Public Accounts drew upon the county treasurer. The statute provided: "* * * the said county shall annually assess and collect by tax the

amount necessary to pay said order * * *." Laws 1885, c. 52, § 8, p. 258. From 1915 to 1945 the Legislature required the county board to provide clothing and transportation, and to pay the superintendent $40 when he admitted an indigent. The money was to be used for "incidental expenses, such as dental work, repairs of clothing, etc., and burial expenses; * * *." It was the board's duty annually to pay the superintendent "such sum of money as added to the balance in his hand shall equal * * * forty dollars * * *." Laws 1915, c. 131, § 1, p. 295. In 1945 the Legislature prescribed "a sum to be fixed by the Board of Control which shall be an amount equal to the per capita cost of maintaining the patient * * *" in the home. Laws 1945, c. 245, § 2, p. 777. Section 3 of the act introduced the phrase "state tax levy" as follows: "The county board shall add such amount to the next state tax levy to be levied in the county, and pay the amount received from said levy into the state treasury, * * *." The phrase was replaced in 1965 by "county tax levy." Laws 1965, c. 478, § 15, p. 1545.

Early statutory provisions concerning care of indigent patients in the state hospital for the insane read: "The board of trustees shall * * * fix the sum to be paid per week for the board and care of patients * * *. The auditor shall * * * charge the same to said county; and the board of county commissioners shall add such amount to the next state tax, to be levied in said county, and pay the amount so levied into the state treasury." G. S., c. 31, §§ 46, 47. An amendment in 1935 replaced the phrase "state tax" with "county tax levy." Laws 1935, c. 181, § 1, p. 676. An amendment in 1937 returned to the original phrase. Laws 1937, c. 208, § 1, p. 835. The Legislature then declared all claims of indebtedness to the state under the 1935 act to be excess charges which it canceled. Provision was made for refunds to the counties. Laws 1937, c. 198, p. 821.

The early legislation concerning the state hospital for the insane had been challenged in State v. Douglas

County, 18 Neb. 601, 26 N. W. 378. A divided court sustained the act, the majority saying: "It is clearly within the power of the legislature * * * to require each county to maintain its own insane * * * or to pay the expense of the maintenance * * * in a hospital provided by the state. In this each state has adopted the course which to its legislature has seemed most judicious.

"It is claimed that the tax * * * is a state tax, and therefore the county has no authority to make the levy, and further, that such levy would be a violation of fundamental requirement that taxation shall be uniform throughout the state. While it is true that the hospital for the insane is * * * a state institution, yet, * * * maintenance of the insane is not necessarily a state burden, and therefore it is within the power of the legislature to require that the tax be levied and collected by each county for the purpose of reimbursing the state, * * *. * * * the tax is uniform throughout the taxing district in which it is levied. This is all that is required. * * *

"(For such maintenance) it is the duty of the * * * (county board) to levy the necessary taxes within the constitutional limit * * *."

The above views were reaffirmed in State v. Stanton County, 100 Neb. 747, 161 N. W. 264. In order for the state Constitution to restrict plenary power of the Legislature to tax, the language of restriction must be clear. State ex rel. School Dist. of Scottsbluff v. Ellis, 168 Neb. 166, 95 N. W. 2d 538.

The meaning of the constitutional prohibition is related to the national scene of state-local relations. The county has been viewed historically as a limited agency. Funding most, if not all, county functions has served state purposes. State government has remained largely free to supervise local administration of the property tax. Programs of state assistance to local units have been tied to effective, equitable use of the property tax by the local units themselves. Federal, state, and local governments have joined to combat conditions of

common concern. See, Adrian, State and Local Governments (2d Ed., 1967), 441; Fesler, The 50 States and Their Local Governments (1967), 13, 25, 152, 397, 580; Maddox, Issues in State and Local Government (1965), 247; Mitau, State and Local Government: Politics and Processes (1966), 519 to 524.

Although conceptual stratification of operations by state and local governments seems ill-suited to the reality of vertical integration, stratification is the central arch of the constitutional prohibition. We therefore conclude that a statute requiring a county to levy a property tax for purposes substantially local does not contravene the prohibition, although the statute commingles state and local purposes.

This court upheld levies similar to those now in suit against arguments that uniformity of distribution throughout the county was not enough without statewide uniformity. The court recognized that the discretion of the Legislature was wide; that the local purposes were substantial. See, State v. Douglas County, 18 Neb. 601, 26 N. W. 378; State v. Stanton County, 100 Neb. 747, 161 N. W. 264. In the present case neither one of the statutory sections contravenes the constitutional prohibition against state levy of a property tax for state purposes.

The judgment is reversed and the cause remanded with directions to dismiss the taxpayer's petition on appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

MILDRED PUPKES, APPELLEE, V. DEWANE SAILORS, APPELLEE, MFA MUTUAL INSURANCE COMPANY, GARNISHEE-APPELLANT.

164 N. W. 2d 441

Filed January 24, 1969. No. 37056.

1. **Insurance.** Compliance with section 44-135, R. R. S. 1943, constitutes a voluntary acceptance of the provisions of that statute.

2. **Insurance: Pleading.** Service of a garnishment summons and interrogatories from any county in the state may properly be had under the provisions of sections 44-135 and 44-137, R. R. S. 1943.
3. **Insurance: Trial.** The failure of an insured to attend trial as requested by the insurer is not per se prejudicial.
4. **Insurance.** An insurer cannot assert a breach of the cooperation clause as a policy defense, in the absence of a showing of prejudice or detriment to the insurer.

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

Baylor, Evnen, Baylor & Urbom, for garnishee-appellant.

Harold L. Gurske and Boland, Mullin, Walsh & Cooney, for appellee Pupkes.

Dwight Griffiths, for appellee Sailors.

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

SPENCER, J.

This is a garnishment action by plaintiff, a judgment creditor of DeWane Sailors, hereinafter referred to as defendant, against MFA, a mutual insurance company, hereinafter referred to as garnishee, by virtue of the omnibus provision in an automobile insurance policy on an automobile driven by defendant and involved in a collision with an automobile driven by plaintiff.

Some of the facts pertinent herein are set out in MFA Mutual Ins. Co. v. Sailors, 180 Neb. 201, 141 N. W. 2d 846. In that action, garnishee sought a declaratory judgment to determine its rights under the policy in question. We there held that garnishee was obligated to defend the action brought by plaintiff against defendant because there had been no showing that the breach of the policy had resulted in substantial prejudice to garnishee.

After the decision in MFA Mutual Ins. Co. v. Sailors,

supra, garnishee retained counsel to represent defendant. This counsel interviewed defendant, and, preparatory to the trial, went with him to the scene of the accident. There defendant gave a detailed statement, partially exonerating himself and suggesting plaintiff drove into the automobile he was driving. Defendant, who had a felony record, 7 years earlier had given garnishee's representative a statement to the effect that at the time of the collision he was, to use his words, "pretty well lit"; that his recollection was foggy; and that he couldn't remember any of the details of the accident.

Defendant's counsel testified that he informed defendant when the case would be called for trial, and told him that his presence would be required. Defendant admits that he was advised of the trial date, but denies he was told he had to be present. At the time of the trial defendant was in Kansas City seeking work. He did not return to Nebraska until after the trial. Defendant's counsel was instructed by garnishee's representative, who was present at the time the case was called for trial, to withdraw from the case. He made a motion for a continuance, and when this was overruled requested permission of the court to withdraw. This was refused. The case proceeded to trial in the absence of defendant, and resulted in a judgment against defendant in the sum of $14,500.

Subsequent to the judgment, plaintiff filed the present garnishment action in aid of execution. Garnishee filed a special appearance contesting the right of plaintiff to issue a garnishment summons in Richardson County, to be served in Lancaster County on the Director of Insurance rather than on the president or other officer of garnishee, contrary to section 25-1011, R. R. S. 1943. This special appearance was overruled. The action then proceeded to trial on the garnishment answer, alleging essentially that the defendant's failure to cooperate as required by the insurance policy relieved garnishee of any liability herein. The trial court after hearing

decreed that plaintiff recover judgment against garnishee in the sum of $10,000 and costs. Garnishee perfected an appeal to this court.

Although garnishee sets out 20 assignments of error, there are only two main issues herein: Whether the special appearance should have been sustained, and whether garnishee was prejudiced by the failure of defendant to appear at the trial.

Garnishee argues that section 25-1056, R. R. S. 1943, provides that service of a garnishment summons shall be in all respects as provided in section 25-1011, R. R. S. 1943, which section provides that copies of the garnishment summons and interrogatories shall be served on a corporation by leaving them with the president or other officer of the corporation or with its managing agent. Garnishee argues that this is the only manner of service provided, and is controlling herein.

Service herein was had under the provisions of sections 44-135 and 44-137, R. R. S. 1943. Section 44-135, R. R. S. 1943, requires the appointment of the Director of Insurance as the lawful attorney for service by every foreign insurance company doing business in Nebraska. Section 44-137, R. R. S. 1943, provides the manner of such service. In Hinds State Bank v. Loffler, 113 Neb. 110, 202 N. W. 465, we held that garnishment being a statutory remedy, a litigant seeking such relief must find his authority in the statute, and that after judgment a summons from one county to another in aid of execution is unauthorized.

The question presented is, must a Nebraska judgment creditor who seeks garnishment against a foreign insurance company which insured the liability of the Nebraska judgment debtor transcribe that judgment to the county and state in which the foreign carrier has its principal office, and obtain service upon the president or other officer or managing agent of the foreign insurance company, notwithstanding the foreign insurer's compliance with section 44-135, R. R. S. 1943.

Garnishee, in order to do business in Nebraska, has complied with the provisions of section 44-135, R. R. S. 1943. It now seeks to nullify the effect of this compliance by insisting on a strict interpretation of the provisions of section 25-1056, R. R. S. 1943, the garnishment in aid of execution statute, as interpreted in Hinds State Bank v. Loffler, *supra*. It certainly was not the intention of the Legislature to make section 44-135, R. R. S. 1943, a condition precedent to the right of a foreign insurance company to do business in Nebraska, and still permit it to avoid the effect of the intent of that statute. We determine that compliance with section 44-135, R. R. S. 1943, constitutes a voluntary acceptance of the provisions of that section, and that service of a garnishment summons and interrogatories from any county in the state may properly be had under the provisions of sections 44-135 and 44-137, R. R. S. 1943. See Baker Steel & Machinery Co. v. Ferguson, 137 Neb. 578, 290 N. W. 449, 131 A. L. R. 798. The special appearance was properly overruled.

Garnishee argues that the failure of an insured to attend trial as requested by the insurer is per se prejudicial, and cites cases from five jurisdictions which so hold. An annotation in 60 A. L. R. 2d at page 1149 suggests this is the minority rule. The majority view is that the cooperation clause of a policy is not breached by the insured's nonattendance where his testimony would not have been of material aid, or where the insurer was not prejudiced by his absence. The question is no longer an open one in this jurisdiction. In the previous appearance of this case in this court, MFA Mutual Ins. Co. v. Sailors, 180 Neb. 201, 141 N. W. 2d 846, we held: "An insurer cannot assert a breach of the cooperation clause as a policy defense in the absence of a showing of prejudice or detriment to the insurer." See, also, Iowa Mut. Ins. Co. v. Meckna, 180 Neb. 516, 144 N. W. 2d 73. Regardless of the nature of the breach,

there must be a showing of detriment or prejudice to the insurer.

The trial court found that defendant orally informed his counsel that he would be present at the time and place of trial; that he did not keep counsel informed of his whereabouts; and that he did not appear at the trial. The ultimate question then is whether, under the facts of this case, the failure of the defendant to be present at the trial was prejudicial to the garnishee.

The record amply demonstrates that garnishee was well aware that defendant was difficult to locate for interviews and was unreliable in many respects, particularly in keeping appointments or making appearances. Defendant, during a part of the intervening time, was absent from the State of Nebraska, which fact was known to the garnishee. Garnishee secured defendant's attendance at the garnishment hearing by the issuance of a subpoena.

There is little doubt that at the time of the accident defendant was under the influence of intoxicants. Garnishee, shortly after the accident, took an extensive statement from the defendant which became a matter of record in the previous case. His statement to counsel shortly before the trial was so much at variance with the previous statement that it was readily apparent his credibility as a witness was subject to serious question. The trial court in its judgment entry specifically found: "Defendant Sailors testified at the garnishment proceeding in response to a subpoena. His appearance and demeanor as a witness were unimpressive. His ability to recall facts and circumstances at the time of the accident was limited, vague and inconsistent with other statements made by him. Defendant had been convicted of a felony."

Garnishee had the burden of proving prejudice. On the facts adduced, we cannot say that garnishee met that burden. As the observation of the trial court set out above would indicate, there is a very serious ques-

tion whether the testimony of the defendant would not have been extremely detrimental to the garnishee's case. The question presented herein is one of fact. In determining the weight of the testimony, we must consider the fact that the trial court observed the witnesses, their demeanor of testifying, and accepted one version of the facts rather than the other.

For the reasons given, we determine that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

MERVYN GOMPERT ET AL., APPELLANTS, V. GREAT WESTERN SUGAR COMPANY, A CORPORATION, APPELLEE.
164 N. W. 2d 459

Filed January 31, 1969. No. 36944.

Trial. Instructions to the jury should be considered and construed as a whole.

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

Van Steenberg, Winner & Wood, for appellants.

Wright, Simmons & Hancock, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and COLWELL, District Judge.

BOSLAUGH, J.

The plaintiff, Mervyn Gompert, operates a farm in Scotts Bluff County, Nebraska. The defendant operates a sugar factory near Mitchell, Nebraska. In 1965 the plaintiff entered into a contract with the defendant to grow sugar beets upon a 25-acre tract owned by the plaintiff and his wife.

The plaintiff purchased chemicals from the defendant which he applied to the beet field for the purpose of weed control. The beets failed to develop satisfactorily

so the field was replanted to beans on June 6, 1965. The beans did not grow properly so the field was again replanted to beans on July 1, 1965. The second bean planting did not mature and plaintiff did not harvest a crop from the 25-acre tract in 1965.

The plaintiffs claim that the bean crop was damaged and prevented from maturing by the chemicals purchased from the defendant; that the defendant had represented and warranted to the plaintiff that the chemicals would not be harmful to beans planted in fields to which chemicals had been applied; and that the defendant was negligent in regard to representations which it made to the plaintiff concerning the chemicals. The plaintiffs' first cause of action alleged the breach of an express warranty and the second cause of action alleged negligence.

The defendant alleged that it made no warranty as claimed by the plaintiff and that the plaintiff was contributorily negligent and assumed the risk of damage.

The jury returned a verdict for the defendant. The plaintiffs' motion for new trial was overruled and they have appealed. The assignments of error relate to the instructions.

The plaintiffs contend that instruction No. 18 was erroneous because it included the following language: "* * * there is no duty upon a seller concerning an article which is sold except where the product is used for the purpose for which it is ordinarily and generally sold and except also where seller makes a specific warranty or promise in reference to it."

It was stipulated at the pretrial conference that all warranties alleged by the plaintiffs were express and not implied. Instruction No. 18 merely stated that there is no duty upon a seller concerning a product unless a specific warranty or promise is made in reference to the product, or the product is used for the purpose for which it is ordinarily and generally sold. See Mueller v. Keeley, 165 Neb. 243, 85 N. W. 2d 309. Instruction No.

18 advised the jury that a seller may be liable for an express warranty. It was not erroneous or prejudicial, particularly when considerd in its entirety and together with the other instructions to the jury.

The plaintiffs further contend that the trial court should not have submitted the issue of contributory negligence and assumption of risk to the jury.

The evidence shows that the beets were planted in 22-inch rows and that the chemicals were applied at the time of planting in 7-inch bands centered on the rows. This left a 15-inch area between the rows to which the chemicals were not applied.

The defendant produced evidence that at the time the plaintiff was considering abandoning the beet crop, he was advised that the defendant's recommendations were, in order of preference, that the plaintiff (1) replant beets, or (2) plant corn, or (3) plant between the beet rows, or (4) deep plow. The plaintiff did not follow these recommendations but used a spring tooth harrow to prepare the field, and made no attempt to plant the beans between the beet rows. There was other evidence from which the jury could have found that the paintiff should have known that the chemicals had remained active longer than normally expected and would damage or destroy any broad-leaved plant at the time the beans were planted.

With respect to the issue of assumption of risk there was evidence that the plaintiff knew that there were problems involved in the use of chemicals and understood the risk involved in planting beans in soil that had been treated with the chemicals purchased from the defendant. The plaintiff testified that he "checked around" and "asked different people" and then decided to "gamble on beans." The trial court did not err in submitting the issues of contributory negligence and assumption of risk to the jury.

The judgment of the district court is affirmed.

AFFIRMED.

SUN OIL COMPANY ET AL., APPELLANTS, V. MARY EMERY ET AL., APPELLEES.
164 N. W. 2d 644

Filed January 31, 1969. No. 36958.

1. **Deeds: Estates.** An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a less interest is effectively manifested.
2. ———: ———. Ordinarily, the inclusion of a purpose clause in a deed, of and by itself, does not operate to limit the estate granted by the deed.

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

Robert J. Bulger and Richard W. Coates, for appellants.

Frank Glebe and Lyman & Gallawa, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and HUBKA and GARROTTO, District Judges.

WHITE, C. J.

The question involved in this case is whether the plaintiff acquired a title in fee or a mere right-of-way by virtue of a deed executed by their predecessors in the chain of title in 1910. The pertinent portions of the deed are: "That the said parties * * * have remised, released and quit-claimed, and by these presents do, for themselves, their heirs, executors, administrators and assigns, remise, release and forever quit-claim and convey unto the said party of the second part and to its successors and assigns forever, all their right, title, interest, estate, claim and demand, both at law and in equity, of, in and to all of a certain strip of ground in

"Lot No. 3 in Section Eighteen ----------(18)
Township Twenty-two ----------(22)
North of Range Fifty-three ----------(53)
"west of the Sixth Principal Meridian in Scotts

Bluff County, Nebraska; *said strip of ground* being of the uniform width of one hundred and fifty (150) feet, being seventy-five feet (75 ft.) on each side of the center line of The Farmers Mutual Canal Company's canal, as surveyed and located over, through and across said Lot No. Three (3) of said Section Eighteen (18)

"This deed is given for the purpose of conveying to the party of the second part a right of way for its irrigation canal over, through and across said above described premises, together with all and singular the hereditaments thereunto belonging.

"To have and to hold the above described premises unto the said The Farmers Mutual Canal Company, its successors and assigns, so that neither they, the said Mathias Schumacher and Nancy Schumacher, *nor any person in their name and behalf, shall or will hereafter claim or demand any right, title or interest to the said premises or any part thereof; but they and every one of them shall by these presents be excluded and forever barred.*" (Emphasis supplied.)

Considerable ingenious and refined argument in the briefs of both parties is devoted to a discussion of the rules of construction used in construing deeds. These rules, of course, may be helpful in determining the fundamental question of the intent of the parties, but they should never be applied with ritualistic supremacy. The rule of law at the bottom of this case and in effect at the time the conveyance was made in 1910 is section 6192, Rev. St. 1913, as follows: "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." The present statute, section 76-104, R. R. S. 1943, is in part as follows: "An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a less interest is effectively manifested."

In determining whether there was an effective limita-

tion required by the statute, the question boils down to whether the words, "This deed is given for the purpose of conveying to the party of the second part a right of way for its irrigation canal * * *" is mere description or whether it effectively created an intent to reserve an interest in the property, contrary to the absolute terms of the granting clause and the last paragraph, the traditional "habendum" clause.

In Carr v. Miller, 105 Neb. 623, 181 N. W. 557, the pertinent language of the deed was: "* * * does hereby grant, bargain, sell, and convey unto the said Omaha Bridge and Terminal Railway Company, its successors and assigns, for terminal and railway purposes and uses, the following described real estate * * *." This court said: "We think that the words quoted amount at most only to a description of the use to which the land was to be put, or at most a covenant for the violation of which a suit for damages might be maintained. * * * We find nothing in the words, 'for terminal and railway purposes and uses,' which indicates that *the grantor intended to reserve in itself any interest whatsoever in the land granted, or even that the language constituted a restriction of the use of the land to the railway tracks and facilities.* Before such a construction could be approved it would be necessary to find *some language in the instrument indicating such an intent.*" (Emphasis supplied.) The Carr case has long been the law in the State of Nebraska and has been followed in many jurisdictions in almost identical conveyances with the one therein presented and with the present case. See, Carr v. Miller, *supra;* Midkiff v. Castle & Cooke, Inc., 45 Hawaii 409, 368 P. 2d 887; Rowell v. Gulf, M. & O. R.R. Co., 248 Ala. 463, 28 So. 2d 209; Midstate Oil Co. v. Ocean Shore R.R. Co., 93 Cal. App. 704, 270 P. 2d 216; Coates & Hopkins Realty Co. v. Kansas City Terminal Ry. Co., 328 Mo. 1118, 43 S. W. 2d 817; Radetsky v. Jorgensen, 70 Colo. 423, 202 P. 175; 26 C. J. S., Deeds, § 134, pp. 987, 988; 19 Am. Jur. 2d, Estates, § 29, p. 107. The Carr case

and the overwhelming weight of authority seem to support the rule that a purpose clause, of and by itself, does not operate to limit the estate granted by the deed. It does not convert an otherwise absolute granting and habendum clause into an easement or other limited estate, unless there is other language clearly manifesting such an intention. This interpretation is not only logical but is consonant with the intent statute and the principle underlying it, to maintain the stability and certainty of real estate titles and favor the vesting of fee estates in the interest of maintaining the freedom of alienability of property. We, therefore, come to the conclusion, construing the whole deed, that the purpose clause used is a mere expression or recital of the anticipated use by the immediate grantee of the property and does not indicate an intent to limit the estate granted unequivocally and absolutely in the granting clause and confirmed by the hallowed finality of the habendum clause.

So construed, the purpose clause is consistent with the other language in the deed and it is not necessary to reach any issue of conflict between the clauses discussed by this court in City of Gering v. Jones, 175 Neb. 626, 122 N. W. 2d 503. As mentioned, this case has been very ably argued and presented by counsel of all the parties. As an original matter, the decision in this case would be close. But our previous decisions, followed in the cases generally, together with the basic policy behind the intent statute, leaves us no room for doubt as to the decision in this case. We further point out that a grantor is charged with knowledge of the intent statute, and if he desired to create a mere easement or to convey a determinable fee, he could have easily used appropriate language for this purpose.

Consideration should be given to the strenuous insistence by appellees of the applicability of Blakely v. Chicago, K. & N. Ry. Co., on rehearing, 46 Neb. 272, 64 N. W. 972. There the court held that a conveyance for "right of way and for operating its railway *only*" did not

convey a fee. Not only is the Carr case a much later case, but the Blakely case has not been followed in other jurisdictions passing on this situation. But an even stronger reason exists for rejecting it. The Blakely case perhaps anticipated the Carr case as well as the case before us by specifically pointing out that it did not pass on the question if the deed involved therein had been absolute in form.

The district court found that only an easement had been granted and rendered judgment accordingly. The judgment of the district court is reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SCHOOL DISTRICT NO. 8 OF KEITH COUNTY, NEBRASKA, ET AL., APPELLANTS, V. SCHOOL DISTRICT NO. 15 OF KEITH COUNTY, NEBRASKA, ET AL., APPELLEES.

164 N. W. 2d 438

Filed January 31, 1969. No. 36962.

1. **Schools and School Districts: Taxation.** School tax money received by one school district from lands apparently, but not legally, within its exterior boundaries, levied and collected for its uses and purposes, cannot be recovered by the school district within whose territory the lands actually lie, where no levy was made or taxes collected on said lands by such district for its uses and purposes, and each district obtained exactly the amount of money for which its budget called and neither district obtained or had the use of money intended for the other district.
2. ———: ———. In absence of statute, taxes voluntarily paid cannot be recovered. One who seeks to avail himself of the statutory right to recover from a school district a tax voluntarily paid must show a substantial compliance with the statute.

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

Firmin Q. Feltz, for appellants.

Frank B. Svoboda, for appellees.

Heard before WHITE, C. J., BOSLAUGH, SMITH, and MCCOWN, JJ., and HUBKA, GARROTTO, and ACH, District Judges.

HUBKA, District Judge.

This is an action in equity to void a transfer of land from School District No. 8 to School District No. 15, both districts being located in Keith County, Nebraska; and to recover for said School District No. 8 school tax money claimed to have been wrongfully paid to School District No. 15 arising by such void transfer.

Plaintiffs School District No. 8 and Donald Welch, Marvin Pullen, and James Perlinger, members of the school board, residents, taxpayers, and electors of School District No. 8, alleged in the first cause of action of their amended petition that the county superintendent, county clerk, and county treasurer of Keith County, Nebraska, on a freeholder's petition and without statutory notice detached Section 1, Township 13 North, Range 37, in Keith County, Nebraska, from School District No. 8, and attached it to defendant School District No. 15; and that the transfer was void and the property was erroneously assessed since 1951. The second cause of action prayed for an accounting for school taxes on property in Section 1 paid to defendant School District No. 15 because of the purported transfer.

The trial court sustained defendants', School District No. 15 and Keith County, Nebraska, demurrers to plaintiff's, School District No. 8, amended petition. School District No. 8 failed to amend its amended petition or to further plead and it was later dismissed.

The district court found: That the transfer of property was void for want of statutory notice; that the total assessed value of each school district was erroneous since 1951; that each district presumably established budgets according to law; that the board of equalization of Keith County duly fixed the mill levy for each school district

according to the assessed value reported to said board; that any discrepancies in the extension of the valuations for tax purposes did not cause any reduction in funds accruing to School District No. 8; and that no landowners have applied for refund of illegal assessments of taxes. It ordered the second cause of action of plaintiffs Donald Welch, Marvin Pullen, and James Perlinger be dismissed; the defendant Keith County, Nebraska, to correct its records to reflect the invalidity of the transfer of said Section 1; and ordered the action of plaintiff School District No. 8 dismissed. From this judgment, plaintiffs appeal.

The facts are not in dispute. On July 21, 1951, Mrs. Helen Paddock signed a freeholder's petition to change the school district boundaries. On July 21, 1951, an order detaching the property from School District No. 8 and transferring it to School District No. 15 was entered. Taxpayers in Section 1 paid real and personal school taxes to the county treasurer of Keith County, Nebraska, from December 28, 1951, to and including the year 1966, which have been credited to School District No. 15. School District No. 15 prepared a budget for each year as required by law. All the school tax money was expended by School District No. 15 for the purpose of educating children within School District No. 15, including any children living on the disputed land. There were school age children living on Section 1 and attending District No. 15 from 1951 to the year 1959, since that time no school age children have resided on Section 1. Each school district is a Class I district.

This proceeding is a collaterial attack on the transfer of Section 1 from School District No. 8 to School District No. 15.

On July 21, 1951, the filing date of the freeholders' petition, section 79-403, R. R. S. 1943, amended by the Legislature in 1951, required that a notice of filing of the petition and of the hearing thereon before the board be given at least 10 days prior to such hearing by one

publication in a newspaper of general circulation in such district and by posting a notice on the outer door of the schoolhouse in each district affected thereby, which notice shall designate the territory to be transferred.

To give the board jurisdiction, a petition must be filed and notice given. State ex rel. School Dist. No. 1 v. School Dist. No. 19, 42 Neb. 499, 60 N. W. 912. It was established that a public notice was not given and posting of notices was not had as required by the statute. We hold the petition was properly filed but hearing proceeded irregularly without a notice as required by statute and the district court was correct in finding that transfer of Section 1 was null and void.

Plaintiffs Donald Welch, Marvin Pullen, and James Perlinger contend that the court erred in dismissing plaintiffs' second cause of action for damages and an accounting of school tax money received by School District No. 15.

The statutes for each year 1951 to 1966 required that the school board of each school district shall, prior to the annual school district meeting, prepare a budget for the operation and maintenance of school during the ensuing school year sufficient to maintain the same in the manner provided by law; and the school board shall make and deliver to the county superintendent and the county clerk for the use of the county board of equalization of each county a certificate in writing signed by the secretary of the school board containing a copy of the budget as finally adopted and approved. The certificates shall include a statement showing the amount of funds necessary to be raised by a tax levy, as shown by the budget for the district, and to be collected by the treasurer at the same time and in the same manner as state and county taxes are collected.

School districts are not private corporations. While they hold title to school sites and schoolhouses, etc., they do not enjoy the general property rights of natural persons. They are merely legislative agents to receive

and disburse what the Legislature provides for them through administration of a taxation scheme by another set of legislative agents. The territory of a state is divided into school districts or their equivalent, and the schools of each district are supported by taxes on the property of that district. In order to enable them to discharge their functions, school districts are constituted quasi-municipal corporations with boards of officials for governing bodies.

The question at issue is whether school tax money received by one district from lands apparently, but not legally, within its exterior boundaries, levied and collected for its uses and purposes and devoted to the purpose of education of school children, can be recovered by a school district within whose territory the land actually lies, where both districts involved obtained exactly the amount of school tax money for which their budget called, and neither district obtained or had the use of money intended for the other.

So far as the evidence in the case at bar is concerned, each district in this action had and enjoyed all the money necessary for its uses and purposes, and no money was paid by mistake to School District No. 15 derived from taxes levied and collected for the uses and purposes of the plaintiffs as no such taxes were levied or collected.

The authorities sustain the rule that money received by one school district from lands apparently, but not legally, within its exterior boundaries, levied and collected for its uses and purposes and devoted to its uses and purposes, cannot be recovered by a district within whose territory the lands actually lie, where no levy had been made or taxes collected for its uses and purposes, and where both districts involved obtained exactly the amount of money for which their budget called, and neither district obtained or had the use of money intended for the other. Fall River Joint Union High School Dist. v. Shasta Union High School Dist. (1930),

104 Cal. App. 444, 285 P. 1091; Fort Wayne Community Schools v. State of Indiana ex rel. New Haven Public Schools (Feb. 9, 1968), — Ind. —, 233 N. E. 2d 636; Pleasant View Reorganized School Dist. No. 1 of Green County v. Springfield Reorganized School Dist. (Mo. 1961), 341 S. W. 2d 853; School District of Terre Haute v. Harrison School Township, 184 Ind. 742, 112 N. E. 514; Board of Education of Lyme Township v. Board of Education of Special School Dist. No. 1, 44 Ohio 278, 7 N. E. 12; School Directors of Dist. No. 153 v. School Directors of Dist. No. 154, 232 Ill. 322, 83 N. E. 849; Lepanto School Dist. v. Marked Tree School Dist., 173 Ark. 82, 291 S. W. 1006.

Plaintiffs contend that Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85, and Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 102 N. W. 2d 599, constitute and support right to recover for School District No. 8. These cases do not present an issue with respect to school district budgeting, the spending and the using of school tax money for educational purposes within a budget. In other cases relied on by the plaintiffs there was wrongful distribution of funds; misappropriation resulting in the withholding of the funds or payment to a party who thereby received more than its share of revenue to which it was entitled. We are compelled to observe that the fact situation presented and the law therein considered are removed from the facts and issue of law with which we are here confronted.

Taxpayers who paid real and personal property taxes from 1951 to 1966 in Section 1 of School District No. 8 are not parties to this action and have not objected or complained about their respective payment of taxes. Plaintiffs Donald Welch, Marvin Pullen, and James Perlinger have made no claim for any taxes that any one of them have paid, voluntarily or under protest, they only appear as representatives of School District No. 8. In the absence of statute, taxes voluntarily paid cannot be recovered. One who seeks to avail himself of statu-

tory right to recover from a county or school district a tax voluntarily paid must show a substantial compliance with the statute. Misle v. Miller, 176 Neb. 113, 125 N. W. 2d 512; Satterfield v. Britton, 163 Neb. 161, 78 N. W. 2d 817.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES LAPLANTE, APPELLANT.
164 N. W. 2d 448

Filed January 31, 1969. No. 36972.

Criminal Law: Trial. An instruction as to a lesser included offense is proper only when applicable to the evidence, and where there is no evidence that would justify a verdict of guilty of a lesser offense, no instruction need be given.

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

Yost & Yost, for appellant.

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

Byron J. Norval, amicus curiae.

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

WHITE, C. J.

Defendant was convicted pursuant to section 28-729.01, R. S. Supp., 1967, of unlawfully and feloniously assaulting a police officer with a dangerous weapon while the police officer was engaged in the performance of his duties. Defendant appeals this conviction and the subsequent conviction and sentencing as a habitual criminal.

Defendant seeks reversal of his conviction on three grounds: (1) The court erred in failing to instruct on the lesser and included offense of assault where the evidence conclusively showed the defendant to be intoxicated at the time of the assault; (2) there was no credible evidence to establish that defendant knew or should have known that one Officer Stack was in fact a police officer; and (3) the court erred in failing to instruct on the lesser and included offense of simple assault.

The evidence in this case is undisputed, no evidence having been offered by the defendant. Defendant was engaged in a fight wherein he had struck the first blow by slashing with a small knife the cheek of another, causing a wound that necessitated 20 stitches to close. After a short fight, two bystanders stopped the fight and were attempting to disarm defendant when two officers in civilian clothes arrived. The officers announced that they were police and ordered the defendant to drop the knife. The bystanders who were attempting to disarm defendant and the assembled spectators moved back from the scene, the defendant called one of the officers, Officer Stack, by name, then took a swipe at Officer Stack with the knife, attempted to kick him, and took a second swipe at him, whereupon both officers disarmed the defendant.

Defendant alleges that he was entitled to an instruction on a lesser charge of simple assault where the evidence shows that he was intoxicated at the time of the assault. The evidence regarding defendant's intoxication is that defendant had been intoxicated to the extent that he had a "little trouble walking" and his speech "wasn't very good" over 1 hour prior to the alleged assault. Approximately 1 hour before the assault, defendant had been beaten in a fist fight, recovered, dialed a telephone and talked with friends, and had not been seen by any one after being evicted from a bar some 45 minutes before he slashed the third party which led to the intervention by the police officers.

A portion of the rule with regard to intoxication as a defense or as reducing the degree of the crime requires that the intoxication be excessive to the extent of wholly depriving the defendant of reason. Tvrz v. State, 154 Neb. 641, 48 N. W. 2d 761. Considering the evidence most favorable to defendant, the record establishes only that defendant had been drinking beer, was under the influence of alcohol, but had reasonable control of his faculties 1 hour prior to the incident. There was no basis for an instruction on intoxication. Defendant's allegation is without merit.

Defendant next alleges that the charge should have been dismissed because there was no credible evidence to establish that defendant knew or should have known that Officer Stack was in fact a police officer. It is unnecessary to reach the issue of whether knowledge that the victim is a police officer is an essential element of the crime charged. See, United States v. Lombardozzi, 335 F. 2d 414, 10 A. L. R. 3d 826 (2d Cir., N. Y., 1964), cert. denied, 379 U. S. 914, 85 S. Ct. 261, 13 L. Ed. 2d 185; United States v. Montanaro, 362 F. 2d 527 (2d Cir., N. Y., 1966), cert. denied, 385 U. S. 920, 87 S. Ct. 233, 17 L. Ed. 2d 144; United States v. Wallace, 368 F. 2d 537 (4th Cir., Va., 1966), cert. denied, 386 U. S. 976, 87 S. Ct. 1169, 18 L. Ed. 2d 136; United States v. Heliczer, 373 F. 2d 241 (2d Cir., N. Y., 1967), cert. denied, 388 U. S. 917, 87 S. Ct. 2133, 18 L. Ed. 2d 1359. Any error is to the benefit of the defendant. Defendant was charged with knowledge and the jury was so instructed. The evidence regarding this allegation, which evidence is not contradicted, is that upon arriving at the scene, the officers announced once, if not twice, that they were police. The two men who were grappling with defendant withdrew and the crowd of spectators stepped back. Defendant paused and called Officer Stack by name before the assault. Further, the defendant had known Officer Stack when they were in high school and they had worked together on construction work. Certainly,

there was credible evidence that defendant knew or should have known that he was assaulting a police officer.

Defendant's last assignment of error is the failure of the trial court to instruct on the offense of simple assault. Such an instruction is not mandatory where the evidence is conclusive of the guilt of the defendant. Mantell v. State, 141 Neb. 15, 2 N. W. 2d 586; Moore v. State, 147 Neb. 390, 23 N. W. 2d 552. Further, in Davis v. State, 116 Neb. 90, 215 N. W. 785, this court stated the general rule in the following language: "Such an instruction is proper only when applicable to the evidence and where the evidence would justify a verdict of guilty of the lesser offense. If the evidence is such as to warrant only a verdict of the greater offense, or one of not guilty, then it is not proper to give such an instruction." See, also, In re Application of Flanders, 119 Neb. 761, 230 N. W. 684; Olney v. State, 169 Neb. 717, 100 N. W. 2d 838. The evidence in the present case is such that defendant is either guilty of the crime charged or not guilty. The trial court did not err in failing to instruct on the lesser offense.

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

AFFIRMED.

McCOWN, J., dissenting.

The first count of the information charged the defendant with feloniously and maliciously stabbing Jack Tiegs with intent to wound under section 28-410, R. R. S., 1943. The second count of the information charged the defendant with an unlawful and felonious assault with a dangerous weapon upon Clifford M. Stack, a law enforcement officer, engaged in his official duties under section 28-729.01, R. S. Supp., 1967. The defendant requested the court to instruct the jury, with respect to both the first count and the second count, that the elements of the particular offense also might constitute the lesser included offense of assault or assault and battery.

