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DEPARTMENT OF BANKING OF THE STATE OF NEBRASKA, AS RECEIVER AND LIQUIDATING AGENT OF NEBRASKA STATE BANK OF VALENTINE, VALENTINE, NEBRASKA, INSOLVENT, APPELLEE AND CROSS-APPELLANT, V. FRANK L. COLBURN, APPELLANT AND CROSS-APPELLEE.

198 N. W. 2d 69

Filed May 26, 1972. No. 38116.

1. **Motions, Rules, and Orders: Verdicts: Evidence: Trial.** In determining whether a motion for judgment notwithstanding the verdict should have been sustained, the evidence must be considered in the light most favorable to the party who obtained the verdict. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every reasonable inference that may be drawn therefrom.
2. **Verdicts: Appeal and Error: Evidence.** The verdict of a jury based upon conflicting evidence will not be set aside unless it is clearly wrong.
3. **Banks and Banking: Corporate Officials.** A director of a bank must exercise ordinary care and prudence in the administration of the affairs of the bank. He must exercise that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances and give the same degree of care and prudence as is generally exercised by men in their own affairs.

Appeal from the district court for Cherry County: ROBERT R. MORAN, Judge. Reversed and remanded with directions.

Michael V. Smith and W. Gerald O'Kief, for appellant.

Milton C. Murphy of Murphy, Pederson & Piccolo, and Bernard C. Smith of Smith Brothers, for appellee.

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

BOSLAUGH, J.

The Nebraska State Bank of Valentine, Nebraska, was closed on October 29, 1964, by the Department of Banking of the State of Nebraska. The bank had become insolvent because its president, Richard L. Davenport,

had embezzled over $3,000,000 of its funds.

The defendant, Frank L. Colburn, was a director and the cashier of the bank at the time it was closed. This action was commenced on June 8, 1966, by the Department of Banking, as receiver and liquidating agent, to recover from Colburn the loss sustained by the bank because of his failure to discover and detect the misappropriation of bank funds by Davenport. Essentially, the action was one to recover damages caused by the negligence of the defendant.

The jury returned a verdict for the defendant. The trial court sustained a motion for judgment notwithstanding the verdict and ordered a new trial on the issue of damages only. The trial court determined, as a matter of law, the defendant was liable for the loss caused by his negligence between June 8, 1962, and October 29, 1964, but that the amount of the loss was a question for the jury. The defendant has appealed. By cross-appeal the plaintiff contends that the trial court should have determined the damages as a matter of law.

The defendant was first employed by the bank in 1924 as a teller and posting machine operator. The bank was then controlled by E. C. Davenport and J. W. Tobien. In 1930, the defendant became the cashier of the bank. In 1948, Richard L. Davenport succeeded his father, E. C. Davenport, as president of the bank. After the death of E. C. Davenport, the control of the bank passed to Richard L. Davenport and his mother, M. M. Davenport. At the time the bank closed they, together with Davenport's wife, owned approximately 55 percent of the stock.

Richard L. Davenport testified, by deposition, that sometime after 1948 he commenced the misappropriation of bank funds. By 1950 or 1951 the bank had become insolvent. His method of operation involved the use of notes and property statements that had been signed in blank by customers of the bank. He would

fill out the notes and property statements and then insert the notes into the flow of daily transactions of the bank or send them directly to a correspondent bank. An account might be opened to receive the proceeds from the spurious note. The proceeds from the notes would be transferred by use of debit memorandums. When monthly statements were made he would hold the statements or have them remade so that the accounts would appear to have proper balances.

The embezzlement was difficult to discover because the transactions appeared to be regular on their face. The signatures were genuine and the property statements seemed to justify the loans. The bank did a large volume of business and occasionally had a million-dollar day. On a typical day there would be 3,000 or more bookkeeping entries of which only 4 or 5 might relate to spurious transactions. Notes that were placed directly with correspondent banks would appear only in the total remittances for the day. The matter was further complicated in that some of the notes were valid in part.

Colburn had his desk near the front door of the bank and devoted a large part of his time to an insurance business that he had operated since 1930 and as a partnership with Davenport. His other duties included supervision of the bookkeeping department and the cash in the bank. The loans were handled by Davenport although Colburn occasionally handled small transactions. Davenport opened all the mail and kept many of the records in his office in a locked file.

Although Colburn had been the cashier of the bank for nearly 35 years, he was not familiar with statutes or directives of the Department of Banking concerning the duties of the officers of a bank. His understanding was based upon his experience in the bank and his association with the Davenports. He had complete confidence in Richard L. Davenport, as did the other officers, employees, and customers of the bank.

The bank was examined regularly by the Department of Banking and the Federal Deposit Insurance Corporation. None of these examinations indicated any irregularity other than a very high volume of loans, both in-bank loans and loans placed or sold to correspondent banks. This condition also caused concern to the defendant. On May 19, 1964, the defendant called the Deputy Director of Banking and said he was concerned about the note case of the bank; the volume of loans; the size of some of the loans; and the territory in which the loans were being made. The defendant requested a special examination of the bank.

A joint examination conducted by the Department of Banking and the FDIC commenced on October 13, 1964. During this examination the examiners were instructed to check the proceeds from notes and verify a part of the accounts. The examination failed to disclose any irregularity and on October 22, 1964, the examiners were ready to leave the bank.

During the second week of the examination the defendant happened to see some of the working papers used by the examiners and noticed that all or most of the correspondent banks appeared to hold notes with the Tobien name on them. The defendant obtained copies of the working papers from the examiners and made an analysis of the loans listed on them.

The next day, or the day after that, the defendant happened to have a conversation with Paul Charbonneau, a customer who was supposedly indebted to the bank in the amount of $90,000. During their conversation the defendant learned that Charbonneau had no cattle and that the cattle on his land belonged to another man. The defendant then asked the examiners to check the Charbonneau and J. W. Tobien notes.

As the examiners were leaving the bank on October 22, 1964, they talked with the defendant and advised him concerning two large notes and five small notes that were to be reduced or charged off. They also ad-

vised the defendant that they had checked the Charbonneau and Tobien lines and that they were "O.K." The defendant asked the examiners to check some of the other notes which he thought were too high or were signed by debtors that he did not know. During the conversation, the defendant called J. W. Tobien and made an appointment for the examiners to see Tobien that evening.

That evening the Tobiens told the examiners they were not indebted to the bank. On the following day the Director of Banking, his counsel, and the examiners confronted Davenport with this information. The Tobiens were called into the bank and they each admitted they were indebted on the notes in question.

The following week the examiners returned to the bank and did more checking with respect to proceeds from notes. They uncovered what appeared to be a serious irregularity in the St. Francis Educational Society account. Although the society had suffered no loss, it was apparent there had been irregularities in the transactions. After interviewing other debtors they eventually obtained a statement from L. C. Beel, Sr., that he was not indebted to the bank. The Department of Banking then closed the bank.

The plaintiff's right to recover in this case depended upon proof of negligence. The burden of proof was upon the plaintiff to show that the defendant had been negligent in failing to detect or discover the misappropriation of bank funds by Davenport and that the negligence of the defendant was the proximate cause of the loss. There was no evidence to sustain the allegations that the defendant had participated in the embezzlement and misappropriation of bank funds by Davenport.

A director of a bank must exercise ordinary care and prudence in the administration of the affairs of the bank. He must exercise that degree of care which ordinarily prudent and diligent men would exercise un-

der similar circumstances. Briggs v. Spaulding, 141 U. S. 132, 11 S. Ct. 924, 35 L. Ed. 662. He is required to give the same degree of care and prudence as is generally exercised by men in their own affairs. Ashby v. Peters, 128 Neb. 338, 258 N. W. 639, 99 A. L. R. 843. See, also, Annotation, 25 A. L. R. 3d 941.

In determining whether a motion for judgment notwithstanding the verdict should have been sustained, the evidence must be considered in the light most favorable to the party who obtained the verdict. Haffke v. Grinnell, *ante* p. 323, 196 N. W. 2d 390. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every reasonable inference that may be drawn therefrom. The verdict of a jury based upon conflicting evidence will not be set aside unless it is clearly wrong.

Much of the evidence bearing upon the issue of negligence was circumstantial. The direct evidence was largely in conflict. The issue of liability was a question of fact which, ordinarily, is a question for the jury.

The trial court correctly determined that the action was one at law. There was no serious controversy concerning the loss sustained by the bank. The principal issues were negligence and proximate cause.

In addition to the evidence which has been summarized, the following matters were of significance in this case. The defendant owned only about 4 percent of the stock. The Deputy Director of Banking testified that Davenport dominated the affairs of the bank and that Colburn "was never in a position to get anything done." He characterized the defendant as "not much more than a figurehead cashier."

Gerner v. Mosher, 58 Neb. 135, 78 N. W. 384, cited by the plaintiff, was an action in deceit based upon the publication of false statements as to the financial condition of a bank. In that case the falsity of the statements could have been discovered easily by a comparison of each report with the daily balance sheet of the

bank for the same date. In this case the evidence shows that the discovery of the embezzlement was a very difficult matter.

Robert C. O'Dell, a certified public accountant employed by Haskins & Sells, testified that he and his assistants spent more than 30 weeks making an audit of the bank for the Department of Banking to determine which loan accounts were overstated. He explained in detail how it was necessary to work from the tape of the proof machine which contained entries for all of the transactions of the bank on a particular day. He stated that it would be a "Herculean task" to trace particular loans through from origination because of the methods used by Davenport.

Lane Nansel, a senior examiner for the Department of Banking who participated in the October 13, 1964, examination, testified that during the third week of the examination, when the examiners were tracing the proceeds of notes, it "entailed quite a number of hours of labor." An entire day was spent checking the St. Francis Educational Society account.

The Deputy Director of Banking testified that an audit by independent certified public accountants would not have disclosed the embezzlement. Only a verification of each note and deposit account would have disclosed the embezzlement.

At no time did the Department of Banking suspect that there had been an illegal diversion of funds. The department thought Davenport was a poor loan man and that his loan policy would eventually destroy the bank. This is the same matter that concerned the defendant and caused him to call the Deputy Director of Banking on May 19, 1964.

On October 22, 1964, the joint examination had been completed and the examiners were ready to leave the bank. Although this examination had included a verification of from 15 to 20 percent of the accounts and an investigation of the disposition of proceeds from

notes, no irregularities had been discovered. It was only at the urging of the defendant that further examination and investigation was made which eventually disclosed the embezzlement.

As we view the record, a reasonable trier of fact could find that the plaintiff had failed to prove that the loss was caused by negligence of the defendant in failing to detect and discover the embezzlement by Richard L. Davenport.

It is unnecessary to consider further the issues raised by the cross-appeal.

The judgment of the district court is reversed and the cause remanded with directions to reinstate the verdict and dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., dissenting.

I respectfully dissent. The record I believe discloses that the defendant Colburn, as a director of the bank, exercised not the slightest degree of care to prevent or detect defalcations such as here occurred. The record shows that from the time he first became a director he abdicated completely his responsibilities as such and left the entire, complete, and absolute control of the bank in the hands of the bank manager. He did not in all those years even suggest a director's audit with independent random verification of accounts and loans. He did not suggest any of the internal controls which might prevent, discourage, or lead to the detection of defalcations. A bank directorship is not an honorary position. Depositors and stockholders rely upon the directors to fulfill their obligations. Directors who do not wish to exercise their responsibilities should resign if they wish to avoid responsibility for their defaults. Colburn was negligent as a matter of law because he did not exercise even slight care. Gibbons v. Anderson, 80 F. 345; Gamble v. Brown, 29 F. 2d 366, cert. den. 279 U. S. 839, 49 S. Ct. 253, 73 L. Ed. 986; Bank of Commerce v. Goolsby, 129 Ark. 416, 196 S. W. 803; 25

A. L. R. 3d, Directors—Liability for Defalcations, § 18, p. 1011; Atherton v. Anderson, 99 F. 2d 883; Anderson v. Bundy, 161 Va. 1, 171 S. E. 501; Lippitt v. Ashley, 89 Conn. 451, 94 A. 995.

I do not suggest of course that one director alone can take appropriate precautions without the joinder of the majority of the directors. Proksch v. Bettendorf, 218 Iowa 1376, 257 N. W. 383. In this case the record shows that all of the directors abdicated their responsibilities. Under these circumstances whether the defendant could have done anything effective to prevent or to earlier detect the defalcations is open to debate. Therefore, whether the defendant's negligence was the proximate cause of the bank's losses presented a jury question. The trial court properly set aside the verdict and on retrial only the questions of proximate cause and the amount of damages, if any, would be jury questions.

GARRY E. RUDY ET AL., APPELLEES, V. WARREN S. WAGNER ET AL., APPELLANTS, IMPLEADED WITH ROBERT K. RUDY ET AL., APPELLEES.
198 N. W. 2d 75

Filed May 26, 1972. No. 38134.

1. **Estates: Wills.** The law favors the early vesting of estates, and in construing a will containing a devise of a life estate and a devise of the remainder, the inference of a vested remainder is stronger than the inference of a contingent remainder if the meaning is obscure in this respect.
2. **Estates: Wills: Words and Phrases.** The words "in the event of death," "in case of death," or "at his death" do not have the effect of postponing the vesting of an estate in remainder to the time of the death of the life tenant.
3. **Estates: Wills.** In the absence of provisions indicating the contrary, a remainder granted in a will to the children of a life tenant becomes vested at once in the children, defeasibly, despite the presence of a limitation over in the event of the death of the life tenant leaving no child.

4. ———: ———. A devise to children as a class of the remainder over after a life estate vests the title to the estate in remainder in such of them as are living at the time of the death of the testator and in those born during the continuance of the life estate from the moment of their birth. The estate in remainder when once vested does not lapse by reason of the death of a beneficiary prior to the expiration of the life estate unless the will so provides.
5. ———: ———. Where the language conveying a remainder interest to a class does not provide for a defeasance in case of the death of one of the class during the continuance of the life estate, the vested interest of such member of the class does not lapse but descends to his heirs.
6. ———: ———. Under the testamentary language involved here, the devise of a remainder over after a life estate was to the children of the life tenant as a class; the estate in remainder vested in each of them as they were born during the continuance of the life estate, and did not lapse as to a child who predeceased the life tenant. The remainder was defeasible only in the event of the death of the life tenant, leaving no child or children.

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

E. Harold Powell and John E. Dougherty, for appellants.

Adams & Carstenson, for appellees Garry E. Rudy et al.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

MCCOWN, J.

This was an action for the partition of certain real estate in Hamilton County, Nebraska. The ownership interests involved are dependent upon the construction of a will executed in 1907 by one Matthias Wagner.

Matthias Wagner died testate in 1913, leaving his wife and seven children surviving him. The fourth paragraph of that will is the specific portion directly involved here. It provided: "I give, devise, and bequeath unto my beloved son, Carl Wagner the following described real estate, to-wit:- The South One Half of the South

East Quarter (S.½S.E.¼), of Section nineteen (19), Township Ten (10) North, Range Seven (7), West of the Sixth (6th) Principal Meridian, and situate in Hamilton County, Nebraska, for and during his natural life: At his death the remainder shall vest in his children born in lawful wedlock, and in the event of said Carl Wagner dying and leaving no legitimate child or children, the remainder shall vest in my surviving child or children, share and share alike as tenants in common, and if none of my children be then surviving such remainder shall vest as aforesaid in my surviving grandchildren." Matthias also devised other specific pieces of real estate to other specific children for their natural lives with virtually identical provisions as to the remainder interests. He also devised a lot outright to each of his children, the lots to be carved out of a described parcel of land.

Carl Wagner, the life tenant under paragraph Four, was married in 1912. He had three children, Glena Wagner Rudy, born in 1914; Warren S. Wagner, born in 1921; and Bonnie N. Wagner, born in 1927. Glena Wagner Rudy died intestate in 1947. Her heirs-at-law were Kenneth G. Rudy, her husband; two sons, Garry E. Rudy, the plaintiff; and Robert K. Rudy, one of the defendants. Glena's husband, Kenneth, subsequently married Glena's younger sister, Bonnie Wagner.

Carl Wagner, the life tenant under the will, died in 1963. He was survived by his children, Warren S. Wagner and Bonnie Wagner Rudy, and by the husband and children of Glena Wagner Rudy, who had predeceased her father.

The plaintiff, Garry E. Rudy, commenced this partition action thereafter. The district court found that Glena Wagner Rudy died intestate in 1947, seized of an estate of inheritance in an undivided one-third interest in the real estate, which descended to her heirs-at-law, her husband and her two sons, an undivided one-ninth interest each. Other issues involving improvements

were reserved for later determination and decree was entered accordingly.

The appealing defendants contend that under the language of the will, the remainder interests in the real estate did not vest in the children of Carl Wagner until his death, and the remainder interest then vested only in his children who survived him and were then living. The plaintiffs' position is that the remainder interest of each lawful child of Carl Wagner vested upon his or her birth, subject to defeasance only if no child or children of Carl Wagner survived him.

The authorities and our cases agree that the intent of the testator is controlling. Here the testator clearly devised the remainder interest in this property to the children of his son, Carl Wagner. The critical issue is whether the disposition was limited to those children who survived the life tenant. In another sense, the issue may be said to be whether or not the remainder interest of the children of the life tenant vested upon the birth of each or was contingent and postponed to vest only when and if that child survived the life tenant.

The law favors the early vesting of estates, and in construing a will containing a devise of a life estate and a devise of the remainder, the inference of a vested remainder is stronger than the inference of a contingent remainder if the meaning is obscure in this respect. Davis v. Davis, 107 Neb. 70, 185 N. W. 442.

Our cases consistently reflect that policy, Baldwin v. Colglazier, 173 Neb. 775, 114 N. W. 2d 890, involved 1 of 11 similar paragraphs in a will. The testator devised the property to his daughter "to be hers during her natural life only, and in the event of the death of my daughter * * * shall be and is hereby bequeathed to her children and in the event of no issue or children surviving my daughter * * * shall revert to my legal heirs." The life tenant had two children, one of whom predeceased the life tenant leaving three children of his own. The surviving child of the life tenant sought to quiet

title in herself. The court stated: "The words 'in the event of death' appear synonymous with the phrase 'in case of death.' In the decisions of this court such phrases do not have the effect of postponing the vesting of an estate in remainder to the time of the death of the life tenant. (Citing cases.)" "At his death" is equally ineffective to postpone vesting.

The court specifically rejected the claim that because the remainder estate given to the children of the life tenant was subject to defeasance or limitation if the life tenant should die without issue or children, the estate granted to the children of the life tenant was contingent on their surviving the life tenant. This court held that in the absence of provisions indicating the contrary, a remainder granted in a will to the children of a life tenant becomes vested at once in the children, defeasibly, despite the presence of a limitation over in the event of the death of the life tenant leaving no child.

Strawhacker v. Strawhacker, 132 Neb. 614, 272 N. W. 772, is persuasive upon several aspects of the issue involved here. In that case, a deed was "to Andrew M. Strawhacker for and during his natural life and at his death, to his present wife Genevieve and her children. Now of the town of Minonk, county of Woodford and state of Illinois." On the date of the deed, the life tenant and his wife, Genevieve had one child. After the execution and delivery of the deed, seven additional children were born. The one child who was living on the date of the deed predeceased the life tenant, leaving a widow and one son. Another child born after the deed also predeceased the life tenant. This court held that the estates of both deceased children should share in the remainder estate equally with those who survived the life tenant. This court quoted with approval the rule that: " 'A bequest or devise to a class of the remainder over after a life estate vests the title to the estate in remainder in those of the class in esse at the death of the testator; the right of enjoyment of posses-

sion, however, is deferred until the expiration of the preceding estate. The estate in remainder, when once vested as upon the death of the testator, does not lapse by reason of the death of a beneficiary prior to the expiration of the life estate unless the will so provides, as by a limitation over in the event of the death of a remainderman before that of the life tenant. But the class will open up and let in those born during the continuance of the life estate, who belong to the class designated in the will. This general rule is held to apply particularly to gifts to children as a class, and in all such cases the estate in remainder vests in such of them as are living at the time of the death of the testator and in those born during the continuance of the life estate, from the moment of their birth.' 2 Alexander, Commentaries on Wills, sec. 890."

The case also quotes with approval the rule that: " 'Where the distribution to or among children is to come after a prior life estate, a different rule is applicable than where it is immediate; for if the distribution or the possession of the property devised in remainder to children is not to be made or enjoyed until a period has elapsed subsequent to the death of the testator, a gift to children as a class will embrace not only all children who are living at the testator's death, and compose the class at that time, but also all who are born before the period of distribution arrives.' "

In the Strawhacker case this court concluded that the remainder interest immediately vested in Genevieve Strawhacker and her then only son at the time the deed was executed and delivered, and as each subsequent child was born during the continuance of the life estate, he became a member of the class and his interest in the land immediately vested. The court noted that each of the eight children became vested with an undivided interest in the land as they entered the class.

In Semrad v. Semrad, 155 Neb. 209, 51 N. W. 2d 264, parents conveyed land by deed to Mary Semrad, their

daughter. The deed contained a provision that: "Grantors reserve the right that Mary Semrad (their daughter) can not convey or sell the above described land to any person during her natural life, and in case of Mary Semrad death said above described land should be divided among her own children, and in case there should be no children after Mary Semrad then in that case the above described land should revert back to the Grantors above mentioned." Nine children were born to Mary Semrad. Two of her children predeceased her leaving surviving children. This court regarded the Strawhacker case as determinative of the issue, and held that the remainder interest vested in each child of the life tenant upon birth during the continuance of the life estate. It specifically reaffirmed the rule that where the language conveying a remainder interest to a class does not provide for a defeasance in case of the death of one of the class during the continuance of the life estate, the vested interest of such member of the class does not lapse but descends to his heirs.

The cases referred to, while they do not deal with identical language, are nevertheless persuasive and ample authority here. They are in accord with the great weight of authority in those states which favor early vesting rather than a postponed contingent construction as to remainder interests. See cases cited in companion Annotations, 57 A. L. R. 2d 103-234, inclusive.