The court did so instruct the jury as to Count I, but failed to do so as to Count II. The jury returned a verdict of not guilty on Count I, but found the defendant guilty of the lesser and included crime of assault and battery; and found the defendant guilty as charged on Count II.

The majority opinion here finds it "unnecessary to reach the issue of whether knowledge that the victim is a police officer is an essential element of the crime charged" under Count II.

It should be noted here that the second count of the information itself specifically charged the defendant with unlawfully and feloniously assaulting with a dangerous weapon, "Clifford M. Stack, whom the said Charles LaPlante, knew to be a law enforcement official * * *." The jury was specifically instructed that among the essential elements required to be established beyond a reasonable doubt on Count II was "* * * 4. That defendant knew he (Clifford Stack) was a law enforcement officer."

Under 18 U. S. C. A., Crimes and Criminal Procedure, § 111, p. 11, the federal statute after which section 28-729.01, R. S. Supp., 1967, was apparently patterned, there is a split of authority as to whether scienter or guilty knowledge is essential. See, Annotation, 10 A. L. R. 3d 833. The appropriate rule should require proof that the defendant knew or reasonably should have known that the person assaulted was a law enforcement officer. It would also seem obvious that the information here properly and specifically charged that knowledge, and the jury was so instructed.

It is difficult to accept the conclusion of the majority opinion that the evidence is conclusive that the defendant knew Stack was a law enforcement officer. That opinion notes that the defendant had known Officer Stack when they were in high school, and that they had worked together on construction work. It does not note that Stack had been a police officer for less than 2

months at the time of the assault, and there is no evidence in the record that the defendant knew that fact. The evidence also shows that the officers arrived in an unmarked car and were both in plain clothes, with no weapons or badges visible. The defendant was engaged in a fight with a crowd surrounding the combatants. The officers walked up to the crowd and told the spectators to move away. One officer, not Officer Stack, stated to the defendant: "This is the police," and the defendant said nothing in response. Under these circumstances, it would certainly seem to be invading the province of the jury to hold that the evidence was conclusive that the defendant knew or reasonably should have known that Stack was a law enforcement officer.

"While, under some statutes, to be guilty of this offense the offender must know that the person assaulted is an officer, it is not necessary that the person assaulting the officer knows that the officer is about his official duties. Under other statutes ignorance of the fact that the person assaulted was a peace officer in the discharge of his duties is no defense to the crime, but it may be shown to reduce the grade of the offense from an aggravated to a simple assault." 6 C. J. S., Assault and Battery, § 84, p. 939.

A defendant is entitled to jury instructions on his theory of the case as disclosed by the evidence. Where the evidence, if believed by the jury, could absolve the defendant from guilt of the greater offense, but would support a finding of guilt of the lesser offense, an instruction as to the lesser offense should be mandatory when requested.

SMITH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. WYATT MICHAEL ROSE, APPELLANT.

164 N. W. 2d 646

Filed January 31, 1969. No. 36995.

1. **Constitutional Law: Criminal Law: Courts.** The due process clauses of the state and federal Constitutions do not require that a person convicted after a fair trial be confronted with and permitted to cross-examine witnesses as to his prior criminal record considered by the judge in accordance with a state statute in determining the sentence to impose pursuant to the wide discretion vested in him under the law.
2. **Criminal Law: Courts: Evidence.** A sentencing judge has a wide discretion as to the sources and types of information used to assist him in determining the sentence to be imposed within the limits fixed by statute.
3. ———: ———: ———. A sentencing judge may properly consider reports of probation officers, police reports, affidavits, and other relevant information including his own observations of the defendant.
4. ———: ———: ———. Arrests of the defendant upon which no conviction was obtained or sought are material as bearing on defendant's character, previous conduct, and the moral turpitude involved.
5. **Criminal Law: Appeal and Error.** Where a sentence has been imposed by the district court within statutory limits, it will not be disturbed in the absence of an abuse of discretion.

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

Fromkin, Fromkin & Herzog, for appellant.

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

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

CARTER, J.

The defendant, Wyatt Michael Rose, was charged in the district court for Douglas County with the crime of burglary. The defendant was arraigned on December 5, 1967, and, with the assistance of legal counsel, entered a plea of guilty. Sentence was deferred pending a pre-

sentence investigation and on April 16, 1968, defendant was sentenced to the Nebraska Penal and Correctional Complex for a period of not less than 2 years nor more than 3 years. The defendant has appealed to this court.

It is the contention of the defendant that the sentence is excessive in that the trial court considered improper matters arising from the presentence investigation which the defendant caused to be placed in the record.

The report of the chief adult probation officer shows the following: According to the records of the Omaha police department, defendant, in 1960, then 13 years of age, was charged with the possession of obscene photographs and was placed on probation. In 1963, he was charged with malicious destruction of property and was again placed on probation. In 1964, he was charged with violating the terms of his probationary order and was sentenced to serve 8 days in the county jail. In 1965, he was charged with armed robbery and robbery and assault with intent to commit murder. This charge was dismissed. In 1966, he was arrested as a suspect in the commission of grand larceny, but no charge was filed. Later in 1966, he was charged with shooting with intent to kill, wound, or maim and this case was also dismissed. Still later in 1966, he was charged with petit larceny and was fined $25 and costs. Still later in 1966, he was charged with petit larceny and sentenced to 60 days in the county jail. In 1967, defendant was charged with petit larceny, second offense, but the charge was dismissed. Later in 1967, while out on bond in the case now before the court, he was arrested for carrying a concealed weapon and resisting arrest, but these charges were dismissed. At the time defendant entered his plea of guilty to the charge of burglary, defendant admitted that while riding in an automobile with two others, he and one of the others entered the Takin Brothers Truck Line building through a hole in the panel of the door where they were apprehended by the police while hiding behind a pile of tires. He informed the court that he

entered the warehouse with intent to steal. At the time of imposing sentence, the trial court stated, in responding to the argument of defense counsel that defendant had reformed, that: "He certainly must have changed within the last few months, I will say that for him. I had him in court here where he came in and testified. If I ever heard perjury, it certainly was in that case. He came in and told a cock and bull story under oath in that case." It is under such a showing as here recited that defendant was sentenced to imprisonment from 2 to 3 years and which defendant contends was beyond the discretion of the trial court.

It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the sourse and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct. In gaining this information, the trial court may consider reports of probation officers, police reports, affidavits, and other information including his own observations of the defendant. A presentence investigation has nothing to do with the issue of guilt. The rules governing due process with respect to the admissibility of evidence are not the same in a presentence hearing as in a trial in which guilt or innocence is the issue. The latitude allowed a sentencing judge at a presentence hearing to determine the nature and length of punishment, other than in recidivist cases, is almost without limitation as long as it is relevant to the issue. Maher v. State, 144 Neb. 463, 13 N. W. 2d 641; State v. Hylton, 175 Neb. 828, 124 N. W. 2d 230; Williams v. New York, 337 U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337.

Section 29-2217, R. R. S. 1943, furnishes adequate basis for the foregoing holdings. It states: "In all cases of criminal prosecution, whenever any person shall have

been found guilty, by verdict of a jury, or by his plea of guilty duly entered in the cause, of any misdemeanor or any felony, except murder, treason, or forcible rape, it shall be the duty of the court in which such cause is pending to ascertain, if practicable, through the agency of a probation officer or otherwise, the age of the accused, whether the offense of which he is found guilty by such verdict is his first offense, the extent of the moral turpitude involved in the act committed by the accused, and such other facts and circumstances relating to the accused as he may desire to know."

In the instant case, the record of the defendant shows a long list of arrests and convictions. It is true that many of the arrests did not lead to a conviction of crime, but they are no less proper to be considered in arriving at the sentence to be imposed. Egelak v. State (Alaska), 438 P. 2d 712. Defendant contends that he has reformed, but the only reference to reformation appears in the argument of his counsel to the court in mitigation of the offense. It seems clear to us that the past record of defendant is such as to foreclose the contention that the trial court abused its discretion.

It is argued at length that the statement of the trial judge regarding the perjury of the defendant in a previous case is prejudicial to the rights of the defendant. The record of the presentence hearing is such that the sentence is clearly within the court's discretion even if the perjury statement had been locked within the court's breast.

Where a sentence has been imposed by the district court within the limits prescribed by statute, it will not be disturbed in the absence of an abuse of discretion. Nicholson v. Sigler, *ante* p. 24, 157 N. W. 2d 872. We find no abuse of discretion in imposing the sentence in the instant case and it is affirmed.

AFFIRMED.

IN RE APPLICATION OF JOHN E. NEYLON, DOING BUSINESS AS NEYLON BROS. FREIGHT LINES.

JOHN E. NEYLON, DOING BUSINESS AS NEYLON BROS. FREIGHT LINES, APPELLEE, V. PETERSEN & PETERSEN, INC., ET AL., APPELLEES, IMPLEADED WITH WINTER BROS., INC., ET AL., APPELLANTS.

164 N. W. 2d 452

Filed January 31, 1969. No. 37032.

1. **Administrative Law: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.
2. **Administrative Law: Motions, Rules, and Orders.** The Nebraska State Railway Commission has continuing jurisdiction over its orders and the right to modify, annul, and vacate them thereafter. The doctrine of res judicata does not apply.
3. **Administrative Law: Public Service Commissions.** Evidence of operations under color of authority may be considered by the Nebraska State Railway Commission in determining whether or not the proposed service is or will be required by the present or future public convenience and necessity.
4. ———: ———. The issue of public convenience and necessity is ordinarily one of fact and where there is evidence in the record to sustain the Nebraska State Railway Commission's order, this court cannot say that it is unreasonable and arbitrary.

Appeal from the Nebraska State Railway Commission. Affirmed.

Nelson, Harding, Leonard & Tate and Charles J. Kimball, for appellants.

Herman Ginsburg and James E. Ryan, for appellee Neylon.

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

MCCOWN, J.

The Nebraska State Railway Commission reopened its proceedings and, upon reconsideration, granted the

alternative application of John E. Neylon, doing business as Neylon Bros. Freight Lines, to extend his authority to permit statewide irregular route operation, which had previously been denied. Protestants have appealed.

Neylon had applied originally to the commission seeking an order clarifying or interpreting his certificate as authorizing statewide irregular route operation or, in the alternative, for an extension of his authority to permit such operation. The commission interpreted Neylon's certificate as permitting irregular route operation only to and from Gage County, and not statewide, and also denied the alternative petition to extend his certificate to authorize statewide irregular route operations. That action of the commission was affirmed by this court December 22, 1966. See Neylon v. Petersen & Petersen, Inc., 181 Neb. 143, 147 N. W. 2d 488. The essential facts involved are set out in our prior decision and will not be restated here except for clarification or explanation.

The appellants contend that because of the previous order of the commission and its affirmance by this court, the commission had no jurisdiction to reopen the matter; that the doctrine of res judicata bars a reconsideration and redetermination of the order; and that there is no evidence to support the present order of the commission.

A ruling by the Nebraska State Railway Commission on the issuance or denial of a certificate of public convenience and necessity constitutes the exercise of administrative and legislative powers and functions. Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. Shanks v.

Watson Bros. Van Lines, 173 Neb. 829, 115 N. W. 2d 441.

An order of the commission granting or denying an application for a certificate of public convenience and necessity is the act of the commission and not of the court even though the order of the commission may have been upheld. It would seem clear that the commission has continuing jurisdiction over its orders and the right to modify, annul, and vacate them thereafter. The fact that the commission has jurisdiction to sustain motions for rehearing or reconsideration has been recognized by this court. See Miller v. Consolidated Motor Freight, Inc., 168 Neb. 712, 97 N. W. 2d 265.

An order of the commisison is not res judicata as to another application of the same nature subsequently filed, nor does it require an independent proceeding. In Holmberg v. Chicago, St. P., M. & O. Ry. Co., 115 Neb. 727, 214 N. W. 746, this court said: "* * * in proceedings which involve either directly or as a necessary consequence the annulment, modification or alteration of a previous order entered by the commission, the doctrine of estoppel or res judicata, as usually applied to judicial decisions of courts of record, has no application whatever." The court also said: "* * * whether such proceedings to reverse, modify, or annul shall take the form of an application to reopen the original proceeding in which the order complained of was entered, or whether they shall take the form of an independent proceeding and formally wholly unconnected with the previous proceeding, is a matter of procedure strictly within the constitutional control and determination of the commission."

Rules of Practice and Procedure of the Nebraska State Railway Commission, § 5(g) provides: "When any application has been denied in whole or in part, a subsequent application covering substantially the same subject matter will not be considered by the Commission within 90 days from the date of the final denial in whole

or in part of the previous application, except for good cause shown."

The question remains of whether there is evidence to support the action of the commission in granting the certificate of public convenience and necessity involved here. In the prior appeal here, we clearly stated that the evidence as to public convenience and necessity was in conflict and that: "Where the evidence is in conflict, as here, the weight of the evidence is for the determination of the commission and not this court." Neylon v. Petersen & Petersen, Inc., 181 Neb. 143, at page 148, 147 N. W. 2d 488. That finding in itself is sufficient to sustain the ruling of the commission on reconsideration.

At the prior hearing, the commission refused to consider evidence of past operations and service under Neylon's previous ambiguous certificate. On the prior appeal, this court said: "The commission was therefore correct in finding that the irregular route portion of Neylon's intrastate certificate is ambiguous and has not been previously interpreted by the commission." Neylon v. Petersen & Petersen, Inc., *supra*.

Exhibits establishing that Neylon had conducted his irregular route operations on a statewide unrestricted basis for a period of more than 10 years prior to the first hearing were considered on the rehearing. The commission also on rehearing found that due to the general nature of the proceedings at the time petitioner acquired the involved certificate on January 24, 1952, the petitioner had every reason to believe that he had acquired, as contended, statewide irregular route authority. From 1952 until the original hearing herein, the commission did not in any way attempt to advise or direct petitioner that he held less than statewide irregular route authority. The commission also found that its action in 1953, in denying the request of competing carriers to clarify Neylon's certificate on the basis that it was something less than statewide, could have furthered Neylon's belief that he held statewide authority.

The commission on rehearing also specifically found that Neylon had conducted irregular route truck operations in intrastate commerce on a statewide basis under his previous certificate and that his operations were conducted openly, in good faith, with legal justification, and under color of authority.

As we said in Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc., 180 Neb. 764, 145 N. W. 2d 584: "Evidence of operations under color of authority may be considered by the commission in determining whether or not the proposed service is or will be required by the present or future public convenience and necessity. Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

"The issue of public convenience and necessity is ordinarily one of fact and where there is evidence in the record to sustain the commission's order, this court cannot say that it is unreasonable and arbitrary."

The determination of the public interest in such a case is one that is peculiarly for the determination of the commission. If there is evidence to sustain the finding of the commission, this court cannot intervene. Neylon v. Petersen & Petersen, Inc., *supra.*

There is evidence to sustain the findings of the commission here. The order of the commission is not arbitrary or capricious, and it is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM HENRY KAUFFMAN, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. WALTER EDWARD FRANS, APPELLANT.

164 N. W. 2d 469

Filed January 31, 1969. Nos. 37065, 37066.

Criminal Law: Homicide. In a prosecution for homicide in the perpetration or attempt to perpetrate a robbery, under sec-

tion 28-401, R. R. S. 1943, proof is not required of premeditation and deliberation or a purpose to kill.

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

William Henry Kauffman and Walter Edward Frans, pro se.

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

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

WHITE, C. J.

This is an appeal in a post-conviction proceeding, denying relief to the defendants from a conviction and sentence by a three-judge court to life imprisonment for first degree murder. We affirm the judgment of the district court denying relief.

These were prosecutions under section 28-401, R. R. S. 1943, providing that whoever in the perpetration of a robbery, shall kill another, shall be deemed guilty of murder in the first degree. The defendants in their brief raise only one issue, that there was no evidence of intent to kill or premeditation. The victim of the robbery was bound, gagged, died from suffocation, and was not found until several days after the robbery. It is also true that the record reveals no intent to kill, deliberation, or premeditated malice. Such elements are unnecessary to prove or show in a prosecution under section 28-401, R. R. S. 1943. The turpitude involved in the robbery takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for robbery. Wilson v. State, 170 Neb. 494, 103 N. W. 2d 258; Garcia v State, 159 Neb. 571, 68 N. W. 2d 151; Rogers v. State, 141 Neb. 6, 2 N. W. 2d 529; Swartz v. State, 118 Neb. 591, 225 N. W. 766; South v. State, 111 Neb. 383, 196 N.

W. 684; Keezer v. State, 90 Neb. 238, 133 N. W. 204; Rhea v. State, 63 Neb. 461, 88 N. W. 789; State v. Hall, 176 Neb. 295, 125 N. W. 2d 918.

Giving maximum range to the somewhat uncertain contentions raised in their briefs, there is no question that the states have the right to define and punish such an offense under the United States Constitution. Duggan v. Olson, 146 Neb. 248, 19 N. W. 2d 353. No contention is made of the lack of due process. The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. JERRY A. WINEMAN, APPELLEE.
164 N. W. 2d 468

Filed January 31, 1969. No. 37073.

1. **Appeal and Error: Time.** On appeal from a police court to the district court, if the appeal is not completed within the time fixed by statute due to the fault of the appealing party, the appeal will be dismissed.
2. **Appeal and Error: Public Officers and Employees.** The failure on the part of the police magistrate to perfect the appeal in violation of a mandatory duty does not deprive the district court of jurisdiction and does not deprive either party of his right to be heard.
3. ———: ———. Where the fault lies with the police magistrate, the district court acquires jurisdiction and may not dismiss the appeal on the ground that it was not filed within the time fixed by law.

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

George A. Sommer, for appellant.

Lyman & Meister, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and WALTER H. SMITH, District Judge.

NEWTON, J.

Defendant was charged in the police court of the city of Scottsbluff, Nebraska, with a violation of the city ordinance prohibiting willful reckless driving. He was convicted of the offense charged, gave notice of appeal, and filed an appeal bond which was duly approved, all in accordance with the provisions of section 18-203, R. R. S. 1943. Transcript on appeal was not filed in the district court until 119 days thereafter.

Upon filing of the transcript in the district court, defendant moved for dismissal of the complaint on the ground that the police magistrate had failed to prepare and deliver the transcript to the clerk of the district court *forthwith* as required by statute. The motion was sustained and the complaint dismissed. The State has appealed to this court. We reverse the judgment of the district court.

Section 18-203, R. R. S. 1943, requires that the magistrate shall *forthwith* make and deliver such transcript to the appellate court. In this respect, no burden is placed upon either party to the action, it being the mandatory duty of the magistrate to perform this function.

Unlike many of our statutes regulating appeals, the cited statute does not require the filing of a transcript in the appellate court within a specified time. It simply commands that it be done forthwith. The statute was not complied with and the effect would be the same as that in case of a failure to comply with a statute requiring that the transcript be filed within a specified number of days. Were the appealing party at fault, his appeal should be dismissed. See, Iron Bear v. State, 149 Neb. 634, 32 N. W. 2d 130; Anderson v. State, 163 Neb. 826, 81 N. W. 2d 219. In this case the defendant had performed every act required of him for the completion of his appeal. The failure on the part of the police magistrate to perfect the appeal in violation of a mandatory duty did not deprive the district court of jurisdiction and cannot deprive either party of his right to be heard.

See, Anderson v. State, *supra;* Liljehorn v. Fyfe, 178 Neb. 532, 134 N. W. 2d 230.

To rule otherwise would mean that defendant's appeal had failed and that the judgment of the police court was final. Certainly, even if the district court was warranted in dismissing the appeal, it was totally lacking in grounds for a dismissal of the complaint.

Defendant contends that the delay in filing the transcript on appeal deprived him of his right to a speedy trial. We do not agree. Defendant might readily have brought about an earlier filing of the transcript had he been sufficiently concerned to take the necessary steps to bring it about. Also, he has had his day in court in the first instance and no complaint is registered about undue delay of hearing in the police court.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

LAUREN M. CARSTENSON, APPELLANT, V. GEORGE E. WEINRICH ET AL., APPELLEES.
164 N. W. 2d 655

Filed February 7, 1969. No. 36845.

1. **Adverse Possession.** The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years.
2. ———. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted.

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

Chambers, Holland, Dudgeon & Beam, for appellant.

Luebs, Tracy & Huebner, Cunningham & Blackburn, and Harold S. Salter, for appellees.

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

WHITE, C. J.

This is an equity action to quiet title in real estate. At issue is the title to 13½ acres of land which on the south borders the present north bank of the Platte River and on the north borders the south edge of plaintiff's deeded property. The district court denied the plaintiff Carstenson relief and quieted title to the property in the defendant Weinrich. We affirm the judgment.

Almost all of the material evidence in this case is undisputed. Defendants Loyal H. Denman and Bernice Weinrich are brother and sister. In 1944 their father died intestate, leaving them the deeded tract now owned by Carstenson, the disputed tract of 13½ acres to the south immediately bordering on the present north channel of the Platte River, and a considerable amount of land to the east. Late in 1944, Loyal H. Denman conveyed all of his interest in the inherited property to his sister, Bernice Weinrich, and she reconveyed to him the tract containing about 39 acres, consisting of hay and meadow land which Denman, in turn, sold to Carstenson about September 5, 1961, the description of the property in the contract being almost identical to that in the quit claim deed received by Denman in 1944 from his sister. Carstenson bought the property from Denman for gravel purposes. Bernice Weinrich and her husband, George, have retained the record title of all of the remaining property that descended intestate to Bernice Weinrich and her brother on her father's death in 1944. The evidence is that for a period of about 60 years the 39-acre tract, hereinafter called the Carstenson tract, was used for a different purpose and function than the 13½-acre tract immediately to the south of it bordering upon the present north channel of the Platte River. For a period of about 60 years there has been a fence on the south side of the Carstenson deeded prop-

erty runing diagonally from the west to the east. The 13½-acre tract stretching south from the deeded property has a different use and function than the Carstenson tract and is mainly used for pasture purposes. Also, for a period of approximately 50 to 60 years, the 13½-acre tract has had a fence enclosing three of its sides, on the west, on the south, and its north fence border being the south fence on the Carstenson deeded property of 39 acres. The east end is open and forms one contiguous and continuous unit with the rest of the Weinrich land.

Carstenson contends that he is the owner of the 13½-acre tract stretching south of his property because it is accretion and reliction land that he is entitled to because of his ownership of the deeded Carstenson tract of 39 acres. The evidence shows that the south fence of the Carstenson tract runs generally almost on the edge of the "old" north bank channel of the Platte River. The evidence also fairly demonstrates that at sometime in the remote past the 13½-acre tract formed to the south where it now borders the present north channel of the Platte River or the edge of the "wet stream." Also, although not pertinent in the discussion of these issues, the evidence shows that a portion of the 13½-acre tract to the north next to the old north bank channel on which the south fence of the Carstenson tract is located, fills with water intermittently during the years. The 13½-acre tract that is in dispute here, by the undisputed evidence, has been formed and been fenced for a period of at least 50 years, and many years prior to the death of the elder Denman and the conveyances and redivision of the property between Loyal H. Denman and his sister Bernice Weinrich, the defendants in this action.

We find it unnecessary to discuss the abstract arguments and issues raised in the brief concerning whether this is accretion or reliction property, or as to whether Loyal H. Denman intended to convey this property as an appurtenance to the deeded 39 acres that he conveyed to Carstenson by metes and bounds under his contract

of September 5, 1961. The evidence is conclusive that Bernice and George Weinrich have established their ownership to this 13½-acre tract by actual, open, exclusive, and continuous possession under a claim of ownership under the statutory period of over 10 years. The general rule is well stated in Krimlofski v. Matters, 174 Neb. 774, 119 N. W. 2d 501, wherein we said as follows: "The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted." Carstenson himself, having bought the land for gravel purposes only, makes no contention or claim that he ever was in actual use or possession of the 13½-acre tract in any manner whatsoever. The evidence is conclusive that the sole use of this property was pasture land for cattle. The evidence shows that Denman pastured cattle in conjunction with Weinrichs on the disputed property until 1946 and that he has never made any claim or any use of any nature whatsoever to the accretion or reliction land south of the Carstenson tract since 1946. The Weinrichs and a disinterested witness, one Lawrence Wiese, age 75, a lifetime resident of the area, testified that the Weinrichs had been running cattle on the land in dispute since prior to 1947. The east border of this property had no fence on it, was open, and all of this land was used continuously by the Weinrichs. The Weinrichs' testimony that they had used this property for pasturing cattle continuously, openly, and exclusively under a claim of ownership since about 1946 is undisputed. Denman corroborated this testimony. The only shadow on this testimony is the testimony of Carstenson that in securing the deeded property from Denman in 1961, Denman told him that he also owned the accretion land to the south and that he wes permitting the Weinrichs to pasture their cattle on the property. Carstenson knew

that the Weinrichs were using the property and were using it exclusively for their own purposes and he so testified. Denman categorically denied this testimony and testified that never at any time in the history of the property had he claimed title to or possession to the 13½-acre tract south of the deeded property which he conveyed to Carstenson by almost an identical metes and bounds conveyance by which he had received it in 1944. Besides the other testimony, the contract of sale of real estate corroborates Denman's testimony in several respects. Probably the most important one is that the property was sold by the acre and, under the contract, Carstenson was to pay so much per acre according to what a survey would show. Carstenson himself had the survey made and the purchase price was paid according to a precise number of acres that were found as a result of the survey. In any event, besides these corroborating circumstances, the trial court saw and observed the witnesses, heard the testimony, and founded its decision upon the theory of adverse possession. We can find no basis in the record for overturning this conclusion. We also note that the land was purchased for the purpose of digging gravel and that the property immediately south of the 13½-acre tract is not suited in its present state for this purpose. This land borders on the Platte River and at times a portion of it is under water. It is not suitable for farm land or for any other purpose but which it has been used exclusively by the Weinrichs, mainly, the pasturing of cattle. It opens and forms a part of the other property that the Weinrichs own to the east and along the present north bank channel of the Platte River. Carstenson recites the old case of Opp v. Smith, 96 Neb. 224, 147 N. W. 672 (1914), to the effect that adverse possession of property cannot be acquired in Nebraska by virtue of the pasturing of cattle. That case involved pasturing on open range and the circumstances in this case of the 13½-acre, fenced-in tract, opening up and used in conjunction with the rest of the

Weinrichs' property clearly distinguishes it. Our recent cases have held that possession is sufficient if the land is continuously used for the purpose in which it may, by its nature, be adapted. Krimlofski v. Matters, *supra*. At the time of the purchase, Carstenson knew of the Weinrichs' ownership, made no check as to what claim they were making, and admitted they were in possession and he knew they were using it.

Summarizing, the land Carstenson is claiming has been fenced off and used in connection with the land to the east owned by the Weinrichs for a minimum of about 45 years. The Weinrichs owned all of this property after a deed from Denman to his sister, Bernice Weinrich, after the reconveyance to him of the deeded tract by metes and bounds that Carstenson received under his contract. Denman has made no claim to the land that is in dispute. The Weinrichs have used this land, suitable only for pasture land, continuously under a claim of ownership and exclusively since about the year 1946. During that period of time no person has ever made any other use of the property. We come to the conclusion that the Weinrichs' title has been established to this disputed tract of 13½ acres by virtue of the doctrine of "adverse possession." The trial court came to the same conclusion, based upon the evidence and the law, and we find no reason to disturb this finding and the judgment based thereon.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. VERNON DALE PETERSON, APPELLANT.
164 N. W. 2d 649

Filed February 7, 1969. No. 36857.

1. **Criminal Law: Trial.** An application for postponement of time of trial of a criminal case is addressed to the sound discretion

of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error.

2. ———: ———. Every person accused is entitled to an opportunity to prepare for trial, but the opportunity is not unlimited.
3. **Criminal Law: Right to Counsel.** A defendant in any criminal prosecution must be given a reasonable opportunity to employ and consult with counsel.
4. **Criminal Law: Trial.** Every defendant charged with a criminal offense is not entitled to a jury trial.
5. **Constitutional Law: Criminal Law: Trial.** There is no federal constitutional right to a jury trial in misdemeanor cases.

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

Francis A. McLane, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and KOKJER and ACH, District Judges.

WHITE, C. J.

The defendant and one Billy Schnoor were charged with assault and battery and were arrested on July 3, 1967. On July 21, 1967, after a motion for a continuance was denied, the trials of both parties were consolidated. Upon pleas of not guilty, trial was had to the county judge who found both parties guilty and sentenced each to 60 days in jail. Their appeals were subsequently dismissed because of defective appeal bonds. No issue is presented on this appeal in that respect. This is an appeal from a denial of relief sought on a petition in error from the county court to the district court based upon the grounds that, first, the defendant was effectively denied the assistance of counsel because the court failed to grant a continuance so that he could procure counsel, and second, that the defendant was not advised of his right to trial by jury.

The defendant in this case seeks to support the issue of the denial of the constitutional right to counsel by

contending that the order of the county judge denying a continuance effectively denied him counsel. Ordinarily, the denial of a continuance could only be asserted by means of a direct appeal and not by error proceeding. Other than contending that he was not given sufficient time to procure counsel, no issue is presented in this case that the defendant was denied the right to counsel; that he was not advised of his right to counsel; or that he was entitled to counsel at the State's expense. The issue is simply that his fundamental constitutional right to counsel to represent him in court in any proceedings, civil or criminal, was effectively denied by the county court's overruling his motion for continuance.

Prior to the trial, the county judge received a call from the wife of the defendant who requested a continuance because the defendants were working in Lincoln so that they could get enough money to hire a lawyer. The county judge told Mrs. Peterson that this matter should be discussed with the deputy county attorney. Several hours later, both defendants appeared for trial, on July 21, 1967, and at that time the matter of continuance was again discussed. The county attorney objected to the continuance on the ground that the defendants had been free to secure counsel; that ample time had elapsed; and that the case having been set for trial, witnesses were subpoenaed and were present and ready to testify. The record demonstrates that the court gave consideration to this request and heard all parties concerned. The motion for continuance was denied.

The granting of a continuance is a matter within the sound discretion of the trial court. "An application for postponement of time of trial of a criminal case is addressed to the sound discretion of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error." Hyslop v. State, 159 Neb. 802, 68 N. W. 2d 698. Every person accused is entitled to an opportunity to prepare for trial, but the opportunity

is not unlimited. With regard to consulting counsel, this court said in State v. Ninneman, 179 Neb. 729, 140 N. W. 2d 5: "Defendant in any criminal prosecution must be given a reasonable opportunity to employ and consult with counsel; * * *."

From the record herein it cannot be said that the trial judge abused his discretion in denying the requested continuance so that defendant might employ counsel. This is a misdemeanor charge. The record shows that the defendant was arrested on July 3, 1967, and knew at that time that the case was set for trial on July 21, 1967. Both defendants were free on bond in the intervening period of time. Their request for continuance was not made until the time of the appearance for trial on July 21, 1967. During this 18-day period, defendant was free, and the record shows no reason why 18 days were not reasonable time to employ and consult with counsel. There is nothing in the record to suggest, by affidavit or otherwise, that they were unable to employ counsel; that counsel had been consulted by the defendants and had refused to represent them for any reason; or that at any time they did not have full knowledge of their rights or in any way were prevailed upon by the county attorney or by the court. The court must balance the considerations of the right to a reasonable opportunity to prepare for trial and to consult counsel, with the necessity for the orderly and prompt disposition of cases in the ordinary course of the administration of justice, and must be mindful that such rights may be exercised to subvert the orderly processes of justice by the disappearance of witnesses and other considerations not necessary to discuss here. All the authorities agree that these matters are addressed to the sound discretion of the trial judge when raised with relation to the granting of a motion for continuance. The record here is entirely devoid of a showing of an abuse of discretion by the county judge. This contention is without merit.

Defendant also complains that he was not advised of his right to a jury trial. Every defendant charged with a criminal offense is not entitled to a jury trial. State v. Hauser, 137 Neb. 138, 288 N. W. 518. There is no federal constitutional right to a jury trial in misdemeanor cases such as the present case. Cheff v. Schnackenberg, 384 U. S. 373, 86 S. Ct. 1523, 16 L. Ed. 2d 629; Dyke v. Taylor Implement Mfg. Co., Inc., 391 U. S. 216, 88 S. Ct. 1472, 20 L. Ed. 2d 538; Duncan v. Louisiana, 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491. There being no constitutional right to a jury trial, defendant's contention in this respect is without merit.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BILLY SCHNOOR, APPELLANT.

164 N. W. 2d 652

Filed February 7, 1969. No. 36858.

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

Francis A. McLane, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, and MCCOWN, JJ., and KOKJER and ACH, District Judges.

WHITE, C. J.

This is a companion case to State v. Peterson, *ante* p. 826, 164 N. W. 2d 649. The facts and issues raised in the briefs in this case are identical with the ones raised in the companion case.

The issues and contentions raised by the defendant

herein are controlled under the opinion and decision in the case of State v. Peterson, *supra*. The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WASH A. ALLEN, APPELLANT.
164 N. W. 2d 662

Filed February 7, 1969. No. 36860.

Criminal Law: Evidence. An exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified it is immaterial in how many or whose hands it has been.

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

A. 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., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and MORAN, District Judge.

MORAN, District Judge.

The defendant, Wash A. Allen, was tried before a jury and was convicted of robbery. His motion for new trial was overruled and he has appealed. He assigns as error admission into evidence of a cigarette lighter, part of a roll of mints, and $4.43 in money.

The victim testified that on the afternoon of June 12, 1967, he was seized from behind while walking on the sidewalk in Omaha, Nebraska. He was forced to the sidewalk, and a cigarette lighter, a partial roll of mints, and approximately $5 in cash and currency were re-

moved from his pockets by two assailants. He identified the defendant as one of them.

Two Omaha police officers were in the area. Their attention was directed to the crime by a passerby, and immediately after the robbery the defendant and another man were seen by them in an alley a short distance from the scene of the crime. Ray E. Hunt, one of the officers, testified that as he approached the defendant he saw him throw a silver colored object into the weeds about 2 or 3 feet away. Hunt went to the area and picked up a cigarette lighter which he identified at the trial as the lighter he retrieved from the weeds. He searched the area and found no other shiny objects. He kept the lighter and later turned it in to the evidence vault of the Omaha police department. Hunt testified that it was in substantially the same condition as it was when he first picked it up out of the weeds. The victim testified that the lighter was his. He identified it by the wick and nicks and scratches on it from hitting it on farm machinery and the like.

The other officer, Robert Hrbek, testified that as he approached the defendant he saw what appeared to be money in his left hand. The defendant put his left hand into his coat pocket as the officer ran to him. Hrbek seized the defendant. He placed his hand in the defendant's left coat pocket and removed $4.43 in cash and a partial roll of mints from defendant's hand and the pocket. He later placed these items in a property envelope and turned the envelope in to the desk at the Omaha police department. At the trial Hrbek identified the roll of mints as those which he removed from the defendant's coat pocket, and he stated that they were in substantially the same condition then as when he took them from the defendant. He also testified that the money produced at the trial was the money which he turned in at the desk at the police station.

The victim testified that the mints were the same type as those he had in his pocket before the robbery,

and that prior to the robbery he had two or three one-dollar bills and $1 or $1.50 in change.

The defendant denied committing the crime.

Defendant contends that the foundation for the admission of the items of property into evidence was insufficient. He argues that the identity of the objects admitted in evidence must be established by tracing their possession through every hand that held them, and that failure to produce the testimony of their custodian from the date they were turned in at the desk at the police station to the date of trial renders them inadmissible. This is not the law. Defendant's argument goes to credibility, not admissibility.

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

The objections to the sufficiency of foundation were general. In such a case the evidence is admissible in the absence of clear error. Redman Industries, Inc. v. Morgan Drive Away, Inc., 179 Neb. 406, 138 N. W. 2d 708.

In this case the identity of the property was the relevant factor. Cases of this type should be distinguished from those where identity of condition at points of time is required. In these cases the condition of the exhibit often forms the basis for expert opinion. In such cases the rule enunciated in State v. Huffman, *supra,* must be followed.

We hold that an exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified it is immaterial in how many or in whose hands it has been. See, 32 C. J. S., Evidence, § 607a, p. 762; Lestico v. Kuehner, 204 Minn. 125, 283

N. W. 122; Brown v. General Motors Corp., 67 Wash. 2d 278, 407 P. 2d 461; Allen v. Porter, 19 Wash. 2d 503, 143 P. 2d 328.

The foundation laid in this case meets the test. The judgment of the district court is correct and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT G. NICHOLSON, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. JIMMY D. MADDOX, APPELLANT.

164 N. W. 2d 652

Filed February 7, 1969. Nos. 36986, 36987.