The appealing defendants contend that the words "at his death the remainder shall vest" were intended to create only a contingent remainder and therefore postpone its vesting until the death of the life tenant. It seems clear to us that the language used indicates only that distribution or possession and enjoyment was postponed until the death of the life tenant. As the court indicated in Baldwin v. Colglazier, *supra*, a similar reference to the death of the life tenant "refers to the time the children should enter into the enjoyment of their estate." The language of the will does not restrict the

grant to a contingent remainder which never vested in Glena Wagner Rudy because she did not survive the life tenant. It should be noted also that there is no specific language in the will of Matthias Wagner which requires that survival of a remainderman is a condition of taking. The disposition of the remainder interest to the children of Carl Wagner is not by its terms limited to "surviving" children, but instead goes simply to "his children."

The appealing defendants want to have the language of the will interpreted as though it contained words such as "surviving" or "then living" when it referred to the children of the testator's son, Carl Wagner. Obviously it does not. We point out, however, that later in the same sentence, the testator used the word "surviving" when he referred to his own child or children as well as when he referred to his grandchildren when he provided for limitation over in the event Carl Wagner left no legitimate child or children.

The pattern of testamentary disposition and the language of the will of Matthias Wagner convince us that the testator had no intention to limit the class of the children of Carl Wagner to those children who survived their father, the life tenant. Under the testamentary language involved here, the devise of a remainder over after a life estate was to the children of the life tenant as a class; the estate in remainder vested in each of them as they were born during the continuance of the life estate, and did not lapse as to a child who predeceased the life tenant. The remainder was defeasible only in the event of the death of the life tenant, leaving no child or children.

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

AFFIRMED.

H. H. NEUMEYER ET AL., APPELLEES, V. OMAHA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLANT.

198 N. W. 2d 80

Filed May 26, 1972. No. 38253.

1. **Appeal and Error: Bonds: Statutes: Eminent Domain.** The execution and approval of the undertaking required in section 76-716, R. R. S. 1943, is directory only.
2. **Appeal and Error: Bonds: Statutes: Eminent Domain: Case Overruled.** Insofar as Jacobitz v. Bussinger, 179 Neb. 524, 138 N. W. 2d 839, and Gebhart v. Tri-State Generation & Transmission Assn., 181 Neb. 457, 149 N. W. 2d 41, hold that section 76-716, R. R. S. 1943, is mandatory and jurisdictional, they are overruled.
3. **Appeal and Error: Courts: Pleading: Time.** Where a discretionary duty is imposed upon a district court to determine whether or not good cause has been shown to grant leave to a party to plead out of time, its decision will not ordinarily be disturbed absent showing abuse of discretion.

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

Fraser, Stryker, Marshall & Veach, for appellant.

Matthews, Kelley, Cannon & Carpenter, for appellees.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

Omaha Public Power District, appellant, hereafter called condemner, appeals a jury verdict and judgment of $10,072.50 in the district court for Douglas County, Nebraska, for a transmission line easement. Condemner assigns as error: (1) The district court had no jurisdiction because plaintiffs, H. H. Neumeyer and Esther Neumeyer, hereafter called condemnees, failed to secure approval of and file with the county judge their appeal bond within 30 days following the filing of the report of appraisers, contrary to section 76-715, R. R. S. 1943; and (2) the district court erred in overruling condemner's motion to dismiss on the grounds that condemnees

failed to file their petition on appeal within the 50-day period provided by law, and no good cause was shown for its late filing. We affirm the judgment.

A brief summary of the pleadings is necessary. The report of appraisers was filed in the county court on January 18, 1968; condemnees filed notice of appeal and affidavit of service of notice of appeal on January 30, 1968; corporate appeal bond in due form, dated February 16, 1968, was filed and approved on February 23, 1968, 36 days after the filing of report of appraisers; transcript filed in the district court on February 29, 1968; on March 15, 1968, condemner filed motion to dismiss for lack of jurisdiction because of the late filing of the appeal bond; on March 29, 1968, condemnees filed petition on appeal without leave of court; on April 1, 1968, condemner filed motion for nonsuit for filing petition more than 50 days after notice of appeal; on May 6, 1968, condemner filed motion for summary judgment; and on May 16, 1968, condemnees asked leave to file petition on appeal out of time. All of condemner's motions were denied. The issues were tried to a jury in May of 1971. Condemner preserved the asserted jurisdictional objections and appeals the judgment.

"The securing of an appraisal of damages by the appraisers appointed by the county judge is an administrative act as distinguished from a judicial proceeding. The method of appeal is procedural only and contemplates a complete new trial upon pleadings to be filed as in the case of an appeal from the county court. The present appeal statute contemplates the filing of pleadings and the framing of issues for the first time in the judicial proceedings in the district court." Jensen v. Omaha Public Power Dist., 159 Neb. 277, 66 N. W. 2d 591.

As to the first claimed error, this question has not been met directly since the present eminent domain statutes were enacted in 1951. However, two cases are close to the issue. In Jacobitz v. Bussinger, 179 Neb.

524, 138 N. W. 2d 839 (1965), the report of appraisers was filed on January 16, 1964, notice of appeal was filed on February 14, 1964, and on the same date an incomplete bond was tendered to the county judge who questioned its propriety. It was approved and stamped filed on February 19, 1964. This court said: "Where the record shows that an appeal bond was delivered to the proper official within the time provided by law, a delay by the official, for his own reasons, in actually performing, entering, or recording the official filing should not prevent the district court from acquiring jurisdiction on appeal." The court also stated: "While the statute is mandatory in requiring an appeal bond in appeals from appraisals * * * and the bond must be filed within the time prescribed by statute, the filing date stamped on it, or the time the official records the formal filing, is merely prima facie evidence of the time it was received." In Gebhart v. Tri-State Generation & Transmission Assn., 181 Neb. 457, 149 N. W. 2d 41 (1967), the plaintiffs therein gave notice of appeal and filed the required appeal bond, transcript of proceedings, and petition on appeal in the district court. The defendant gave notice of appeal, filed transcript of proceedings, and answer to petition on appeal in the district court, but filed no appeal bond. Plaintiffs dismissed their appeal and the district court dismissed defendant's appeal. This court, holding that the defendant had no pleading on file in the nature of a cross-petition, stated: "Section 76-716, R. R. S. 1943, requires: 'The party appealing shall also, at the time of filing notice of appeal, enter into an undertaking, * * *.' Defendant as a cross-appellant, was simply a 'party appealing' within the purview of this statute and was not exempt from complying with its provisions. Had it so complied, it would have completed a separate appeal which would not have been subject to dismissal on dismissal of the plaintiffs' appeal."

Jurisdiction "may be defined in law as the power to

hear and decide a legal controversy." Douglas County v. Vinsonhaler, 82 Neb. 810, 118 N. W. 1058.

"In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately." In re Application of Silberman, 153 Neb. 338, 44 N. W. 2d 595.

We first examine related statutes: "Either condemner or condemnee may appeal from the assessment of damages by the appraisers to the district court of the county where the petition to initiate proceedings was filed. Such appeal *shall be taken by filing a notice of appeal* with the county judge *within thirty days* from the date of filing of the report of appraisers as provided in section 76-710." § 76-715, R. R. S. 1943. (Emphasis supplied.) This section directs with clarity the manner of taking appeal, including the time and requirement of filing the notice. It is mandatory and jurisdictional. See Friedman v. State, 183 Neb. 9, 157 N. W. 2d 855.

"The party appealing from the award for assessment of damages by the appraisers in any eminent domain action *shall, within thirty days* of the filing of the award, *file a notice of appeal* with the county judge, specifying the parties taking the appeal and the award thereof appealed from, and *shall serve a copy of the same* upon all parties bound by the award or upon their attorneys of record." § 76-715.01, R. R. S. 1943. (Emphasis supplied.) This section restates the requirement of filing the notice set out in section 76-715, R. R. S. 1943, and further requires service of notice on the parties and counsel. Again, it is clear that this section is also mandatory and jurisdictional. See Radil v. State, 182 Neb. 291, 154 N. W. 2d 466.

Section 76-717, R. R. S. 1943, provides: "Within thirty days after the filing of such *notice of appeal,* the county

judge shall prepare and transmit to the clerk of the district court a duly certified transcript of all proceedings * * *. When *notice of appeal* is filed by both the condemner and the condemnee, such transcript shall be prepared only in response to the first notice of appeal; the transcript prepared in response to the second notice of appeal shall contain only a copy of such notice * * *." No reference is made to either the filing of an undertaking or including it in the transcript. In City of Seward v. Gruntorad, 158 Neb. 143, 62 N. W. 2d 537, relating to this section, it was held: "* * * we hold that the 50-day period for the filing of a petition in the district court on an appeal in eminent domain proceedings * * * begins to run with the date of the *filing of notice of appeal* in the county court." (Emphasis supplied.)

The statute in question here, section 76-716, R. R. S. 1943, provides: "The party appealing *shall also, at the time of filing of notice of appeal,* enter into an undertaking, with at least one good and sufficient surety, to be approved by the county judge conditioned (1) that the appellant will prosecute such appeal to effect without unnecessary delays, and (2) that if judgment be rendered against appellant on the appeal, the appellant will satisfy whatever judgment may be rendered against him." (Emphasis supplied.) Appellants are required to (1) execute an undertaking with surety and statutory conditions, (2) to do so at the time of filing notice of appeal, and (3) secure the approval of the county judge. These things are to be done in addition to the jurisdictional requirements of sections 76-715 and 76-715.01, R. R. S. 1943. The filing of the undertaking is not provided. There is no clear language relating the execution of the undertaking as a step necessary to vest the district court with jurisdiction and we think none was intended by the Legislature, rather jurisdiction in all eminent domain appeal statutes is keyed to the provision in section 76-715, R. R. S. 1943, that such "appeal

shall be taken by filing a notice of appeal."

We hold that sections 76-715 and 76-715.01, R. R. S. 1943, state the jurisdictional requirements for an appeal from the report of appraisers in eminent domain proceedings, and that section 76-716, R. R. S. 1943, is directory only. To hold otherwise would convert clear, brief language into a jurisdictional maze. Insofar as Jacobitz v. Bussinger, *supra,* and Gebhart v. Tri-State Generation & Transmission Assn., *supra,* hold that section 76-716, R. R. S. 1943, is mandatory and jurisdictional, they are overruled.

Relating to condemner's second claimed error, condemnees made as a showing of good cause for the late filing of the petition on appeal that condemners had on file a pending motion to dismiss condemnees' appeal for lack of jurisdiction. Where a discretionary duty is imposed upon a district court to determine whether or not good cause has been shown to grant leave to a party to plead out of time, its decision will not ordinarily be disturbed absent showing abuse of discretion. See Jensen v. Omaha Public Power Dist., *supra.* Condemnees did file their petition on appeal 9 days late. The trial court did not abuse its discretion.

There being no error in the proceedings we affirm the judgment.

AFFIRMED.

BOSLAUGH, J., concurring.

I concur in the opinion of the court except that I would not include *service* of the notice of appeal as a jurisdictional requirement.

McCOWN, J., joins in this concurrence.

FLOYD MELCHER, APPELLANT, V. BOESCH MOTOR COMPANY, A PARTNERSHIP, ET AL., APPELLEES.
198 N. W. 2d 57

Filed May 26, 1972. No. 38259.

1. **Warranty: Contracts: Trial: Evidence.** The burden of proof is on the party relying on a breach of warranty to show performance of conditions as to which the right to assert the warranty depends, or waiver thereof, or excuse for nonperformance.
2. **Warranty: Contracts: Trial: Courts.** The issue of whether a provision of express warranty is unconscionable presents a question of law for the court.
3. **Appeal and Error: Evidence: Judgments.** 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.
4. **Appeal and Error: Evidence: Verdicts.** A jury verdict based upon conflicting evidence will not be set aside unless it is clearly wrong.
5. **Appeal and Error: Evidence.** It is not the province of this court in reviewing the record in a law action to resolve conflicts in or weigh the evidence.
6. **Trial: Verdicts.** Objections to the forms of verdict should be made before or at the time the verdict is returned.
7. **Trial: Verdicts: Damages: Appeal and Error.** If the jury finds the defendant not liable in a breach of warranty action, an error relating to the subject of damages is necessarily harmless.

Appeal from the district court for Platte County: C. THOMAS WHITE, Judge. Affirmed.

George H. Moyer, Jr., and Moyer & Moyer, for appellant.

Jewell, Otte, Pollock & Gatz and Robak & Geshell, for appellees.

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

BUCKLEY, District Judge.

This is an appeal by the plaintiff, Floyd Melcher, from a jury verdict and a judgment for the defendants Boesch Motor Company, a partnership, hereafter called

"Boesch," and Ford Motor Company, a corporation, hereafter called "Ford," in an action for damages based upon a breach of express warranty.

Plaintiff alleged in his petition that on April 14, 1967, he purchased a new Ford pickup truck from Boesch, a sales and service dealer of Ford products, in Humphrey, Nebraska. From the beginning, the truck used an abnormal amount of oil, until, when it had been driven nearly 25,000 miles, it threw a connecting rod and destroyed the engine. His petition seeks damages for breach of Ford's express warranty of the engine block, head, and all internal parts to be free from defects in material and workmanship.

The defendants in their answers deny that the engine failure was caused by factory defective material or workmanship; and for affirmative defenses allege that plaintiff: (1) Failed to comply with the required maintenance services which form a condition precedent to liability on the warranty, (2) subjected the truck to abnormal use by operating it without sufficient oil contrary to warranty requirements, and (3) materially altered the motor, by converting the fuel system to propane without the consent of the defendants.

The material portions of the warranty are:

"BASIC WARRANTY

"Ford Motor Company warrants to the owner each part of this vehicle to be free under normal use and service from defects in material and workmanship for a period of 24 months from the date of original retail delivery or first use, or until it has been driven for 24,000 miles, whichever comes first.

"POWER TRAIN WARRANTY

"In addition, Ford Motor Company further warrants to the owner each part of the engine block, head, and all internal engine parts, . . . and all internal transmission parts . . . of this vehicle to be free under normal use and service from defects in material and workmanship for a period five (5) years from the date of

original retail delivery or first use, or until it has been driven for fifty thousand (50,000) miles, whichever comes first. . . .

"GENERAL WARRANTY PROVISIONS

"It is a condition of both these warranties that the owner maintain this vehicle according to the required maintenance services set forth in the Maintenance Schedule in this Owner's Manual. It is also a condition of both of these warranties that, every twelve months, the owner furnish an authorized Ford or Lincoln-Mercury dealer with evidence that these maintenance services have been performed and obtain the dealer's written certification that he has received such evidence.

"Both of these warranties shall be fulfilled by the Selling Dealer. . . .

"The warranties-herein are expressly IN LIEU OF any other express or implied warranty, including any implied WARRANTY of MERCHANTABILITY or FITNESS, and of any other obligation on the part of the Company or the Selling Dealer."

Plaintiff complains that the trial court should not have submitted to the jury the defense of his failure to comply with the service requirements and to obtain the required certification of such compliance, for two reasons: (1) There is no evidence that he failed to perform the required maintenance or that any failure caused or contributed to the loss, and (2) the requirement that plaintiff obtain from defendants a certification of compliance is unconscionable and unreasonable and, therefore, unenforceable.

Plaintiff read the operator's manual furnished him by Boesch when he received the truck. It contains the warranty and also the maintenance schedule setting forth the required maintenance services. One of them is "Change Rotunda Motor Oil and Autolite Oil Filter" every 6,000 miles. The schedule also requires that this service, as well as many others not material here, "must be performed as indicated, and certified by

an authorized Ford dealer every 12 months, to keep the warranties in force. You must show the dealer the bills for any outside services and they must indicate that parts and lubricants of Autolite, Rotunda or equivalent quality were used."

Plaintiff, a young farmer living near Madison, Nebraska, used the pickup truck for general farm work, including hauling gas cans and pulling wagons. When the truck had 1,612 miles, he took it to Boesch for a 1,000 mile check and a change of oil and filter. After that he testified he changed the oil and the filter himself at 2,573, 4,700, 7,010, 8,812, 10,410, 13,062, 14,374, 16,526 and 20,735 miles (defendants do not contend that any oil or filter used did not meet warranty specifications as to quality). He stated he took the truck to Boesch at 8,300 miles, again at 12,000 miles, at 18,000 miles, and at 24,000 miles and told them to make a check but didn't know if they did or not. He asked about the required certifications but was told each time it wasn't necessary and did not obtain any. No charges were made for any warranty service check-ups, and both Jerry Boesch and Harry Boesch, partners of Boesch, the two parties plaintiff dealt with, deny that plaintiff ever asked the required services be performed, or that he showed evidence they had been done, or that he requested certifications they were done.

This conflict in testimony presents a question of fact for the jury as to whether the plaintiff complied with the service requirements, and that issue was properly submitted.

Whether, as defendants contend, the failure to comply with these service requirements caused the engine failure is immaterial. Plaintiff grounds his cause of action upon a breach of the express warranty. The service requirements and certifications were conditions precedent to be performed by plaintiff. The burden of proof is on the party relying on a breach of warranty to show performance of conditions as to which

the right to assert the warranty depends, or waiver thereof, or excuse for nonperformance. Worden v. Sycamore Marsh Harvester Co., 11 Neb. 116, 7 N. W. 756; 77 C. J. S., Sales, § 365, p. 1283. See, also, Metschke v. Marxsen, 176 Neb. 240, 125 N. W. 2d 684.

For his reply to defendants' answers that no required certifications were obtained, plaintiff asserts that such a provision is unconscionable and unreasonable and, therefore, unenforceable. He asserts error in failing to instruct the jury on this issue.

It is not a jury question. The conscionability of the provision became a matter of law for the court. § 2-302, U. C. C. It is commented, under that section, that: "The basic test is whether in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power."

The basis for the certification clearly is reasonable. The requirements of an owner to properly maintain the engine of his vehicle in exchange for a warranty that it is free of defect in material and workmanship at time of delivery go hand-in-hand. But plaintiff contends that the required certification puts Ford and Boesch in the position of sole arbitors as to what is sufficient maintenance and he cites Mills v. Maxwell Motor Sales Corp., 105 Neb. 465, 181 N. W. 152, and Henningsen v. Bloomfield Motors, 32 N. J. 358, 161 A. 2d 69, 75 A. L. R. 2d 1. Both cases involved warranties similar to the one involved here, but both required that the alleged defective parts be shipped to the manufacturer's factory, where it reserved the right to determine if the parts were defective. In Mills v. Maxwell Motor Sales Corp., *supra,* we said: "It would,

nevertheless, be repugnant to every conception of justice to hold that if the parts thus returned for examination were, in point of fact, so defective as to constitute a breach of the warranty, the appellee's right of action could be defeated by the appellant's arbitrary refusal to recognize that fact. Such an interpretation would substitute the appellant for the courts in passing upon the question of fact, and would be unreasonable. *The provision in question should not be so construed upon a retrial of this cause.*" (Emphasis supplied.) The certification requirement should not be so construed here, as it would give Boesch and Ford the unqualified right to refuse the certification and defeat plaintiff's claim. While the plaintiff must furnish Boesch with evidence of performance of the required maintenance services, Boesch may not then unreasonably withhold the certification. If it does, the condition precedent that plaintiff obtain such certification is waived. Thus construed, the provision is not unreasonable.

Plaintiff assigns as error instruction No. IV, wherein the jury was instructed in part that: "In this case the plaintiff has offered evidence suggesting that demand was made on the defendant Boesch Motor Company for the performance of all required service checks and appropriate certification. If you find by a preponderance of the evidence that such fact has been established, the performance of the conditions precedent to the enforcement of the warranty contract are waived; that is, the law does not require them." The instruction correctly construed the applicability of the required certification.

Plaintiff assigns as error the submission of the issues of abnormal use and material alteration to the jury, contending that neither issue was supported by competent evidence.

In testing the sufficiency of the evidence to support a judgment, the evidence must be considered in the light most favorable to the successful party. Haney v.

L. R. Foy Constr. Co., Inc., 186 Neb. 528, 184 N. W. 2d 628; McGerr v. Beals, 180 Neb. 767, 145 N. W. 2d 579.

A jury verdict based upon conflicting evidence will not be set aside unless it is clearly wrong. Haney v. L. R. Foy Constr. Co., Inc., *supra*.

It is not the province of this court in reviewing the record in a law action to resolve conflicts in or weigh the evidence. Satterfield v. Watland, 180 Neb. 386, 143 N. W. 2d 124.

Plaintiff testified that the truck used too much oil from the beginning, but he vascillated considerably as to the actual oil consumption. Generally he said the oil consumption gradually increased from the time he got the pickup until the engine blew up. Otherwise he ranged from a quart per 300 to 500 miles at the start to six quarts in the first 1,000 miles, from two to three quarts per 1,000 up to 10,000 miles, to three to five quarts at 10,000 miles, from no change from 10,000 to 15,000 miles to "getting worse after ten to twelve thousand miles," from three to six quarts at 15,000 miles, six to seven quarts at 17,000 miles, increasing after that to a quart per 100 miles at the end.

The evidence indicates one quart of oil per 750 miles is an acceptable rate of oil consumption at 10,000 miles, which should not change up to 24,000 miles.

A mechanic examined the engine nearly 2 years after it blew up. He found that the two rear rods had come loose from the crankshaft and burned out, and one went through the side of the block. The other rod bearings showed excessive clearance between them and the crankshaft indicating a lack of oil pressure to them. This excessive clearance would cause oil to escape around the bearings and be thrown to the cylinder walls where it can more easily be picked up by the rings and burned. He removed the cylinder heads and found that the intake valves were oily and had excessive clearance in the valve guides. This indicated that oil was drawn down the valve guides and into the cylinder. He gave

his opinion that the excessive clearance in the valve guides was caused by a defect in material or workmanship at the time of manufacture, which in turn resulted in excessive oil consumption, in turn causing unusual engine wear, and finally causing the rod bearing to go out.