1. **Constitutional Law: Criminal Law.** There is nothing in the Constitution of the United States or of the State of Nebraska which exempts an offender, unlawfully brought into this State, from trial and punishment for any offense against the laws of this State.
2. **Criminal Law: Indictments and Informations.** A defect in the manner of charging an offense is waived by defendant's plea to the general issue if the information contains no jurisdictional defect and is sufficient to charge an offense under the law.
3. **Criminal Law: Guilty Plea.** The fact that "plea bargaining" occurred is not a proper ground for reversal of a plea of guilty.
4. **Criminal Law: Duress and Coercion.** Informing a defendant that strong feelings against him were harbored by the local populace, in the absence of any overt acts against him, is not a sufficient showing of coercion to justify vacation of a plea of guilty.
5. **Criminal Law: Post Conviction.** In a proceeding under the Post Conviction Act, if the trial court finds on examination of its files and records that the proceeding is without foundation, an evidentiary hearing may properly be denied.
6. **Criminal Law: Right to Counsel.** It is the duty of the public to provide counsel for destitute persons charged with criminal offenses, but abuse of this privilege should not be permitted. When such persons have once had their contentions fairly presented and litigated or it is obvious that the grounds urged for consideration are without merit in the eyes of the law, such obligation on the part of the public comes to an end.

Appeals from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

William G. Blackburn and Donald L. Abraham, for appellants.

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

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

NEWTON, J.

Appellants were convicted, on pleas of guilty, of robbery and assault with intent to rape. The present actions have been brought under the Post Conviction Act, but at least three habeas corpus actions have been heretofore filed and heard.

It is the present contention of appellants that their constitutional rights were violated because extradition proceedings were improper; the complaints, warrants, and informations were defective; and their guilty pleas were the result of coercion. They further complain that they were unlawfully denied an evidentiary hearing and the services of court-appointed counsel.

Regarding the constitutional issues raised, appellants have failed to cite any cases or other law to sustain their positions. It would appear that there are none. The proposition that a defective extradition proceeding entitles them to further consideration was specifically determined adversely to appellants in the cases of Maddox v. Sigler and Nicholson v. Sigler, 181 Neb. 690, 150 N. W. 2d 251. There is nothing in the Constitution of the United States or of the State of Nebraska which exempts an offender, unlawfully brought into this State, from trial and punishment for any offense against the laws of this State. See Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, 165 A. L. R. 932.

The complaints, warrants, and informations charged the offenses of robbery and assault with intent to rape

substantially in statutory language. The challenge here is due to the failure to include the names of the victims. In the case of Nicholson v. Sigler and Maddox v. Sigler, *ante* p. 24, 157 N. W. 2d 872, this court specifically found this proposition to be without merit. A defect in the manner of charging an offense is waived by defendants' pleas to the general issue if the informations contain no jurisdictional defect and are sufficient to charge an offense under the law. See, Hunt v. State, 143 Neb. 871, 11 N. W. 2d 533; Smith v. State, 169 Neb. 199, 99 N. W. 2d 8. The informations here were sufficient to charge the offenses mentioned and did not contain any jurisdictional defects.

It is contended that appellants' guilty pleas were the result of coercion in that they were informed by law officers that they might face a more serious charge of kidnapping and that the local populace was so aroused that harm might result to appellants. The record discloses that appellants were informed by their own attorney that there was some local feeling against them. They had nevertheless been safely lodged in jail and the record does not disclose that any overt acts against them occurred or were threatened. A kidnapping charge was actually pending against them, but was evidently dropped as a result of "plea bargaining," a procedure which is not objectionable. See State v. Crenshaw, *ante* p. 449, 161 N. W. 2d 502. Appellants were represented by counsel, were advised that it was in their best interests to plead as they did, and the record discloses that their pleas were voluntarily made.

The contention that appellants were denied an evidentiary hearing is belied by the record which contains the depositions of both appellants and numerous other exhibits. In any event, the court records clearly disclosed that the contentions of appellants, as set forth in their motion to vacate the judgments entered, were without foundation. In a proceeding under the Post Conviction Act, if the trial court finds on examination

of its files and records that the proceeding is without foundation, an evidentiary hearing may properly be denied. See State v. Hizel, 181 Neb. 680, 150 N. W. 2d 217.

The failure of the court to provide court-appointed counsel in this post conviction proceeding is not error in the absence of an abuse of discretion. See State v. Hizel, *supra*. As above mentioned, it was apparent to the court that the contentions of appellants were without foundation and had been previously litigated. It is the duty of the public to provide counsel for destitute persons charged with criminal offenses, but abuse of this privilege should not be permitted. When such persons have once had their contentions fairly presented and litigated or it is obvious that the grounds urged for consideration are without merit in the eyes of the law, such obligation on the part of the public comes to an end. Furthermore, appellants have had the assistance of counsel throughout this proceeding and cannot have been prejudiced by the failure of the trial court to appoint counsel.

The judgments of the trial court are affirmed.

AFFIRMED.

EDITH DOUGLASS, APPELLEE, V. MARION C. DOUGLASS ET AL., APPELLANTS.

164 N. W. 2d 661

Filed February 7, 1969. No. 36999.

Negligence: Automobiles. Gross negligence under the automobile guest statute signifies more than ordinary inadvertence or inattention.

Appeal from the district court for Dundy County: VICTOR WESTERMARK, Judge. Reversed and remanded with directions.

Bosley & Bosley, for appellants.

Daniel E. Owens and Russell, Colfer & Frazier, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and COLWELL, District Judge.

SMITH, J.

A jury found for plaintiff, an automobile guest, on her personal injury claim. Defendants on appeal assign insufficiency of evidence for error.

Plaintiff and five relatives were motoring in fair weather the morning of May 18, 1965, from Haigler to Hayes Center, Nebraska. Plaintiff was sitting in the front seat of a 1957 Ford sedan owned and operated by her daughter-in-law, defendant Florence E. Douglass. Sitting in the back seat were two grandchildren, a daughter-in-law, and Alvin Tidyman, a brother. Three miles east of Trenton, Florence detoured from blacktop to a gravel road northward toward the crest of a hill several miles away. Unacquainted with the road, she maintained a speed of 40 miles per hour toward the crest. The Ford at times weaved slightly, and Alvin inquired whether Florence was having trouble with it. She remarked that it was hard for her to handle. The subject was dropped for lack of concern.

Florence crested the hill at 40 miles an hour. The grade of descent caused acceleration and loss of control. The Ford, careening in the east half of the 22-foot road, laid down three curved skid tracks 88 feet long. At a speed of 55 or 60 miles per hour, estimated by two passengers, it ran off the east side of the road, across a 13-foot ditch, and into a slope. It came to rest upside down 32 feet east of the traveled surface of the road, the nose pointing southeast.

The road from crest to base of the hill, a distance of 1,800 feet, was hard, rough, and steep. The upper half had been scarified in the spring of 1964 with rock, the fragment size being half that of a walnut. The 1,800 feet exhibited corrugations and no heavy layer of gravel.

Falls revealed in a profile were: (a) At station 5+50, 3.6 percent, or 2°; (b) between stations 5+50 and 14+00, 11.4 percent, or 7°; (c) between stations 14+00 and 18+00, 7.8 percent, or 5°; and (d) between stations 0+00 and 18+00, 146 feet, 8.1 percent, or 5°.

Except for reference to gravel, the following testimony of Florence is undisputed: "A. Well, all of a sudden I came to this dropping-off place; it was just steep hill that I hadn't anticipated or knew about. * * * The gravel was more heavy on the hill and the car began—the back seem to want to slide. I tried to compensate for this by turning the wheels the opposite direction, and it kept sliding anyway. * * * about the time we left the road * * * the steering wheel began to spin in my hand and I was pretty sure that my arm was broken then. Q. Did you apply your brakes? A. No. * * * I was afraid to."

Gross negligence under the automobile guest statute signifies "more than ordinary inadvertence or inattention." Prosser, Torts (3d ed. 1964), § 34, p. 187. See, also, Brugh v. Peterson, *ante* p. 190, 159 N. W. 2d 321. The evidence in the present case was insufficient to sustain a finding of gross negligence.

The judgment is reversed and the cause remanded with directions to sustain defendants' motion for judgment notwithstanding the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

STANLEY SLOSBURG, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE, MEYER KATZMAN ET AL., INTERVENERS-APPELLEES.

165 N. W. 2d 90

Filed February 7, 1969. No. 37008.

1. **Administrative Law: Powers.** An administrative board has no power or authority other than that specifically conferred upon it by statute or ordinance, or by a construction necessary to accomplish the purpose of the act.

2. ———: ———. An administrative agency cannot, in the absence of legislative authority, rescind or change its own final orders.
3. **Judgments.** The Declaratory Judgments Act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.
4. ———. The requisite precedent conditions of obtaining declaratory relief 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 E. MURPHY, Judge. Reversed and remanded with directions.

Foulks, Wall & Wintroub, for appellant.

Herbert M. Fitle and James E. Fellows, for appellee.

Abrahams, Kaslow & Cassman and Frederick C. Gilbert, for interveners-appellees.

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

CARTER, J.

This is a declaratory judgment action in which the plaintiff sought to have the rights of the plaintiff declared in a controversy with the city of Omaha and owners of real estate adjoining plaintiff's lands on which he had constructed fences used as backstops and sidestops to a tennis court. At the close of plaintiff's evidence, the trial court dismissed the action and plaintiff has appealed.

In June 1966, plaintiff, without securing a permit from the city, constructed a fence around a tennis court on a tract of ground north and west of his residence property. The fence was 10 feet in height except in a small part

it was as high as 14 feet. The mesh fence was attached to the inside of the sustaining posts.

The ordinances of the city of Omaha provide in part that before any fence more than 4 feet in height can be erected, built, or constructed a permit must be obtained from the Permits and Inspection Division of the Public Safety Department. Such applications must be accompanied with construction drawings. No fences shall be erected, built, or constructed with the posts located on the outside of the fence fabric or lattice work. Violation of the foregoing is punishable by fine or imprisonment. § 37.56.020, Omaha Municipal Code. One who fails to make application for a permit before starting work for which a permit is required shall, upon being granted a permit, be required to pay double the amount of the regular fees. § 37.12.010, Omaha Municipal Code.

After the erection of the fence in late June 1966 and shortly before July 7, 1966, plaintiff went to the office of the Permits and Inspection Division of the Public Safety Department to obtain a permit to erect the fence. After stating the object of his call, the clerk took the information to Leo Ohlinger who decided that a permit could not be issued and refused to accept an application for a permit. Ohlinger advised the plaintiff that his only remedy was an appeal to the Administrative Appeals Board. Plaintiff perfected such an appeal. On August 4, 1966, the Administrative Appeals Board decided that a permit for the fence "should have been granted." No appeal was taken to the district court from this finding. On August 10, 1966, plaintiff went to the office of the Permits and Inspection Division to obtain the authorized permit, where he was told he must apply for a permit and furnish copies of the survey certificate and of the plans and specifications. On August 15, 1966, plaintiff filed his application with the necessary attachments to obtain the permit authorized by the Administrative Appeals Board ruling. On October 7,

1966, the Director of Public Safety, Francis Lynch, refused to issue the permit. On December 6, 1966, L. K. Smith, successor to Lynch as Director of Public Safety, reviewed the file, came to the conclusion that the holding of the Administrative Appeals Board on August 4, 1966, was a final determination of the issue, and issued the permit on December 7, 1966. Within 10 days thereafter Frederick C. Gilbert and Meyer Katzman, adjoining owners, gave notice of appeal to the Administrative Appeals Board. Chairman Carey refused to set the matter for hearing before the Administrative Appeals Board on the ground that it had been previously determined by the board on August 4, 1966. Some time later, chairman Phillips, successor to Carey, set the matter for hearing and on April 24, 1967, the Administrative Appeals Board held that the denial of a permit by Lynch was final in that no appeal was taken therefrom and denied the permit. Plaintiff gave notice of appeal to the district court. During the pendency of this appeal, agents and employees of the city are alleged to have threatened to revoke the permit issued by safety director Smith. The plaintiff thereupon commenced this declaratory judgment action to have his rights determined.

It must be borne in mind that the obtaining of a permit is a purely administrative proceeding. The city and interveners contend that no application for a permit was filed in the proceeding that led to the decision of the Administrative Appeals Board on August 4, 1966. The record shows that plaintiff went to the office of the Permits and Inspection Division of the Public Safety Department to apply for and obtain the permit. The facts were elicited from the plaintiff and it was determined that he was not entitled to a permit. Instead of filing the application and entering a denial of it, the division passed on the merits and refused to permit a filing of the application, which appears to be a method of handling not uncommon to the office. On appeal, the Administrative Appeals Board considered the appeal and granted

the permit. Under such circumstances, the city is in no position to assert that no application was made, irregular as it may be. Plaintiff was informed that his only remedy was to appeal to the Administrative Appeals Board which he did and secured a favorable result. No appeal was taken from this finding on August 4, 1966, and it became a final disposition of the case.

"An administrative board has no power or authority other than that specifically conferred upon it by statute or by a construction necessary to accomplish the purpose of the act." City of Schuyler v. Cornhusker P. P. Dist., 181 Neb. 704, 150 N. W. 2d 588. See, also, City of Auburn v. Eastern Nebraska Public Power Dist., 179 Neb. 439, 138 N. W. 2d 629; County of Antelope v. State Board of Equalization & Assessment, 146 Neb. 661, 21 N. W. 2d 416.

Under the provisions of section 4.08.050, Omaha Municipal Code, it is provided that any person aggrieved by any decision or determination of the Administrative Appeals Board may appeal to the district court for Douglas County by complying with section 14-813, R. R. S. 1943. There is no provision for a rehearing or reconsideration of a finding or determination of the Administrative Appeals Board. The exclusive remedy provided for one aggrieved by an order or holding of the Administrative Appeals Board is by appeal to the district court.

In Olive Proration Program v. Agricultural Prorate Comm., 17 Cal. 2d 204, 109 P. 2d 918, it is said: "The statute contains no provision in express terms giving the commission authority to change its considered determination, made after a full hearing, and the fact that any order made by it may be reviewed in a judicial proceeding to be commenced within 30 days after its effective date is some evidence of legislative intention to the contrary. And since all administrative action must be grounded in statutory authority, in the absence of a provision allowing a commission to change its determination, courts have usually denied the right to do so."

In the last-cited case, the court cites Heap v. City of Los Angeles, 6 Cal. 2d 405, 57 P. 2d 1323, as follows: " 'If the power were admitted, what procedure would govern its exercise? Within what time would it have to be exercised; how many times could it be exercised? Could a subsequent commission reopen and reconsider an order of a prior commission? And if the commission could reconsider an order sustaining a discharge, could it reconsider an order having the opposite effect, thus retroactively holding a person unfit for his position? These and many other possible questions which might be raised demonstrate how unsafe and impracticable would be the view that a commission might upset its final orders at its pleasure, without limitations of time, or methods of procedure.' "

We necessarily conclude that the order of the Administrative Appeals Board, dated August 4, 1966, became a final and binding order when no appeal was taken therefrom as provided by the ordinances of the city of Omaha. It is plain, therefore, that proceedings before the Permits and Inspection Division, the Director of Public Safety, and the Administrative Appeals Board, occurring subsequent to August 4, 1966, are void as being outside the scope of the powers with which each has been invested.

The city of Omaha and the interveners, Gilbert and Katzman, contend that the action before the court cannot be entertained for the reason that it is not within the purview of the Declaratory Judgments Act. The present action was filed on May 10, 1967. On May 23, 1967, the plaintiff filed a second action which constituted an appeal from the void order of the Administrative Appeals Board. Appellees assert that a declaratory judgment action cannot be entertained if another action is pending to which the same persons are parties and the same issues involved, citing Strawn v. County of Sarpy, 146 Neb. 783, 21 N. W. 2d 597, and Phelps County v. City of Holdrege, 133 Neb. 139, 274 N. W. 483. They further contend that a declaratory judgment will be refused

where such a judgment, if rendered, will not terminate the controversy giving rise to the proceeding. See, § 25-21,154, R. R. S. 1943; Custer Public Power Dist. v. Loup River Public Power Dist., 162 Neb. 300, 75 N. W. 2d 619. It is also asserted that a declaratory judgment action is not proper where another equally serviceable remedy is available. See Scudder v. County of Buffalo, 170 Neb. 293, 102 N. W. 2d 447. The foregoing cases are clearly the law of this state. The question is whether they control the disposition of the present case.

The record does not show that other actions were pending when the declaratory judgment action was filed. One of the pending actions was a suit by Katzman and his wife against plaintiff to abate the fence as a nuisance, including a claim for damages. It was filed on June 19, 1967, a date subsequent to the filing of the present action. The other case alleged to be pending was plaintiff's last appeal from the void order of the Administrative Appeals Board and was filed on May 23, 1967, approximately 13 days after the action before the court was filed. It is evident, after an examination of the pleadings in the two cases, that neither the issues nor parties are the same as in the case before us, and that neither was pending when the present case was commenced.

We think a proper declaratory judgment would terminate the issues in the present case between the plaintiff and the city of Omaha. The city contends, however, that the ordinances of the city of Omaha provide an exclusive remedy by appeal from the Administrative Appeals Board to the district court and that this precludes a declaratory judgment. This would ordinarily be true and the rule announced in Scudder v. County of Buffalo, *supra*, would apply. But in this case, the plaintiff has a permit which has become final by virtue of the order of the Administrative Appeals Board of August 4, 1966, which was not appealed. On the other hand, the Administrative Appeals Board has issued subsequent void orders which endanger plaintiff's rights, tend to

harass the plaintiff, and subject him to interminable litigation and expense. No cases were pending when the action was filed that preclude a declaratory judgment. A declaratory judgment will terminate the controversy between plaintiff and the city, and tend to terminate other cases growing out of the existing situation. No other remedy is available except on appeal to the district court and plaintiff, after two appeals to the Administrative Appeals Board, is in no better position in determining his rights than he was before. The action will avoid a multiplicity of suits. A justiciable controversy exists in which plaintff has a legal interest. It is between persons with adverse interests which this action will terminate.

A statute applicable to declaratory judgments states: "Sections 25-21,149 to 25-21,164 are declared to be remedial; their purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and are to be liberally construed and administered." § 25-21,160, R. R. S. 1943.

In Nebraska Seedsmen Assn. v. Department of Agriculture & Inspection, 162 Neb. 781, 77 N. W. 2d 464, we said: " 'The requisite precedent conditions of obtaining declaratory relief 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.' " See, also, Schroder v. City of Lincoln, 155 Neb. 599, 52 N. W. 2d 808; Berigan Bros. v. Growers Cattle Credit Corp., 182 Neb. 656, 156 N. W. 2d 794. The requirements for declaratory relief as set out in these cases are met. A declaratory judgment should have been entered.

The judgment of the district court is reversed and the

cause remanded with directions to enter judgment for the plaintiff as prayed.

REVERSED AND REMANDED WITH DIRECTIONS.

ROBERT L. GILLIAM ET AL., APPELLEES, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.
164 N. W. 2d 658

Filed February 7, 1969. No. 37017.

1. **Property: Local and Special Assessments.** The only foundation for a local assessment lies in the special benefits conferred upon the property assessed. An assessment beyond the benefits conferred is a taking of property for public use without compensation and is illegal.
2. ———: ———. Special assessments are to be made and levied on the basis of special benefits accruing to the property as the result of the improvement and not on the basis of the cost of the improvement made immediately in front of the property.
3. ———: ———. The assessment of benefits for a public improvement is separate from the condemnation of the land for a public purpose. Benefits represented by special assessments must be paid or deducted by condemnees in the same manner and in the same proportion as other property owners benefited by an improvement.

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

Ralph D. Nelson and Jack B. Lindner, for appellant.

Reller, McArthur & Hayes and A. James McArthur, for appellees.

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

BOSLAUGH, J.

In 1965 the City of Lincoln, Nebraska, created Improvement District No. 77 for the purpose of improving Forty-fourth Street. Ordinance No. 8826 which created the district provided that the improvement to be made was the opening and widening of a part of Forty-fourth

Street to a width of 60 feet by acquiring 30-foot strips from 7 lots which abut upon the street. The district included only the 7 lots from which land was to be taken. The plaintiffs own 4 of the lots that were included within the district. This action was brought to declare ordinance No. 8826 and the assessment levied under it void and unenforceable.

The trial court found that the ordinance and the assessments levied under it were void. The defendant's motion for new trial was overruled and it has appealed.

The record shows that the improvement actually undertaken was the opening and widening of Forty-fourth Street from Edison Street to Turner Street; that the city excluded from Improvement District No. 77 all property whose owners had voluntarily conveyed property for the street; that prior to the acquisition of the street by the city, the street was open to and used by the general public; that Improvement District No. 77 did not provide for any construction on Forty-fourth Street; and that the special assessments were levied against the plaintiffs solely to reimburse the city for the costs of acquisition of property located in the improvement district.

The only foundation for a local assessment lies in the special benefits conferred upon the property assessed. An assessment beyond the benefits conferred is a taking of property for public use without compensation and is illegal. Wiborg v. City of Norfolk, 176 Neb. 825, 127 N. W. 2d 499.

Special assessments are to be made and levied on the basis of special benefits accruing to the property as the result of the improvement and not on the basis of the cost of the improvement made immediately in front of the property. Chicago & N. W. Ry. Co. v. City of Seward, on rehearing, 166 Neb. 662, 90 N. W. 2d 282; Schneider v. Plum, 86 Neb. 129, 124 N. W. 1132.

The assessment of benefits for a public improvement is separate from the condemnation of the land for a

public purpose. Benefits represented by special assessments must be paid or deducted by condemnees in the same manner and in the same proportion as other property owners benefited by an improvement. City of Lincoln v. Marshall, 161 Neb. 680, 74 N. W. 2d 470. See, also, Shannon v. City of Omaha, on rehearing, 73 Neb. 514, 106 N. W. 592; Sterling Realty Co. v. City of Bellevue, 68 Wash. 2d 760, 415 P. 2d 627; Pickering Hardware Co. v. City of Cincinnati, 149 Ohio St. 275, 78 N. E. 2d 563.

The evidence in this case shows that Forty-fourth Street was open to and used by the public prior to the creation of Improvement District No. 77. There has been no benefit in the form of construction upon the street. The finding of the district court that the plaintiffs received no special benefits from the establishment of Improvement District No. 77 and that the sole purpose of the district was to levy assessments against the plaintiffs for the taking of their property is sustained by the record.

The following statement from Cain v. City of Omaha, 42 Neb. 120, 60 N. W. 368, is applicable here: "In fact the whole scheme of assessment is such as to indicate that an attempt was made under the guise of a local assessment to take back from the plaintiff two-thirds of the condemnation money awarded him. It is but just that where a portion of one's property is taken under circumstances allowing no deduction for benefits conferred upon the remainder, the remainder, if specially benefited, should bear its fair proportion of the costs of the improvement; but the courts will not permit municipalities to evade the provision of the constitution, that the property of no person shall be taken or damaged for public use without just compensation, by paying the compensation and then under the guise of taxation taking it back from the person entitled."

The judgment of the district court is affirmed.

AFFIRMED.

JOHANNES MYRON SCHOLTING, A MINOR, BY MILDRED SCHOLTING, HIS LEGAL GUARDIAN, APPELLANT, V. MELVIN R. SCHOLTING ET AL., APPELLEES.
164 N. W. 2d 918

Filed February 7, 1969. No. 37025.

1. **Deeds: Undue Influence.** The elements necessary to be established in order that a deed may be set aside on the ground of undue influence are: (1) That the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence.
2. **Wills: Undue Influence.** Undue influence exercised by any one, whether he or another gains by its exercise, renders the will or other instrument thus procured worthless.
3. **Deeds: Undue Influence.** Generally, the one attacking an instrument on the ground that its execution was procured by undue influence has the burden resting on him to establish that fact, but the circumstances under which a conveyance is made, the condition of the grantor at the time, and the injustice to him and his heirs, if it is upheld, may be such as to cast upon the grantee the burden of evidence showing that it is untainted with undue influence, imposition or fraud, but is the intelligent and deliberate act of the grantor.
4. **Deeds: Undue Influence: Evidence.** When a party seeking to set aside a conveyance because of undue influence establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden then shifts to the party seeking to sustain such conveyance to introduce evidence to overcome such presumption and in the absence thereof a decree should be entered against him.
5. ———: ———: ———. It is impossible to lay down any hard and fast rule in cases of this kind as to when a presumption of undue influence arises. The rule must of necessity be applied according to the particular facts and circumstances of each case in which the question arises.
6. **Deeds: Evidence.** It may generally be stated that if the facts and circumstances of a case show such a confidential, fiduciary, or trust relation that it would be inequitable to sustain the deed in question then such presumption arises and the burden of going forward with the evidence rests upon the grantee to show the bona fides thereof.
7. ———: ———. In determining whether or not the plaintiffs have established sufficient facts and circumstances, considering

the relationship of the parties, to raise a presumption of undue influence, and, if so, whether the defendants have rebutted it, the court will examine the transaction with care and closely scrutinize everything done by the donees to secure the deed in question.

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

Dixon G. Adams, for appellant.

Chambers, Holland, Dudgeon & Beam, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and WALTER H. SMITH, District Judge.

NEWTON, J.

This is an action brought by Mildred Scholting, guardian of Johannes Myron Scholting, a minor, against Melvin R. Scholting and Lola Scholting, husband and wife, praying that two deeds from Johannes F. Heuck to defendants conveying the north one-half of the northeast quarter of Section 32, Township 13 North, Range 11 East of the 6th P.M., in Sarpy County, Nebraska, be canceled and set aside. It is alleged that at the time of the execution of the two deeds, the grantor was mentally incompetent and that the deeds were obtained by means of undue influence exercised upon the grantor by the defendants and other persons. The trial court found in favor of the defendants and plaintiff has appealed.

There is no contention made in this court that the grantor was mentally incapable of making a valid conveyance, but it is contended that by reason of age, his mental and physical faculties had deteriorated to the extent that he was susceptible to undue influence, and that the deeds were the result of such influence.

Johannes F. Heuck owned 320 acres of land in Sarpy County and in addition thereto, he owned an undivided one-half interest in an additional 400 acres of land, the

remaining half interest in said land being owned by Mildred Scholting. Johannes F. Heuck died February 2, 1966, at the age of 88 years. He had no children, but in 1911 he had married Mathilda Scholting, a widow with four children, namely Henrietta Scholting Alley, who died in 1949, Freda Scholting Alley, Melvin Scholting, a defendant herein, and LeRoy Scholting, who was the husband of Mildred Scholting and the father of the plaintiff Johannes Myron Scholting and of Edwin Scholting, a minor plaintiff in a companion case. LeRoy, Melvin, and Mr. Heuck all lived on adjoining quarter sections. Mathilda Heuck died in 1948 and prior to her death conveyed to her son LeRoy the quarter section of land on which LeRoy and his family resided down through the years to the present time. The conveyance was subject to a life estate vested in Mr. Heuck. Henrietta Scholting and Freda Scholting married and left home. As mentioned, Henrietta died in 1949. Freda and her husband moved to the State of Arizona in 1950 where they resided until the spring of 1962. They then returned to Sarpy County where they remained until after the death of Mr. Heuck at which time they returned to the State of Arizona. Melvin, although residing on an adjoining farm, was apparently busy with his own affairs and had little contact down through the years following his mother's death with Mr. Heuck. LeRoy and his family maintained a close relationship with Mr. Heuck and this relationship was continued by the family even after LeRoy's death. The family consisted of LeRoy's wife Mildred and seven children. Mr. Heuck was lame due to an ankle injury, walked with a cane, and retired from farming at a comparatively early age. After the death of Mrs. Heuck, LeRoy's family, down through the years until 1962, were in close contact with Mr. Heuck. They assisted him with any small chores that he had to do, mowed his lawn, maintained and installed improvements for him on his various farms, drove him about, for many years took him to a doctor, at

first twice a week and then once a week, did his telephoning for him, got his mail, took him to family affairs, assisted him in the transaction of various business matters, and were generally helpful in all matters pertaining to his personal or business requirements. As the years progressed, Mr. Heuck became very hard of hearing, suffered from a heart condition and edema which increasingly resulted in a swelling of his feet and ankles and made it more difficult for him to get about. One or two of the LeRoy Scholting children went over and stayed with Mr. Heuck each night for many years.

In the late fall of 1961, Mr. Heuck became ill and was taken to an Omaha hospital where he remained for a short time after which, as a result of his then condition of health, Mildred Scholting arranged for his admission to the Ashland Nursing Home. There Mrs. Scholting and her children visited him at least once a week and continued to look after his business interests for him. To facilitate this, he executed a power of attorney to Mildred Scholting authorizing her to handle his business affairs. He did not complain about conditions in the nursing home, but did display some degree of homesickness and a desire to return to his farm home. In May of 1962, Freda Alley returned to Nebraska and began to visit with Mr. Heuck. She encouraged his desire to return to his farm home and apparently promised to bring this about. In September of 1962 Mrs. Alley removed Mr. Heuck from the Ashland Nursing Home and the two of them moved into Mr. Heuck's farm home where Mrs. Alley's husband joined them a short time later. There they resided until December 1964 when Mrs. Alley had Mr. Heuck placed in a nursing home in Seward, Nebraska. He remained at the Seward home until his death on February 2, 1966, and in a comparatively short time thereafter, Mr. and Mrs. Alley returned to Arizona.

After the return of Freda Alley in May of 1962, Mr. Heuck displayed increasing hostility toward Mildred

Scholting and her family with the exception of Johannes Myron Scholting and Edwin Scholting, the two younger boys who had been close to Mr. Heuck throughout their lives and who continued to visit him until his death. Freda Alley, for reasons not clear, disliked Mildred Scholting and gave her to understand that she was not to come to the Heuck farm home after Freda made her home there with Mr. Heuck. Freda looked after Mr. Heuck at the farm home until he was placed in the Seward nursing home and until his death; and she assisted in the transaction of his business affairs. One of the older Scholting boys had been farming Mr. Heuck's home farm as a tenant. After Freda's arrival, this tenancy was canceled and the lease was given to a son-in-law of Fredas and then to individuals who were not related.

The record contains numerous exhibits. On August 5, 1948, Mr. Heuck executed a will wherein he bequeathed $1,000 to a niece, $3,000 to a brother, $4,000 to Melvin, a defendant herein, $500 each to two daughters of Freda Alley, $1,000 and two lots in Springfield, Nebraska, to Henrietta Alley, and the remainder of his property to his stepson LeRoy Scholting. On June 5, 1962, he executed another will wherein he bequeathed to defendant Melvin Scholting the sum of $3,000, $1,000 to Freda Alley, the Springfield, Nebraska, lots to the daughter of Henrietta Alley, $1,500 to a sister, $1,000 to a brother, and the remainder of his property was devised to Mildred Scholting, wife of his stepson LeRoy. On July 31, 1962, Mr. Heuck executed another will wherein he bequeathed the sum of $3,000 to his stepson Melvin Scholting, devised 240 acres of land to Freda Alley, the Springfield, Nebraska, lots to a daughter of Henrietta Alley, $1,500 to a sister, $1,000 to a brother, the south half of the northeast quarter of Section 32, Township 13 North, Range 11 East of the 6th P.M., to Edwin Scholting, a son of LeRoy, and the remainder of his estate to Johannes Scholting, another son of LeRoy,

and the minor plaintiff herein. This will has been admitted to probate. On July 31, 1964, Mr. Heuck executed two deeds in each of which he retained a life estate. In the first deed, he conveyed the northeast quarter of Section 32, Township 13 North, Range 11 East of the 6th P.M., in Sarpy County, Nebraska, to the defendants Melvin R. Scholting and Lola Scholting as joint tenants. In the second deed, he conveyed the east half of the northwest quarter of Section 17 and the northwest quarter of Section 20, Township 13 North, Range 11 East of the 6th P.M., in Sarpy County, Nebraska, to Freda M. Alley and Pearl M. Alley, wife and husband, as joint tenants. Prior to this date, similar conveyances had been made by him. On October 11, 1962, he had conveyed the south one-half of the northeast quarter of such Section 32 to the defendants Melvin R. Scholting and wife as joint tenants and on November 9, 1962, by another deed, conveyed the north one-half of the northeast quarter of said Section 32 to the same parties. On October 8, 1962, he had executed a deed conveying to Freda Alley and her husband, as joint tenants, the same land that he subsequently reconveyed to them in the deed of July 31, 1964. These deeds were also subject to a life estate retained by the grantor. The only consideration paid for any of these conveyances was $1.

Some of the land conveyed by the deeds above mentioned had been owned in severalty with Mildred Scholting and in order to dispense with her interest therein, this land was divided by an exchange of conveyances during November 1962 and March 1963.

The record does not disclose any undue influence to have been exercised by the defendants on Mr. Heuck, the contention being that the conveyances by him were the result of undue influence exercised by Freda Alley on her stepfather Mr. Heuck. Mr. Heuck had by these conveyances conveyed all of the real estate that he owned, with exception of the lots in Springfield, Nebraska, and the estate has few, if any, assets, the re-

sult being that these conveyances have from a practical standpoint, nullified the will which has been admitted to probate.

On June 2, 1962, Mr. Heuck signed a petition requesting the appointment of Mildred Scholting as conservator of his estate. Objections to the appointment of Mildred Scholting were filed by Freda Alley and thereafter, on July 2, 1962, one Otto Nielsen was appointed as conservator. On September 27, 1962, Mr. Heuck filed a motion requesting that the conservator be discharged and a preliminary order of discharge was entered on October 3, 1962, but a final order was not entered until January 8, 1964. On January 28, 1965, another petition was executed by Mr. Heuck requesting that Freda Alley be appointed as his conservator. An agreement was entered into between Mr. Hueck and Freda Alley whereby she agreed to look after his personal and business affairs, he then being in the Seward rest home, with the understanding that Freda Alley would occupy his home farm, should have the use of the buildings and 20 acres of pasture, feed for 25 heifers, 25 calves, 25 pigs, 100 chickens, and 1 horse, and should receive payment of utility bills for the telephone, gas, and electricity. Pursuant to this petition, Freda Alley was appointed and qualified as conservator on February 3, 1965. She was discharged as such conservator on January 18, 1967.

The deposition of Freda Alley taken after she had returned to Arizona forms a part of this record. A portion of that testimony is particularly enlightening. Reference was made to Mr. Heuck's desire in 1962 to leave the Ashland Nursing Home and return to his farm home. With reference to the Ashland home, the following question was asked: "Q. So you feel that he would have done just about anything to get out of there?" The answer was as follows: "A. I think he would have and that's—like I say, if I had been trying to gyp him out of anything I could have gotten more; I could have got the whole works if I would have talked to him but I

didn't. I just didn't want it. I felt like I had enough and I felt like Melvin was entitled to some and Mildred got four hundred acres and I felt like she had her share, so I just felt—I would have done it because I had promised my mother before she died that we would always see that he was taken care of and I can't go back on that promise and I would have taken care of him if I didn't gotten anything, only just our utilities and a place to live." Immediately thereafter appears the following questions and answers: "Q. But you feel like if you would have tried real hard you could have got everything he had? A. If I would have just said, Grampa, I won't come unless you give me thus and so— Q. Yes. A.—in order to get out on the farm he might have consented because he wanted to go so bad."

"The elements necessary to be established in order that a deed may be set aside on the ground of undue influence are: (1) That the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence." Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193. This appears to be the general rule. This being an equitable action, the cause must be heard de novo in this court and a determination made as to whether or not the attendant circumstances are sufficient to merit a finding of undue influence in accordance with the foregoing rules. We believe that such a finding is required. In 1962, when the original deeds were executed, the grantor was not mentally incompetent to execute a valid deed. He was, however, 84 years of age, in failing health and suffering from edema and a heart condition. He was lame, found it increasingly difficult to walk, and was very hard of hearing. He had a strong desire to leave the Ashland Nursing Home and return to his farm home. The strength of that desire, which is a natural one often found in elderly people, is attested to by the testimony of Freda Alley. Although Mrs.

Alley had not been close to the grantor for many years, shortly after her appearance on the scene the close relationship which had existed over a period of many years between Mr. Heuck and the family of his stepson LeRoy Scholting came to an end. She saw to it that his contacts with the members of the LeRoy Scholting family, with the exception of the two youngest children, became very infrequent. She made it known to Mildred Scholting that she was persona non grata. She soon succeeded in terminating the lease which Mr. Heuck had had for many years with one of the older Scholting boys and apparently an antagonistic feeling toward the LeRoy Scholting family developed in Mr. Heuck. No good reason appears in the record in this case to explain his change of attitude toward this family in the sense that it does not appear that any members of the family had performed any act of any kind which would warrant the antagonism Mr. Heuck developed toward all but the two younger members of the family. It seems obvious from this record and from the testimony of Freda Alley that by playing on Mr. Heuck's wish to return to his farm home, she was able to gain his trust and confidence, to take over his personal and business affairs, and to alienate him from the members of the LeRoy Scholting family, thus bringing to an end a relationship that had existed over a period of a great many years.

The evidence in this case indicates that not only did Freda Alley object to the appointment of Mildred Scholting as conservator for Mr. Heuck, but that she was dissatisfied with his having a conservator at all and influenced Mr. Heuck to bring about the discharge of Otto Nielsen as conservator. The original deeds from Mr. Heuck to the defendants and to Freda Alley were executed during the period of this conservatorship. Being somewhat doubtful under the circumstances that the deeds were valid, the later deeds conveying the same property were obtained after the termination of the conservatorship. A short time after the second set of

deeds was obtained, Mr. Heuck was placed in the rest home in Seward, Nebraska, and Freda Alley was appointed as conservator.

It is frequently difficult to prove the state of mind of one alleged to have been subjected to undue influence, but the testimony of Freda Alley would appear to make it clear that such influence did exist in the present case. The desire of the grantor to return to his farm home and his declining mental and physical condition rendered him subject to such influence. Freda Alley, who resided with him for a considerable period, certainly had the opportunity to exercise it. Her testimony, together with the evidence of the change in attitude toward the LeRoy Scholting family and the change in the disposition of his property desired by Mr. Heuck, make it apparent that there was a disposition on the part of Freda Alley to exercise such influence and that the deeds in question are the result of it.

It may be said that these defendants had nothing to do with the exercise of such influence upon Mr. Heuck, however, the antagonism of Freda Alley toward the LeRoy Scholting family and her evident desire to dictate the disposition of Mr. Heuck's property, together with the fact that she called the defendants, informed them that Mr. Heuck wanted to make a deed to them and that they should take him into town for that purpose, makes it apparent that the conveyances to the defendants were the direct result of the machinations of Freda Alley. " 'Undue influence exercised by any one, whether he or another gains by its exercise, renders the will or other instrument thus procured worthless.' " Sampson v. Sissel, 151 Neb. 521, 38 N. W. 2d 341. See, also, Woodring v. Seibold, 136 Neb. 647, 287 N. W. 75; Gidley v. Gidley, 130 Neb. 419, 265 N. W. 245.

Ordinarily, in cases of this type, the burden of proof is upon and remains with the plaintiff. This court has held on many occasions, however, that the burden of going forward with the evidence may shift to the defend-

ant. In Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645, this court stated: " 'Generally, the one attacking an instrument on the ground that its execution was procured by undue influence has the burden resting on him to establish that fact, but the circumstances under which a conveyance is made, the condition of the grantor at the time, and the injustice to him and his heirs, if it is upheld, may be such as to cast upon the grantee the burden of (evidence) showing that it is untainted with undue influence, imposition or fraud, but is the intelligent and deliberate act of the grantor.'

"Therefore, when a party seeking to set aside a conveyance because of undue influence establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden then shifts to the party seeking to sustain such conveyance to introduce evidence to overcome such presumption and in the absence thereof a decree should be entered against him.

"It is impossible to lay down any hard and fast rule in cases of this kind as to when a presumption of undue influence arises. The rule must of necessity be applied according to the particular facts and circumstances of each case in which the question arises. It may generally be stated that if the facts and circumstances of a case show such a confidential, fiduciary or trust relation that it would be inequitable to sustain the deed in question then such presumption arises and the burden of going forward with the evidence rests upon the grantee to show the bona fides thereof.

"In determining whether or not the plaintiffs have established sufficient facts and circumstances, considering the relationship of the parties, to raise a presumption of undue influence, and, if so, whether the defendants have rebutted it, the court will examine the transaction with care and closely scrutinize everything done by the donees to secure the deed in question." See, also, Eggert v. Schroeder, 158 Neb. 65, 62 N. W. 2d 266; Cun-

ningham v. Quinlan, 178 Neb. 687, 134 N. W. 2d 822; Conry v. Langdon, 181 Neb. 53, 146 N. W. 2d 782.

In Conry v. Langdon, *supra*, it was stated: "However, when a party upon whom the burden rests establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden of going forward with the evidence devolves upon the grantee to show the bona fides of the conveyance. 'In any such case where confidence is known, or may reasonably be expected to exist as a fact, where it is of a legal, moral, social, domestic, or personal character, equity will scrutinize the transaction critically, and especially so where age, infirmity, and instability are involved, to see that no inequitable action has been taken and no injustice has occurred. * * * When a party seeking to set aside a conveyance because of undue influence establishes facts which show the relationship of the parties and their dealings to be such that a presumption of undue influence arises therefrom, the burden of going forward with the evidence then shifts to the party seeking to sustain such a conveyance to overcome such presumption.' "

In view of the relationship which existed between Freda Alley and the grantor named in the deeds in question and the attendant circumstances disclosed in this record, we believe that this case is one requiring close scrutiny, that a presumption of undue influence arose, and that the burden of going forward with the evidence shifted to the defendants. We find that the conveyances made to the defendants by Mr. Heuck were obtained by the undue influence of Freda Alley and that the judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

WALTER H. SMITH, District Judge, not participating.

EDWIN SCHOLTING, A MINOR, BY MILDRED SCHOLTING, HIS MOTHER AND NEXT FRIEND, APPELLANT, V. MELVIN R. SCHOLTING ET AL., APPELLEES
164 N. W. 2d 926

Filed February 7, 1969. No. 37026.

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

Dixon G. Adams, for appellant.

Chambers, Holland, Dudgeon & Beam, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and WALTER H. SMITH, District Judge.

NEWTON, J.

This is a companion case to Scholting v. Scholting, *ante* p. 850, 164 N. W. 2d 918. The two cases are identical except that the minor plaintiff in the present case is a brother of the minor plaintiff in the preceding case and this case involves the south one-half of the northeast quarter of Section 32, Township 13 North, Range 11 East of the 6th P.M., in Sarpy County, Nebraska.

The two cases were tried together in the district court and but one bill of exceptions is presented here. This case is to be determined on identically the same set of facts and issues as was the preceding case and the same propositions of law are applicable. Its determination is controlled by the opinion and decision in the companion case.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

WALTER H. SMITH, District Judge, not participating.

PATTI HUFF, APPELLANT, V. OTTO SEIPOLD ET AL., APPELLEES.
164 N. W. 2d 916

Filed February 7, 1969. No. 37038.

1. **New Trial: Jurors.** A motion for new trial for alleged misconduct of a juror is addressed to the sound discretion of the trial court.
2. ———: ———. Jury misconduct not calculated to prejudice a substantial right of the complaining party is no ground for a new trial.
3. **New Trial: Jurors: Evidence.** Although a juror's testimony to the effect of misconduct upon him is not directly contradicted, it is not always conclusive on the issue of prejudice.

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

William H. Mecham and Charles H. Truelsen, for appellants.

Cassem, Tierney, Adams & Henatsch, John R. Douglas, and Gross, Welch, Vinardi, Kauffman, Schatz & Day, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and WALTER H. SMITH, District Judge.

SMITH, J.

Otto Seipold having gained a jury verdict, Patti Huff in a motion for new trial alleged that misconduct of a juror ought to vitiate the verdict. She complained that the foreman had improperly used a Nebraska driver's manual published by the Department of Motor Vehicles. The district court overruled her motion. She has appealed.

The bill of exceptions contains no verbatim record of the jury trial, and counsel have stipulated few items. The evidence concerns Patti's personal injury claim arising out of two automobile collisions in Sarpy County, Nebraska, at 4:30 p.m., October 8, 1965. She was driving west and Seipold was driving east on State Highway

No. 370 toward an intersecting access road to Interstate Highway No. 80. Seipold entered the intersection to turn left. At that time his car was struck by an overtaking, eastbound car operated by Francis Lechner. The impact drove Seipold's car across the centerline and into the path of Patti's car. The stipulation reads:

"1. * * * the only evidence * * * concerning skid marks came from Highway Patrolman David Hatcliff, who testified that there were one hundred forty-four feet of skid marks from the vehicle driven by Francis Lechner, and twenty feet of skid marks from the vehicle driven by Patti Huff, and no skid marks from the vehicle driven by Otto Seipold. 2. * * * Lechner testified he was driving between sixty and sixty-five miles per hour when he applied his brakes. 3. * * * there was a dispute * * * whether * * * Seipold * * * had given a signal of his intention to make a left hand turn from Highway 370." Contributory negligence of Patti was not asserted.

The jury deliberated from 12:18 to 5 p.m., March 20, 1968, and from 9:30 a.m. to 3.20 p.m., March 21. A 5/6 verdict for Seipold was rendered by the foreman, Frances Filipowicz, and nine other jurors.

The Director of Motor Vehicles had been distributing the driver's manual in connection with examinations for renewals of drivers' licenses. See, §§ 60-411.01 and 60-440, R. R. S. 1943. Frances and the other members of the array heard an open announcement in which the speaker recommended that they obtain copies of the manual for that purpose. Frances received a copy on request at the close of her first day of jury duty. At home in evenings of trial days, she read the following statements in the manual:

"Begin turn signal for at least 50 feet from corner. (500 feet on Interstate) * * * Well ahead of the turn, look for any following cars and move over close to center line, giving signal * * * Allow at least one car length for every 10 mph of speed * * * Total minimum stopping distances with perfect 4-wheel brakes on best type of

road surface under favorable conditions - Mi. Per Hr. * * * 60 * * * Thinking Distance 66 (ft.) * * * Braking Distance 215 (ft) * * * (Total) 281 ft."

At the hearing on Patti's motion for new trial, Frances testified: "I was asking my daughter a lot of questions; she had to take this test, and I have three teenagers, and I want to make sure that they know * * * also I was thinking about this, that within so many feet of tread marks, that with proper signaling that I felt in my own mind that Seipold had given sufficient indication of turn signaling and the guy would have had time to stop. That was in my own mind; I ran across this in stressing this to my own daughters how much distance you have to have in reaction time."

During deliberation of the jury, Frances removed the manual from her purse. She read aloud the instructions for a left-turn signal. Juror Grievious quickly interrupted her, and all agreed that they ought not to consider the statement. Their deliberation ended without further reference to the manual. The jurors, four in number, who testified included Grievious and another who had not signed the verdict. In their opinion, Frances' reading the manual in the jury room had not influenced the verdict.

No instruction to the jury is assigned for error. Instruction No. 12 contains the substance of Neb. Jury Instns. No. 1.01 concerning knowledge of a juror. Instruction No. 9 reads: "The following sections of statutes * * * are submitted for your consideration: * * * A signal of intention to turn left shall be given continuously during not less than the last fifty feet traveled by the vehicle before turning." See, also, § 39-7,115, R. R. S. 1943.

A motion for new trial for alleged misconduct of a juror is addressed to the sound discretion of the trial court. State v. Adams, 181 Neb. 75, 147 N. W. 2d 144; Klein v. Wilson, 167 Neb. 779, 94 N. W. 2d 672. Jury misconduct not calculated to prejudice a substantial right

of the complaining party is no ground for a new trial. Wessel v. Bishop, 76 Neb. 74, 107 N. W. 220. Although a juror's testimony to the effect of misconduct upon him is not directly contradicted, it is not always conclusive on the issue of prejudice. See, Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689; Whitehead v. State, 115 Neb. 143, 212 N. W. 35. A juror's conduct in obtaining outside, expert opinion to guide the weighing of testimony and in communicating the opinion to fellow jurors during deliberation may vitiate the verdict. See Hoskovec v. Omaha St. Ry. Co., 80 Neb. 784, 115 N. W. 312.

Rules for impeachment of verdicts mediate among public interests in fairness to individual litigants, integrity of trials, and stability of verdicts. Chicago, B. & Q. R.R. Co. v. Oyster, 58 Neb. 1, 78 N. W. 359; Omaha Fair & Exposition Assn. v. Missouri P. Ry. Co., 42 Neb. 105, 60 N. W. 330. See, also, Comment, 25 U. Chi. L. Rev. 360. An additional feature is legislative concern over lack of driver education and need for dissemination of information. See §§ 60-411.01 and 60-440, R. R. S. 1943. Policy measures the degree of misconduct ascribable to given behavior. The degree in turn is to be considered in assessment of the effect of the misconduct.

Frances' knowledge of deceleration was gained innocently. She did not communicate that information to her fellow jurors. Differences between instruction No. 9 and the manual are trivial. There was no prejudicial error.

The judgment of the trial court is affirmed.

AFFIRMED.

EDNA ACKER, APPELLANT, V. C. N. SORENSEN, M.D., APPELLEE.

165 N. W. 2d 74

Filed February 7, 1969. No. 37053.

1. **Physicians and Surgeons: Limitations, Statute of.** In a malprac-

tice action against a physician, the statute of limitations does not commence to run until the time the act of malpractice with resulting injury was, or by the use of reasonable diligence could have been, discovered.

2. **Judgments.** At a hearing on a motion for summary judgment, the moving party has the burden of showing that no material issue of fact exists and unless this is done conclusively, the motion must be overruled.

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

Marti, O'Gara, Dalton & Bruckner, for appellant.

Wright, Simmons & Hancock, for appellee.

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

MCCOWN, J.

This is an action for malpractice. The defendant's motion for summary judgment was sustained by the trial court on the ground that plaintiff's cause of action was barred by the statute of limitations.

The pleadings, deposition, and affidavit of the plaintiff, Edna Acker, assert that she first had a skin disorder in 1956. There was a small lump on the side of her nose and one on her cheek. She consulted Dr. Blackstone of Bridgeport, Nebraska, who burned them off with acid. On August 30, 1957, after a recurrence of the small lump on her nose, the size of a kernel of rice, she consulted Dr. Gentry of Gering, Nebraska, who told her to go to Dr. Sorensen, the defendant here, and have the lump X-rayed off. She saw Dr. Sorensen the same day and he used X-ray to treat the condition. Dr. Sorensen advised her that the condition was not cancerous and did not take a biopsy at that time. She experienced difficulty for 3 or 4 months. Thereafter the scab was gone and it seemed to be healed.

In September of 1958, she had a drawing sensation inside her nose and saw Dr. Sorensen again. It was all healed on the outside and Dr. Sorensen told her to be

patient. The drawing sensation left and she had no more trouble until 1961. In 1961, there was a breaking out and bleeding at the place where her nose had been X-rayed. She went to Dr. Blackstone, who gave her some salve, and she consulted him several times in 1961. The condition on her nose would heal for 3 or 4 weeks and then break out again.

In May 1962, she went to Dr. Palmer in Bridgeport, Nebraska, about the disorder on the left side of her nose. Dr. Palmer was retired from the active practice of medicine at that time, but agreed to see Mrs. Acker in his home. After examining the condition on the left side of her nose, Dr. Palmer advised Mrs. Acker that, in his opinion, it was cancer and that it was caused from an X-ray burn. Dr. Palmer suggested that Mrs. Acker go to the Mayo Clinic. After reporting Dr. Palmer's opinion to her husband, her husband suggested that she again contact Dr. Sorensen about the matter because he had administered the X-ray treatment. Mrs. Acker called Dr. Sorensen and he agreed to see her the same day. At that time, after examining the left side of her nose, Dr. Sorensen advised Mrs. Acker that Dr. Palmer was right; that the X-ray burn had caused a cancer of some kind, but that he did not feel it was necessary for her to go to Mayo's; and that he could take care of the condition. Dr. Sorensen then undertook to cauterize the area with an electric needle. This was in May 1962. Mrs. Acker saw Dr. Sorensen again in June 1962, and he gave her a prescription for some salve and told her to stay out of the sun. At his suggestion, she returned in July 1962, and Dr. Sorensen cauterized an area where he had not burned it before. He said he did not have all the cancer. She saw him again in August 1962, and he again cauterized the area. After the cauterization in August 1962, it seemed to heal up. The redness went away and the bleeding stopped. At his suggestion, Mrs. Acker returned to see Dr. Sorensen in September 1962. He told her that everything looked fine and that the cancer was

all gone. He suggested that she return in approximately 3 months. Mrs. Acker returned to see Dr. Sorensen in December 1962. At that time the condition still appeared to be healed, but she was having some difficulty with her nose in the area of the bridge where the glasses came in contact with the nose. Dr. Sorensen again assured her that the cancer had been cured and that she had nothing further to worry about.

Mrs. Acker had no further trouble until approximately July or August of 1963. The area began bleeding again and would get red. In August 1963, she again consulted Dr. Sorensen who cauterized it again in three places. He assured her that it was not cancer and assured her that he could clear it up without much difficulty. At his suggestion, she returned to see him again in September and October of 1963, at which time he did not perform any further cauterization with the electric needle, but merely gave her a prescription for salve which he suggested that she apply daily. The condition seemed to improve. She returned to Dr. Sorensen in November at his suggestion, and he said that everything was fine and so far as she knew, everything was fine.

In 1964, while visiting in California, the area on the left side of her nose became red, bled, and developed a scab. She called and made an appointment with a skin specialist, Dr. Lewe. The appointment was about a week ahead and by the time she reached his office, the condition was all healed up. She reported to Dr. Lewe that her former doctor had told her she had had cancer but that it was cured. Dr. Lewe told her that there was no cancer showing at the time that he could see, and that he didn't think there was ever any cancer there because he didn't think any doctor would ever treat her condition with an electric needle and X-ray without taking a biopsy. Dr. Lewe did not administer any treatment.

In the summer of 1965, the area on the left side of her nose again began to break out occasionally and bleed,

and for the first time, Mrs. Acker began to have some pain in this area. She had had the pain for some 2 or 3 months before she went to see Dr. Gentry on approximately July 21, 1965. He examined her and, for the first time, said that they would take a biopsy, but asked her to go over and have Dr. Sorensen look at it. She went to see Dr. Sorensen the same day and he examined the nose, but gave her no treatment. He sent her back to Dr. Gentry, who agreed that she could wait for the biopsy until after a short trip she was planning. She returned to Dr. Gentry's office and the biopsy was taken on August 3, 1965. This was the first biopsy taken of the area on the left side of her nose. Mrs. Acker was not informed of the results of the biopsy until approximately August 16, 1965. At that time, Dr. Gentry advised her that she had cancer. She was referred to a Dr. Heinke who examined her on the same day, and thereafter she was referred to Dr. Latenser in Omaha, Nebraska. August 16, 1965, was the first time that Mrs. Acker was told that the condition on the left side of her nose was still cancerous and that it was a very serious cancerous condition.

Mrs. Acker went to Omaha approximately August 23, 1965, and at that time Dr. Latenser did another biopsy and then recommended a procedure called chemo-surgery. This procedure was performed on August 24, 1965, by Dr. Latenser. The surgery revealed that the subcutaneous cancer had spread massively through the left side of her face. Treatments by Dr. Latenser were carried out in Immanuel Hospital in Omaha through September 30, 1965. A biopsy taken at the Mayo Clinic in February 1966, revealed that the chemo-surgery had successfully eradicated the cancer.

This action was brought against Dr. Sorensen on August 1, 1967. The sole issue presented at the hearing on the motion for summary judgment was whether the statute of limitations had run. The statutory period in

Nebraska is 2 years. The trial court held the action was barred by the statute.

There is a great divergence of opinion among courts in determining the proper event which starts the period of limitation against a malpractice action. Conflicting policies are involved. On the one hand is the policy of protecting the practitioner from stale demands, with the consequent dangers of missing witnesses, and errors in memory and recollection of available witnesses. On the other hand is the policy of protecting patients against negligence of medical practitioners, which is often difficult to discover within the statutory period of limitation. Cases considering this question are collected and discussed in an annotation in 80 A. L. R. 2d 368, and in earlier annotations appearing in 144 A. L. R. 209, and 74 A. L. R. 1317.

Theoretically, there are several choices as to the event which will start the running of the statute of limitations. The plaintiff contends that the discovery rule adopted by this court in Spath v. Morrow, 174 Neb. 38, 115 N. W. 2d 581, applies to malpractice actions generally. The defendant contends that the end of treatment rule set out in Williams v. Elias, 140 Neb. 656, 1 N. W. 2d 121, is the proper rule, and that the application of the discovery rule in Spath v. Morrow, *supra,* should be limited to cases involving foreign objects. We think it clear that the rule of Spath v. Morrow, *supra,* was intended to apply broadly. That case held that a cause of action for malpractice based upon the alleged failure of a physician to remove a foreign object left in the body of a patient by mistake does not accrue until the patient discovers, or in the exercise of reasonable diligence should have discovered, the presence of the foreign object. That discovery rule was extended to conditions other than foreign objects in the case of Stacey v. Pantano, 177 Neb. 694, 131 N. W. 2d 163. We said there: "The treatment and advice were part of the duties that arose in law from the nature of his employ-

ment as a physician. The cause of action, therefore, accrued when the alleged breach of duty was discovered, * * *." Citing Spath v. Morrow, *supra.*

It should be noted here that the specific charges of negligence against the defendant include not only the original X-ray treatment in 1957, and the cauterization in 1962 and 1963, but include charges of faulty diagnosis and medical advice, and failure to diagnose and advise, which interfered with proper tests and treatment, as well as the failure at any time to take a biopsy. Obviously, the situation here involved the acceleration of an existing condition into an aggravated state. This was "the product of a period of time rather than a point of time" and in such circumstances, the plaintiff should be held to be "injured" only when the accumulated effects manifest themselves. See, United States v. Reid, 251 F. 2d 691 (5th Cir., Miss.); Urie v. Thompson, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, 11 A. L. R. 2d 252.

There is obviously a distinction between notice of negligent act and notice of its consequences. This court is already committed to the discovery rule. As we said in Spath v. Morrow, *supra:* "Patients should not be encouraged to go from physician to physician in an effort to ascertain whether the diagnosis made and the treatment received are proper. Silence on the part of the physician for the statutory period should not destroy the rights of the patient." The principle becomes even more compelling where affirmative representations as to a cure replace silence. We, therefore, hold that in a malpractice action against a physician, the statute of limitations does not commence to run until the time the act of malpractice with resulting injury was, or by the use of reasonable diligence could have been, discovered. We do not pass on the effect of continued treatment by the physician after discovery.

This case involves a motion for summary judgment. There is a factual issue as to whether the plaintiff, by

the use of reasonable diligence, could have or should have discovered the continued existence of the cancer more than 2 years prior to the filing of the action here. At a hearing on a motion for summary judgment, the moving party has the burden of showing that no material issue of fact exists and unless this is done conclusively, the motion must be overruled. Youngs v. Wagner, 172 Neb. 735, 111 N. W. 2d 629.

The judgment is therefore reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

INDEX

Actions.

1. Where a plaintiff employee comes within the provisions of the Workmen's Compensation Law, its remedies are exclusive of his right to bring an action for damages against his employer based upon the provisions of the Nebraska Factory Act. Goodwin v. Epsen Lithographing Co. ---------- 281
2. In the absence of substantial prejudice, a misjoinder of causes of action or defenses is not a ground for reversal. Coomes v. Drinkwalter ---------- 564
3. A declaratory judgment proceeding is permissible to determine rights and benefits under the firemen's pension statute. Hooper v. City of Lincoln -- 591
4. In a juvenile court proceeding, it is essential to the jurisdiction of the court that service of summons be had on the person or persons having the custody or control of the child, or with whom the child may be when the action is commenced. Mingus v. Traxler 638
5. Statute requires that where facts are set forth in a proper proceeding to terminate parental rights, the summons or proper notice must be endorsed that the proceeding is one to terminate parental rights. Mingus v. Traxler ---------- 638
6. An appeal or error proceeding does not lie from a purely legislative act by a public body to which legislative power has been delegated. Scottsbluff Improvement Assn. v. City of Scottsbluff -------- 722
7. The only remedy to challenge a purely legislative act by a public body is by collateral attack, that is, by injunction or other suitable action. Scottsbluff Improvement Assn. v. City of Scottsbluff ---------- 722
8. Review by error proceeding allowed only when a tribunal acts judicially. Scottsbluff Improvement Assn. v. City of Scottsbluff ---------- 722

Administrative Law.

1. The rules relating to nunc pro tunc orders are generally applicable to administrative and quasi-judicial commissions. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp. ---------- 229
2. A final order of the State Board of Equalization and Assessment is presumptively valid and will not be reversed except where it is shown that such order

or action was illegal, arbitrary, capricious, or unreasonable. County of Kearney v. State Board of Equalization & Assessment ---------- 329

3. A sales assessment ratio study consisting of a relatively small number of sales or sales nonrepresentative in character is not sufficient upon which to base a comparison of market or actual value and the value used for purposes of taxation. County of Kearney v. State Board of Equalization & Assessment ---------- 329

4. The constitutional and statutory power of the State Board of Equalization and Assessment is to equalize values uniformly on a statewide basis and equalization as between counties within a district or intracounty equalization is not authorized. County of Kearney v. State Board of Equalization & Assessment 329

5. The State Board of Equalization and Assessment may rely on and is entitled to act on the presumption that the abstracts of assessment returned by the various counties have conformed to the law. County of Kearney v. State Board of Equalization & Assessment ---------- 329

6. An appeal to the district court from a decision of the Department of Water Resources of this state is not commenced or perfected by filing within 30 days of the service of the final decision of the department a petition in the office of the district court, plaintiffs on appeal must also cause a summons to issue on the petition on appeal within 30 days as directed by statute. Norris P. P. Dist. v. State ex rel. Jones ---------- 489

7. A summons issued within 30 days and subsequently served thereafter is a valid service of summons under the statute. Norris P. P. Dist. v. State ex rel. Jones ---------- 489

8. Summonses issued and served after the 30-day time to appeal do not meet the requirements of statute, and require a dismissal of the petition on appeal as not being in compliance with the statutory appeal procedure. Norris P. P. Dist. v. State ex rel. Jones 489

9. An appeal to the district court to review the revocation of a motor vehicle operator's license by the Director of Motor Vehicles under the Implied Consent Act is a judicial proceeding. Gibbs v. Johns 618

10. The same motor vehicle operation may give rise to two separate and distinct proceedings: One is a civil and administrative licensing procedure; the

other is a criminal action. Each action proceeds independently of the other and the outcome of one action is of no consequence to the other. Ziemba v. Johns ---------- 644

11. A defendant's plea of guilty to a criminal charge of operating a motor vehicle while under the influence of alcohol does not preclude the subsequent revocation of his driver's license in an administrative proceeding. Ziemba v. Johns ---------- 644
12. On appeal of an order of the railway commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. Neylon v. Petersen & Petersen, Inc. ---------- 813
13. The railway commission has continuing jurisdiction over its orders and the right to modify, annul, and vacate them thereafter; doctrine of res judicata not applicable. Neylon v. Petersen & Petersen, Inc. -- 813
14. Evidence of operations under color of authority may be considered by the railway commission in determining whether or not the proposed service is or will be required by the present or future public convenience and necessity. Neylon v. Petersen & Petersen, Inc. ---------- 813
15. The issue of public convenience and necessity is ordinarily one of fact and where there is evidence in the record to sustain the railway commission's order, the Supreme Court cannot say that it is unreasonable and arbitrary. Neylon v. Petersen & Petersen, Inc. ---------- 813
16. An administrative board has no power or authority other than that specifically conferred upon it by statute or ordinance, or by a construction necessary to accomplish the purpose of the act. Slosburg v. City of Omaha ---------- 839
17. An administrative agency cannot, in the absence of legislative authority, rescind or change its own final orders. Slosburg v. City of Omaha ---------- 839

Adverse Possession.

1. The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. Carstenson v. Weinrich ---------- 821

2. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted. Carstenson v. Weinrich ---------- 821

Affidavits.

1. Where the circulator of an initiative petition has signed and sworn to a properly executed statutory form of affidavit that he or she is a legal and qualified voter of the State of Nebraska, there is a presumption that he or she is a qualified elector in the absence of affirmative evidence to the contrary. State ex rel. Morris v. Marsh ---------- 521
2. Where there is no evidence of fraud or irregularity on the part of the circulator in his circulation of the initiative petitions, evidence that he, as an individual, signed two other petition forms for the same measure does not destroy the presumption of validity of his affidavit as a circulator nor justify the disqualification of concededly valid signatures obtained by him as circulator. State ex rel. Morris v. Marsh ---------- 521

Appeal and Error.

1. It is mandatory and jurisdictional, under statute, that a petition in error be filed in the appellate court and a properly authenticated transcript be filed within 1 calendar month after the rendition of the judgment or final order. Friedman v. State 9
2. When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly. Friedman v. State -- 9
3. An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law. Friedman v. State ---------- 9
4. Where a plaintiff did not elect to stand upon his petition after defendants' demurrer to it was sustained, and no judgment of dismissal was thereafter rendered by the trial court disposing of the case and terminating the litigation in that court, the order sustaining the demurrer is not a final order reviewable on appeal. Root v. School Dist. No. 25 ------ 22
5. An order overruling a special appearance is not a final order from which an appeal can be taken. Root v. School Dist. No. 25 ---------- 22
6. Rule for reviewing a sentence within statutory limits stated. Nicholson v. Sigler ---------- 24

State v. Mayes ---------- 165
State v. Giles ---------- 296
State v. Williams ---------- 395
State v. Lenz ---------- 496
State v. Borgmann ---------- 497
State v. Rose ---------- 809

7. A party may not successfully complain of the introduction of evidence of a like character to that which it subsequently introduced. Iske v. Metropolitan Utilities Dist. ---------- 34

8. Alleged improper conduct of the trial judge in the absence of the jury will not be reviewed on appeal in the absence of a timely objection. Drahota v. Wieser ---------- 66

9. Rule for testing sufficiency of evidence stated. Riddle v. Erickson ---------- 122
Speedway Transp., Inc. v. DeTurk ---------- 629

10. In a criminal action the Supreme Court will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Rich ---------- 128
State v. Fender ---------- 92

11. When an appeal is taken from a judgment of the county court denying the admission of a will to probate, the party appealing is required to file a petition on appeal within 50 days from the date of the rendition of such judgment unless the court, on good cause shown, shall otherwise order. Mitchell v. Tucker ---------- 155

12. Whether good cause has been shown is ordinarily a question of fact. Mitchell v. Tucker ---------- 155

13. For a question of constitutionality to be considered in the Supreme Court, it must be previously raised in the trial court. State v. Mayes ---------- 165

14. Where a notice of appeal is not filed within time required by statute, the Supreme Court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed. State v. Williamsen ---------- 173

15. Time provisions provided in statute for appealing from municipal court to district court are mandatory and jurisdictional. Simmons v. Mutual Benefit Health & Acc. Assn. ---------- 175

16. Statutory provision regarding time and method of filing proof of service of a copy of the notice of appeal from municipal court to district court is

directory, and not mandatory or jurisdictional. Simmons v. Mutual Benefit Health & Acc. Assn ------ 175
17. When the evidence on material questions of fact is in irreconcilable conflict, the Supreme Court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Jones v. Jones ---------- 223
Hooper v. City of Lincoln ---------- 591
Jenkins v. Watson-Wilson Transp. System, Inc. -- 634
18. The discretion of the lower court with respect to awarding or changing the custody and support 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. Jones v. Jones ---------- 223
Boyer v. Boyer ---------- 226
19. Instructions must be considered together and if, when considered as a whole, they correctly state the law, error cannot be predicated thereon. Liebers v. State ---------- 250
Deitloff v. City of Norfolk ---------- 648
20. The provisions of cited statute do not apply to appeals in probate matters. Schurmann v. Curtiss 277
21. A party may not complain of error which he has invited. County of Kearney v. State Board of Equalization & Assessment ---------- 329
22. A litigant who asks relief, which is granted, cannot appeal from such decree because the effect is different from that he anticipated. County of Kearney v. State Board of Equalization & Assessment ---------- 329
23. The jurisdiction of the Supreme Court in criminal cases is appellate in nature and it acquires no jurisdiction of a criminal appeal unless the mandatory requirement of the statute that a notice of appeal be filed within 1 month of a final judgment and sentence of the district court is complied with. State v. Wycoff ---------- 373
24. An application for a hearing under the Post Conviction Act is not a substitute for an appeal. State v. Reizenstein ---------- 376
State v. Riley ---------- 616
25. An appeal to the district court from a decision of the Department of Water Resources of this state is

not commenced or perfected by filing within 30 days of the service of the final decision of the department a petition in the office of the district court, plaintiffs on appeal must also cause a summons to issue on the petition on appeal within 30 days as directed by statute. Norris P. P. Dist. v. State ex rel. Jones ---------- 489

26. A summons issued within 30 days and subsequently served thereafter is a valid service of summons under the statute. Norris P. P. Dist. v. State ex rel. Jones ---------- 489

27. Summonses issued and served after the 30-day time to appeal do not meet the requirements of statute, and require a dismissal of the petition on appeal as not being in compliance with the statutory appeal procedure. Norris P. P. Dist. v. State ex rel. Jones 489

28. In the absence of a motion for a directed verdict on the issue of liability, the plaintiff cannot complain of the failure of the trial court to withdraw that issue from the jury. Kehm v. Dumpert ---------- 568

29. Appellant, on appeal, is precluded from raising error of law occurring at the trial unless alleged error is properly presented to the trial court and properly preserved. Lucht v. American Propane Gas Co. ---------- 583

30. A motion to set aside a judgment of conviction or a sentence in a post conviction proceeding cannot serve the purpose of appeal to secure a review of the conviction. State v. Riley ---------- 616

31. An appeal to the district court to review the revocation of a motor vehicle operator's license by the Director of Motor Vehicles under the Implied Consent Act is a judicial proceeding. Gibbs v. Johns -- 618

32. Objection to the admission of evidence must be properly and timely raised at the trial. State v. Oliva 620

33. Under ordinary circumstances, expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony. Deitloff v. City of Norfolk ---------- 648

34. In a condemnation action, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong. Deitloff v. City of Norfolk ---------- 648

35. Errors in the trial of a criminal case, in order to require a reversal of conviction, must be harmful to a substantial right of the defendant. State v. Heiser 665
State v. Caldwell ---------- 712

36. A divorce action is triable de novo upon the issues presented by the appeal. Johnson v. Johnson ---- 670
37. Errors assigned but not argued will be considered waived. State v. Caldwell ---------- 712
38. If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case, unless proper instruction has been requested by the party complaining. State v. Caldwell ---------- 712
39. The provisions of cited statute do not apply to appeals taken from the action of a freeholder board. Clark v. Sweet ---------- 723
40. On appeal of an order of the railway commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. Neylon v. Petersen & Petersen, Inc. ---------- 813
41. On appeal from a police court to the district court, if the appeal is not completed within the time fixed by statute due to the fault of the appealing party, the appeal will be dismissed. State v. Wineman -- 819
42. The failure on the part of the police magistrate to perfect the appeal in violation of a mandatory duty does not deprive the district court of jurisdiction and does not deprive either party of his right to be heard. State v. Wineman ---------- 819
43. Where the fault lies with the police magistrate, the district court acquires jurisdiction and may not dismiss the appeal on the ground that it was not filed within the time fixed by law. State v. Wineman 819

Arrest.

1. Evidentiary statements made subsequent to an illegal arrest are not ipso facto tainted by it. State v. Mayes ---------- 165
2. A police officer may arrest for a misdemeanor committed or attempted in his presence. State v. Reeder ---------- 425
3. Rule for arrest with warrant stated. State v. Heiser 665
State v. Beasley ---------- 681
4. A search and seizure incident to a lawful arrest is not violative of the Fourth Amendment. State v. Heiser ---------- 665

Attorney and Client.

1. Where defendant is notified by certified mail of the immediate withdrawal of his counsel from the case and he takes no steps to procure another attorney for 20 days prior to the granting of a default judgment by the court, any harm resulting is due to the inexcusable negligence of the defendant, and, ordinarily, affords no basis for relief. Frazier, Inc. v. Alexander ---------- 451
2. Ordinarily it is proper for counsel to comment on the failure of the opposing side to produce or use available and competent witnesses, where the circumstances justify an unfavorable inference from such omission. State v. Heiser ---------- 665

Attorneys at Law.

1. Canon 38, Canons of Professional Ethics, states that a lawyer should accept no compensation, commissions, rebates, or other advantages from others without the knowledge and consent of his client after full disclosure. State ex rel. Nebraska State Bar Assn. v. Richards ---------- 184
2. Neither harm to the client nor insufficiency of the consideration for the compensation received from others is an essential element of a violation of Canon 38. State ex rel. Nebraska State Bar Assn. v. Richards ---------- 184
3. Willfulness or wrongful intent to violate the canons may be proved by circumstantial evidence. State ex rel. Nebraska State Bar Assn. v. Richards ---------- 184
4. The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association as adopted by the Nebraska Supreme Court, and those which may from time to time be approved. State ex rel. Nebraska State Bar Assn. v. Tesar ---------- 272
5. Lawyers who are granted licenses to practice their profession in this state thereby voluntarily assume certain obligations and duties as officers of the courts, and in the performance thereof they must conform to certain standards in relation to clients, to the courts, to the profession, and to the public. State ex rel. Nebraska State Bar Assn. v. Tesar -- 272
6. The trial court has a wide discretion in determining the latitude permitted in the argument of counsel. State v Heiser ---------- 665

Automobiles.