There is no evidence to refute plaintiff's contention that the truck used large amounts of oil or that the bearing failure was directly attributable to either a lack of sufficient oil or any oil at all. The mechanic stated that the loose valve guides would cause the engine to be constantly low on oil, that the rod bearings and main bearings were scuffed, probably from being low on oil, and that the exhaust valves had an abnormal amount of carbon deposits, indicating a high rate of oil consumption.

The jury could have found from the evidence that plaintiff operated the truck without sufficient oil during all the time he complained of excessive oil consumption, and that he did not bring this problem to the attention of Boesch until the truck had 18,000 to 20,000 miles, at which time successive 2,000 and 3,000 mile oil consumption checks were made by the plaintiff at Boesch's direction. The second check was in progress at the time the engine went out. At that time plaintiff and two brothers-in-law checked the oil level and found it a quart and one half low. Boesch towed the truck to its garage the next day and there no oil showed on the dipstick. When the engine was drained, about a cupful of oil remained. Some oil could have escaped in the towing.

In addition, the Ford operator's manual provides for six quarts of oil to be used when changing the oil and oil filter. When plaintiff changed the oil and filter himself, he did not use quart cans but poured it from a 5 gallon can until it was full.

The evidence clearly warranted the submission of the defense of abnormal use to the jury. The court instructed the jury that: ". . . you shall consider such

abnormal use if shown by a preponderance of the evidence, . . . along with all other evidence in determining whether the defects complained of by the plaintiff were in existence at the time of the delivery of the pickup . . . ." The instruction correctly limited the jury's consideration of abnormal use to one of evidence in its essential determination, namely, whether the engine failed because it was defective at the time of delivery to the plaintiff. Plaintiff's assignment of error is without merit.

Plaintiff also attacks the defense of material alteration on the same basis, namely that there was no evidence showing the conversion to propane increased oil consumption or caused any other engine defect that could have caused the rod bearing to go out. As stated previously, the evidence unequivocally established that the engine failure was caused by the engine being operated without sufficient oil for a considerable length of time resulting from excessive oil consumption. But plaintiff contends that there is no evidence to causally relate the increase in oil consumption to the propane conversion.

The warranty does not prohibit such a conversion to propane. The conversion involves the carburetor system, with a different carburetor, fuel tank, fuel pump, and fuel filter being installed. Special piston rings, valve seats, and intake manifolds are used in factory propane engines. There is no evidence that such parts were used in the conversion here.

The piston rings must seal to the cylinder wall to the point where oil won't go around them and be burned up. This "seating of the rings" is a part of the breaking in of the engine and takes approximately 6,000 miles to complete. Therefore, it is expected that oil consumption would be relatively high for the first 1,000 miles, but should steadily improve until the rings are seated.

While the evidence was conflicting, the jury could

have found that it is more difficult to seat rings in a propane engine, and that an engine should not be converted to propane until the rings are seated. Plaintiff was told by Jerry Boesch that he didn't think the rings were seated at 10,000 miles, and he felt if they weren't seated by then they never would be, so plaintiff converted to propane at 10,000 miles without telling Boesch.

Among conflicting testimony by the plaintiff himself, he stated initially on direct examination:

"Q. Did you notice any change in the oil consumption as you drove the pickup more miles?

"A. Not a lot, until I got over ten, twelve thousand miles. After that it started getting worse. Up to then it stayed about the same.

"Q. When it got up to ten or twelve thousand miles, then what did the oil consumption do?

"A. It kept getting worse."

As to the defense of abnormal use, the court instructed the jury that it could consider the conversion to propane as evidence in determining whether the defects complained of existed at the time of delivery of the truck to plaintiff. From the evidence, the jury was entitled to conclude that the conversion to propane was instrumental in the lack of seating of the piston rings, which directly resulted in the increased oil consumption that led to the engine failure. The defense of material alteration was properly submitted to the jury by the instruction given.

Plaintiff assigns as error the failure of the trial court to give the jury four forms of verdict instead of two. The forms of verdict submitted were: (1) "For the plaintiff, and assess the damages at $————." (2) "For the defendants." In his brief, plaintiff says: "By its sixth instruction, the Court told the jury that the defendants were jointly and severally liable. Obviously this required four forms of verdict." Since plaintiff does not assign as error the giving of that instruction,

we presume he contends there was some basis for a finding by the jury of liability against one defendant and not the other, but he does not mention this in his brief or oral argument.

The warranties were issued by Ford but delivered to the plaintiff by Boesch. They provide that "Both these warranties shall be fulfilled by the Selling Dealer . . . ." Plaintiff called upon both Boesch and Ford to replace the engine under the warranty. The rights and obligations of Boesch and Ford on the warranty to the extent involved in this case were identical. The two forms of verdict were the only ones which the jury could have returned on the issues.

The record is silent as to any conference on instructions or forms of verdict. Plaintiff objected for the first time in his supplemental motion for new trial. Objections to the forms of verdict should be made before or at the time the verdict is returned. McGrew Machine Co. v. One Spring Alarm Clock Co., 124 Neb. 93, 245 N. W. 263; In re Estate of Kajewski, 134 Neb. 485, 279 N. W. 185.

Plaintiff complains that the trial court withdrew from the jury the element of incidental and consequential damages. The verdict was necessarily a finding by the jury that the defendants were not liable under the terms and conditions of the express warranty. The error, if any, in any instructions stating the measure of damages must necessarily be harmless. Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677.

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

AFFIRMED.

RUTH I. LAKE, APPELLEE, V. CLYDE P. SOUTHWICK ET AL., APPELLANTS.
198 N. W. 2d 319

Filed May 26, 1972. No. 38302.

1. **Damages.** The process of ascertaining the amount of compensation to be awarded for impairment of the capacity to work or to earn requires (1) the determination of the extent to which such capacity has been diminished, (2) the determination of the permanency of the decrease in earning capacity, and (3) the fixing of the amount of money which will compensate for the determined extent and length of the impairment, including a reduction of the award to its present worth.
2. **Damages: Evidence.** Damages for future loss of earning capacity may not be based on speculation, probabilities, or uncertainty, but must be shown by competent evidence as reasonably certain and proximately resulting from the pleaded injury.
3. **Trial: Evidence: 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.

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

Wilson, Barlow & Watson and Kile W. Johnson, for appellants.

Bauer & Galter, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

This is a personal injury case. Plaintiff Ruth I. Lake received serious and painful injuries in a two vehicle collision on May 16, 1970, on a four-lane highway 1 mile west of Lincoln, Nebraska. Plaintiff driving her family car west in the left lane collided with a truck driven by defendant Clyde P. Southwick, employed by defendant Lawrence L. Sintek. Both car and truck were proceeding west on the highway, and they col-

lided when the truck made a left turn from the right lane in front of plaintiff's car and stopped in the median opening for turning, leaving part of the truck extended in plaintiff's lane and part in the eastbound lane. There was conflict in the evidence as to whether the turn signals were operating on the truck. The jury returned a verdict of $19,000 for plaintiff and judgment was entered for that amount. Defendants' motion for new trial was denied and this appeal was perfected. The issue of defendants' liability is not presented in this appeal. Defendants contend that the evidence does not support submitting to the jury the issue of damages for loss of future earning capacity, and in particular the evidence of the duration of the injury to plaintiff's knee was speculative.

At the time of the accident, plaintiff was 32 years of age, married, and living with her husband and three children in Lincoln, Nebraska. She was a graduate of the University of Nebraska and employed as a third grade teacher with 4 years teaching experience. In addition to her teaching duties she performed all usual household duties. Her general health was good.

As a result of the accident, plaintiff's injuries included cuts on her face, tongue, and inside mouth, one cut penetrating the tongue; five teeth loosened, permitting movement of one-eighth inch; bruised eye, face, arm, back, stomach, left knee, and both legs; and a severe 2 ¾ inch laceration midway between lip and point of chin where her teeth penetrated and were caught in the lip. It required 91 stitches to close the wounds to face, tongue, and inside mouth. She was hospitalized 4 days and confined to bed at home part of the time until the fall of 1970. Because of loose teeth and malocclusion plaintiff was unable to eat anything but soft foods until late in the fall of 1970.

In June of 1970 plaintiff moved with her family to Hastings, Nebraska, where her husband had accepted a teaching position. In November of 1970 plaintiff ob-

tained a position in the Hastings elementary school system teaching six students remedial mathematics and reading for half days, and she was so employed at the time of trial. Plaintiff continued irregular consultation and treatment with medical doctors and dental surgeons up to the time of trial on April 14, 1971.

At the time of trial, three of her teeth were still loose, there was inconclusive evidence of "pulp" testing conducted to determine if the injured teeth might be dead; plaintiff continued to experience difficulty in chewing food; all bruises had healed; the cut to the tongue had healed without resultant damage to either eating or speaking; the cut to the lip had healed with a fine line scar and a small raised mass in the middle, resulting in a permanent diminished sensation, and there is evidence that this condition affected plaintiff's speech at times, including some difficulty in speaking and pronunciation of words in her teaching duties; plaintiff regularly experiences fatigue and nausea; plaintiff's left leg was sore and ached most of the time, and always ached following prolonged walking, standing, riding in a car, and sitting; and she walked with a limp at times. Plaintiff testified that because of leg pain she could not teach full time, household duties were difficult, and she could not participate in family physical activities.

Dr. Harold R. Horn, M. D., an orthopedic surgeon, examined plaintiff in February 1971, finding objective tenderness over the posteromedial aspect of the left knee joint space, and a hyperesthesia or exaggerated sensation above it; there was no tenderness in the calf of the left leg, no fluid in the knee, no swelling, and no instability. It was his opinion that plaintiff's complaint of pain in her left leg was referred pain from her left knee. Further he related: "Q- Assuming further the same thing, she's working half days and at the end of a half day she feels pain in the leg and she becomes fatigued and tired, and a year has gone

by almost, do you have an opinion as to whether this will continue in the future? A- Yes. Q- And what is your opinion? A- It would appear that it should continue. Q- I would imagine this sort of thing is difficult to say how long it would continue. Is this correct? A- Yes. Q- From the examination you have made to this point, is there an indication of further medical treatment that's needed? A- Well, I would think so. Q- And do you know now, without further examination, what the nature of that might be? A- No." The doctor went on to explain some tests, surgery, and diagnosis that might be employed. On cross-examination, Dr. Horn said: "Q- And if she had some pain in her left leg since last fall, or early last fall, would you expect that eventually she might seek further diagnostic treatment? A- Yes. Q- And if further diagnostic testing indicated treatment of one kind or another, is there any reason to believe that something couldn't be done for Mrs. Lake that would relieve her of her symptoms? A- Well, I would certainly think so."

Defendants offered no evidenie relating to plaintiff's injuries or their duration, pain, or loss of future earning capacity.