1. Statute requires that every motor vehicle shall be equipped with brakes, including two separate means of applying the brakes, each of which shall be effective and so constructed that no part which is liable to failure shall be common to the two. Ritchie v. Davidson ---------- 94
2. An automobile operator is required to be familiar with the proper use of the braking system on his vehicle and to use it in a proper manner, if necessary, to avoid accidents. Ritchie v. Davidson ---- 94
3. It is a general rule, subject to exceptions not applicable to this case, that it is negligence as a matter of law for a motorist to drive an automobile on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he is traveling. Ritchie v. Davidson 94
4. Basis of rule that it is negligence as a matter of law for a motorist to drive an automobile on a public highway, at any time, at a speed or in such a manner that a collision with object in range of vision cannot be avoided stated. Ritchie v. Davidson 94
5. Gross negligence, within the meaning of the motor vehicle guest statute, defined. Brugh v. Peterson 190
   Reeder v. Rinne ---------- 734
6. A qualified expert, upon laying a proper foundation, may give his opinion as to the minimum speed which a vehicle must have been traveling to lay down the skid marks shown in the evidence. Brugh v. Peterson 190
7. A hypothetical question asked an expert witness as to the rate of speed of a vehicle must include all factors necessary for a reasonably accurate opinion, and all such factors must be supported by the evidence. Brugh v. Peterson ---------- 190
8. Skid marks, distance traveled after impact, and force of impact are pertinent factors for the consideration of the jury in determining speed in a proper case. Brugh v. Peterson ---------- 190
9. Although a driver may have the technical right-of-way, if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way. Brugh v. Peterson ------ 190

10. A leased automobile converted by the lessee with intent to steal is a stolen automobile within the meaning of the statute prohibiting concealment of a stolen automobile. Kruger v. Brainard ---------- 455
11. A motorist owes a duty of reasonable care to a pedestrian who is crossing a street at a point not a regular crossing. Miller v. Moeller ---------- 508
12. A pedestrian crossing at a regular crosswalk with the right-of-way has a right, until he has notice or knowledge to the contrary, to assume that others will respect his right-of-way. Miller v. Moeller ------ 508
13. It is negligence as a matter of law for a motorist to drive so fast on the highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his headlights. Kehm v. Dumpert ---------- 568
14. A purchaser who receives possession of a motor vehicle without obtaining the certificate of title thereto, as required by our statutes, acquires no title or ownership therein. Forman v. Anderson -- 715
15. The purpose of the act relating to transfers and titles to motor vehicles is to provide a means of identifying motor vehicles, to ascertain the owner thereof, to prevent theft of motor vehicles, and to prevent fraud. Forman v. Anderson ---------- 715
16. A certificate of title to a motor vehicle is generally conclusive evidence in this state of ownership of the vehicle. Forman v. Anderson ---------- 715
17. The contributory negligence of a wife operates to bar recovery of damage by both husband and wife for negligent injury to an automobile owned by them jointly. Forman v. Anderson ---------- 715
18. Negligence of coowner driving the automobile is imputed to the other owner in an action against a third party for property damage to the jointly owned automobile. Forman v. Anderson ---------- 715
19. Where one common owner makes arrangements for the other owner to drive for both, the former is liable for the driver's negligence. Forman v. Anderson ---------- 715
20. Conditions, such as dust, which obscure the vision of a driver are not intervening causes and no not excuse the driver but require him to exercise a degree of care commensurate with the circumstances. Reeder v. Rinne ---------- 734
21. A driver whose vision is obscured should stop until visibility is restored, or reduce his speed so that he

can stop immediately if necessary. Reeder v. Rinne 734
22. When automobiles collide in the center of an ordinary intersection of highways and there is no evidence of substantial difference in speeds of the vehicles, it is generally self-evident that they approached the intersection at approximately the same time and, under the rule that when two vehicles approach an intersection at approximately the same time, the driver on the left must yield the right-of-way to the vehicle on the right and which is traveling at a lawful rate of speed. McCall v. Weeks ---------- 743
23. A driver entering an intersection of two highways is obligated to look for approaching vehicles and to see any vehicle within the radius which denotes the limit of danger, and a driver who enters an intersection and looks for approaching vehicles but fails to see one which is favored over him under the rules of the road is guilty of negligence. McCall v. Weeks ---------- 743
24. Contributory negligence means any negligence of the plaintiff directly and proximately contributing to the cause of the accident. McCall v. Weeks ---- 743
25. Gross negligence under the automobile guest statute signifies more than ordinary inadvertence or inattention. Douglass v. Douglass ---------- 837

Bills and Notes.

Instruments payable on demand include those in which no time for payment is stated. Erickson v. Newell 641

Bonds.

1. Municipal bonds, including interest and principal payments thereon, which are purchased with the proceeds of revenue bonds issued by a state agency, may be pledged to secure the payment of the revenue bonds. Such municipal bonds are not revenue within the meaning of the constitutional limitation upon state indebedness. State ex rel. Meyer v. Duxbury 302
2. Fees and charges received by an agency of the state which remain unspent at the end of the biennium, lapse and become unavailable until reappropriated. Such funds may not be pledged to secure the payment of revenue bonds issued by the agency. State ex rel. Meyer v. Duxbury ---------- 302

Buildings.

The owner of a business establishment has a legal

duty to exercise ordinary care to keep his premises reasonably safe for the use of a business invitee. This, however, does not make him an insurer of his safety. Lund v. Mangelson ---------- 99

Burglary.

1. In a prosecution for burglary with intent to commit rape, there must be evidence of an unlawful breaking and entering with a felonious intent. Such breaking and entering and the intent with which it was done may be proved by direct or circumstantial evidence. State v. Rich ---------- 128
2. An entry with the intent to steal is an unlawful entry which satisfies the requirements of statute that the entry be willful and malicious. State v. Baker ---------- 499

Compromise and Settlement.

1. The general standard for court approval of a proposed settlement by a corporation is fairness in the best interests of the corporation. System Meat Co. v. Stewart ---------- 698
2. Elements for a court to consider in determining whether a proposed settlement by a corporation is fair include (1) nature of the claim proposed for settlement, (2) probability of success in event of litigation of the claim, and (3) reasonableness of the business judgment exercised by the board of directors. System Meat Co. v. Stewart ---------- 698

Constitutional Law.

1. The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, the Supreme Court will not inquire in individual cases whether the defendant was aware of his rights without a warning being given. State v. Ross ---------- 1
2. Whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time. State v. Ross -- 1
3. For a question of constitutionality to be considered in the Supreme Court, it must be previously raised in the trial court. State v. Mayes ---------- 165
State v. Tucker ---------- 577

4. One purpose of the constitutional limitation upon state indebtedness is to prevent the anticipation of revenue by the creation of obligations to be paid from revenue to be received in future fiscal periods. State ex rel. Meyer v. Steen ---------- 297
State ex rel. Meyer v. Duxbury ---------- 302
5. An obligation payable from revenue subject to the plenary control of the Legislature and available for any legal purpose is subject to the constitutional limitation upon indebtedness. State ex rel. Meyer v. Steen ---------- 297
State ex rel. Meyer v. Duxbury ---------- 302
6. The special fund doctrine is applicable generally to an indebtedness incurred in the construction of a project which is payable from the revenue arising from the operation of the project. State ex rel. Meyer v. Steen ---------- 297
State ex rel. Meyer v. Duxbury ---------- 302
7. In this state the special fund doctrine is not applicable to obligations payable from excise taxes or other revenue subject to the control of the Legislature and available for any legal use. State ex rel. Meyer v. Steen ---------- 297
8. The Legislature is prohibited from making a continuing appropriation in this state. State ex rel. Meyer v. Steen ---------- 297
9. An act is unconstitutional and void which authorizes the construction of a state office building to be financed by the issue of revenue bonds, payable from the proceeds of the sale of permits and licenses to hunt, trap, and fish. State ex rel. Meyer v. Steen 297
10. Municipal bonds, including interest and principal payments thereon, which are purchased with the proceeds of revenue bonds issued by a state agency, may be pledged to secure the payment of the revenue bonds. Such municipal bonds are not revenue within the meaning of the constitutional limitation upon state indebtedness. State ex rel. Meyer v. Duxbury 302
11. Fees and charges received by an agency of the state which remain unspent at the end of the biennium, lapse and become unavailable until reappropriated. Such funds may not be pledged to secure the payment of revenue bonds issued by the agency. State ex rel. Meyer v. Duxbury ---------- 302
12. 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. State ex rel. Meyer v. Duxbury ---------- 302
State ex rel. Morris v. Marsh ---------- 521

13. A severability clause is a declaration of the intent of the Legislature that it would have passed the act with the invalid parts omitted. State ex rel. Meyer v. Duxbury ---------- 302

14. In the absence of a violation or infringement of a constitutional right no relief may be had under the Post Conviction Act. State v. Reizenstein ---- 376

15. A person whose property is damaged by the operation of a municipal dump may recover his damages from the municipal corporation operating the dump. Colburn v. City of Valentine ---------- 391

16. The right to engage in the sale of intoxicating liquors involves a mere privilege; and restrictive regulations or even a suppression of the traffic do not deprive persons of property without due process of law, violate the privileges and immunities clause, the due process clause, the uniformity provisions, nor, unless they contain irrational classifications or invidious discriminations, the equal protection of the law as provided by the state and federal Constitutions. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission ---------- 410

17. The statutory provisions placing persons having retailer's licenses to sell beer in one class and persons having retailer's licenses to sell alcoholic liquors in another class, for purposes of legislation in regulating the liquor traffic, is not arbitrary or unreasonable and therefore valid. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission ---------- 410

18. Where an exemption for the operation of a general law dealing with intoxicating liquors is not made applicable to all persons in the same class similarly situated, such provision is invalid as granting special privileges or immunities. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission ---------- 410

19. There is no vested right in an existing law which precludes its amendment or repeal, and there is no implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission ---------- 410

20. Where it appears that an unconstitutional portion of an act can be separated from the valid portions and

the latter enforced independent of the former, and it further appears that the invalid portion did not constitute such an inducement to the passage of the valid parts that they would not have passed without them, the former may be rejected and the latter upheld. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission ---------- 410

21. The State is not constrained in the exercise of its police power to ignore experience that marks a class of offenders or a family of offenses for special treatment. State v. Holland ---------- 485

22. Statute relating to felony convictions for simple assault and battery committed by certain prisoners is not violative of constitutional clauses concerning unreasonable classification, special legislation, equal protection, or due process. State v. Holland ------ 485

23. Constitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed to make effective the powers reserved. State ex rel. Morris v. Marsh ---------- 521

24. The power of initiative must be liberally construed to promote the democratic process and the right of initiative constitutionally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise. State ex rel. Morris v. Marsh -------- 521

25. Constitutional prohibition of cruel and unusual punishment was intended to prohibit torture and agonizing punishment and does not abridge the Legislature's power to select such punishment as it deems most effective in the suppression of crime. State v. Tucker ---------- 577

26. The Fifth amendment says no more than that a man shall not be "compelled" to give evidence against himself. State v. Oliva ---------- 620

27. The Constitution of Nebraska provides that the property of no person shall be taken or damaged for public use without just compensation therefor. Deitloff v. City of Norfolk ---------- 648

28. When an owner of property damaged by the construction of some public improvement is entitled to compensation, the measure of his compensation is the same as in the case of a partial taking, namely, the decrease in the market value of his land. Deitloff v. City of Norfolk ---------- 648

29. In all criminal prosecutions an accused has a consti-

tutional right to appear and defend in person. State v. Beasley ---------- 681

30. In order for the Constitution of Nebraska to restrict plenary power of the Legislature to tax, the language of restriction must be clear. Craig v. Board of Equalization ---------- 779

31. A statute requiring a county to levy a property tax for purposes substantially local does not contravene the prohibition against state levy of a property tax for state purposes although the statute commingles state and local purposes. Craig v. Board of Equalization ---------- 779

32. Person convicted after a fair trial has no constitutional right to be confronted with and permitted to cross-examine witnesses as to his prior criminal record considered by the judge in determining the sentence to impose under the law. State v. Rose -- 809

33. There is no federal constitutional right to a jury trial in misdemeanor cases. State v. Peterson ---- 826

34. There is nothing in the Constitution of the United States or of the State of Nebraska which exempts an offender, unlawfully brought into this state, from trial and punishment for any offense against the laws of this state. State v. Nicholson ---------- 834

Contempt.

In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of purposes for which the order was entered. Drake v. Drake -- 677

Continuance.

A motion for a new trial on the ground of surprise is properly overruled where a request for a continuance for that reason was not made at the trial. Kehm v. Dumpert ---------- 568

Contracts.

1. 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. Inland Drilling Co. v. Davis Oil Co. ---------- 116

2. Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time sup-

posed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it. Inland Drilling Co. v. Davis Oil Co. ---------- 116

3. A condition in a contract may be excused without other reason if its requirement (1) will involve extreme forfeiture or penalty, and (2) its existence or occurrence forms no essential part of the exchange for the promisor's performance. Wortman v. Jessen ---------- 274
4. Parol evidence is inadmissible to vary a written agreement complete on its face. Jenkins v. Watson-Wilson Transp. System, Inc. ---------- 634
5. Terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. Jenkins v. Watson-Wilson Transp. System, Inc. ---------- 634
6. Instruments payable on demand include those in which no time for payment is stated. Erickson v. Newell ---------- 641
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. Erickson v. Newell ---------- 641
8. An essential element of actionable false representation is justifiable reliance on the representation. Camfield v. Olsen ---------- 739
9. A disclaimer clause of a bargain is relevant to an issue whether claimant in fact relied on a false representation disclaimed in the clause. Camfield v. Olsen ---------- 739
10. A disclaimer clause of a bargain is ineffective to preclude a trier of fact from considering whether or not fraud induced formation of the bargain. Camfield v. Olsen ---------- 739

Courts.

1. A question of fact once litigated on its merits is settled as to the litigants and may not be relitigated directly or collaterally by the litigants or their privies. Calkins v. Witt ---------- 178
2. Where a court has jurisdiction of the subject matter of the action, and its jurisdiction over the parties to the action depends on the existence or nonexistence of a fact, a final determination of such fact

issue by a court of competent jurisdiction is not subject to collateral attack. Calkins v. Witt ---------- 178
3. When the determination of a controversy cannot be had without the presence of new parties to the suit, the court should order them brought in. Whitaker v. Gering Irr. Dist. ---------- 290
4. In an equity case, the court is authorized on its own motion to make a necessary party a defendant. Whitaker v. Gering Irr. Dist. ---------- 290
5. When it appears that all indispensable parties to a proper and complete determination of an equity cause were not before the district court, the Supreme Court will remand the cause for the purpose of having such parties brought in even though no proper objection was made by any party litigant. Whitaker v. Gering Irr. Dist. ---------- 290
6. Where the evidence on an application to vacate a default judgment shows that defendant has no meritorious defense, it is not an abuse of discretion for the trial court to refuse to vacate the judgment although the application was made at the same term of court at which it was entered. Frazier, Inc. v. Alexander ---------- 451
7. Person convicted after fair trial has no constitutional right to be confronted with and permitted to cross-examine witnesses as to his prior criminal record considered by the judge in determining the sentence to impose under the law. State v. Rose ---------- 809
8. A sentencing judge has a wide discretion as to the sources and types of information used to assist him in determining the sentence to be imposed within the limits fixed by statute. State v. Rose ---------- 809
9. A sentencing judge may properly consider reports of probation officers, police reports, affidavits, and other relevant information including his own observations of the defendant. State v. Rose ---------- 809
10. Arrests of the defendant upon which no conviction was obtained or sought are material as bearing on defendant's character, previous conduct, and the moral turpitude involved. State v. Rose ---------- 809

Criminal Law.
1. Where the court properly admits evidence of a confession challenged as involuntary by defendant's evidence, it is prejudicial error to fail to submit to the jury for its determination, under appropriate instructions, the factual question of whether defend-

ant's alleged confession was voluntary, in which event it would be considered as any other evidence, or whether it was involuntary, in which event it should be wholly rejected and disregarded. State v. Ross ---------- 1

2. The question of the voluntariness of an oral or written confession is an essential fact issue. Our law requires its ultimate resolution by the jury. State v. Ross ---------- 1

3. Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. State v. Ross 1

4. The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, the Supreme Court will not inquire in individual cases whether the defendant was aware of his rights without a warning being given. State v. Ross ---------- 1

5. Whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time. State v. Ross ---------- 1

6. A judgment or sentence of a court of record in a criminal case is supported by the usual presumption of validity and regularity when thus attacked. Nicholson v. Sigler ---------- 24

7. The regularity of the proceeding leading up to a sentence in a criminal case cannot be inquired into on an application for a writ of habeas corpus. Nicholson v. Sigler ---------- 24

8. Rule for reviewing a sentence within statutory limits stated. Nicholson v. Sigler ---------- 24
State v. Mayes ---------- 165
State v. Giles ---------- 296
State v. Williams ---------- 395
State v. Lenz ---------- 496
State v. Borgmann ---------- 497
State v. Rose ---------- 809

9. 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. Fender ---------- 92
State v. Rich ---------- 128

10. In a prosecution for burglary with intent to commit rape, there must be evidence of an unlawful breaking and entering with a felonious intent. Such breaking and entering and the intent with which it was done may be proved by direct or circumstantial evidence. State v. Rich ---------- 128

11. Evidence of another crime, similar to that charged, is relevant and admissible if it tends to prove a particular criminal intent which is necessary to constitute the crime charged. State v. Rich ---------- 128
State v. Mayes ---------- 165

12. Whether or not other crimes used to prove a particular criminal intent are too remote rests largely in the discretion of the trial court. The extent to which the discretion of the trial court will be permitted to be exercised in this regard depends upon the facts of each case. State v. Rich ---------- 128

13. A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof. State v. Jones ---------- 133

14. A defendant in a criminal case who becomes a witness subjects himself to the rules applicable to other witnesses. State v. Jones ---------- 133

15. The affirmative evidence supporting the finding of voluntariness must show that the confession was freely and voluntarily made and exclude any other reasonable hypothesis. State v. Foster ---------- 247
State v. Holland ---------- 485

16. Where error as to one defendant in a criminal prosecution requires that a new trial be granted him, the rights of his codefendant to a new trial depend upon whether that error was prejudicial as to the codefendant. State v. Foster ---------- 247

17. The defense counsel in a criminal prosecution have no right to inspect or compel the production of evidence in the possession of the State unless a valid reason exists for so doing. The defendant has no inherent right to invoke this means of examining the State's evidence merely in the hope that something may be uncovered which would aid his defense. State v. Williams ---------- 257

18. In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce written

confessions, statements, and other documentary evidence for the inspection of defendant's counsel before the trial. Error may be predicated only for an abuse of such discretion. State v. Williams ------- 257
19. A person charged with crime may be convicted on circumstantial evidence only. State v. Williams -- 257
20. Test for jury in determining sufficiency of circumstantial evidence in a criminal case stated. State v. Williams ---------- 257
Guy v. Doeschot ---------- 557
21. Commutation of punishment is substitution of a milder punishment known to the law for the one inflicted by the court. Lincoln v. Sigler ---------- 347
22. The Board of Pardons possesses authority in extending clemency to grant a commutation of punishment for escape from custody. Lincoln v. Sigler ------ 347
23. Standard for evaluation of reasonableness of a search or seizure without warrant stated. State v. Dillwood ---------- 360
24. Objects falling in the plain view of a peace officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. State v. Dillwood ---------- 360
25. The jurisdiction of the Supreme Court in criminal cases is appellate in nature and it acquires no jurisdiction of a criminal appeal unless the mandatory requirement of the statute that a notice of appeal be filed within 1 month of a final judgment and sentence of the district court is complied with. State v. Wycoff ---------- 373
26. Where, with full knowledge of his rights in the matter and represented by counsel, a defendant fails to allege or assert that he was unconstitutionally deprived of his right to appeal, a post conviction action filed more than 2 years after the time of his original conviction in which he first alleges a deprival of the right to appeal comes too late to invest the Supreme Court with any appellate jurisdiction. State v. Wycoff ---------- 373
27. The law of Nebraska in operation at the time of defendant's offense and trial did not require that he be warned that any statements he might make might be used against him as a necessary prerequisite to their admission in evidence. State v. Reizenstein 376
28. It was sufficient if the statement was voluntarily made and not induced by threats or promises. State v. Reizenstein ---------- 376

29. The recent requirements laid down by the United States Supreme Court regarding in-custody interrogations were not in effect at the time of the defendant's trial and are not retroactive. State v. Reizenstein ---------- 376
30. Evidence that a crime has been committed and that there is probable cause to believe that the accused committed it is sufficient at a preliminary hearing. Kruger v. Brainard ---------- 455
31. A leased automobile converted by the lessee with intent to steal is a stolen automobile within the meaning of the statute prohibiting concealment of a stolen automobile. Kruger v. Brainard ---------- 455
32. The following rule of practice is adopted, effective October 4, 1968, and to be applicable to all preliminary hearings held after that date. The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceeding in the district court. Kruger v. Brainard ---------- 455
33. Where the State in a criminal trial attempts to lay the foundation for a confession which it fails to establish, such foundational evidence is not prejudicial to the rights of the defendant. State v. Young 458
34. 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. Young ---------- 458
35. A finding that a statement of an accused is voluntary will not ordinarily be set aside unless the finding is clearly erroneous. State v. Holland ---- 485
36. The State is not constrained in the exercise of its police power to ignore experience that marks a class of offenders or a family of offenses for special treatment. State v. Holland ---------- 485
37. Statute relating to felony convictions for simple assault and battery committed by certain prisoners is not violative of constitutional clauses concerning unreasonable classification, special legislation, equal protection, or due process. State v. Holland 485
38. An entry with the intent to steal is an unlawful entry which satisfies the requirements of statute that the entry be willful and malicious. State v. Baker ---------- 499
39. Where the defendant has consented to a search, the

search is not illegal because the consent was given in the presence of police officers and the defendant had not been advised concerning his rights. State v. Baker ---------- 499

40. Persons convicted of murder, treason, or forcible rape belong to a class that the statute excludes from eligibility for probation. State v. Randolph - 506

41. An in-court identification by a witness to whom the accused was exhibited before trial and in absence of defense counsel is inadmissible, unless an independent origin of the identification has been established. State v. Cannito ---------- 575

42. The exclusionary rules of search and seizure are subject to an impeachment exception that at most is narrow. State v. Cannito ---------- 575

43. Constitutional prohibition of cruel and unusual punishment was intended to prohibit torture and agonizing punishment and does not abridge the Legislature's power to select such punishment as it deems most effective in the suppression of crime. State v. Tucker ---------- 577

44. The Legislature has the power to define crimes and to fix penalties; and this power, exercised within constitutional limits is not subject to review by the courts. State v. Tucker ---------- 577

45. A defendant may request a hearing on and a determination of the voluntariness of an admission or confession, but in the absence of such request, defendant cannot complain. State v. Oliva -------- 620

46. Objection to the admission of evidence must be properly and timely raised at the trial. State v. Oliva ---------- 620

47. The rule that a defendant is entitled, on request therefor, to an independent hearing and determination by the court on the question of the voluntariness of an admission or confession is not applicable regarding statements spontaneously made and volunteered in the absence of any in-custody interrogation. State v. Oliva ---------- 620

48. A request for counsel does not per se disable an accused from thereafter waiving counsel. State v. Oliva ---------- 620

49. The Fifth Amendment says no more than that a man shall not be "compelled" to give evidence against himself. State v. Oliva ---------- 620

50. The same motor vehicle operation may give rise to two separate and distinct proceedings: One is a civil

and administrative licensing procedure; the other is a criminal action. Each action proceeds independently of the other and the outcome of one action is of no consequence to the other. Ziemba v. Johns ---------- 644

51. A defendant's plea of guilty to a criminal charge of operating a motor vehicle while under the influence of alcohol does not preclude the subsequent revocation of his driver's license in an administrative proceeding. Ziemba v. Johns ---------- 644

52. Errors in the trial of a criminal case, in order to require a reversal of conviction, must be harmful to a substantial right of the defendant. State v. Heiser ---------- 665
State v. Caldwell ---------- 712

53. In all criminal prosecutions an accused has a constitutional right to appear and defend in person. State v. Beasley ---------- 681

54. In the absence of unusual circumstances a defendant in a criminal case who is sui juris and mentally competent has the right to conduct his defense in person without the assistance of counsel. State v. Beasley ---------- 681

55. Opportunity for prejudice or disqualification of jurors does not raise a presumption that they exist. State v. Beasley ---------- 681

56. Evidence obtained prior to and independent of an alleged illegal search is admissible. State v. Beasley 681

57. Under the circumstances in this case, the pretrial identification of the defendant from photographs was not prejudicial. State v. Beasley ---------- 681

58. A peace officer may arrest a person without a warrant if he has reasonable cause to believe that such person has committed a felony. State v. Beasley -- 681

59. A photograph to be admissible in evidence must be a direct reproduction of the person, place, or thing which it purports to represent before it is competent as evidence. State v. Hunter ---------- 689

60. In a charge of attempted burglary it is proper to receive in evidence burglary tools found on or near a building from which the defendant was observed fleeing. State v. Hunter ---------- 689

61. A defendant in a criminal action is presumed sane until the defendant produces evidence of insanity at the time of the alleged crime. If any evidence is produced, the State must then sustain the burden of producing evidence and persuading the jury be-

yond a reasonable doubt that the defendant was sane at the time of the crime. State v. Newson ------- 750

62. In a criminal case where the issue of insanity is raised, the primary test is the capacity of the defendant to distinguish between right and wrong at the time of the commission of the offense. State v. Newson ---------- 750

63. Generally, an information which alleges all of the facts and elements necessary to constitute the offense described in the statute is sufficient. State v. McKee 754

64. In a prosecution for receiving stolen property, such prosecution may be laid in the county where a defendant either received or had such property, notwithstanding the theft was committed in another county. State v. McKee ---------- 754

65. In a prosecution for receiving stolen property, if the facts known to a defendant are such that a man of his age, intelligence, and experience would know that the property was stolen, the evidence is sufficient to justify a jury in finding that such defendant had guilty knowledge. State v. McKee ------ 754

66. Requirements for departure to take on the legal significance of flight stated. State v. Lincoln ---- 770

67. An instruction as to a lesser included offense is proper only when applicable to the evidence, and where there is no evidence that would justify a verdict of guilty of a lesser offense, no instruction need be given. State v. LaPlante ---------- 803

68. Person convicted after fair trial has no constitutional right to be confronted with and permitted to cross-examine witnesses as to his prior criminal record considered by the judge in determining the sentence to impose under the law. State v. Rose -- 809

69. A sentencing judge has a wide discretion as to the sources and types of information used to assist him in determining the sentence to be imposed within the limits fixed by statute. State v. Rose ---------- 809

70. In a prosecution for homicide in the perpetration or attempt to prepetrate a robbery, proof is not required of premeditation and deliberation or a purpose to kill. State v. Kauffman ---------- 817

71. An application for postponement of time of trial of a criminal case is addressed to the sound discretion of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error. State v. Peterson ---------- 826

72. Every person accused is entitled to an opportunity

to prepare for trial, but the opportunity is not unlimited. State v. Peterson ---------- 826
73. A defendant in any criminal prosecution must be given a reasonable opportunity to employ and consult with counsel. State v. Peterson ---------- 826
74. Every defendant charged with a criminal offense is not entitled to a jury trial. State v. Peterson ---- 826
75. There is no federal constitutional right to a jury trial in misdemeanor cases. State v. Peterson ------ 826
76. Admissibility rule regarding identity of exhibit stated. State v. Allen ---------- 831
77. There is nothing in the Constitution of the United States or of the State of Nebraska which exempts an offender, unlawfully brought into this state, from trial and punishment for any offense against the laws of this state. State v. Nicholson ---------- 834
78. A defect in the manner of charging an offense is waived by defendant's plea to the general issue if the information contains no jurisdictional defect and is sufficient to charge an offense under the law. State v. Nicholson ---------- 834
79. The fact that "plea bargaining" occurred is not a proper ground for reversal of a plea of guilty. State v. Nicholson ---------- 834
80. Informing a defendant that strong feelings against him were harbored by the local populace, in the absence of any overt acts against him, is not a sufficient showing of coercion to justify vacation of a plea of guilty. State v. Nicholson ---------- 834
81. In a proceeding under the Post Conviction Act, if the trial court finds on examination of its files and records that the proceeding is without foundation, an evidentiary hearing may properly be denied. State v. Nicholson ---------- 834
82. It is the duty of the public to provide counsel for destitute persons charged with criminal offenses, but abuse of this privilege should not be permitted. When such persons have once had their contentions fairly presented and litigated or it is obvious that the grounds urged for consideration are without merit in the eyes of the law, such obligation on the part of the public comes to an end. State v. Nicholson -- 834

Customs and Usages.

Ditto marks have a clear and definite meaning and their use on an initiative petition cannot be held objectionable. State ex rel. Morris v. Marsh ------ 521

Damages.

1. The amount of damages sustained by a landowner is peculiarly of a local nature and ordinarily is to be determined by the jury, and the Supreme Court will not ordinarily interfere with the verdict of the jury when the evidence is conflicting unless it is clearly wrong. Iske v. Metropolitan Utilities Dist. ------- 34
2. The measure of damages for breach of covenants for title to part of a tract is (1) reasonable expenses and (2) such proportion of the consideration as the value of the part lost bears to the total value of the tract. Westhaven Properties, Inc. v. Pahl -------- 355
3. A person whose property is damaged by the operation of a municipal dump may recover his damages from the municipal corporation operating the dump. Colburn v. City of Valentine ---------- 391
4. The amount of damages sustained by a landowner for the taking of land by eminent domain for a public improvement and the difference in the fair and reasonable market value of the remainder of the land before and after the taking 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. Deitloff v. City of Norfolk 648
5. When an owner of property damaged by the construction of some public improvement is entitled to compensation, the measure of his compensation is the same as in the case of a partial taking, namely, the decrease in the market value of his land. Deitloff v. City of Norfolk ---------- 648
6. A general measure of damages for fraud is compensation for loss occasioned by the fraud. Camfield v. Olsen ---------- 739
7. Person suffering from a disease, who is injured by the reason of the negligence of another, has right to recover for the aggravation of the preexisting disease. McCall v. Weeks ---------- 743

Death.

The presumption against death by suicide is rebuttable and such presumption is overcome and disappears when either direct or circumstantial evidence is introduced showing that the death was caused by suicide, and the burden is then upon the party asserting such to adduce evidence that the death was accidental and not from suicide. Mustard v. St. Paul Fire & Marine Ins. Co. ---------- 15

Dedication.

1. The main statutes affecting the property interest granted in dedication by plat are those in force at the time of dedication. Trahan v. Council Bluffs Steel Erection Co. ---------- 170
2. An acceptance is ordinarily necessary to complete a dedication by plat. Trahan v. Council Bluffs Steel Erection Co. ---------- 170
3. The party asserting dedication by plat carries the risk of nonproduction of evidence sufficient to sustain a finding of dedication. Trahan v. Council Bluffs Steel Erection Co. ---------- 170

Deeds.

1. While it is true that a deed must describe land so that it can be identified, yet that is certain which by evidence aliunde can be made certain. Franz v. Nelson ---------- 137
2. If the description in a deed identifies, or furnishes the means of identifying, the property conveyed, it performs its function, it being sufficient when from it the property can be identified. Franz v. Nelson ---------- 137
3. Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence, but there must be a solid foundation of established facts on which to rest the inference of its existence. Zych v. Zych ---------- 708
4. In an action to set aside a deed on the ground of undue influence, the burden is on the plaintiff to establish that the grantor was subject to such influence; that the opportunity to exercise it existed; that there was a disposition to exercise it; and that the result appears to be the effect of such influence. Zych v. Zych ---------- 708
5. An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a less interest is effectively manifested. Sun Oil Co. v. Emery ---------- 793
6. Ordinarily, the inclusion of a purpose clause in a deed, of and by itself, does not operate to limit the estate granted by the deed. Sun Oil Co. v. Emery 793
7. Elements necessary to be established in order to set aside a deed on the ground of undue influence stated. Scholting v. Scholting ---------- 850
8. Shifting of burden of proof when instrument is

challenged as being procured by undue influence stated. Scholting v. Scholting ---------- 850
9. Whether presumption of undue influence arises must of necessity be decided according to the particular facts and circumstances of each case in which the question arises. Scholting v. Scholting ---------- 850
10. If the facts and circumstances of a case show such a confidential, fiduciary, or trust relation that it would be inequitable to sustain the deed in question then presumption arises and burden of going forward with the evidence rests upon the grantee to show the bona fides thereof. Scholting v. Scholting 850
11. In determining whether or not the plaintiffs have established sufficient facts and circumstances, considering the relationship of the parties, to raise a presumption of undue influence, and, if so, whether the defendants have rebutted it, the court will examine the transaction with care and closely scrutinize everything done by the donees to secure the deed in question. Scholting v. Scholting -------- 850

Divorce.

1. Where the evidence in a divorce suit sustains a finding of cruelty on the part of one spouse toward the other, and is corroborated as required by law, the action of the district court in granting a divorce to the aggrieved spouse is proper and ordinarily will not be interfered with by the Supreme Court on appeal. Neeman v. Neeman ---------- 105
Baudendistel v. Baudendistel ---------- 334
2. Factors to be considered in an award of alimony or a division of property in a divorce case stated. Neeman v. Neeman ---------- 105
3. The fixing of the amount of alimony rests, in each case, within the sound discretion of the court. Neeman v. Neeman ---------- 105
4. Ordinarily, acts of personal violence by the husband toward his wife are not justified by conduct on the part of the wife that does not threaten bodily harm. Rickus v. Rickus ---------- 140
5. It is impossible to lay down any general rule as to the degree of corroboration necessary in a divorce action as each case must be decided on its own facts and circumstances. Rickus v. Rickus ---------- 140
6. Condonation defined. Ruckus v. Rickus --------- 140
Wade v. Wade ---------- 268
Johnson v. Johnson ---------- 670

7. On appeal to the Supreme Court in a divorce action the cause is for trial de novo. Rickus v. Rickus -- 140
Johnson v. Johnson ---------- 670
8. Power of court and effect of remarriage stated. Wolter v. Wolter ---------- 160
9. An allowance of alimony in gross is a final judgment, not subject to modification, which survives the death of the judgment debtor and is payable in full regardless of the death or remarriage of the judgment creditor. Ball v. Ball ---------- 216
Shomaker v. Shomaker ---------- 609
10. Statutory authority of court to revise and alter its awards of alimony as to future payments stated. Ball v. Ball ---------- 216
11. "Alimony" defined. Ball v. Ball ---------- 216
12. "Alimony in gross" or "lump-sum alimony" defined. Ball v. Ball ---------- 216
13. "Alimony in general," or "installment alimony," contemplates periodic payments of a definite sum for the indefinite future, and terminates on the death of either party or the remarriage of the wife. Ball v. Ball ---------- 216
14. The phrase "alimony in gross" or "gross alimony" is always for a definite amount of money, the payment is always for a definite length of time, and it is always a charge on the estate of the husband and is not modifiable. Ball v. Ball ---------- 216
15. An application for a change with respect to care and custody of minor children, which has been provided for in a decree of divorce, made at any time after the decree has been entered must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res judicata. Jones v. Jones ------ 223
Boyer v. Boyer ---------- 226
16. Rule in divorce cases for custody of minor children stated. Jones v Jones ---------- 223
17. The natural rights of a parent to the custody of his child are not absolute. They must yield to the best interests of the child where the preferential right has been forfeited. Jones v. Jones ---------- 223
18. Ordinarily, custody of minor children awarded to their mother in a divorce action will not be disturbed unless by changed circumstances it is affirmatively shown that the mother is an unfit person to have

their custody, or that the best interests of the children require such action. Boyer v. Boyer ---- 226

19. Cruelty, which by itself is not sufficient to constitute grounds for divorce, may justify a separation and permit a later action for divorce upon the grounds of abandonment and nonsupport. Matz v. Matz ---- 266

20. When the evidence on material questions of fact is in irreconcilable conflict, the Supreme Court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Wade v. Wade ---- 268
Baudendistel v. Baudendistel ---- 334

21. The discretion of the lower court with respect to awarding or changing the custody and support 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. Baudendistel v. Baudendistel ---- 334

22. Any unjustifiable conduct which destroys the legitimate ends and objects of matrimony constitutes extreme cruelty. Mercer v. Mercer ---- 515

23. A divorce from bed and board is in the nature of a conditional decree, leaving the legal status of the parties unchanged in many respects but relieving both parties from all obligations and rights to cohabitation while making the necessary adjustments of their property to assure support during the continuance of their relationship. It is a complete and permanent separation of the parties without a legal dissolution of the marriage. Mercer v. Mercer ---- 515

24. Where one party has prayed for a divorce from bed and board and has adduced sufficient proof duly corroborated in support thereof, and in the same action the other party has prayed for an absolute divorce but has not adduced sufficient proof duly corroborated in support thereof, the trial court has no discretion in granting the remedy but must grant the divorce from bed and board as prayed. Mercer v. Mercer ---- 515

25. In a suit for a divorce from bed and board the court will adjust the property rights between the parties only to the extent necessary to provide for the separate maintenance of the party entitled thereto. Mercer v. Mercer ---- 515

26. Ordinarily, the right to receive alimony and the duty to pay it terminates at the death of either of the parties where the decree is silent on the subject. Shomaker v. Shomaker ---------- 609
27. A decree for child support in a divorce action is always subject to review and modification regardless of the particular language of the award. Shomaker v. Shomaker ---------- 609
28. A judgment in a divorce action in which alimony and child support are combined is subject to modification and is not an allowance of alimony in gross. Shomaker v. Shmaker ---------- 609
29. To the extent that Beard v. Beard, 57 Neb. 754, 78 N. W. 255, may be in conflict with this opinion it is overruled. Shomaker v. Shomaker ---------- 609

Due Process.

Within the meaning of due process it is recognized that a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the state action may have repercussions beyond state lines. Calkins v. Witt ---------- 178

Duress and Coercion.

Informing a defendant that strong feelings against him were harbored by the local populace, in the absence of any overt acts against him, is not a sufficient showing of coercion to justify vacation of a plea of guilty. State v. Nicholson ---------- 834

Elections.

1. It is unlawful for a candidate for public office, as compensation for a vote or votes or the promise of a vote or votes, with the intention to promote his election, to offer to pay out, give, contribute, or expend money or thing of value. State ex rel. Tomka v. Janing ---------- 76
2. One who advocates the abolition of corrupt practices cannot be deemed to be offering the pecuniary benefits derived from such practices to the public. State ex rel. Tomka v. Janing ---------- 76
3. Public policy requires that a candidate for office who condemns corrupt practices on the part of his predecessor in the absence of clear and convincing evidence to the contrary should not have his statements so narrowly interpreted as to require a find-

ing that he is advocating a continuance of such practices. State ex rel. Tomka v. Janing ---------- 76

Eminent Domain.

1. An expert witness may be permitted to use and testify concerning the factors which a well-informed buyer would use in arriving at the price he would pay for the property. Iske v. Metropolitan Utilities Dist. 34
2. When land taken by eminent domain has valuable deposits of gravel, this circumstance may be considered so far as it may affect the market value of the land, but part of the realty cannot be separately valued for its materials as an item in addition to the market value of the land. Iske v. Metropolitan Utilities Dist. ---------- 34
3. In an eminent domain proceeding, an expert witness may consider the quantity of a mineral in place and its unit price as a factor in determining the fair market value of the land. Iske v. Metropolitan Utilities Dist. ---------- 34
4. Generally in an eminent domain proceeding, an expert witness, otherwise properly qualified, may be permitted to use and to testify concerning the different factors affecting valuation which a well-informed buyer would use in arriving at the price which he would pay for the property at the time of the taking. Iske v. Metropolitan Utilities Dist. ---------- 34
5. Generally in an eminent domain proceeding, an expert witness, when properly qualified, may testify as to the valuation of the property, and the weight and credibility of what the witness considers in coming to his conclusion is for the jury to determine. Iske v. Metropolitan Utilities Dist. ---------- 34
6. Jurors are not bound by the testimony of expert witnesses. Their evidence is to be weighed as that of all other witnesses. Iske v. Metropolitan Utilities Dist. ---------- 34
7. In an eminent domain proceeding where a prospective use for recreational or subdivision uses is not merely speculative and not too remote to influence present market value, an exhibit consisting of a plat or plan of such reasonable prospective use may be admissible in evidence. Iske v. Metropolitan Utilities Dist. ---------- 34
8. In an eminent domain proceeding, the capitalizing of an estimate of the net rents from a probable use of

the property is an accepted method of valuation. Iske v. Metropolitan Utilities Dist. ---------- 34

9. Where land taken by eminent domain has a reasonable prospective use for recreational and subdivision purposes, this circumstance may be considered so far as it may affect the market value of the land, at the time of the taking, and that part of the realty cannot be separately valued for its prospective use for recreational and subdivision purposes as an item in addition to the market value of the land. Iske v. Metropolitan Utilities Dist. ---------- 34

10. In an eminent domain proceeding, capitalization of income of rentals from a reasonably prospective use of the property is an acceptable method of arriving at the value of the property as a factor in the determination of its present market value, and an expert witness may testify as to the quantity and unit price resulting from such reasonably prospective use and sale of all or part of said property. Iske v. Metropolitan Utilities Dist. ---------- 34

11. The giving of an instruction on the burden of proof in an eminent domain action relating to damage to that part of plaintiff's property which was not taken, when the fact of the presence of such damage was conceded and not an issue, does not constitute prejudicial error. Liebers v. State ---------- 250

12. Whether or not evidence of a comparable sale is near enough in point of time to furnish a test of the present value is a matter within the sound discretion of the trial court. Liebers v. State ---------- 250

13. There could be no better evidence of the true market or going value of land than the prices paid for other, similar and similarly situated lands sold at about the same time when, by evidence, it is shown that the prices so paid for the other lands depend upon market or going value rather than other considerations. Liebers v. State ---------- 250

14. The questions of admission of the sale prices of other lands and the sufficiency of the foundation for their admission were within the sound discretion of the court. Liebers v. State ---------- 250

15. Where the value of real estate is an issue, evidence of particular sales of other lands is admissible as independent proof on the question of value when a proper foundation has been laid indicating that the prices paid represented the market or going value of such lands; that the sales were made at or about

the time of the taking by condemnation; and that the lands so sold were substantially similar in location and quality to that condemned. Liebers v. State ---------- 250

16. In an eminent domain action, before evidence of the sale prices of other lands is admissible, a proper foundation must be laid; and such evidence in the absence of a proper foundation may not be introduced by subterfuge on cross-examination. Liebers v. State ---------- 250

17. In condemnation proceedings, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation. Deitloff v. City of Norfolk ---------- 648

18. The owner of real estate which is taken in condemnation proceedings and who is familiar with its value can testify as to it value. Deitloff v. City of Norfolk ---------- 648

19. Generally, either lay or expert witnesses may be allowed to testify as to the value of a tract of land taken or the value of the remainder thereof immediately before and immediately after the taking if proper foundation is laid showing they have an acquaintance with the property and are informed as to the state of the market, the weight and credibility of their testimony being for the jury. Deitloff v. City of Norfolk ---------- 648

20. The amount of damages sustained by a landowner for the taking of land by eminent domain for a public improvement and the difference in the fair and reasonable market value of the remainder of the land before and after the taking 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. Deitloff v. City of Norfolk 648

21. In a condemnation action, when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong. Deitloff v. City of Norfolk ---------- 648

22. In a condemnation action, the weight and credibility of testimony of either lay or expert witnesses regarding value of land taken or value of remainder immediately before and immediately after the taking is for the jury. Deitloff v. City of Norfolk ---------- 648

23. The Constitution of Nebraska provides that the

property of no person shall be taken or damaged for public use without just compensation therefor. Deitloff v. City of Norfolk ---------- 648

24. When an owner of property damaged by the construction of some public improvement is entitled to compensation, the measure of his compensation is the same as in the case of a partial taking, namely, the decrease in the market value of his land. Deitloff v. City of Norfolk ---------- 648

Equity.

To decree reformation of a written instrument for mistake, equity insists that the parties shall have come to a complete mutual understanding of all the essential terms of their bargain. Westhaven Properties, Inc. v. Pahl ---------- 355

Estates.

1. The interval of time between grant of administration and timely application by a surviving spouse for a maintenance allowance may be included in the period of the allowance. Grassman v. Jensen ---------- 147
2. Jurisdiction for administration of a nonresident decedent's estate requires property in this state. Calkins v. Witt ---------- 178
3. A decedent's claim is an asset within a state if there is jurisdiction over the person or property of the one against whom the decedent may assert the claim. Calkins v. Witt ---------- 178
4. A tort-feasor decedent's ownership of an automobile liability policy, with the insurer reachable by process in this state, justifies administration and the litigating of the tort claim against the estate. Calkins v. Witt ---------- 178
5. Where the want of authority to make the appointment is disclosed by the record the validity of the letters of administration may be questioned collaterally. Calkins v. Witt ---------- 178
6. An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a less interest is effectively manifested. Sun Oil Co. v. Emery ---------- 793
7. Ordinarily, the inclusion of a purpose clause in a deed, of and by itself, does not operate to limit the estate granted by the deed. Sun Oil Co. v. Emery 793

Estoppel.

Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of a governmental function, but exceptions can be made where right and justice so demand. Abernathy v. City of Omaha ---------- 660

Evidence.

1. Where the court properly admits evidence of a confession challenged as involuntary by defendant's evidence, it is prejudicial error to fail to submit to the jury for its determination, under appropriate instructions, the factual question of whether defendant's alleged confession was voluntary, in which event it would be considered as any other evidence, or whether it was involuntary, in which event it should be wholly rejected and disregarded. State v. Ross ---------- 1
2. Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. State v. Ross 1
3. The question of the voluntariness of an oral or written confession is an essential fact issue. Our law requires its ultimate resolution by the jury. State v. Ross ---------- 1
4. Where reasonable minds may draw different inferences or conclusions from the evidence it is within the province of the jury to decide the issues of fact and the Supreme Court may not set aside or direct a verdict in such a situation. Mustard v. St. Paul Fire & Marine Ins. Co. ---------- 15
   Kehm v. Dumpert ---------- 568
5. The presumption against death by suicide is rebuttable and such presumption is overcome and disappears when either direct or circumstantial evidence is introduced showing that the death was caused by suicide, and the burden is then upon the party asserting such to adduce evidence that the death was accidental and not from suicide. Mustard v. St. Paul Fire & Marine Ins. Co. ---------- 15
6. An expert witness may be permitted to use and testify concerning the factors which a well-informed buyer would use in arriving at the price he would pay for the property. Iske v. Metropolitan Utilities Dist. 34
7. When land taken by eminent domain has valuable deposits of gravel, this circumstance may be con-

sidered so far as it may affect the market value of land, but part of the realty cannot be separately valued for its materials as an item in addition to the market value of the land. Iske v. Metropolitan Utilities Dist. ---------- 34

8. In an eminent domain proceeding, an expert witness may consider the quantity of a mineral in place and its unit price as a factor in determining the fair market value of the land. Iske v. Metropolitan Utilities Dist. ---------- 34

9. As a general rule, exhibits which are practically instructive to explain the evidence or aid in its interpretation or application by the jury may be admitted. Iske v. Metropolitan Utilities Dist. ------ 34

10. Generally in an eminent domain proceeding, an expert witness, otherwise properly qualified, may be permitted to use and to testify concerning the different factors affecting valuation which a well-informed buyer would use in arriving at the price which he would pay for the property at the time of the taking. Iske v. Metropolitan Utilities Dist. ---- 34

11. Generally in an eminent domain proceeding, an expert witness, when properly qualified, may testify as to the valuation of the property, and the weight and credibility of what the witness considers in coming to his conclusion is for the jury to determine. Iske v. Metropolitan Utilities Dist. ---------- 34

12. Jurors are not bound by the testimony of expert witnesses. Their evidence is to be weighed as that of all other witnesses. Iske v. Metropolitan Utilities Dist. ---------- 34
Deitloff v. City of Norfolk ---------- 648

13. In an eminent domain proceeding where a prospective use for recreational or subdivision uses is not merely speculative and not too remote to influence present market value, an exhibit consisting of a plat or plan of such reasonable prospective use may be admissible in evidence. Iske v. Metropolitan Utilities Dist. ---------- 34

14. In an eminent domain proceeding, the capitalizing of an estimate of the net rents from a probable use of the property is an accepted method of valuation. Iske v. Metropolitan Utilities Dist. ---------- 34

15. Where land taken by eminent domain has a reasonable prospective use for recreational and subdivision purposes, this circumstance may be considered so far as it may affect the market value of the

land, at the time of the taking, and that part of the realty cannot be separately valued for its prospective use for recreational and subdivision purposes as an item in addition to the market value of the land. Iske v. Metropolitan Utilities Dist. ---------- 34

16. In an eminent domain proceeding, capitalization of income of rentals from a reasonably prospective use of the property is an acceptable method of arriving at the value of the property as a factor in the determination of its present market value, and an expert witness may testify as to the quantity and unit price resulting from such reasonably prospective use and sale of all or part of said property. Iske v. Metropolitan Utilities Dist. ---------- 34

17. A party may not successfully complain of the introduction of evidence of a like character to that which it subsequently introduced. Iske v. Metropolitan Utilities Dist. ---------- 34

18. Rule for determining sufficiency of the evidence to sustain a verdict stated. Drahota v. Wieser ---- 66
Inland Drilling Co. v. Davis Oil Co. ---------- 116
Riddle v. Erickson ---------- 122
Kehm v. Dumpert ---------- 568
Lucht v. American Propane Gas Co. ---------- 583

19. Rule for admission of opinion evidence stated. Drahota v. Wieser ---------- 66
Brugh v. Peterson ---------- 190

20. Opinion evidence should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine. Drahota v. Wieser ---------- 66

21. Conflicting opinion testimony of expert witnesses ordinarily raises a question of fact. State v. Barnes 85

22. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Lund v. Mangelson 99

23. Rule for consideration of motion for directed verdict stated. Lund v. Mangelson ---------- 99

24. Evidence of another crime, similar to that charged, is relevant and admissible if it tends to prove a particular criminal intent which is necessary to constitute the crime charged. State v. Rich ----- 128
State v. Mayes ---------- 165

25. Whether or not other crimes used to prove a particular criminal intent are too remote rests largely in the discretion of the trial court. The extent to which the discretion of the trial court will be permitted to be exercised in this regard depends upon the facts of each case. State v. Rich ---------- 128

26. While it is true that a deed must describe land so that it can be identified, yet that is certain which by evidence aliunde can be made certain. Franz v. Nelson ---------- 137

27. Evidentiary statements made subsequent to an illegal arrest are not ipso facto tainted by it. State v. Mayes ---------- 165

28. A hypothetical question asked an expert witness as to the rate of speed of a vehicle must include all factors necessary for a reasonably accurate opinion, and all such factors must be supported by the evidence. Brugh v. Peterson ---------- 190

29. Skid marks, distance traveled after impact, and force of impact are pertinent factors for the consideration of the jury in determining speed in a proper case. Brugh v. Peterson ---------- 190

30. The affirmative evidence supporting the finding of voluntariness must show that the confession was freely and voluntarily made and exclude any other reasonable hypothesis. State v. Foster ---------- 247

31. Whether or not evidence of a comparable sale is near enough in point of time to furnish a test of the present value is a matter within the sound discretion of the trial court. Liebers v. State ---------- 250

32. There could be no better evidence of the true market or going value of land than the prices paid for other, similar and similarly situated lands sold at about the same time when, by evidence, it is shown that the prices so paid for the other lands depend upon market or going value rather than other considerations. Liebers v. State ---------- 250

33. The questions of admission of the sale prices of other lands and the sufficiency of the foundation for their admission were within the sound discretion of the court. Liebers v. State ---------- 250

34. Where the value of real estate is an issue, evidence of particular sales of other lands is admissible as independent proof on the question of value when a proper foundation has been laid indicating that the prices paid represented the market or going value of such lands; that the sales were made at or about

the time of the taking by condemnation; and that the lands so sold were substantially similar in location and quality to that condemned. Liebers v. State -- 250

35. In an eminent domain action, before evidence of the sale prices of other lands is admissible, a proper foundation must be laid; and such evidence in the absence of a proper foundation may not be introduced by subterfuge on cross-examination. Liebers v. State ---------- 250

36. The defense counsel in a criminal prosecution have no right to inspect or compel the production of evidence in the possession of the State unless a valid reason exists for so doing. The defendant has no inherent right to invoke this means of examining the State's evidence merely in the hope that something may be uncovered which would aid his defense. State v. Williams ---------- 257

37. In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce written confessions, statements, and other documentary evidence for the inspection of defendant's counsel before the trial. Error may be predicated only for an abuse of such discretion. State v. Williams -------- 257

38. A person charged with crime may be convicted on circumstantial evidence only. State v. Williams 257

39. Test for jury in determining sufficiency of circumstantial evidence in a criminal case stated. State v. Williams ---------- 257
State v. Reeder ---------- 425
Guy v. Doeschot ---------- 557

40. To justify a conviction on circumstantial evidence it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence. State v. Williams ---------- 257

41. After a jury has considered the evidence in the light of the rules stated, and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt. State v. Williams ---------- 257

42. When the evidence on material questions of fact is

in irreconcilable conflict, the Supreme Court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Wade v. Wade ---------- 268
Baudendistel v. Baudendistel ---------- 334

43. Evidence that a printing or die cutting press is old and is hand-fed rather than automatic is not evidence of improper design and does not, in and of itself, establish a violation of the Nebraska Factory Act. Goodwin v. Epsen Lithographing Co. ---------- 281

44. Evidence that the Department of Labor has inspected and approved a particular machine is prima facie evidence that its use is not in violation of the Nebraska Factory Act. Goodwin v. Epsen Lithographing Co. ---------- 281

45. Where the evidence in a divorce suit sustains a finding of cruelty on the part of one spouse toward the other, and is corroborated as required by law, the action of the district court in granting a divorce to the aggrieved spouse is proper and ordinarily will not be interfered with by the Supreme Court on appeal. Baudendistel v. Baudendistel ---- 334

46. Markings, scratches, or other damages showing actual force and damage within the safe do not establish a case under the terms of a policy requiring visible marks of actual force and violence on the exterior walls of the safe. Hazuka v. Maryland Cas. Co. ---------- 336

47. Where policy of burglary insurance indemnified insured only for loss of property extracted from safe, which policy contains a restrictive clause relating to abstraction of such insured property, the loss was not covered by the policy. Hazuka v. Maryland Cas. Co. ---------- 336

48. In order to warrant reformation of a written instrument for mistake, the evidence must be clear and convincing. Westhaven Properties, Inc. v. Pahl 355

49. In an action based on negligence to which the comparative negligence rule has application wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or a verdict directed. Lyon v. Paulsen Building & Supply, Inc. ---------- 365
Lucht v. American Propane Gas Co. ---------- 583

50. The law of Nebraska in operation at the time of defendant's offense and trial did not require that he be warned that any statements he might make might be used against him as a necessary prerequisite to their admission in evidence. State v. Reizenstein -- 376
51. It was sufficient if the statement was voluntarily made and not induced by threats or promises. State v. Reizenstein ---------- 376
52. The recent requirements laid down by the United States Supreme Court regarding in-custody interrogations were not in effect at the time of defendant's trial and are not retroactive. State v. Reizenstein 376
53. An evidentiary post conviction hearing at which the issue of voluntariness of defendant's admissions is tried and determined is a sufficient finding by the judge on such issue to satisfy the requirements of Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A. L. R. 3d 1205. State v. Reizenstein ---------- 376
54. After a jury has considered the evidence and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt. State v. Reeder ---- 425
55. Generally, matters that go to the weight and credibility of the evidence are solely for the jury to determine as trier of the facts and do not relate to the question of the sufficiency of the evidence. State v. Reeder ---------- 425
56. In determining whether district court findings are clearly erroneous, the Supreme Court takes into consideration the advantage of the district court in hearing oral evidence. State v. Crenshaw -------- 449
57. The following rule of practice is adopted, effective October 4, 1968, and to be applicable to all preliminary hearings held after that date: The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceeding in the district court. Kruger v. Brainard ---------- 455
58. Where the State in a criminal trial attempts to lay the foundation for a confession which it fails to establish, such foundational evidence is not prejudicial to the rights of the defendant. State v. Young 458
59. Where voluntary statements or confessions are not offered or received in evidence, the foundational requirements for such are not material and, on ob-

jection or motion, should be excluded or stricken if they are not otherwise relevant to the issues. State v. Young ---------- 458

60. A district court's finding that an in-custody statement of an accused is voluntary must appear from the record with unmistakable clarity. State v. Holland ---------- 485

61. A finding that a statement of an accused is voluntary will not ordinarily be set aside unless the finding is clearly erroneous. State v. Holland ---- 485

62. Rule for determination of credibility of a witness in a jury trial stated. Puckett v. First Nat. Bank of Atkinson ---------- 549

63. In a law action, a verdict of a jury based on conflicting evidence will not be disturbed unless clearly wrong. Puckett v. First Nat. Bank of Atkinson -- 549

64. Circumstantial evidence is not sufficient to sustain a verdict unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the fact finder is the only one that can fairly and reasonably be drawn therefrom. Guy v. Doeschot ---------- 557

65. In a replevin action, involving branded livestock, where the plaintiff's recorded brand is on an animal and is older than defendant's brand on the animal, it is prima facie evidence of ownership in the older brand, and places the burden on the defendant to establish his right to put his brand upon the animal. Coomes v. Drinkwalter ---------- 564

66. If there is any evidence to support a jury's verdict, it is not the court's function to weigh the evidence to determine whether it would have returned a different verdict. Kehm v. Dumpert ---------- 568

67. A defendant may request a hearing on and a determination of the voluntariness of an admission or confession, but in the absence of such request, defendant cannot complain. State v. Oliva ---------- 620

68. Parol evidence is inadmissible to vary a written agreement complete on its face. Jenkins v. Watson-Wilson Transp. System, Inc. ---------- 634

69. Terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. Jenkins v. Watson-Wilson Transp. System, Inc. ---------- 634

70. 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. Erickson v. Newell ---- 641
71. Under the circumstances in this case, the pretrial identification of the defendant from photographs was not prejudicial. State v. Beasley ---- 681
72. A photograph to be admissible in evidence must be a direct reproduction of the person, place, or thing which it purports to represent before it is competent as evidence. State v. Hunter ---- 689
73. In a charge of attempted burglary it is proper to receive in evidence burglary tools found on or near a building from which the defendant was observed fleeing. State v. Hunter ---- 689
74. So reluctant are the courts to engraft trust by parol on the legal title to real estate that there is perhaps no better established doctrine than the one which requires a high degree of proof in order to establish the trust by parol evidence. Zych v. Zych 708
75. Rule for determining sufficiency of plaintiff's evidency to present a jury question stated. Reeder v. Rinne ---- 734
76. In a prosecution for receiving stolen property, if the facts known to a defendant are such that a man of his age, intelligence, and experience would know that the property was stolen, the evidence is sufficient to justify a jury in finding that such defendant had guilty knowledge. State v. McKee ---- 754
77. A sentencing judge has a wide discretion as to the sources and types of information used to assist him in determining the sentence to be imposed within the limits fixed by statute. State v. Rose ---- 809
78. A sentencing judge may properly consider reports of probation officers, police reports, affidavits, and other relevant information including his own observations of the defendant. State v. Rose ---- 809
79. Arrests of the defendant upon which no conviction was obtained or sought are material as bearing on defendant's character, previous conduct, and the moral turpitude involved. State v. Rose ---- 809
80. Admissibility rule regarding identity of exhibit stated. State v. Allen ---- 831
81. Shifting of burden of proof when instrument is challenged as being procured by undue influence stated. Scholting v. Scholting ---- 850
82. Whether presumption of undue influence arises must of necessity be decided according to the particular

facts and circumstances of each case in which the question arises. Scholting v. Scholting ---------- 850

83. If the facts and circumstances of a case show such a confidential, fiduciary, or trust relation that it would be inequitable to sustain the deed in question then presumption arises and burden of going forward with the evidence rests upon the grantee to show the bona fides thereof. Scholting v. Scholting 850

84. In determining whether or not the plaintiffs have established sufficient facts and circumstances, considering the relationship of the parties, to raise a presumption of undue influence, and, if so, whether the defendants have rebutted it, the court will examine the transaction with care and closely scrutinize everything done by the donees to secure the deed in question. Scholting v. Scholting ---------- 850

85. Although a juror's testimony to the effect of misconduct upon him is not directly contradicted, it is not always conclusive on the issue of prejudice. Huff v. Seipold ---------- 863

Executors and Administrators.

1. A person nominated in a will as executor is not "legally competent" to act in that capacity, where his duties would require him to prosecute on behalf of adversary litigants, a suit which he would at the same time defend as an individual. Moss v. Eaton 71

2. Where there exists at the time of the hearing on appointment of executor, a conflict of interest of a nature sufficiently adverse or antagonistic that the exercise of proper judicial discretion would require the immediate removal of an executor if he were appointed, the named executor is not legally competent under statute and should not be appointed. Moss v. Eaton ---------- 71

3. There must be a measure of judicial discretion in determining whether a particular conflict of interest is sufficiently serious, adverse, or antagonistic to prevent appointment or compel removal of an executor. Moss v. Eaton ---------- 71

4. Where the want of authority to make the appointment is disclosed by the record the validity of the letters of administration may be questioned collaterally. Calkins v. Witt ---------- 178

Exemptions.

1. A wife contributing to the support of her dependent

husband ordinarily qualifies as the head of the family within the meaning of the exemption in the statute. Grassman v. Jensen ---------- 147
2. Property owned and used exclusively for educational purposes, and not owned or used for financial gain or profit to the owner or user, is exempt from taxes. Union College v. Board of Equalization ---------- 579
3. The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation. A use which is not direct, but remote, will not qualify for exemption. Union College v. Board of Equalization ---------- 579
4. Property used primarily for the purpose of providing student employment is not exempt as property used exclusively for educational purposes. Union College v. Board of Equalization ---------- 579

Fraud.

1. One who solicits a sale has a duty to disclose all pertinent facts within his knowledge affecting his representations when he knows or ought to know that they are not within the reach of a reasonably diligent and observing buyer and would readily mislead the purchaser as to the true condition of the property. Riddle v. Erickson ---------- 122
2. A prospective purchaser is justified in relying on a representation made to him where it is a representation of an existing fact and an investigation would be required to discover the truth. Riddle v. Erickson 122
3. A prospective purchaser may not rely on a meaning that he gives to a representation which he knows is beyond the power of the seller to make. Riddle v. Erickson ---------- 122
4. The intent or good faith of a person making false statements in soliciting a sale is not material, nor may he avoid liability for positive misrepresentation of fact by disclaiming accuracy in his offering communication. Riddle v. Erickson ---------- 122
5. Fraud in the inducement of an antenuptial agreement between prospective spouses is sufficient ground for avoidance of the agreement in the absence of contravening equitable considerations. Grassman v. Jensen ---------- 147
6. An essential element of actionable false representation is justifiable reliance on the representation. Camfield v. Olsen ---------- 739
7. A disclaimer clause of a bargain is relevant to an

issue whether claimant in fact relied on a false representation disclaimed in the clause. Camfield v. Olsen ---------- 739
8. A disclaimer clause of a bargain is ineffective to preclude a trier of fact from considering whether or not fraud induced formation of the bargain. Camfield v. Olsen ---------- 739
9. A general measure of damages for fraud is compensation for loss occasioned by the fraud. Camfield v. Olsen ---------- 739

Fraud and Deceit.
1. A misrepresentation by an applicant in negotiation for an insurance policy is not a ground for avoidance of the policy unless the misrepresentation deceived the insurer to its injury. MFA Mut. Ins. Co. v. Meisinger ---------- 285
2. An attempt by a person to verify false statements and to form a judgment upon the facts that he discovers is evidence that he did not rely upon the false statements. MFA Mut. Ins. Co. v. Meisinger 285

Guilty Plea.
The fact that "plea bargaining" occurred is not a proper ground for reversal of a plea of guilty. State v. Nicholson ---------- 834

Habeas Corpus.
1. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose. Nicholson v. Sigler ---------- 24
2. Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attack upon a judgment sentencing a defendant. Nicholson v. Sigler ---------- 24
3. Habeas corpus cannot be used as a substitute for a writ of error. Nicholson v. Sigler ---------- 24
4. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void. Nicholson v. Sigler ---------- 24
5. A writ of habeas corpus is not a writ for the correction of errors and its use will not be permitted for that purpose. Nicholson v. Sigler ---------- 24
6. An inquiry by habeas corpus into the sufficiency of

an information is limited to a determination of whether there is enough on the face of the information to charge an offense known to law and whether such offense is within the jurisdiction of the trial court. Nicholson v. Sigler ---------- 24

7. An information charging the accused with the commission of an offense substantially in the language of the statute is not subject to attack on habeas corpus. Nicholson v. Sigler ---------- 24

8. A prisoner will not be set at liberty by a writ of habeas corpus because the complaint on account of which he is held in custody states an alleged offense so defectively that it is or may be subject to successful attack by demurrer or motion to quash, if it contains enough substantially to accuse him of an act justifying his arrest and detention. Nicholson v. Sigler ---------- 24

9. The regularity of the proceeding leading up to a sentence in a criminal case cannot be inquired into on an application for a writ of habeas corpus. Nicholson v. Sigler ---------- 24

10. Legal cause must be shown to entitle a petitioner to the remedy of habeas corpus. It is not demandable as a matter of course. Nicholson v. Sigler -------- 24

Health.

Acute manifestation of a chronic condition defined. Miller v. Industrial Hospital Assn. ---------- 704

Highways.

1. A highway contractor is not required in the exercise of reasonable care to place signals or flares at intermediate places on a highway under construction in order to give notice that machinery is being used thereon or that defects due to construction exist, where warning signals and barricades at the termini thereof give notice that the highway is under construction and the condition of the highway itself shows that it is under various stages of completion. Lyon v. Paulsen Building & Supply, Inc. 365

2. Where a highway undergoing construction has not been completed by the contractor or accepted by proper authorities, and is being used permissively in a limited manner by local residents, it is only required that the highway be kept and maintained in a reasonably safe condition for the use of those traveling thereon who are at the time exercising

reasonable care, under the peculiar circumstances and conditions by which they are at the time confronted, by keeping a constant lookout and vigilant caution for obstructions incident to the progress and completion of the work. Lyon v. Paulsen Building & Supply, Inc. ---------- 365

3. When a user of a public highway is warned by proper notice, barricades, and the condition of the road itself of obstructions or excavations in the road and voluntarily elect to continue, without knowledge of the conditions existing in and around an obstruction or excavation, thus placing himself in a position of danger, such conduct constitutes contributory negligence as a matter of law sufficient to bar a recovery. Lyon v. Paulsen Building & Supply, Inc. ---------- 365

4. When automobiles collide in the center of an ordinary intersection of highways and there is no evidence of substantial difference in speeds of the vehicles, it is generally self-evident that they approached the intersection at approximately the same time and, under the rule that when two vehicles approach an intersection at approximately the same time, the driver on the left must yield the right-of-way to the vehicle on the right and which is traveling at a lawful rate of speed. McCall v. Weeks -- 743

Homicide.

In a prosecution for homicide in the perpetration or attempt to perpetrate a robbery, proof is not required of premeditation and deliberation or a purpose to kill. State v. Kauffman ---------- 817

Husband and Wife.

1. Ordinarily, acts of personal violence by the husband toward his wife are not justified by conduct on the part of the wife that does not threaten bodily harm. Rickus v. Rickus ---------- 140

2. Fraud in the inducement of an antenuptial agreement between prospective spouses is sufficient ground for avoidance of the agreement in the absence of contravening equitable considerations. Grassman v. Jensen ---------- 147

3. A wife contributing to the support of her dependent husband ordinarily qualifies as the head of the family within the meaning of the exemption in the statute. Grassman v. Jensen ---------- 147

4. The interval of time between grant of administration and timely application by a surviving spouse for a maintenance allowance may be included in the period of the allowance. Grassman v. Jensen ------ 147
5. Condonation defined. Johnson v. Johnson ---------- 670

Indictments and Informations.

1. An inquiry by habeas corpus into the sufficiency of an information is limited to a determination of whether there is enough on the face of the information to charge an offense known to law and whether such offense is within the jurisdiction of the trial court. Nicholson v. Sigler ---------- 24
2. An information charging the accused with the commission of an offense substantially in the language of the statute is not subject to attack on habeas corpus. Nicholson v. Sigler ---------- 24
3. A prisoner will not be set at liberty by a writ of habeas corpus because the complaint on account of which he is held in custody states an alleged offense so defectively that it is or may be subject to successful attack by demurrer or motion to quash, if it contains enough substantially to accuse him of an act justifying his arrest and detention. Nicholson v. Sigler ---------- 24
4. Generally, an information which alleges all of the facts and elements necessary to constitute the offense described in the statute is sufficient. State v. McKee 754
5. A defect in the manner of charging an offense is waived by defendant's plea to the general issue if the information contains no jurisdictional defect and is sufficient to charge an offense under the law. State v. Nicholson ---------- 834

Infants.

1. Knowledge and consciousness of possession are essential elements of the crime of possession of alcoholic liquor by a minor. State v. Reeder ---------- 425
2. In a juvenile court proceeding, it is essential to the jurisdiction of the court that service of summons be had on the person or persons having the custody or control of the child, or with whom the child may be when the action is commenced. Mingus v. Traxler ---------- 638
3. Statute requires that where facts are set forth in a proper proceeding to terminate parental rights, the summons or proper notice must be endorsed

that the proceeding is one to terminate parental rights. Mingus v. Traxler ---------- 638

Initiative and Referendum.

1. Constitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed to make effective the powers reserved. State ex rel. Morris v. Marsh -------- 521
2. A requirement that an initiated measure be submitted at the first general election held not less than 4 months after filing of the petition is satisfied by a filing on July 5 for a general election to be held November 5. State ex rel. Morris v. Marsh -- 521
3. Where the circulator of an initiative petition has signed and sworn to a properly executed statutory form of affidavit that he or she is a legal and qualified voter of the State of Nebraska, there is a presumption that he or she is a qualified elector in the absence of affirmative evidence to the contrary. State ex rel. Morris v. Marsh ---------- 521
4. Where there is no evidence of fraud or irregularity on the part of the circulator in his circulation of the initiative petitions, evidence that he, as an individual, signed two other petition forms for the same measure does not destroy the presumption of validity of his affidavit as a circulator nor justify the disqualification of concededly valid signatures obtained by him as circulator. State ex rel. Morris v. Marsh ---------- 521
5. The power of initiative must be liberally construed to promote the democratic process and the right of initiative constitutionally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise. State ex rel. Morris v. Marsh ---------- 521
6. On an otherwise validly executed initiative petition form, where the actual and exact date on which the signature of an elector was signed is readily apparent, the omission or faulty rendition of the date should be treated as a clerical or technical error and constitutes substantial compliance with the statute. State ex rel. Morris v. Marsh ---------- 521
7. Ditto marks have a clear and definite meaning and their use on an initiative petition cannot be held objectionable. State ex rel. Morris v. Marsh 521
8. A substantial compliance with the statute in filing

the itemized verified statement of contributions and expenditures is all that is required. State ex rel. Morris v. Marsh ---------- 521

Injunction.

If attempted annexation to a municipal corporation is illegal, injunction is a proper remedy, and resort to a court of equity is proper either to prevent consummation of the annexation or, if it has been completed, to have the proceedings declared null and void. Sullivan v. City of Omaha ---------- 511

Insane Persons.

1. A defendant in a criminal action is presumed sane until the defendant produces evidence of insanity at the time of the alleged crime. If any evidence is produced, the State must then sustain the burden of producing evidence and persuading the jury beyond a reasonable doubt that the defendant was sane at the time of the crime. State v. Newson ---------- 750
2. In a criminal case where the issue of insanity is raised, the primary test is the capacity of the defendant to distinguish between right and wrong at the time of the commission of the offense. State v. Newson ---------- 750

Insurance.

1. In the absence of a statute to the contrary, the risks insured against under a policy of liability insurance are determined by the terms of the policy and not by the liability of the insured. And, if plainly expressed, insurers are entitled to have such limitations construed and enforced as expressed. Marx v. Hartford Acc. & Ind. Co. ---------- 12
2. Generally, the obligation of an insurer to defend is no broader than the insuring agreement. Marx v. Hartford Acc. & Ind. Co. ---------- 12
3. An uninsured motorist endorsement should be interpreted in light of statutory requirements concerning coverage. Shipley v. American Standard Ins. Co. 109
4. An insurance policy should be interpreted in accordance with reasonable expectations of the insured at the time of the contract. Shipley v. American Standard Ins. Co. ---------- 109
5. In an uninsured motorist endorsement that is inapplicable to bodily injury to an insured in the operation of an automobile owned by him without applicable bodily injury liability coverage, the word

"automobile" in the exclusion clause ordinarily includes motorcycles. Shipley v. American Standard Ins. Co. ---------- 109

6. The words "total annual premium volume" contained in an offer to sell an insurance agency mean not only the cash income from policies written on an annual basis, but include as well the proportionate annual share of premiums on policies written for 3 and 5 year terms, whether or not paid when the policy was issued or paid on an annual basis during the term of the policy. Riddle v. Erickson ---------- 122

7. The opportunity to collect unpaid installment premiums and to renew an existing policy on its expiration is a valuable asset of an insurance agency. Riddle v. Erickson ---------- 122

8. A tort-feasor decedent's ownership of an automobile liability policy, with the insurer reachable by process in this state, justifies administration and the litigating of the tort claim against the estate. Calkins v. Witt ---------- 178

9. Within the meaning of due process it is recognized that a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the state action may have repercussions beyond state lines. Calkins v. Witt ---------- 178

10. A misrepresentation by an applicant in negotiation for an insurance policy is not a ground for avoidance of the policy unless the misrepresentation deceived the insurer to its injury. MFA Mut. Ins. Co. v. Meisinger ---------- 285

11. An attempt by a person to verify false statements and to form a judgment upon the facts that he discovers is evidence that he did not rely upon the false statements. MFA Mut. Ins. Co. v. Meisinger 285

12. In a policy indemnifying insured for loss by burglary of property within a vault or safe, which policy contains a restrictive clause relating to abstraction of such insured property, such restrictive clause was intended to be and is a limitation on liability and not an attempt to determine the character of evidence to show liability. Hazuka v. Maryland Cas. Co. ---------- 336

13. A limited liability provision is not ambiguous and there is no room for the rule that insurance contracts will be construed most favorably to the insured. Hazuka v. Maryland Cas Co. ---------- 336

14. To recover upon a policy of insurance of limited liability, insured must bring himself within its express provisions. Hazuka v. Maryland Cas. Co. ____ 336
15. Under a burglary insurance policy requiring entry into a safe to be made by actual force and violence of which there are visible marks, if actual force and violence were used in connection with opening a safe, even though the safe was not opened by such actual force and violence alone, the policy applies, provided actual force and violence were contributing factors to opening of the safe and without which the safe could not have been opened. Hazuka v. Maryland Cas. Co. ____ 336
16. Markings, scratches, or other damages showing actual force and damage within the safe do not establish a case under the terms of a policy requiring visible marks of actual force and violence on the exterior walls of the safe. Hazuka v. Maryland Cas. Co. 336
17. Where policy of burglary insurance indemnified insured only for loss of property extracted from safe, which policy contains a restrictive clause relating to abstraction of such insured property, the loss was not covered by the policy. Hazuka v. Maryland Cas. Co. ____ 336
18. A schedule limiting the benefits payable under an insurance policy must be made known to the insured before it can be effective. Miller v. Industrial Hospital Assn. ____ 704
19. Provisions in an insurance policy limiting recovery under the policy are generally defensive in character and must be pleaded and proved by the insurer. Miller v. Industrial Hospital Assn. ____ 704
20. An insurance contract prepared by the insurer which contains provisions reasonably subject to different interpretations will be liberally construed in favor of the insured. Miller v. Industrial Hospital Assn. 704
21. The word "permission" as used in the ordinary omnibus clause of an insurance policy means permission "express or implied." Arndt v. Davis ___ 726
22. The meaning of the word "permission" as used in the omnibus clause of an insurance policy and in the Nebraska Motor Vehicle Safety Responsibility Act is synonymous. Arndt v. Davis ____ 726
23. Nebraska is committed to a broad rather than a narrow interpretation of the word "permission" and to a liberal construction of the omnibus clause to effectuate its purpose. Arndt v. Davis ____ 726

24. In interpreting the omnibus clause of an insurance policy, Nebraska is committed to the "liberal or initial permission" doctrine. Arndt v. Davis ---- 726
25. Once initial permission has been given by the insured to the use of his motor vehicle by another, the person so using such motor vehicle becomes an insured under the terms of an ordinary omnibus clause contained in the insured's policy and remains such until such permission is terminated. Arndt v. Davis ---------- 726
26. Compliance with statute requiring certificate of authority to do business constitutes a voluntary acceptance of the provisions of that statute. Pupkes v. Sailors ---------- 784
27. Service of a garnishment summons and interrogatories from any county in the state may properly be had under the provisions of the insurance process statute. Pupkes v. Sailors ---------- 784
28. The failure of an insured to attend trial as requested by the insurer is not per se prejudicial. Pupkes v. Sailors ---------- 784
29. An insurer cannot assert a breach of the cooperation clause as a policy defense, in the absence of a showing of prejudice or detriment to the insurer. Pupkes v. Sailors ---------- 784

Interest.