The process of ascertaining the amount of compensation to be awarded for impairment of the capacity to work or to earn requires (1) the determination of the extent to which such capacity has been diminished, (2) the determination of the permanency of the decrease in earning capacity, and (3) the fixing of the amount of money which will compensate for the determined extent and length of the impairment, including a reduction of the award to its present worth. 22 Am. Jur. 2d, Damages, § 93, p. 136. See, also, collection of cases in Annotation, 18 A. L. R. 3d 88.

Defendants rely on Schwab v. Allou Corp., 177 Neb. 342, 128 N. W. 2d 835, wherein the court stated: "Damages for a permanent injury may not be based on spec-

ulation, probabilities, or uncertainty but must be shown by competent evidence that such damage is reasonably certain as the proximate result of the pleaded injury. * * * the plaintiff did not prove permanent loss of earning power, although she did show permanent injury." In the Schwab case the plaintiff, a teacher, had a 10 to 15 per cent partial permanent disability from a fractured ankle. The medical expert could not relate this permanent disability to the plaintiff's work performance. The court said: "There is evidence that she had a partial permanent disability in the ankle that inconveniences her in climbing stairs and causes discomfort on those occasions, and in standing while teaching and in certain work on the playground with the students. Nothing is shown to indicate that she will not be able to earn the same salary in the future or to what extent her earning power would be diminished."

"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." Speedway Transp., Inc. v. DeTurk, 183 Neb. 629, 163 N. W. 2d 283.

The time for allowance of damages for loss of future earning capacity is at the time of trial. The injured party is not required to postpone her right to recover damages for her injuries until there is either full recovery, surgery, exhaustion of possible therapy, and treatment, although she may choose to do so. Defendants argue that the leg ache could be relieved if the cause was diagnosed and treated. Whether or not plaintiff used reasonable care to seek a cure and mitigate her damage was defendants' burden of proof; that was not made an issue here. See Colton v. Benes, 176 Neb. 483, 126 N. W. 2d 652.

In Schwab there was partial permanent disability but no evidence relating that disability to the work per-

formance of the injured party. Here there is medical evidence of permanent injury to the lip and that the pain in the leg would continue in the future, but no mathematical assessment in terms of permanence or duration; there is competent evidence of the injuries, the extent thereof, their duration, and their relation to the plaintiff's work performance. The evidence was sufficient for submission to the jury. See Kowalke v. Farmers Mutual Automobile Ins. Co., 3 Wis. 2d 389, 88 N. W. 2d 747. It is then for the jury to assess the damage. "The fact that the amount of damage may not be susceptible of exact proof or may be in a degree uncertain or difficult of ascertainment should not be a bar to any recovery." Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891. See, also, Baylor v. Tyrrell, 177 Neb. 812, 131 N. W. 2d 393.

Defendants contend that the court erred in giving instruction No. 15 which includes, in substance, the form of NJI Nos. 4.01, 4.02, 4.03, 4.04, 4.06, and 4.07, and that the court erred in giving instruction No. 16 which generally instructs the jury in computing future damages on account of plaintiff's injuries or loss of earning capacity. Considering these instructions, examined with all of the other instructions given, they do fairly and adequately inform and instruct the jury on the issues presented by the pleadings and the evidence.

The judgment of the trial court is supported by the evidence. There being no error in the proceedings, the judgment should be affirmed.

AFFIRMED.

SALLY ANN GYDESEN, APPELLANT, V. DUANE C. GYDESEN, APPELLEE.

198 N. W. 2d 67

Filed May 26, 1972. No. 38308.

1. **Divorce: Appeal and Error.** On appeal in an action for divorce the cause is tried de novo in this court.

2. **Divorce: Parent and Child.** In determining the question of who should have the care and custody of the children, the paramount consideration is the best interests and welfare of the children.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Affirmed in part, and in part reversed and remanded.

Robert E. Paulick, for appellant.

Luebs, Tracy, Huebner & Dowding, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

CHADDERDON, District Judge.

This is a divorce action brought by Sally Ann Gydesen, hereinafter called "Sally" or "the plaintiff," versus Duane C. Gydesen, hereinafter called "Duane" or "the defendant."

A petition for divorce was filed by Sally on March 9, 1971. Duane filed an answer on April 16. On May 21 a trial was had, and at the close of the evidence the defendant moved for a dismissal. This motion was taken under advisement by the court until September 1 and the temporary custody of the minor children was given to Duane with Sally to pay child support of $15 per week.

On May 25, 1971, Sally filed a dismissal without prejudice, and on June 1 Sally filed a petition for divorce in Merrick County, Nebraska, which petition was dismissed by the court on motion of the defendant on June 25. On June 9 the court found that the dismissal without prejudice was to be treated as a motion to dismiss and the motion was overruled. The overruling of the dismissal was appealed to this court. This court dismissed the appeal on motion of the defendant on August 11.

On August 17, 1971, defendant asked leave to file a cross-petition. On August 26 the plaintiff filed a dismissal, or, in the alternative, asked permission of the court to dismiss her petition without prejudice. On Au-

gust 26 the court gave the defendant permission to file a cross-petition, and the motion for dismissal was overruled. A cross-petition was filed on August 31 and an answer thereto filed by the plaintiff on September 1. On the same day, evidence was introduced on the cross-petition of the defendant, with rebuttal evidence introduced by the plaintiff. The court granted the plaintiff an absolute divorce from the defendant, gave custody of the minor children to the defendant, and divided the property of the parties. From this decree the plaintiff has appealed.

In considering this question, this court has said in Ivins v. Ivins, 171 Neb. 838, 108 N. W. 2d 99: "The rule as to the character of the hearing to be had here is that on appeal to this court in a divorce action the cause is tried de novo."

Sally and Duane were married December 2, 1962, and have two children, Pamela Jean, born August 20, 1964, and Julie Ann, born June 8, 1967.

It would serve no useful purpose to set out the testimony in regard to the difficulties in this marriage. We think the evidence was sufficient for the trial court to grant Sally a divorce from Duane and that the division of the property was fair and equitable.

The plaintiff has set out six assignments of error but in her brief raises only two questions, which are: (1) Did the court abuse its discretion in awarding custody of the children to Duane? and (2) Did Sally have a right to dismiss her action without prejudice? We will discuss the second question first.

Section 25-601, R. R. S. 1943, provides: "An action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case to a jury, or to the court where the trial is by the court, * * *."

In this case, in the trial on May 21, 1971, the plaintiff presented her case and rested, and the defendant moved for a dismissal of the plaintiff's petition. The

court took the matter under advisement until September 1. Certainly this was a submission of the case to the court and the plaintiff thereby lost her right to dismiss without prejudice. The trial court treated the two dismissals as a motion to dismiss and overruled both motions. This was within the discretion of the court and we do not think that this was an abuse of discretion.

The court found that both Sally and Duane were fit and proper parties to have custody of the minor children, but that since Duane had had a vasectomy and would be unable to have children in the future, he should have the custody of the children. There was testimony at the trial on May 21, 1971, that Sally intended to move to Wyoming, but in her rebuttal testimony on September 1 she testified that she intended to make her home in Grand Island.

There was further testimony that both Duane and Sally used the same babysitter for the minor girls, age 2 and 6, during working hours. It was necessary for Duane to take them to the babysitter at 6:30 a.m. in their nightclothes and they were put to bed by the babysitter until time for them to arise. Sally would take them to the babysitter about 8 or 8:30 a.m. which would allow the girls to get up at the normal time.

The testimony also brought out that Duane lived on an acreage a few miles from Grand Island and at night would play with the children and let them ride a horse he had purchased for that purpose, but there was no evidence that the girls had other children near their age to play with when they were in the custody of Duane.

The rule regarding custody of children laid down by this court is expressed in Bauer v. Bauer, 184 Neb. 777, 172 N. W. 2d 231: "In determining the question of who should have the care and custody of the children, this court has repeatedly said that as between the parties the paramount consideration is the best interest and welfare of the children. * * * Ordinarily the custody

of children of tender years should be awarded to the mother unless it is affirmatively demonstrated that she is unsuitable, unfit, or unable to provide a good home."

Since that rule was adopted, the Legislature in 1971 amended sections 42-310 and 42-311, R. R. S. 1943, to state in part: "No presumption shall exist that the mother of such children is more fit to take custody than the father." Since the passage of this legislation the court can only determine the best interests and welfare of the children as stated in Bauer v. Bauer, *supra*. We feel that the granting of the custody of the two girls to Duane because he had had a vasectomy is not considering the best interests and welfare of the children but that their best interests and welfare would be served by granting their custody to Sally since they would be able to live a more normal life.

The granting of the divorce to Sally and the division of the property is affirmed. The granting of the custody of the minor children is reversed. The cause is remanded, and the trial court is ordered to grant the custody of the minor children to Sally and to provide for support for the minor children by Duane. The trial court may make such order as it sees fit with regard to the removal of the children from the jurisdiction of that court. All other matters are affirmed. The costs of this action, including reasonable attorney fees for the plaintiff in the amount of $600, are taxed to the defendant.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

DORIS SWARTZ, APPELLEE, V. HESS, INC., APPELLANT.
198 N. W. 2d 64

Filed May 26, 1972. No. 38322.

1. **Workmen's Compensation: Appeal and Error: Evidence.** On appellate review of a workman's compensation case in the Su-

preme Court the cause will not be considered de novo unless the findings of fact are not supported by the evidence as disclosed by the record.

2. **Witnesses: Evidence: Trial.** The opinions of experts are not binding on a trier of facts.

Appeal from the district court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed.

Swartz, Wieland, Eberly & Marolf, for appellant.

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

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

C. THOMAS WHITE, District Judge.

This is an appeal from the judgment of the district court finding that Edgar Swartz, hereinafter referred to as decedent, sustained an accident arising out of and in the course of his employment with the defendant Hess, Inc., and awarding compensation to his widow. The Workman's Compensation Court had found that the plaintiff had not met the burden of proof that the decedent's death was caused by accident and injuries resulting from his employment, and dismissed the action.

The facts are not in controversy. Decedent died on February 18, 1969. At the date of his death he was an employee of the defendant Hess, Inc., and had been so for a year and a half. His duties with Hess, Inc., were those of a delivery man for propane fuel to rural areas and towns in and about Fairbury, Nebraska. On the date of his death, decedent reported for work at about 7 a.m., his regular starting time. His schedule of deliveries was handed him. The morning deliveries were in Diller, Nebraska, approximately 15 miles east of Fairbury on a graveled road known as the PWF Road. Decedent returned from Diller at approximately 11 a.m., unloaded. He had lunch while Roy Hess, the

owner of Hess, Inc., reloaded his truck. Decedent left Fairbury shortly after 12:15 p.m. Roy Hess had placed a schedule in the decedent's truck while reloading, indicating further deliveries in Diller, Nebraska. At a point on the PWF Road from Fairbury to Diller approximately 8 ¾ miles east of Fairbury, the truck decedent was driving left the road, apparently in a gradual fashion, went into the ditch, traveled 169 feet and overturned, trapping the decedent in the cab of the truck. There was evidence of a washboard effect on the roadway 25 to 50 feet or more to the rear of the point where the truck left the road. The decedent was alive after the crash and spoke, requesting assistance in getting out of the smashed cab. When decedent was removed from the cab of the truck, Dr. Frank Falloon examined him in an ambulance at the Lynch Clinic in Fairbury at 2:05 p.m. and pronounced him dead, and determined that decedent had suffered a head injury, and appeared to have a broken right leg and a crushed chest. On the death certificate Dr. Falloon recorded the cause of death "as a skull injury secondary to a truck accident with intercranial injury and cardiovascular collapse, associated injuries with crushed injury to the chest."