Recovery of interest on an unliquidated claim, the subject of reasonable controversy and incapable of being fixed by computation, may be had only from the date of determination of the right of recovery and the ascertainment of the amount. Inland Drilling Co. v. Davis Oil Co. ---------- 116

Intoxicating Liquors.

1. The right to engage in the sale of intoxicating liquors involves a mere privilege; and restrictive regulations or even a suppression of the traffic do not deprive persons of property without due process of law, violate the privileges and immunities clause, the due process clause, the uniformity provisions, nor, unless they contain irrational classifications or invidious discriminations, the equal protection of the law as provided by the state and federal Constitutions. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission ---------- 410
2. The statutory provisions placing persons having re-

tailer's licenses to sell beer in one class and persons having retailer's licenses to sell alcoholic liquors in another class, for purposes of legislation in regulating the liquor traffic, is not arbitrary or unreasonable and therefore valid. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission ---------- 410

3. Where an exemption from the operation of a general law dealing with intoxicating liquors is not made applicable to all persons in the same class similarly situated, such provision is invalid as granting special privileges or immunities. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission 410

4. Knowledge and consciousness of possession are essential elements of the crime of possession of alcoholic liquor by a minor. State v. Reeder ---------- 425

Judgments.

1. A judgment or sentence of a court of record in a criminal case is supported by the usual presumption of validity and regularity when thus attacked. Nicholson v. Sigler ---------- 24

2. An order or decree sustaining a demurrer will be affirmed if any one ground of the demurrer is well taken. Morse v. Mayberry ---------- 89

3. Where defendant is notified by certified mail of the immediate withdrawal of his counsel from the case and he takes no steps to procure another attorney for 20 days prior to the granting of a default judgment by the court, any harm resulting is due to the inexcusable negligence of the defendant, and, ordinarily, affords no basis for relief. Frazier, Inc. v. Alexander ---------- 451

4. Where a defendant is notified by mail that plaintiff will apply in open court for a default judgment on a day and hour fixed 7 days later, such defendant may not procure the vacation of the judgment on the day noticed without a showing that he has a meritorious defense. Frazier, Inc. v. Alexander ---------- 451

5. Where the evidence on an application to vacate a default judgment shows that defendant has no meritorious defense, it is not an abuse of discretion for the trial court to refuse to vacate the judgment although the application was made at the same term of court at which it was entered. Frazier, Inc. v. Alexander ---------- 451

6. The Declaratory Judgments Act is declared to be

remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered. Slosburg v. City of Omaha ---------- 839
7. Requisite precedent conditions of obtaining declaratory relief stated. Slosburg v. City of Omaha ----- 839
8. At a hearing on a motion for summary judgment, the moving party has the burden of showing that no material issue of fact exists and unless this is done conclusively, the motion must be overruled. Acker v. Sorensen ---------- 866

Judicial Sales.

1. The confirmation of judicial sales is left to the judicial discretion of the trial court, which must be sound and equitable in view of all the circumstances. Hull v. Hull ---------- 773
2. An upset bid following a judicial sale and before confirmation should be considered only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all concerned and the stability of judicial sales permit its acceptance. Hull v. Hull ---------- 773
3. An upset bid, made after the judicial sale and before confirmation, is relevant only to the extent that it bears upon the fairness of the judicial sale and the adequacy of the high bid obtained there. Hull v. Hull ---------- 773

Juries.

1. It is the settled law of this state that error cannot be predicated upon the overruling of a challenge to a juror for cause, when the record does not disclose that the complaining party has exhausted all his peremptory challenges. Kehm v. Dumpert 568
2. Opportunity for prejudice or disqualification of jurors does not raise a presumption that they exist. State v. Beasley ---------- 681
3. A motion for new trial for alleged misconduct of a juror is addressed to the sound discretion of the trial court. Huff v. Seipold ---------- 863
4. Jury misconduct not calculated to prejudice a substantial right of the complaining party is no ground for a new trial. Huff v. Seipold ---------- 863
5. Although a juror's testimony to the effect of misconduct upon him is not directly contradicted, it is

not always conclusive on the issue of prejudice. Huff v. Seipold ---------- 863

Limitations, Statute of.

Time at which statute of limitations commences to run in malpractice action against a physician stated. Acker v. Sorensen ---------- 866

Livestock.

In a replevin action involving branded livestock, where the plaintiff's recorded brand is on an animal and is older than defendant's brand on the animal, it is prima facie evidence of ownership in the older brand, and places the burden on the defendant to establish his right to put his brand upon the animal. Coomes v. Drinkwalter ---------- 564

Local and Special Assessments.

1. The only foundation for a local assessment lies in the special benefits conferred upon the property assessed; assessment beyond the benefits conferred is a taking of property for public use without compensation and is illegal. Gilliam v. City of Lincoln 847
2. Basis for levying special assessments set out. Gilliam v. City of Lincoln ---------- 847
3. Benefits represented by special assessments must be paid or deducted by condemnees in the same manner and in the same proportion as other property owners benefited by an improvement; such benefits being separate from the condemnation of the land for the public purpose. Gilliam v. City of Lincoln 847

Money, Appropriation of.

A specific appropriation is one expressly providing funds for a particular purpose. State ex rel. Meyer v. Duxbury ---------- 302

Mortgages.

Ordinarily, when a mortgagee becomes the owner of the fee, the former estate is merged in the latter. But the mortgagee may keep his mortgage alive when it is essential to his security against an intervening title. If there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove

most advantageous to himself. Overland-Wolf, Inc. v. Koory ---------- 611

Motions, Rules, and Orders.

1. Function of nunc pro tunc order stated. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp ------ 229
2. The rules relating to nunc pro tunc orders are generally applicable to administrative and quasi-judicial commissions. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp. ---------- 229
3. The record of the trial tribunal in all appellate proceedings imports absolute verity. If such record is incomplete or incorrect, the remedy shall be by appropriate proceeding to secure correction thereof in the trial court. Campbell v. City of Ogallala -- 238
4. In a contempt proceeding for disobedience of an order, language of duty in the order is not expandable beyond a reasonable interpretation in light of purposes for which the order was entered. Drake v. Drake ---------- 677
5. The railway commission has continuing jurisdiction over its orders and the right to modify, annul, and vacate them thereafter; doctrine of res judicata not applicable. Neylon v. Petersen & Petersen, Inc. -- 813

Motor Carriers.

1. In determining the issue of public convenience and necessity, in cases where new or extended operating rights are sought, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers, and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest. Poulson v. Hargleroad Van & Storage Co. 201
2. Purpose of the Nebraska Motor Carrier Act stated. Poulson v. Hargleroad Van & Storage Co. -------- 201
3. In considering an application for a permit to operate as a contract carrier, the burden is upon the applicant to show that the proposed service is specialized and fits the need of the proposed contracting shippers, that the applicant is fit, willing, and able to perform the service, and that the proposed operation will be consistent with the public interest. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp. 229
4. Where the transportation of specified commodities

can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp. ---------- 229

5. If competent proof is made by the applicant showing the proposed service to be specialized and needed, and by protesting common carriers showing a willingness and ability to perform it, the applicant must then establish that he is better equipped and qualified to meet the special needs of the proposed contracting shippers than the protesting common carriers. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp. ---------- 229
6. The adequacy of existing services to perform the normal needs of proposed contracting shippers is not conclusive where the new service is better designed to fit the special requirements of the proposed contracting shippers. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp. ---------- 229
7. The ability of a contract carrier to provide special service at a lower cost cannot ordinarily of itself justify a finding of need for specialized service although it is one of the factors to be considered. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp. ---------- 229
8. Where there is evidence to sustain the factors for and against the issuance of a permit to a contract carrier, the determination of the public interest is for the Railway Commission and not the courts. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp. ---------- 229

Motor Vehicles.

1. The same motor vehicle operation may give rise to two separate and distinct proceedings: One is a civil and administrative licensing procedure; the other is a criminal action. Each action proceeds independently of the other and the outcome of one action is of no consequence to the other. Ziemba v. Johns -- 644
2. A defendant's plea of guilty to a criminal charge of operating a motor vehicle while under the influence of alcohol does not preclude the subsequent revocation of his driver's license in an administrative proceeding. Ziemba v. Johns ---------- 644

Municipal Corporations.

1. Where statute requires an engineer's estimate of

the cost of the proposed improvement, its submission to the city council is jurisdictional. Campbell v. City of Ogallala ---------- 238
2. Statute authorizes a city of the first class to regulate by ordinance and to make and prescribe regulations for the construction and location of stables, barns, and other places where offensive matter is kept or is likely to accumulate within the city's corporate limits. Beaty v. Baker ---------- 349
3. Municipal power extends to the regulation and prohibition of the keeping of livestock where the regulation or prohibition is reasonable and related to the public health, safety, or welfare. Beaty v. Baker -- 349
4. A municipality has the power to regulate the keeping of livestock in the neighborhood of dwelling houses and other inhabited buildings. Beaty v. Baker ---------- 349
5. A regulation fixing the distance within which livestock may be kept in the neighborhood of dwelling houses is a proper exercise of the police power and does not necessarily await the exigencies of an existing nuisance. Beaty v. Baker ---------- 349
6. Statutes authorizing municipalities to establish equitable rates or charges for sewer service declare the common law which prohibits unjust discrimination by a public utility. Rutherford v. City of Omaha 398
7. A difference in utility rates under substantially similar conditions of service may constitute unjust discrimination. Rutherford v. City of Omaha ---- 398
8. Rate differences fairly proportionate to differences in cost or difficulty of service are valid. Rutherford v. City of Omaha ---------- 398
9. In determining reasonable rate relationships, a municipality may sometimes take into account the purpose for which a customer receives the service. Rutherford v. City of Omaha ---------- 398
10. Sewer use charges are not special assessments. Rutherford v. City of Omaha ---------- 398
11. In collecting a sewer service charge unpaid at due date, a municipality may add a reasonable processing charge. Rutherford v. City of Omaha ---------- 398
12. Cities and all other governmental subdivisions and local public bodies of this state are not immune from tort liability arising out of the ownership, use, and operation of motor vehicles. Brown v. City of Omaha 430
13. Under statutes governing cities of the first class, the chief of police has immediate superintendence

of the police, and the mayor has superintending control of all officers and affairs of the city. Frederickson v. Albertsen ---------- 494

14. Civil service commissions of cities of the first class possess broad discretion in ruling on orders of discharge by appointing powers. Frederickson v. Albertsen ---------- 494

15. On appeal by an employee of a city of the first class from the civil service commission to district court, the only issue under the statute involved is whether the commission's order was made in good faith for cause. Frederickson v. Albertsen ---------- 494

16. If attempted annexation to a municipal corporation is illegal, injunction is a proper remedy, and resort to a court of equity is proper either to prevent consummation of the annexation or, if it has been completed, to have the proceedings declared null and void. Sullivan v. City of Omaha ---------- 511

17. Where a person has a personal, pecuniary, and legal interest which is adversely affected by an annexation ordinance, he has standing to contest the validity of the ordinance. Sullivan v. City of Omaha 511

18. Annexing of territory by a metropolitan city, pursuant to statute, is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the annexation thereof. In doing so, it is not for the courts to determine what portions may be properly annexed, for the fixing of boundary lines under this authority is a legislative act. Sullivan v. City of Omaha ---------- 511

19. The use of land for agricultural purposes does not necessarily mean it is rural in character. It is the nature of its location as well as its use which determines whether or not it is rural or urban in character. Sullivan v. City of Omaha ---------- 511

20. Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of a governmental function, but exceptions can be made where right and justice so demand. Abernathy v. City of Omaha ---------- 660

21. Where part of the territory of a sanitary and improvement district is annexed by a city, either the district or the city must institute action as soon as it becomes evident that an agreement cannot be reached. Abernathy v. City of Omaha ---------- 660

22. A zoning ordinance constitutes the exercise of a

governmental and legislative function and a city council adopting a rezoning ordinance which amends a general zoning ordinance acts in a legislative capacity. Scottsbluff Improvement Assn. v. City of Scottsbluff ---------- 722

23. An appeal or error proceeding does not lie from a purely legislative act by a public body to which legislative power has been delegated. Scottsbluff Improvement Assn. v. City of Scottsbluff ---------- 722

24. The only remedy to challenge a purely legislative act by a public body is by collateral attack, that is, by injunction or other suitable action. Scottsbluff Improvement Assn. v. City of Scottsbluff ---------- 722

25. Review by error proceeding allowed only when a tribunal acts judicially. Scottsbluff Improvement Assn. v. City of Scottsbluff ---------- 722

Negligence.

1. It is a general rule, subject to exceptions not applicable to this case, that it is negligence as a matter of law for a motorist to drive an automobile on a public highway, at any time, at a speed or in such a manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he is traveling. Ritchie v. Davidson ---------- 94

2. Basis of rule that it is negligence as a matter of law for a motorist to drive an automobile on a public highway, at any time, at a speed or in such a manner that a collision with object in range of vision cannot be avoided stated. Ritchie v. Davidson 94

3. In an action for damages for negligence the burden is on the plaintiff to show by direct or circumstantial evidence that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. Lund v. Mangelson -- 99

4. The doctrine of res ipsa loquitur proceeds on the theory that, under special circumstances which invoke its operation, the plaintiff is unable to specify the particular act of negligence which caused the injury, but if the petition alleges particular acts of negligence, then the plaintiff, in order to recover, must establish the specific negligence alleged, and the doctrine of res ipsa loquitur cannot be applied. Lund v. Mangelson ---------- 99

5. The owner of a business establishment has a legal duty to exercise ordinary care to keep his premises reasonably safe for the use of a business invitee. This, however, does not make him an insurer of his safety. Lund v. Mangelson ---------- 99
6. Negligence and the duty to use due care do not exist in the abstract but must be measured against a particular set of facts and circumstances. Lund v. Mangelson ---------- 99
7. In an action for negligence based on specific acts of negligence, the plaintiff, in order to recover, must establish at least one of the specific acts of negligence alleged. Lund v. Mangelson ---------- 99
8. Meaning of gross negligence in motor vehicle guest statute stated. Brugh v. Peterson ---------- 190
Reeder v. Rinne ---------- 734
9. Although a driver may have the technical right-of-way, if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way. Brugh v. Peterson ---------- 190
10. A highway contractor is not required in the exercise of reasonable care to place signals or flares at intermediate places on a highway under construction in order to give notice that machinery is being used thereon or that defects due to construction exist, where warning signals and barricades at the termini thereof give notice that the highway is under construction and the condition of the highway itself shows that it is under various stages of completion. Lyon v. Paulsen Building & Supply, Inc. ---------- 365
11. Where a highway undergoing construction has not been completed by the contractor or accepted by proper authorities, and is being used permissively in a limited manner by local residents, it is only required that the highway be kept and maintained in a reasonably safe condition for the use of those traveling thereon who are at the time exercising reasonable care, under the peculiar circumstances and conditions by which they are at the time confronted, by keeping a constant lookout and vigilant caution for obstructions incident to the progress and completion of the work. Lyon v. Paulsen Building & Supply, Inc. ---------- 365

12. When a user of a public highway is warned by proper notice, barricades, and the condition of the road itself of obstructions or excavations in the road and voluntarily elects to continue, without knowledge of the conditions existing in and around an obstruction or excavation, thus placing himself in a position of danger, such conduct constitutes contributory negligence as a matter of law sufficient to bar a recovery. Lyon v. Paulsen Building & Supply, Inc. ---------- 365

13. In an action based on negligence to which the comparative negligence rule has application wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or a verdict directed. Lyon v. Paulsen Building & Supply, Inc. ---------- 365
Lucht v. American Propane Gas Co. ---------- 583

14. One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. Mason v. Western Power & Gas Co. ---------- 392
Disney v. Butler County Rural P. P. Dist. ---------- 420

15. One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself to the danger assumes the risk of injury from it. Mason v. Western Power & Gas Co. ---- 392

16. To constitute want of due care it is not required that a person should have anticipated the exact risk which occurred, or that the peril was a deadly one; it is sufficient that he has placed himself in a position of a known danger where there was no need for him to be or that he knew or should have known that substantial injury was likely to result from his act. Disney v. Butler County Rural P. P. Dist. ---------- 420

17. Negligence is a failure to do what a reasonable and prudent person would have done under the circumstances or doing what a reasonable and prudent person would not have done under the circumstances. Siemsen v. Sky Harbor Air Service, Inc. 504

18. A motorist owes a duty of reasonable care to a pedestrian who is crossing a street at a point not a regular crossing. Miller v. Moeller ---------- 508

19. A pedestrian crossing at a regular crosswalk with the right-of-way has a right, until he has notice

or knowledge to the contrary, to assume that others will respect his right-of-way. Miller v. Moeller ---- 508
20. It is negligence as a matter of law for a motorist to drive so fast on the highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his headlights. Kehm v. Dumpert ---- 568
21. The general rule where a party is responsible for a dangerous instrumentality is that he is charged with the duty to take suitable precautions to avoid injury or damage to persons or property rightly in its proximity, and a failure to do so is negligence. Lucht v. American Propane Gas Co. ---- 583
22. In a case involving issues of negligence where different minds may draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury. Speedway Transp., Inc. v. DeTurk ---- 629
Zucker v. Monohan ---- 686
23. Negligence is actionable only if it approximately caused or contributed to the injury for which recovery is sought. Zucker v. Monohan ---- 686
24. The contributory negligence of a wife operates to bar recovery of damage by both husband and wife for negligent injury to an automobile owned by them jointly. Forman v. Anderson ---- 715
25. Negligence of coowner driving the automobile is imputed to the other owner in an action against a third party for property damage to the jointly owned automobile. Forman v. Anderson ---- 715
26. Where one common owner makes arrangements for the other owner to drive for both, the former is liable for the driver's negligence. Forman v. Anderson ---- 715
27. Whether gross negligence exists must be determined from the facts and circumstances in each case. Reeder v. Rinne ---- 734
28. Conditions, such as dust, which obscure the vision of a driver are not intervening causes and do not excuse the driver but require him to exercise a degree of care commensurate with the circumstances. Reeder v. Rinne ---- 734
29. A driver whose vision is obscured should stop until visibility is restored, or reduce his speed so that he can stop immediately if necessary. Reeder v. Rinne 734
30. A driver entering an intersection of two highways

is obligated to look for approaching vehicles and to see any vehicle within the radius which denotes the limit of danger, and a driver who enters an intersection and looks for approaching vehicles but fails to see one which is favored over him under the rules of the road is guilty of negligence. McCall v. Weeks ---------- 743

31. Contributory negligence means any negligence of the plaintiff directly and proximately contributing to the cause of the accident. McCall v. Weeks -- 743

32. Person suffering from a disease, who is injured by the reason of negligence of another, has right to recover for the aggravation of the preexisting disease. McCall v. Weeks ---------- 743

33. Gross negligence under the automobile guest statute signifies more than ordinary inadvertence or inattention. Douglass v. Douglass ---------- 837

New Trial.

1. Where error as to one defendant in a criminal prosecution requires that a new trial be granted him, the rights of his codefendant to a new trial depend upon whether that error was prejudicial as to the codefendant. State v. Foster ---------- 247

2. A motion for a new trial on the ground of surprise is properly overruled where a request for a continuance for that reason was not made at the trial. Kehm v. Dumpert ---------- 568

3. A motion for new trial for alleged misconduct of a juror is addressed to the sound discretion of the trial court. Huff v. Seipold ---------- 863

4. Jury misconduct not calculated to prejudice a substantial right of the complaining party is no ground for a new trial. Huff v. Seipold ---------- 863

5. Although a juror's testimony to the effect of misconduct upon him is not directly contradicted, it is not always conclusive on the issue of prejudice. Huff v. Seipold ---------- 863

Nuisances.

1. The operation and maintenance of a cafe which serves as a gathering place for hoodlums, prostitutes, gamblers, and other disorderly persons is a public nuisance. State ex rel. Carlson v. Hatfield 157

2. The jurisdiction of an equity court to abate a public nuisance exists independent of statute. State ex rel. Carlson v. Hatfield ---------- 157

3. It is within the power of an equity court to do whatever is reasonably necessary to abate a public nuisance. It includes the power to enjoin the use of the premises for any purpose for a reasonable period of time. State ex rel. Carlson v. Hatfield 157
4. Statute authorizes a city of the first class to regulate by ordinance and to make and prescribe regulations for the construction and location of stables, barns, and other places where offensive matter is kept or is likely to accumulate within the city's corporate limits. Beaty v. Baker ---------- 349
5. Municipal power extends to the regulation and prohibition of the keeping of livestock where the regulation or prohibition is reasonable and related to the public health, safety, or welfare. Beaty v. Baker ---------- 349
6. A municipality has the power to regulate the keeping of livestock in the neighborhood of dwelling houses and other inhabited buildings. Beaty v. Baker 349
7. A regulation fixing the distance within which livestock may be kept in the neighborhood of dwelling houses is a proper exercise of the police power and does not necessarily await the exigencies of an existing nuisance. Beaty v. Baker ---------- 349

Pardons and Paroles.

1. Commutation of punishment is substitution of a milder punishment known to the law for the one inflicted by the court. Lincoln v. Sigler -------- 347
2. The Board of Pardons possesses authority in extending clemency to grant a commutation of punishment for escape from custody. Lincoln v. Sigler -- 347
3. Persons convicted of murder, treason, or forcible rape belong to a class that the statute excludes from eligibility for probation. State v. Randolph 506

Parent and Child.

1. An application for a change with respect to care and custody of minor children, which has been provided for in a decree of divorce, made at any time after the decree has been entered must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res judicata. Jones v. Jones ---------- 223
2. Rule in divorce cases for custody of minor children stated. Jones v. Jones ---------- 223

3. The natural rights of a parent to the custody of his child are not absolute. They must yield to the best interests of the child where the preferential right has been forfeited. Jones v. Jones ---------- 223
4. The discretion of the lower court with respect to awarding or changing the custody and support 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. Jones v. Jones ---------- 223
5. After a divorce decree, if the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody, and maintenance of the children or any of them. Boyer v. Boyer ---------- 226
6. Ordinarily, custody of minor children awarded to their mother in a divorce action will not be disturbed unless by changed circumstances it is affirmatively shown that the mother is an unfit person to have their custody, or that the best interests of the children require such action. Boyer v. Boyer ------ 226
7. The discretion of the trial court with respect to changing the custody of minor chidlren 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. Boyer v. Boyer ---------- 226
8. The discretion of the lower court with respect to awarding or changing the custody and support 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. Baudendistel v. Baudendistel ---------- 334
9. In a juvenile court proceeding, it is essential to the jurisdiction of the court that service of summons be had on the person or persons having the custody or control of the child, or with whom the child may be when the action is commenced. Mingus v. Traxler 638
10. Statute requires that where facts are set forth in a proper proceeding to terminate parental rights, the summons or proper notice must be endorsed

that the proceeding is one to terminate parental rights. Mingus v. Traxler ---------- 638

Parties.

1. A question of fact once litigated on its merits is settled as to the litigants and may not be relitigated directly or collaterally by the litigants or their privies. Calkins v. Witt ---------- 178
2. Where a court has jurisdiction of the subject matter of the action, and its jurisdiction over the parties to the action depends on the existence or nonexistence of a fact, a final determination of such fact issue by a court of competent jurisdiction is not subject to collateral attack. Calkins v. Witt ------ 178
3. When the determination of a controversy cannot be had without the presence of new parties to the suit, the court should order them brought in. Whitaker v. Gering Irr. Dist. ---------- 290
4. In an equity case, the court is authorized on its own motion to make a necessary party a defendant. Whitaker v. Gering Irr. Dist. ---------- 290
5. When it appears that all indispensable parties to a proper and complete determination of an equity cause were not before the district court, the Supreme Court will remand the cause for the purpose of having such parties brought in even though no proper objection was made by any party litigant. Whitaker v. Gering Irr. Dist. ---------- 290
6. Where a person has a personal, pecuniary, and legal interest which is adversely affected by an annexation ordinance, he has standing to contest the validity of the ordinance. Sullivan v. City of Omaha 511
7. A single action of replevin against two or more defendants, each of whom is in the exclusive possession of a portion of the goods and chattels replevied, presents a clear case of misjoinder of parties and causes of action. Coomes v. Drinkwalter ---------- 564
8. One who claims title to or the right to the possession of property replevied, adversely to the plaintiff, is not a necessary party. Coomes v. Drinkwalter 564
9. A party who claims to be the owner of goods which are in controversy in an action of replevin may intervene in the case, upon filing a petition before judgment alleging his ownership. Coomes v. Drinkwalter ---------- 564
10. The person in possession of the property sought to

be replevied is ordinarily the proper and only necessary party defendant. Coomes v. Drinkwalter ---- 564

Partnership.

1. The mere allegation that parties are coowners, standing alone, is not sufficient to allege a partnership. Morse v. Mayberry ---------- 89
2. In Nebraska a partnership is an entity distinct from its members and is recognized in law as a person. Morse v. Mayberry ---------- 89
3. Partners are jointly and severally liable for wrongful acts and omissions committed by a partner in the ordinary course of business of the partnership or with the authority of the copartners. Morse v. Mayberry ---------- 89
4. The words "doing business as" are merely descriptive and do not bind the business or alleged partnership as a separate entity. Morse v. Mayberry ---------- 89

Pensions.

1. The words "other proper municipal authorities" used in firemen's and policemen's pension statute include the fire chief of a city of the primary class. Hooper v. City of Lincoln ---------- 591
2. Statute regulating claims against a city of the primary class is not an exclusive remedy for a fireman entitled to benefits under the firemen's pension statute. Hooper v. City of Lincoln ---------- 591
3. A declaratory judgment proceeding is permissible to determine rights and benefits under the firemen's pension statute. Hooper v. City of Lincoln ------ 591
4. Under the firemen's pension statute, a fireman receives injuries while in the line of duty if he contracts disease while in the discharge of a duty. Hooper v. City of Lincoln ---------- 591
5. Permanent and total disability under the firemen's and policemen's pension statute is the inability to do the work said fireman or policeman was doing at the time of his accident or other disabling act. Hooper v. City of Lincoln ---------- 591

Physicians and Surgeons.

Time at which statute of limitations commences to run in malpractice action against a physician stated. Acker v. Sorensen ---------- 866

Pleading.

1. An order or decree sustaining a demurrer will be affirmed if any one ground of the demurrer is well taken. Morse v. Mayberry ---------- 89
2. The doctrine of res ipsa loquitur proceeds on the theory that, under special circumstances which invoke its operation, the plaintiff is unable to specify the particular act of negligence which caused the injury, but if the petition alleges particular acts of negligence, then the plaintiff, in order to recover, must establish the specific negligence alleged, and the doctrine of res ipsa loquitur cannot be applied. Lund v. Mangelson ---------- 99
3. The failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation. Gibbs v. Johns ---------- 618
4. An objection to the introduction of any evidence on the ground that the petition fails to state a cause of action is a recognized practice in this state; and if the petition is totally defective, the objection should be sustained. Gibbs v. Johns ---------- 618
5. Where the objection is not made until after the trial has commenced, the petition will be liberally construed in the light of the entire record and sustained if possible. If the essential elements of the plaintiff's case may be implied from the petition by reasonable intendment, it will be held sufficient. Gibbs v. Johns ---------- 618
6. Any error or defect in the pleadings which does not affect the substantial rights of the adverse party must be disregarded. Gibbs v. Johns ---------- 618
7. Service of a garnishment summons and interrogatories from any county in the state may properly be had under the provisions of the insurance process statute. Pupkes v. Sailors ---------- 784

Post Conviction.

1. Where, with full knowledge of his rights in the matter and represented by counsel, a defendant fails to allege or assert that he was unconstitutionally deprived of his right to appeal, a post conviction action filed more than 2 years after the time of his original conviction in which he first alleges a deprival of the right to appeal comes too late to invest the Supreme Court with any appellate jurisdiction. State v. Wycoff ---------- 373
2. In a post conviction proceeding, petitioner has the

burden of establishing a basis for relief. State v. Reizenstein ---------- 376
State v. Riley ---------- 616

3. An evidentiary post conviction hearing at which the issue of voluntariness of defendant's admissions is tried and determined is a sufficient finding by the judge on such issue to satisfy the requirements of Jackson v. Denno, 278 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A. L. R. 3d 1205. State v. Reizenstein ---------- 376
4. An application for a hearing under the Post Conviction Act is not a substitute for an appeal. State v. Reizenstein ---------- 376
State v. Riley ---------- 616
5. In the absence of a violation or infringement of a constitutional right no relief may be had under the Post Conviction Act. State v. Reizenstein ---------- 376
6. Findings that are clearly erroneous in a post conviction proceeding will be set aside on appeal. State v. Crenshaw ---------- 449
7. A motion to set aside a judgment of conviction or a sentence in a post conviction proceeding cannot serve the purpose of appeal to secure a review of the conviction. State v. Riley ---------- 616
8. In a proceeding under the Post Conviction Act, if the trial court finds on examination of its files and records that the proceeding is without foundation, an evidentiary hearing may properly be denied. State v. Nicholson ---------- 834

Powers.

1. An administrative board has no power or authority other than that specifically conferred upon it by statute or ordinance, or by a construction necessary to accomplish the purpose of the act. Slosburg v. City of Omaha ---------- 839
2. An administrative agency cannot, in the absence of legislative authority, rescind or change its own final orders. Slosburg v. City of Omaha ---------- 839

Probable Cause.

1. A police officer may arrest for a misdemeanor committed or attempted in his presence. State v. Reeder ---------- 425
2. Rule for arrest without warrant stated. State v. Heiser ---------- 665

Property.

1. The measure of damages for breach of covenants for title to part of a tract is (1) reasonable expenses and (2) such proportion of the consideration as the value of the part lost bears to the total value of the tract. Westhaven Properties, Inc. v. Pahl ---------- 355
2. Ordinarily, when a mortgagee becomes the owner of the fee, the former estate is merged in the latter. But the mortgagee may keep his mortgage alive when it is essential to his security against an intervening title. If there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself. Overland-Wolf, Inc. v. Koory ---------- 611
3. The only foundation for a local assessment lies in the special benefits conferred upon the property assessed; assessment beyond the benefits conferred is a taking of property for public use without compensation and is illegal. Gilliam v. City of Lincoln 847
4. Basis for levying special assessments set out. Gilliam v. City of Lincoln ---------- 847
5. Benefits represented by special assessments must be paid or deducted by condemnees in the same manner and in the same proportion as other property owners benefited by an improvement; such benefits being separate from the condemnation of the land for the public purpose. Gilliam v. City of Lincoln 847

Prosecuting Attorneys.

1. The State is not required to call all material witnesses to an offense. State v. Heiser ---------- 665
2. The failure of the State to call a witness to prove a fact material to its case raises no inference unfavorable to the State when it appears that the witness is not within its reach. State v. Heiser ---------- 665

Public Funds.

1. Funds received by a sheriff through contributions from or assessments made against employees of his office are not county funds and the county has no interest therein. State ex rel. Tomka v. Janing ---- 76
2. Funds received by a sheriff through contributions from or assessments made against employees of his

office not having been derived from the county cannot be "returned" to the county. State ex rel. Tomka v. Janing ---------- 76

3. Even in the absence of statute, public policy and sound morals forbid a public officer from receiving compensation other than the salary prescribed by law. When additional pay or perquisites are accepted by a public officer for performance of duties germane to his office, a taxpayer has a right to insist that the funds wrongfully received shall be returned to the public treasury. State ex rel. Tomka v. Janing ---------- 76

Public Officers and Employees.

1. Assessments made against public employees as a a necessary adjunct to their employment are in violation of public policy and unlawful. State ex rel. Tomka v. Janing ---------- 76
2. The public officer must perform all the duties of his office for the compensation allowed by law and if none is authorized, the services are gratuitous. State ex rel. Tomka v. Janing ---------- 76
3. Even in the absence of statute, public policy and sound morals forbid a public officer from receiving compensation other than the salary prescribed by law. When additional pay or perquisites are accepted by a public officer for performance of duties germane to his office, a taxpayer has a right to insist that the funds wrongfully received shall be returned to the public treasury. State ex rel. Tomka v. Janing ---------- 76
4. Under statutes governing cities of the first class, the chief of police has immediate superintendence of the police, and the mayor has superintending control of all officers and affairs of the city. Frederickson v. Albertsen ---------- 494
5. Civil service commissions of cities of the first class possess broad discretion in ruling on orders of discharge by appointing powers. Frederickson v. v. Albertsen ---------- 494
6. On appeal by an employee of a city of the first class from the civil service commission to district court, the only issue under the statute involved is whether the commission's order was made in good faith for cause. Frederickson v. Albertsen ------ 494
7. The words "other proper municipal authorities" used in firemen's and policemen's pension statute include

the fire chief of a city of the primary class. Hooper v. City of Lincoln ---------- 591
8. Statute regulating claims against a city of the primary class is not an exclusive remedy for a fireman entitled to benefits under the firemen's pension statute. Hooper v. City of Lincoln -------- 591
9. Under the firemen's pension statute, a fireman receives injuries while in the line of duty if he contracts disease while in the discharge of a duty. Hooper v. City of Lincoln ---------- 591
10. Permanent and total disability under the firemen's and policemen's pension statute is the inability to do the work said fireman or policeman was doing at the time of his accident or other disabling act. Hooper v. City of Lincoln ---------- 591
11. The failure on the part of the police magistrate to perfect the appeal in violation of a mandatory duty does not deprive the district court of jurisdiction and does not deprive either party of his right to be heard. State v. Wineman ---------- 819
12. Where the fault lies with the police magistrate, the district court acquires jurisdiction and may not dismiss the appeal on the ground that it was not filed within the time fixed by law. State v. Wineman ---------- 819

Public Service Commissions.

1. Ordinarily the only questions to be determined on appeal from the railway commission are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. Poulson v. Hargleroad Van & Storage Co. ---------- 201
2. In determining the issue of public convenience and necessity, in cases where new or extended operating rights are sought, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers, and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest. Poulson v. Hargleroad Van & Storage Co. ---------- 201
3. Purpose of the Nebraska Motor Carrier Act stated. Poulson v. Hargleroad Van & Storage Co. -------- 201
4. In considering an application for a permit to operate

as a contract carrier, the burden is upon the applicant to show that the proposed service is specialized and fits the need of the proposed contracting shippers, that the applicant is fit, willing, and able to perform the service, and that the proposed operation will be consistent with the public interest. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp. ---------- 229

5. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp. ---------- 229

6. If competent proof is made by the applicant showing the proposed service to be specialized and needed, and by protesting common carriers showing a willingness and ability to perform it, the applicant must then establish that he is better equipped and qualified to meet the special needs of the proposed contracting shippers than the protesting common carriers. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp. ---------- 229

7. The adequacy of existing services to perform the normal needs of proposed contracting shippers is not conclusive where the new service is better designed to fit the special requirements of the proposed contracting shippers. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp. ---------- 229

8. The ability of a contract carrier to provide special service at a lower cost cannot ordinarily of itself justify a finding for need of specialized service although it is one of the factors to be considered. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp. ---------- 229

9. Where there is evidence to sustain the factors for and against the issuance of a permit to a contract carrier, the determination of the public interest is for the railway commission and not the courts. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp. 229

10. Evidence of operations under color of authority may be considered by the railway commission in determining whether or not the proposed service is or will be required by the present or future public convenience and necessity. Neylon v. Petersen & Petersen, Inc. ---------- 813

11. The issue of public convenience and necessity is ordinarily one of fact and where there is evidence

in the record to sustain the railway commission's order, the Supreme Court cannot say that it is unreasonable and arbitrary. Neylon v. Petersen & Petersen, Inc. ---------- 813

Public Utilities.

1. Statutes authorizing municipalities to establish equitable rates or charges for sewer service declare the common law which prohibits unjust discrimination by a public utility. Rutherford v. City of Omaha ---------- 398
2. A difference in utility rates under substantially similar conditions of service may constitute unjust discrimination. Rutherford v. City of Omaha ---- 398
3. Rate differences fairly proportionate to differences in cost or difficulty of service are valid. Rutherford v. City of Omaha ---------- 398
4. In determining reasonable rate relationships, a municipality may sometimes take into account the purpose for which a customer receives the service. Rutherford v. City of Omaha ---------- 398
5. Sewer use charges are not special assessments. Rutherford v. City of Omaha ---------- 398
6. In collecting a sewer service charge unpaid at due date, a municipality may add a reasonable processing charge. Rutherford v. City of Omaha ---------- 398

Records.

1. Function of nunc pro tunc order stated. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp. ----- 229
2. The record of the trial tribunal in all appellate proceedings imports absolute verity. If such record is incomplete or incorrect, the remedy shall be by appropriate proceeding to secure correction thereof in the trial court. Campbell v. City of Ogallala -- 238

Reformation of Instruments.

1. To decree reformation of a written instrument for mistake, equity insists that the parties shall have come to a complete mutual understanding of all the essential terms of their bargain. Westhaven Properties, Inc. v. Pahl ---------- 355
2. In order to warrant reformation of a written instrument for mistake, the evidence must be clear and convincing. Westhaven Properties, Inc. v. Pahl 355

Replevin.

1. In a replevin action, involving branded livestock, where the plaintiff's recorded brand is on an animal and is older than defendant's brand on the animal, it is prima facie evidence of ownership in the older brand, and places the burden on the defendant to establish his right to put his brand upon the animal. Coomes v. Drinkwalter ---------- 564
2. A single action of replevin against two or more defendants, each of whom is in the exclusive possession of a portion of the goods and chattels replevied, presents a clear case of misjoinder of parties and causes of action. Coomes v. Drinkwalter ---- 564
3. The object of an action of replevin is to recover specific personal property, and liability for value of property accrues only if a return of the property cannot be had. Coomes v. Drinkwalter ------ 564
4. One who claims title to or the right to the possession of property replevied, adversely to the plaintiff, is not a necessary party. Coomes v. Drinkwalter -- 564
5. A party who claims to be the owner of goods which are in controversy in an action of replevin may intervene in the case, upon filing a petition before judgment alleging his ownership. Coomes v. Drinkwalter ---------- 564
6. The person in possession of the property sought to be replevied is ordinarily the proper and only necessary party defendant. Coomes v. Drinkwalter 564

Revenue and Taxation.

1. One purpose of the constitutional limitation upon state indebtedness is to prevent the anticipation of revenue by the creation of obligations to be paid from revenue to be received in future fiscal periods. State ex rel. Meyer v. Steen ---------- 297
   State ex rel. Meyer v. Duxbury ---------- 302
2. An obligation payable from revenue subject to the plenary control of the Legislature and available for any legal purpose is subject to the constitutional limitation upon indebtedness. State ex rel. Meyer v. Steen ---------- 297
   State ex rel. Meyer v. Duxbury ---------- 302
3. The special fund doctrine is applicable generally to an indebtedness incurred in the construction of a project which is payable from the revenue arising from the operation of the project. State ex rel. Meyer v. Steen ---------- 297

State ex rel. Meyer v. Duxbury ---------- 302
4. In this state the special fund doctrine is not applicable to obligations payable from excise taxes or other revenue subject to the control of the Legislature and available for any legal use. State ex rel. Meyer v. Steen ---------- 297
5. The Legislature is prohibited from making a continuing appropriation in this state. State ex rel. Meyer v. Steen ---------- 297
6. An act is unconstitutional and void which authorizes the construction of a state office building to be financed by the issue of revenue bonds, payable from the proceeds of the sale of permits and licenses to hunt, trap, and fish. State ex rel. Meyer v. Steen 297
7. Municipal bonds, including interest and principal payments thereon, which are purchased with the proceeds of revenue bonds issued by a state agency, may be pledged to secure the payment of the revenue bonds. Such municipal bonds are not revenue within the meaning of the constitutional limitation upon state indebtedness. State ex rel. Meyer v. Duxbury 302
8. Fees and charges received by an agency of the state which remain unspent at the end of the biennium, lapse and become unavailable until reappropriated. Such funds may not be pledged to secure the payment of revenue bonds issued by the agency. State ex rel. Meyer v. Duxbury ---------- 302

Right to Counsel.

1. A request for counsel does not per se disable an accused from thereafter waiving counsel. State v. Oliva ---------- 620
2. In the absence of unusual circumstances a defendant in a criminal case who is sui juris and mentally competent has the right to conduct his defense in person without the assistance of counsel. State v. Beasley ---------- 681
3. A defendant in any criminal prosecution must be given a reasonable opportunity to employ and consult with counsel. State v. Peterson ---------- 826
4. It is the duty of the public to provide counsel for destitute persons charged with criminal offenses, but abuse of this privilege should not be permitted. When such persons have once had their contentions fairly presented and litigated or it is obvious that the grounds urged for consideration are without merit

in the eyes of the law, such obligation on the part of the public comes to an end. State v. Nicholson -- 834

Sales.

1. One who solicits a sale has a duty to disclose all pertinent facts within his knowledge affecting his representations when he knows or ought to know that they are not within the reach of a reasonably diligent and observing buyer and would readily mislead the purchaser as to the true condition of the property. Riddle v. Erickson ---------- 122
2. A prospective purchaser is justified in relying on a representation made to him where it is a representation of an existing fact and an investigation would be required to discover the truth. Riddle v. Erickson ---------- 122
3. A prospective purchaser may not rely on a meaning that he gives to a representation which he knows is beyond the power of the seller to make. Riddle v. Erickson ---------- 122
4. The intent or good faith of a person making false statements in soliciting a sale is not material, nor may he avoid liability for positive misrepresentation of fact by disclaiming accuracy in his offering communication. Riddle v. Erickson ---------- 122

Schools and School Districts.

1. A school district maintaining nonaccredited high school grades is a nonaccredited high school district within the meaning of statute which concerns the translocation of land upon petition. Schwanebeck v. Brunken ---------- 519
2. The term "district officers" as used in the statute, includes members of the school board or board of education. State ex rel. Haschke v. Duesman -- 673
3. Unless the governing provision specifically provides otherwise, the appointment of a member of a school board or board of education in a Class III school district is for the period to the beginning of the next school year. State ex rel. Haschke v. Duesman 673
4. The provisions of cited statute do not apply to appeals taken from the action of a freeholder board. Clark v. Sweet ---------- 723
5. School tax money received by one school district from lands apparently, but not legally, within its exterior boundaries, levied and collected for its uses and purposes, cannot be recovered by the school

district within whose territory the lands actually lie, where no levy was made or taxes collected on said lands by such district for its uses and purposes, and each district obtained exactly the amount of money for which its budget called and neither district obtained or had the use of money intended for the other district. School District No. 8 v. School District No. 15 ---------- 797

6. In absence of statute, taxes voluntarily paid cannot be recovered; and if recovery is attempted, substantial compliance with the statute must be shown. School Dist. No. 8 v. School Dist. No. 15 -- 797

Searches and Seizures.

1. Standard for evaluation of reasonableness of a search or seizure without warrant stated. State v. Dillwood ---------- 360
2. Objects falling in the plain view of a peace officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. State v. Dillwood ---------- 360
3. Where the defendant has consented to a search, the search is not illegal because the consent was given in the presence of police officers and the defendant had not been advised concerning his rights. State v. Baker ---------- 499
4. The exclusionary rules of search and seizure are subject to an impeachment exception that at most is narrow. State v. Cannito ---------- 575
5. A search and seizure incident to a lawful arrest is not violative of the Fourth Amendment. State v. Heiser ---------- 665
6. Evidence obtained prior to and independent of an alleged illegal search is admissible. State v. Beasley 681

Sheriffs and Constables.

1. Mileage fees accruing to a deputy sheriff by reason of necessary travel in his own automobile in connection with his official duties are the property of such deputy and not of his principal. State ex rel. Tomka v. Janing ---------- 76
2. Funds received by a sheriff through contributions from or assessments made against employees of his office are not county funds and the county has no interest therein. State ex rel. Tomka v. Janing -- 76
3. Funds received by a sheriff through contributions from or assessments made against employees of

his office not having been derived from the county cannot be "returned" to the county. State ex rel. Tomka v. Janing ---------- 76
4. It is the duty of a sheriff to supply the general necessaries of life to inmates of the county jail and he may make other items available when deemed advisable. State ex rel. Tomka v. Janing ---------- 76
5. In performing duty of supplying general necessaries of life to county jail inmates, any profit derived therefrom is the property of the county. State ex rel. Tomka v. Janing ---------- 76

Statutes.

1. Statute requires that every motor vehicle shall be equipped with brakes, including two separate means of applying the brakes, each of which shall be effective and so constructed that no part which is liable to failure shall be common to the two. Ritchie v. Davidson ---------- 94
2. The main statutes affecting the property interest granted in dedication by plat are those in force at the time of dedication. Trahan v. Council Bluffs Steel Erection Co. ---------- 170
3. Where statute requires an engineer's estimate of the cost of the proposed improvement, its submission to the city council is jurisdictional. Campbell v. City of Ogallala ---------- 238
4. An act not complete in itself, but which is clearly amendatory in its character and scope, must set forth the section or sections as amended, and repeal the original section or sections. Schurmann v. Curtiss ---------- 277
5. 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. Schurmann v. Curtiss ---------- 277
State ex rel. Meyer v. Duxbury ---------- 302
6. The provisions of cited statute do not apply to appeals in probate matters. Schurmann v. Curtiss 277
7. A severability clause is a declaration of the intent of the Legislature that it would have passed the act with the invalid parts omitted. State ex rel. Meyer v. Duxbury ---------- 302
8. The fundamental principle in construing statutes is to ascertain from their language the purpose and

intent of the legislative body. Imus v. Bead Mountain Ranch, Inc. ---------- 343
9. While it is competent for the Legislature to classify for the purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission ---------- 410
10. There is no vested right in an existing law which precludes its amendment or repeal, and there is no implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission ---------- 410
11. Where it appears that an unconstitutional portion of an act can be separated from the valid portions and the latter enforced independent of the former, and it further appears that the invalid portion did not constitute such an inducement to the passage of the valid parts that they would not have passed without them, the former may be rejected and the latter upheld. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission ---------- 410
12. A severability clause in a statute is not a condition precedent to a determination of the question of severability. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission ---------- 410
13. Where the title of an amendatory or supplemental act sufficiently indicates the nature of the legislation in it contained, or the nature of the changes or additions by it made, it is immaterial whether or not the provisions of the act amended are covered by the title of the amendatory act. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission ---------- 410
14. Legislative intent, when apparent from the whole statute, is not to be thwarted by strained and unusual interpretations of particular words not required under the circumstances, nor because the statute previously was difficult in detail, or that a subsequent amendment has changed it in some respects. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission ---------- 410
15. A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection

in which they are used and in the light of the mischief to be remedied. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission ---------- 410

16. Annexing of territory by a metropolitan city, pursuant to statute, is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the annexation thereof. In doing so, it is not for the courts to determine what portions may be properly annexed, for the fixing of boundary lines under this authority is a legislative act. Sullivan v. City of Omaha ---------- 511

17. It is clearly the duty of the Supreme Court to give a statute an interpretation which meets constitutional requirements if it can be reasonably done. State ex rel. Morris v. Marsh ---------- 521

18. The power of initiative must be liberally construed to promote the democratic process and the right of initiative constitutionally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise. State ex rel. Morris v. Marsh ------ 521

19. On an otherwise validly executed initiative petition form, where the actual and exact date on which the signature of an elector was signed is readily apparent, the omission or faulty rendition of the date should be treated as a clerical or technical error and constitutes substantial compliance with the statute. State ex rel. Morris v. Marsh ---------- 521

20. A substantial compliance with the statute in filing the itemized verified statement of contributions and expenditures is all that is required. State ex rel. Morris v. Marsh ---------- 521

21. The Legislature has the power to define crimes and to fix penalties; and this power, exercised within constitutional limits is not subject to review by the courts. State v. Tucker ---------- 577

22. Constitutionality of a statute must be raised in the trial court and that court given an opportunity to pass on it. State v. Tucker ---------- 577

23. Word "representative" in dead man's statute defined. Zych v. Zych ---------- 708

24. Our law is well established that any party so placed in litigation that he is called upon to defend that which he has obtained from a deceased person and to make the defense which the deceased might have made if living may be said to represent a deceased

person within the contemplation of the statute. Zych v. Zych ---------- 708

25. A purchaser who receives possession of a motor vehicle without obtaining the certificate of title thereto, as required by our statutes, acquires no title or ownership therein. Forman v. Anderson ------- 715

26. The purpose of the act relating to transfers and titles to motor vehicles is to provide a means of identifying motor vehicles, to ascertain the owner thereof, to prevent theft of motor vehicles, and to prevent fraud. Forman v. Anderson ---------- 715

Taxation.

1. There is a presumption that a board of equalization has properly performed its official duties and in making an assessment acted upon sufficient competent evidence to justify its action. The presumption of correctness disappears when there is competent evidence to the contrary and thereafter the reasonableness of the valuation is one of fact to be determined by the evidence. Boss Hotels Co. v. County of Hall ---------- 19

2. A final order of the State Board of Equalization and Assessment is presumptively valid and will not be reversed except where it is shown that such order or action was illegal, arbitrary, capricious, or unreasonable. County of Kearney v. State Board of Equalization & Assessment ---------- 329

3. A sales assessment ratio study consisting of a relatively small number of sales or sales nonrepresentative in character is not sufficient upon which to base a comparison of market or actual value and the value used for purposes of taxation. County of Kearney v. State Board of Equalization & Assessment ---------- 329

4. The constitutional and statutory power of the State Board of Equalization and Assessment is to equalize values uniformly on a statewide basis and equalization as between counties within a district or intracounty equalization is not authorized. County of Kearney v. State Board of Equalization & Assessment ---------- 329

5. The State Board of Equalization and Assessment may rely on and is entitled to act on the presumption that the abstracts of assessment returned by the various counties have conformed to the law.

County of Kearney v. State Board of Equalization & Assessment ---------- 329
6. Property owned and used exclusively for educational purposes, and not owned or used for financial gain or profit to the owner or user, is exempt from taxes. Union College v. Board of Equalization -- 579
7. The primary or dominant use, and not an incidental use, is controlling in determining whether property is exempt from taxation. A use which is not direct, but remote, will not qualify for exemption. Union College v. Board of Equalization ---------- 579
8. Property used primarily for the purpose of providing student employment is not exempt as property used exclusively for educational purposes. Union College v. Board of Equalization ---------- 579
9. It is the settled policy of our law to guard against double taxation in all cases where it can be avoided. Abernathy v. City of Omaha ---------- 660
10. In order for the Constitution of Nebraska to restrict plenary power of the Legislature to tax, the language of restriction must be clear. Craig v. Board of Equalization ---------- 779
11. A statute requiring a county to levy a property tax for purposes substantially local does not contravene the prohibition against state levy of a property tax for state purposes although the statute commingles state and local purposes. Craig v. Board of Equalization ---------- 779
12. School tax money received by one school district from lands apparently, but not legally, within its exterior boundaries, levied and collected for its uses and purposes, cannot be recovered by the school district within whose territory the lands actually lie, where no levy was made or taxes collected on said lands by such district for its uses and purposes, and each district obtained exactly the amount of money for which its budget called and neither district obtained or had the use of money intended for the other district. School Dist. No. 8 v. School Dist. No. 15 ---------- 797
13. In absence of statute, taxes voluntarily paid cannot be recovered; and if recovery is attempted, substantial compliance with the statute must be shown. School Dist. No. 8 v. School Dist. No. 15 -------- 797

Time.

1. A requirement that an initiated measure be sub-

mitted at the first general election held not less than 4 months after filing of the petition is satisfied by a filing on July 5 for a general election to be held November 5. State ex rel. Morris v. Marsh -- 521

2. On appeal from a police court to the district court, if the appeal is not completed within the time fixed by statute due to the fault of the appealing party, the appeal will be dismissed. State v. Wineman -- 819

Torts.

1. Partners are jointly and severally liable for wrongful acts and omissions committed by a partner in the ordinary course of business of the partnership or with the authority of the copartners. Morse v. Mayberry ---------- 89

2. Cities and all other governmental subdivisions and local public bodies of this state are not immune from tort liability arising out of the ownership, use, and operation of motor vehicles. Brown v. City of Omaha ---------- 430

Trespass.

1. In order to maintain trespass to land the plaintiff must be the owner, or in possession thereof, when the acts complained of were committed. Franz v. Nelson ---------- 137

2. The burden of proof in an action in trespass is upon the plaintiff to prove ownership or possession. Franz v. Nelson ---------- 137

Trial.

1. It is the duty of the trial court to instruct on the issues presented by the pleadings and evidence, whether requested to do so or not. State v. Ross -- 1
Reeder v. Rinne ---------- 734

2. Where reasonable minds may draw different inferences or conclusions from the evidence it is within the province of the jury to decide the issues of fact and the Supreme Court may not set aside or direct a verdict in such a situation. Mustard v. St. Paul Fire & Marine Ins. Co. ---------- 15
Kehm v. Dumpert ---------- 568
Speedway Transp., Inc. v. DeTurk ---------- 629

3. Where a plaintiff did not elect to stand upon his petition after defendants' demurrer to it was sustained, and no judgment of dismissal was thereafter rendered by the trial court disposing of the case and

terminating the litigation in that court, the order sustaining the demurrer is not a final order reviewable on appeal. Root v. School Dist. No. 25 ------- 22
4. An order overruling a special appearance is not a final order from which an appeal can be taken. Root v. School Dist. No. 25 ---------- 22
5. As a general rule, exhibits which are practically instructive to explain the evidence or aid in its interpretation or application by the jury may be admitted. Iske v. Metropolitan Utilities Dist. ------ 34
6. An expert witness' testimony is purely advisory and is not binding on the triers of fact. Iske v. Metropolitan Utilities Dist. ---------- 34
7. The amount of damages sustained by a landowner is peculiarly of a local nature and ordinarily is to be determined by the jury, and the Supreme Court will not ordinarily interfere with the verdict of the jury when the evidence is conflicting unless it is clearly wrong. Iske v. Metropolitan Utilities Dist. ---------- 34
8. Rule for determining sufficiency of the evidence to sustain a verdict stated. Drahota v. Wieser -- 66
Inland Drilling Co. v. Davis Oil Co. ---------- 116
Kehm v. Dumpert ---------- 568
Lucht v. American Propane Gas Co. ---------- 583
Speedway Transp., Inc. v. DeTurk ---------- 629
9. Rule for admission of opinion evidence stated. Drahota v. Wieser ---------- 66
Brugh v. Peterson ---------- 190
10. Opinion evidence should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine. Drahota v. Wieser ---------- 66
11. The trial court is not required to give instructions in the precise language requested. Drahota v. Wieser 66
12. Alleged improper conduct of the trial judge in the absence of the jury will not be reviewed on appeal in the absence of a timely objection. Drahota v. Wieser ---------- 66
13. Conflicting opinion testimony of expert witnesses ordinarily raises a question of fact. State v. Barnes 85
14. It is the duty of the district court, on its own motion, to submit to the jury only the issues upon which there are controverted questions of fact which must be determined by the jury in order to properly arrive at its verdict. Ritchie v. Davidson ---------- 94
15. In every case, before the evidence is submitted to

the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Lund v. Mangelson ---------- 99

16. Rule for consideration of motion for directed verdict stated. Lund v. Mangelson ---------- 99

17. In an action for damages for negligence the burden is on the plaintiff to show by direct or circumstantial evidence that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. Lund v. Mangelson 99

18. A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof. State v. Jones ---------- 133

19. A defendant in a criminal case who becomes a witness subjects himself to the rules applicable to other witnesses. State v. Jones ---------- 133

20. All instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error. State v. Jones 133
Liebers v. State ---------- 250
State v. Reeder ---------- 425
Lucht v. American Propane Gas Co. ---------- 583
Deitloff v. City of Norfolk ---------- 648
Gompert v. Great Western Sugar Co. ---------- 790

21. Where there is irreconcilable conflict on a material issue the Supreme Court will, in determining the weight of 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. Jones v. Jones ---------- 223
Hooper v. City of Lincoln ---------- 591
Jenkins v. Watson-Wilson Transp. System, Inc. -- 634

22. The giving of an instruction on the burden of proof in an eminent domain action relating to damage to that part of plaintiff's property which was not taken, when the fact of the presence of such damage was conceded and not an issue, does not constitute prejudicial error. Liebers v. State ---- 250

23. The primary responsibility for instructions is with

the trial court and the parties cannot be required to approve them previous to their submission. Beveridge v. State ---------- 406
24. Where parties do not elect to approve instructions, they ordinarily thereafter cannot avoid the effect of their failure to point out the defects. Beveridge v. State ---------- 406
25. 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. Reeder ---------- 425
26. After a jury has considered the evidence and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt. State v. Reeder -------- 425
27. Generally, matters that go to the weight and credibility of the evidence are solely for the jury to determine as trier of the facts and do not relate to the question of the sufficiency of the evidence. State v. Reeder ---------- 425
28. Error may not be predicated on the refusal to give an instruction which either erroneously or partially covers the applicable law. State v. Reeder ------ 425
29. In determining whether district court findings are clearly erroneous, the Supreme Court takes into consideration the advantage of the district court in hearing oral evidence. State v. Crenshaw -------- 449
30. A special instruction to the jury on a particular phase of the issues is ordinarily not required without a request. State v. Randolph ---------- 506
31. Rule for determination of credibility of a witness in a jury trial stated. Puckett v. First Nat. Bank of Atkinson ----------549
32. In a law action, a verdict of a jury based on conflicting evidence will not be disturbed unless clearly wrong. Puckett v. First Nat. Bank of Atkinson --- 549
33. In the absence of a motion for a directed verdict on the issue of liability, the plaintiff cannot complain of the failure of the trial court to withdraw that issue from the jury. Kehm v. Dumpert ------ 568
34. In jury cases, jurors are the sole judges of the credibility of witnesses and of the weight to be given

their testimony. They have the right to credit or reject the whole or any part of the testimony of any witness in the exercise of their judgment. Kehm v. Dumpert ---------- 568
35. If there is any evidence to support a jury's verdict, it is not the court's function to weigh the evidence to determine whether it would have returned a different verdict. Kehm v. Dumpert ---------- 568
36. Appellant, on appeal, is precluded from raising error of law occurring at the trial unless alleged error is properly presented to the trial court and properly preserved. Lucht v. American Propane Gas Co. ---------- 583
37. The failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation. Gibbs v. Johns ---------- 618
38. An objection to the introduction of any evidence on the ground that the petition fails to state a cause of action is a recognized practice in this state; and if the petition is totally defective, the objection should be sustained. Gibbs v. Johns ---------- 618
39. Where the objection is not made until after the trial has commenced, the petition will be liberally construed in the light of the entire record and sustained if possible. If the essential elements of the plaintiff's case may be implied from the petition by reasonable intendment, it will be held sufficient. Gibbs v. Johns ---------- 618
40. Any error or defect in the pleadings which does not affect the substantial rights of the adverse party must be disregarded. Gibbs v. Johns ------ 618
41. The rule that a defendant is entitled, on request therefor, to an independent hearing and determination by the court on the question of the voluntariness of an admission or confession is not applicable regarding statements spontaneously made and volunteered in the absence of any in-custody interrogation. State v. Oliva ---------- 620
42. The trial court has a wide discretion in determining the latitude permitted in the argument of counsel. State v. Heiser ---------- 665
43. In a case involving issues of negligence where different minds may draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury. Zucher v. Monohan ------ 686
44. If the court has instructed the jury generally on

the law of the case and has not withdrawn any essential issue from consideration of the jury, error cannot be predicated on failure to charge on some particular phase of the case, unless proper instruction has been requested by the party complaining. State v. Caldwell ---------- 712

45. Rule for determining sufficiency of plaintiff's evidence to present a jury question stated. Reeder v. Rinne ---------- 734

46. The verdict of a jury will not be disturbed unless there is insufficient evidence to support the jury's findings. State v. Newson ---------- 750

47. The failure of an insured to attend trial as requested by the insurer is not per se prejudicial. Pupkes v. Sailors ---------- 784

48. An instruction as to a lesser included offense is proper only when applicable to the evidence, and where there is no evidence that would justify a verdict of guilty of a lesser offense, no instruction need be given. State v. LaPlante ---------- 803

49. An application for postponement of time of trial of a criminal case is addressed to the sound discretion of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error. State v. Peterson ---------- 826

50. Every person accused is entitled to an opportunity to prepare for trial, but the opportunity is not unlimited. State v. Peterson ---------- 826

51. Every defendant charged with a criminal offense is not entitled to a jury trial. State v. Peterson -- 826

52. There is no federal constitutional right to a jury trial in misdemeanor cases. State v. Peterson ---- 826

Trusts.

So reluctant are the courts to engraft trust by parol on the legal title to real estate that there is perhaps no better established doctrine than the one which requires a high degree of proof in order to establish the trust by parol evidence. Zych v. Zych -------- 708

Undue Influence.

1. Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence, but there must be a solid foundation of established facts on which to rest the inference of its existence. Zych v. Zych ---------- 708

2. Elements necessary to be established in order to

set aside a deed on the ground of undue influence stated. Zych v. Zych ---------- 708
Scholting v. Scholting ---------- 850
3. Undue influence exercised by any one, whether he or another gains by its exercise, renders the will or other instrument thus procured worthless. Scholting v. Scholting ---------- 850
4. Shifting of burden of proof when instrument is challenged as being produced by undue influence stated. Scholting v. Scholting ---------- 850
5. Whether presumption of undue influence arises must of necessity be decided according to the particular facts and circumstances of each case in which the question arises. Scholting v. Scholting ------- 850

Venue.

In a prosecution for receiving stolen property, such prosecution may be laid in the county where a defendant either received or had such property, notwithstanding the theft was committed in another county. State v. McKee ---------- 754

Wills.

1. A person nominated in a will as executor is not "legally competent" to act in that capacity, where his duties would require him to prosecute on behalf of adversary litigants, a suit which he would at the same time defend as an individual. Moss v. Eaton 71
2. Where there exists at the time of the hearing on appointment of executor, a conflict of interest of a nature sufficiently adverse or antagonistic that the exercise of proper judicial discretion would require the immediate removal of an executor if he were appointed, the named executor is not legally competent under statute and should not be appointed. Moss v. Eaton ---------- 71
3. There must be a measure of judicial discretion in determining whether a particular conflict of interest is sufficiently serious, adverse, or antagonistic to prevent appointment or compel removal of an executor. Moss v. Eaton ---------- 71
4. When an appeal is taken from a judgment of the county court denying the admission of a will to probate, the party appealing is required to file a petition on appeal within 50 days from the date of the rendition of such judgment unless the court, on

good cause shown, shall otherwise order. Mitchell v. Tucker ---------- 155

5. Whether good cause has been shown in determining time in which an appeal from county court denying admission of will must be filed is ordinarily a question of fact. Mitchell v. Tucker ---------- 155
6. Undue influence exercised by any one, whether he or another gains by its exercise, renders the will or other instrument thus procured worthless. Scholting v. Scholting ---------- 850

Witnesses.

1. An expert witness' testimony is purely advisory and is not binding on the triers of fact. Iske v. Metropolitan Utilities Dist. ---------- 34
2. A qualified expert, upon laying a proper foundation, may give his opinion as to the minimum speed which a vehicle must have been traveling to lay down the skid marks shown in the evidence. Brugh v. Peterson ---------- 190
3. In jury cases, jurors are the sole judges of the credibility of witnesses and of the weight to be given their testimony. They have the right to credit or reject the whole or any part of the testimony of any witness in the exercise of their judgment. Kehm v. Dumpert ---------- 568
4. An in-court identification by a witness to whom the accused was exhibited before trial and in absence of defense counsel is inadmissible, unless an independent origin of the identification has been established. State v. Cannito ---------- 575
5. In condemnation proceedings, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation. Deitloff v. City of Norfolk ---------- 648
6. The owner of real estate which is taken in condemnation proceedings and who is familiar with its value can testify as to its value. Deitloff v. City of Norfolk ---------- 648
7. Generally, either lay or expert witnesses may be allowed to testify as to the value of a tract of land taken or the value of the remainder thereof immediately before and immediately after the taking if proper foundation is laid showing they have an acquaintance with the property and are informed as

to the state of the market, the weight and credibility of their testimony being for the jury. Deitloff v. City of Norfolk ---------- 648

8. In a condemnation action, the weight and credibility of testimony of either lay or expert witnesses regarding value of land taken or value of remainder immediately before and immediately after the taking is for the jury. Deitloff v. City of Norfolk ---------- 648

9. Ordinarily it is proper for counsel to comment on the failure of the opposing side to produce or use available and competent witnesses, where the circumstances justify an unfavorable inference from such omission. State v. Heiser ---------- 665

10. The State is not required to call all material witnesses to an offense. State v. Heiser ---------- 665

11. The failure of the State to call a witness to prove a fact material to its case raises no inference unfavorable to the State when it appears that the witness is not within its reach. State v. Heiser ---------- 665

Words and Phrases.

1. A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. Marx v. Hartford Acc. & Ind. Co. ---------- 12

2. In determining whether a particular act is of a professional nature or a "professional service" the Supreme Court must look not to the title or character of the party performing the act, but to the act itself. Marx v. Hartford Acc. & Ind. Co. ---- 12

3. The words "doing business as" are merely descriptive and do not bind the business or alleged partnership as a separate entity. Morse v. Mayberry 89

4. The words "total annual premium volume" contained in an offer to sell an insurance agency mean not only the cash income from policies written on an annual basis, but include as well the proportionate annual share of premiums on policies written for 3 and 5 year terms, whether or not paid when the policy was issued or paid on an annual basis during the term of the policy. Riddle v. Erickson ---------- 122

5. Effect of unqualified allowance of "alimony in gross" stated. Ball v. Ball ---------- 216

6. Statutory authority of court to revise and alter its

awards of alimony as to future payments stated. Ball v. Ball ---------- 216
7. "Alimony" defined. Ball v. Ball ---------- 216
8. "Alimony in gross or "lump-sum alimony" defined. Ball v. Ball ---------- 216
9. "Alimony in general," or "installment alimony," contemplates periodic payments of a definite sum for the indefinite future, and terminates on the death of either party or the remarriage of the wife. Ball v. Ball ---------- 216
10. The phrase "alimony in gross" or "gross alimony" is always for a definite amount of money, the payment is always for a definite length of time, and it is always a charge on the estate of the husband and is not modifiable. Ball v. Ball ---------- 216
11. Legislative intent controls the construction of a phrase in an ordinance, although the phrase is inappropriate. Rutherford v. City of Omaha -------- 398
12. The term "district officers" as used in the statute, includes members of the school board or board of education. State ex rel. Haschke v. Duesman ---- 673
13. Word "representative" in dead man's statute defined. Zych v. Zych ---------- 708
14. Our law is well established that any party so placed in litigation that he is called upon to defend that which he has obtained from a deceased person and to make the defense which the deceased might have made if living may be said to represent a deceased person within the contemplation of the statute. Zych v. Zych ---------- 708
15. The word "permission" as used in the ordinary omnibus clause of an insurance policy means permission "express or implied." Arndt v. Davis ------ 726
16. The meaning of the word "permission" as used in the omnibus clause of an insurance policy and in the Nebraska Motor Vehicle Safety Responsibility Act is synonymous. Arndt v. Davis ---------- 726
17. Nebraska is committed to a broad rather than a narrow interpretation of the word "permission" and to a liberal construction of the omnibus clause to effectuate its purpose. Arndt v. Davis ---------- 726
18. In interpreting the omnibus clause of an insurance policy, Nebraska is committed to the "liberal or initial permission" doctrine. Arndt v. Davis ---- 726

Workmen's Compensation.

1. Compensation for disability resulting from an in-

jury to the phalanges and metacarpal bones of the hand may be based upon a loss of use of the hand where the disability is not limited to a loss of the use of the fingers. Guerin v. Insurance Co. of North America ---------- 30

2. Compensation for disability resulting from a schedule injury is ordinarily limited to the amount specified in the statute. Guerin v. Insurance Co. of North America ---------- 30

3. Where the injury is to a thumb only, and the effect of the injury is the usual and natural one, compensation must be based upon the loss of use of the thumb and not the hand. Guerin v. Insurance Co. of North America ---------- 30

4. An award of compensation for permanent total disability cannot be based upon the loss of use of one hand and the loss of use of the thumb on the other hand. Guerin v. Insurance Co. of North America 30

5. Where a truckdriver worked under a contract of hire for one-fourth of the proceeds of the trip, such truckdriver is not a pieceworker nor an employee whose compensation is based on output. Loeffelholz v. Allied Mut. Ins. Co. ---------- 112

6. A truckdriver who worked for his employer on a day-to-day basis only when needed, without specified days of work and without any assurance of future employment, is ordinarily an intermittent and not a continuous employee. Loeffelholz v. Allied Mut. Ins. Co. ---------- 112

7. A workmen's compensation award for the death of an intermittent truckdriver who worked under an agreement for payment of earnings at the rate of $13.94 per trip should be based on a weekly wage of $69.70 where the trip ordinarily took 1 day to complete it. Loeffelholz v. Allied Mut. Ins. Co. ---------- 112

8. Where a plaintiff employee comes within the provisions of the Workmen's Compensation Law, its remedies are exclusive of his right to bring an action for damages against his employer based upon the provisions of the Nebraska Factory Act. Goodwin v. Epsen Lithographing Co. ---------- 281

9. Evidence that a printing or die cutting press is old and hand-fed rather than automatic is not evidence of improper design and does not, in and of itself, establish a violation of the Nebraska Factory Act. Goodwin v. Epsen Lithographing Co. ---------- 281

10. Evidence that the Department of Labor has in-

spected and approved a particular machine is prima facie evidence that its use is not in violation of the Nebraska Factory Act. Goodwin v. Epsen Lithographing Co. ---------- 281

11. Under statute, an employer of farm or ranch labor, by the act of obtaining workmen's compensation insurance, becomes an employer within the meaning of the statute and subject to the liabilities imposed by the Workmen's Compensation Act. Imus v. Bead Mountain Ranch, Inc. ---------- 343

12. An employer of farm or ranch labor, being excepted from the Workmen's Compensation Act, who elects to subject himself to it becomes subject to all of the provisions of the act to the same extent as an employer who is not excepted from it. Imus v. Bead Mountain Ranch, Inc. ---------- 343

13. An "accident" within the meaning of the Workmen's Compensation Act, is an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. Harmon v. City of Omaha ---------- 352
Cook v. Christensen Sand & Gravel Co. ---------- 602

14. All acts reasonably necessary or incident to the performance of the work are included within the scope of the employment. Harmon v. City of Omaha 352

15. In an action under the Workmen's Compensation Act the burden is on the claimant to establish by a preponderance of the evidence an accident arising out of and in the course of his employment and the disability resulting therefrom. Cook v. Christensen Sand & Gravel Co. ---------- 602

16. Objective symptoms of an injury are those which may be observed by others as distinguished from those which are apparent only to the injured person and may be any symptom which indicates a deleterious change in the bodily condition of the injured person. Cook v. Christensen Sand & Gravel Co. ---------- 602

17. 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. Cook v. Christensen Sand & Gravel Co. ---------- 602

18. Claimant has the burden of proof to establish that such unexpected or unforeseen injury was in fact

caused by the employment. Cook v. Christensen Sand & Gravel Co. ---------- 602

19. Recovery cannot be had for disability or death due to natural causes but occurring while the employee is at work, nor for disability or death resulting from a natural progression of a preexisting condition. Cook v. Christensen Sand & Gravel Co. 602

20. Where the conditions of the plaintiffs' employment environment accentuate the natural hazard from a severe windstorm, which increased hazard contributed to the injury, it is an injury arising out of the employment, and is compensable under the Workmen's Compensation Act. Ingram v. Bradley ------ 692

21. The "by accident" requirement of the Workmen's Compensation Act is satisfied, either if the cause was of an accidental character, or if the effect was unexpected or unforeseen, and happened suddenly and violently. Brokaw v. Robinson ---------- 760

22. In a workmen's compensation case the plaintiff has the burden of establishing by a preponderance of the evidence that exertion in his employment, in reasonable probability, contributed in some material and substantial degree to cause the injury. Brokaw v. Robinson ---------- 760

Zoning.

1. The use of land for agricultural purposes does not necessarily mean it is rural in character. It is the nature of its location as well as its use which determines whether or not it is rural or urban in character. Sullivan v. City of Omaha ---------- 511

2. A zoning ordinance constitutes the exercise of a governmental and legislative function and a city council adopting a rezoning ordinance which amends a general zoning ordinance acts in a legislative capacity. Scottsbluff Improvement Assn. v. City of Scottsbluff ---------- 722