Dr. Falloon further testified that the "most likely cause of the patient's demise" appeared to be a skull fracture.

Decedent had a long record of treatment for high blood pressure first diagnosed on October 12, 1964, complicated by an over-weight condition. The last visit to Dr. Falloon was on January 30, 1969. Blood pressure read 170 over 102, having been reduced from a previous visit on December 2, 1968, of 200 over 100 when decedent informed Dr. Falloon that he had been out of medication for several days. Dr. Falloon testified: "I would emphasize that from viewing the body postmortem the precipitating event * * * could only be speculative."

Dr. Monte M. Scott, a specialist in internal medicine, after reviewing the records and deposition of Dr. Falloon, and a review of the known physical facts of the accident, testified in response to a hypothetical question, in his opinion with reasonable medical certainty, the precipitating cause of decedent's truck leaving the road was a stroke, but also that, "I feel that the injuries . . . such as the right leg fracture could have been sufficient to produce cardiovascular collapse." He also stated on cross-examination that the cause may have been decedent going to sleep or daydreaming.

An autopsy was not performed. Whether a cardiovascular accident (stroke) occurred is not known. The only evidence with regard thereto is the expert testimony of Dr. Scott. If decedent had a stroke, it is not known when in the sequence of events it happened.

On an appellate review of a workman's compensation case, the cause will be considered de novo only where the findings of fact are not supported by the evidence as disclosed by the record. Gifford v. Ag Lime, Sand & Gravel Co., 187 Neb. 57, 187 N. W. 2d 285. The defendant urges that a compensation award cannot be based on speculative evidence, possibilities, or probabilities, and asserts as the reason for reversal of the award, the opinion based on reasonable medical certainty that the cause of the decedent's truck leaving the roadway was "a stroke or cardiovascular accident," and that assuming such prior stroke, the precipitating cause of the accident, injury, and death was such stroke and did not arise out of and in the course of employment.

The plaintiff urges that even if there were conclusive evidence that decedent suffered a stroke prior to his truck leaving the roadway, nevertheless the judgment must still be affirmed, and urges the adoption of the rule stated in the case of Tapp v. Tapp, 192 Tenn. 1, 236 S. W. 2d 977, which held that where a physical disturbance occurs (in that case an asthmatic attack

causing the driver to black out) suddenly, and contributes to cause an injury with another hazard (the dangers incident to driving) the injury is compensable. In the view we take of this case, it is not necessary to consider this contention.

A trier of fact is not required to take the opinions of experts as binding upon him. Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151; NJI No. 1.42.

The trial court could properly find under the evidence that the accident arose out of the condition of the road, the driver sleeping or daydreaming, and was not required to accept as conclusive the opinion of a medical expert, as to an unrelated precipitating cause. There being evidence in the record to support the findings of the trial court, we affirm its judgment. Plaintiff's counsel will be allowed a fee of $1,000 for services in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RALPH EDWARD LILLARD, APPELLANT.
198 N. W. 2d 184

Filed June 2, 1972. No. 38165.

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

Ralph Edward Lillard, pro se.

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

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

CLINTON, J.

The defendant entered a plea of guilty to a charge of possession of a forged instrument with intent to utter

and publish the same as genuine, and was given an indeterminate sentence of not less than 7 nor more than 10 years. The sole issue raised on appeal is the claim that the sentence is excessive.

Defendant was represented by counsel throughout the proceedings. The proceedings surrounding arraignment and plea adhered meticulously to standards and rules for the protection of the accused. A plea bargain made by the prosecution with defendant, which included a recommendation to the court of a sentence of not more than 10 years, was carefully adhered to by the prosecution. Sentence was imposed after a presentence investigation. The sentence authorized by statute is 1 to 20 years imprisonment and a fine. § 28-601, R. R. S. 1943. The record reveals no abuse of discretion by the trial court.

AFFIRMED.

ORVILLE J. DAHL, APPELLEE, V. MILTON J. ROBINSON, APPELLANT.
198 N. W. 2d 207

Filed June 2, 1972. No. 38241.

1. **Appeal and Error: Evidence: Verdicts.** 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.
2. ———: ———: ———. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake or that it is clear that the jury disregarded the evidence or controlling rules of law.

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

D. Nick Caporale and Waldine H. Olson of Schmid, Ford, Mooney, Frederick & Caporale, for appellant.

Homer E. Hurt, Jr., for appellee.

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

NEWTON, J.

This is an action for damages resulting from an automobile accident occurring at about 1:15 p.m., May 13, 1970, on a level, straight-away section of a paved, two-lane highway. It was misting and the highway was wet. Three cars, all traveling south, were involved. Verdict and judgment were entered for the plaintiff and that judgment is affirmed.

The evidence is disputed in some areas but is ample to warrant a jury finding the facts to be as follows: An automobile operated by Gary Glissman was in the lead, followed by plaintiff's car at a distance of 100 to 150 yards, and then by defendant's car which was 4 or 5 car lengths behind plaintiff. All were proceeding at about the same speed which was 45 to 55 miles per hour. Glissman saw two cars on the right shoulder of the highway and recognizing one, sought to turn off the pavement and stop. The jury could have found that he failed to signal a right turn and did, in fact, stop; also, that plaintiff stopped his car, was struck by defendant's car, and driven into the Glissman car.

The Glissman car sustained a badly crumpled left rear fender, and a bent trunk lid and rear bumper. The trunk lid and right rear fender of plaintiff's car were jammed forward over the rear wheels, the rear window broken, and it received major damage to the right front fender, grille, hood, and rear bumper. Also, four bolts holding the front seat were sheared off. Defendant's car had a badly bent front bumper, hood, grille, and left front fender. Defendant's car left skid-marks 90 feet in length.

At the time of the impact, the front seat having broken off, plaintiff was catapulted backwards with his head between the front and rear seats. A week elapsed

before he consulted a doctor and his medical expense was minimal, amounting to about $320.30 for both him and his wife. He was engaged in the business of selling livestock feeds and also operated a pick-up service hauling dead animals to a rendering plant. Both entail heavy lifting. Up to the time of trial, he had pain in his left arm, difficulty in lifting things, had to quit bowling and playing golf, could not sleep on his left side, had worn a back brace for about 8 months, and had been obliged to offer his rendering business for sale. He had his sons help with the lifting and also occasionally employed other help when the sons were in school. Damage to his car amounted to $300.

Defendant concedes his negligence was the proximate cause of the accident. His first contention is that the evidence fails to show plaintiff's injuries were proximately caused by the accident. Although the evidence on the point could be more specific, we are satisfied that evidence of his former activities, contrasting with their curtailment after the accident, the violence of the accident, the development of pain and physical difficulties soon after the accident of a nature not ordinarily encountered in the absence of a physical injury, and the absence of any evidence of other injuries or accidents required submission of the point to the jury.

Defendant states the verdict, for $10,000, is excessive. Medical and property damage amounted to about $620.30. No permanent or future damages were pleaded. Other elements in issue were inability to properly conduct and retain plaintiff's businesses, employment of additional help, and pain and suffering. We do not believe that the verdict is clearly erroneous. "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.

"A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake or that it is clear that the jury disregarded the evidence or controlling rules of law." Schimonitz v. Midwest Electric Membership Corp., 182 Neb. 810, 157 N. W. 2d 548.

Defendant also insists that plaintiff's counsel was guilty of making an impermissible argument on rebuttal in that his statements were not properly rebuttal argument. The record fails to disclose the argument of plaintiff's counsel. In its absence, it is impossible for this court to determine what was or was not properly rebuttal argument.

The judgment of the district court is affirmed.

AFFIRMED.

BURTON RISTINE, APPELLEE, V. GEIGY AGRICULTURAL CHEMICALS, DIVISION OF GEIGY CHEMICAL CORPORATION, ET AL., APPELLANTS.

198 N. W. 2d 199

Filed June 2, 1972. No. 38264.

1. **Appeal and Error: Evidence: Verdicts.** In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and all conflicts resolved in his favor.
2. **Witnesses: Trial: Evidence.** Testimony by the plaintiff as to statements of the defendants' agent made to a third party and related to the plaintiff by the third party is admissible to show that the statements were related to the plaintiff and that he relied on them.

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

Raymond J. Connell and Stewart & Stewart, for appellants.

Beatty, Morgan & Vyhnalek, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and WARREN, District Judge.

BOSLAUGH, J.

This is an action for damages for the loss of a corn crop. The jury returned a verdict for the plaintiff in the amount of $1,545. The defendants appeal.

The plaintiff farms near Gothenburg, Nebraska. The defendants manufacture and sell Atrazine, a chemical used for weed control. In 1965, the plaintiff applied Atrazine to part of a 60-acre field of corn. The plaintiff claimed the Atrazine destroyed the corn.

There was evidence from which the jury could find that Paul Bergman, an agent of the defendants, talked with Marvin Harms, an employee of the Gothenburg Co-op, early in 1965. Bergman told Harms he was interested in having some farmers apply Atrazine with starter fertilizer. Later Bergman left sample bags of Atrazine with Harms to be distributed to farmers who would apply it this way.

On or about May 4, 1965, the plaintiff talked with Harms about starter fertilizer. He mentioned that he had a weed problem and Harms told him that a representative of the defendants had left samples of Atrazine to be applied with starter fertilizer. The plaintiff purchased 45 pounds of Atrazine and Harms gave him two 5-pound bags of Atrazine. Harms told the plaintiff to mix the Atrazine with water and add it to liquid fertilizer in the pressure tanks on his lister.

The plaintiff followed the instructions given by Harms and applied the 55 pounds of Atrazine to 55 acres, leaving approximately 5 acres untreated. By the end of May it was apparent that the corn was damaged where Atrazine had been applied. The untreated corn appeared to be "real good." The plaintiff then notified Harms who in turn notified the defendants.

The plaintiff was allowed to testify over objection that Harms said Bergman had told Harms the Atrazine

was to be applied with starter fertilizer. Defendants claim the hearsay rule is applicable. The evidence was admissible to show that the statement had been made to the plaintiff and that he relied on it. The representations and reliance thereon were part of the facts to be proved. The hearsay rule was not applicable. See, VI Wigmore on Evidence, § 1766, p. 177, and § 1789, p. 235; McCormick on Evidence, § 228, p. 463. There was evidence in the record of Bergman's authority and evidence that Bergman should have expected and anticipated that his statements would be transmitted to the customer for the purpose of promoting the sale of Atrazine. Harms had testified previously as to his conversation with Bergman, and the plaintiff testified as to his conversation with Harms.

The defendants claimed, and there was evidence which tended to prove, that the Atrazine had been improperly applied in that it was sprayed directly on the seed with the fertilizer solution; that it was applied in excessive amounts; and that the plaintiff was negligent in failing to read the label on the containers. However, the plaintiff's evidence was that he applied the Atrazine in accordance with the instructions of the defendants as relayed to him by Harms. This conflict in the evidence presented a question for the jury. When considered in the light most favorable to the plaintiff, and all conflicts are resolved in his favor, the evidence is sufficient to sustain the verdict and judgment.

The defendants complain that the trial court failed to instruct on their theory of the case. Instruction No. 2 advised the jury that the defendants claimed the plaintiff was negligent and had failed to comply with the instructions and warnings printed on the container labels. Instruction No. 4 required the jury to find that the plaintiff had relied upon the representations of the defendants as to the application of Atrazine with starter fertilizer before a verdict could be returned for the plaintiff. The jury was further advised that if the plain-

tiff had negligently failed to follow the instructions on the label, that must be considered in accordance with the comparative negligence instruction. In the absence of a request for more detailed instructions, these instructions were adequate under the circumstances to state the defendants' theory of the case.

The parties stipulated that the plaintiff's damages were $2,006.70. The defendants claim that the verdict in the amount of $1,545 amounts to a finding that the plaintiff was guilty of negligence more than slight. A similar contention was considered and rejected in Burney v. Ehlers, 185 Neb. 51, 173 N. W. 2d 398.

The evidence disclosed that the corn was planted on rented land and that the landowner's share of the crop was 40 percent. The defendants contend that the verdict should have been reduced accordingly. The plaintiff testified that he had made a settlement with the landowner for the landowner's share of the loss. Under these circumstances the plaintiff was entitled to recover the entire damages. See, also, § 25-304, R. R. S. 1943; Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151.

The judgment of the district court is affirmed.

AFFIRMED.

PETER KIEWIT SONS' CO., APPELLANT, V. HARTFORD FIRE INSURANCE COMPANY, A CORPORATION, APPELLEE.
198 N. W. 2d 193

Filed June 2, 1972. No. 38339.

Insurance: Contracts: Damages. An insurance policy insuring against all risks of direct physical loss covers damage caused by the failure of the boom clutch on a lifting crane unless otherwise excluded in the policy.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded with directions.

D. Nick Caporale and Larry R. Forman of Schmid, Ford, Mooney, Frederick & Caporale, for appellant.

Pilcher, Howard & Dustin, for appellee.

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

BOSLAUGH, J.

This is an action upon an equipment floater insurance policy issued by the defendant to the plaintiff. A 140-ton crane leased by the plaintiff from Rental Machinery Co., Inc., was damaged on March 18, 1968, when the boom clutch failed and allowed the boom to fall. The plaintiff claimed damages in the total amount of $40,854.70 subject to a deductible clause in the amount of $5,000.

The trial court found that the policy did not cover damage to the crane; that other damage did not exceed $5,000; and dismissed the action. The plaintiff appeals.

The policy insured all equipment owned or leased by the insured against "all risks of direct physical loss, damage or destruction." Wear and tear, gradual deterioration "or mechanical breakdown, but not the damage resulting therefrom" were excluded from the policy.

The evidence established that the adjustment between the cam rod and shoe in the boom clutch of the crane was not maintained because a jam nut had worked loose. As a result, the clearance between the shoe and the drum became too great and oil leaked from the hydraulic cylinder onto the drum. When the operator attempted to raise the boom, the clutch did not hold and allowed the boom to fall.

The defendant does not contend that the "mechanical breakdown" exclusion in the policy is applicable to the damages claimed by the plaintiff. The defendant does contend that the damage to the crane was not covered by the policy because the accident was caused by a

defect in the crane and the plaintiff was not obligated to repair the crane.

The lease between the plaintiff and Rental Machinery Co., Inc., required the plaintiff to keep the equipment in good repair and to return it in as good condition as when leased, reasonable wear and tear excepted. The evidence established the accident resulted from a failure to maintain the boom clutch in proper adjustment. Although there was evidence that in other litigation arising out of the same accident the plaintiff has claimed that the crane was defective, the evidence here was not sufficient to show any part of the mechanism was defective or improperly designed. The policy provides that the defendant is subrogated to any right of action of the plaintiff against third persons.

The plaintiff was entitled to judgment in the amount of $35,854.70. The judgment is reversed and the cause remanded with directions to enter judgment for the plaintiff in the amount of $35,854.70.

The plaintiff is allowed $2,000 for the services of his attorneys in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

PATRICIA L. JUNKER, APPELLEE, V. KENNETH JUNKER, APPELLANT.

198 N. W. 2d 189

Filed June 2, 1972. No. 38351.

1. **Divorce: Appeal and Error.** A divorce action is triable de novo upon the issues presented by the appeal.
2. **Divorce: Alimony: Property.** The division of property and allowance of alimony in divorce actions are always to be determined by the facts of each case.
3. ———: ———: ———. The rule for determining alimony or division of property in divorce actions provides no mathematical formula by which such an award can be exactly determined. Generally speaking, awards of this court in cases of this kind vary from one-third to one-half of the value of the property

involved, depending upon the facts and circumstances of the particular case.

4. **Attorneys at Law: Fees.** A reasonable attorney's fee is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorney.
5. ———: ———. In determining the fairness of an award for an attorney's fee, consideration may be given to the provisions of the Nebraska State Bar Association Minimum Fee Advisory Schedule.
6. **Attorneys at Law: Fees: Courts.** While trial courts and appellate courts equally are regarded as experts on the value of legal services, a trial court ordinarily has a better opportunity for practically appraising the situation, and an appellate court will interfere only to correct a patent injustice, where the allowance is clearly excessive or insufficient.

Appeal from the district court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed as modified.

W. O. Baldwin and Joseph Ginsburg of Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellant.

Joseph F. Chilen and Dalke, Carlson & Thompson, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and BRODKEY, District Judge.

BRODKEY, District Judge.

This is an action for divorce, instituted in the district court for Jefferson County, by Patricia L. Junker, plaintiff and appellee, hereinafter referred to as plaintiff, against Kenneth Junker, defendant and appellant, hereinafter referred to as defendant. In its decree, the trial court found for the plaintiff on her petition and against the defendant on his cross-petition, and granted the plaintiff a divorce. The decree also adjudicated the rights of the parties with regard to a division of the property and awarded the plaintiff permanent alimony. Defendant has appealed to this court; but the granting

of the divorce is not assigned as error in the appeal, and both parties concede that ample evidence existed for the granting of the divorce to the plaintiff. The assignments of error by the defendant are directed to a claim of excessiveness of plaintiff's award in the division of the property of the parties, the amount of the allowance of permanent alimony, and the allowance of an excessive attorney's fee to plaintiff. Our court has held that 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.

The parties to this action were married on November 25, 1961. Each of the parties had been previously married and each of them had a daughter by a former marriage. At the time of trial, plaintiff was 42 years of age, and defendant was 34 years of age. During the marriage, the defendant was employed as a car salesman and his income was based upon a salary; and, commencing in 1968, he also became a participant in a profit-sharing bonus plan, which was based upon the net operating profit of the dealership as computed at the end of the year. Total compensation paid to the defendant in 1969 amounted to $15,000.94, which included a bonus of $4,950. In 1970, his compensation amounted to $15,456.84 which included a bonus in the amount of $5,450. At the trial, his employer testified to the high quality of defendant's competence and ability as an executive of his company.

During the same period plaintiff had been variously employed in a florist shop and at the Fairbury Plumbing & Supply Company, and her anunal income varied between $2,700 per year and $3,600 per year; but at the time of the divorce she was unemployed, and lack of essential skills and training have handicapped her in her efforts to obtain employment. Evidence is somewhat contradictory as to the health of the respective parties, each claiming ill health in certain particulars. At the time of her marriage to the defendant, plaintiff

possessed various items of furniture and personal property together with the sum of $4,000 in cash, which she invested in the first home of the parties purchased after their marriage in the City of Fairbury. This home was later sold and the proceeds invested in a new home owned by the parties at the time of the trial. The evidence also shows that the defendant invested $3,000 in cash in the new home, and has made the payments on the mortgage on this home and paid the taxes for same since its acquisition. At the time of their marriage, the defendant possessed certain boats, an automobile, a limited amount of stock, and a modest bank account, together with guns and boating equipment. Since their marriage, the parties have acquired some additional household goods, furniture, and recreational equipment. In its decree entered in this case on July 29, 1971, and as later modified for the purpose of clarity on September 28, 1971, the trial court awarded to the plaintiff the residence of the parties, subject to the existing mortgage thereon, the household goods and furnishings with certain exceptions which it awarded to the defendant, an electric eye attachment for the garage, and a 1962 Oldsmobile, including an insurance claim for damage thereto. The court also awarded the plaintiff alimony totaling $9,000, payable at the rate of $150 per month, commencing August 1, 1971; and also awarded plaintiff an attorney's fee for her attorney in the amount of $1,000 in addition to the temporary attorney's fee of $75 previously allowed. The court awarded the defendant a house trailer and contents, boats, trailers, and boating equipment, camping equipment, his guns and related equipment, his hand and power tools, his stocks, bonds, and bank accounts, the policies of insurance, a 1957 Chevrolet station wagon, and other personal effects in his possession.

Evidence in the record supports the following values of the property involved herein as of the date of the trial. The original purchase price of the home of the

parties was $21,500 and certain improvements were made to the property after its acquisition. One real estate appraiser testified at the trial that the fair market value of the property in question was $26,500 and another appraiser gave its value as $23,500. We accept the median of these two figures and find that the value of the property at the time of the trial was $25,000. There was an outstanding mortgage indebtedness on the home at the time of the trial in the amount of $8,102.75, the defendant having reduced the balance of the mortgage by approximately $900 after the filing of the suit for divorce. In any event, it appears that the equity in the home at that time was $16,897.25. The plaintiff was also awarded the household goods, furnishings, and equipment in the home, which were variously estimated to be from $2,200 to $3,142. For the purposes of this case we have also adopted the median figure of $2,671 as the value of such furniture and equipment. The electric eye for the garage was valued at $150, and the Oldsmobile automobile, including the insurance claim for damages, was valued at $850. The total value of the property awarded plaintiff by the above figures was $20,568.25. With regard to the value of the property awarded to the defendant, evidence in the record substantiates a value of $1,500 on the house trailer and contents, $4,350 on the boats and trailers, $50 for sonar equipment, $200 for camping equipment, $1,233 for guns and equipment, $150 for hand and power tools, $50 for a Walkie-Talkie, $500 in value of stocks, $220 in value of government bonds, $225 in bank accounts, $450 for a 1957 Chevrolet station wagon, and $1,600 for the cash value of an insurance policy, or a total value of property awarded the defendant of $10,528. From the above figures, it appears the plaintiff was awarded approximately sixty-six percent of the total estate, and the defendant thirty-four percent. When we add to this the award of permanent alimony to the plaintiff of $9,000, the disparity becomes even more

pronounced. Keeping in mind the duration of the marriage of the parties of less than 10 years, the fact that no children were born of the marriage, and the additional fact that the evidence discloses the plaintiff was not without fault contributing to the dissolution of the marriage, this court is of the opinion that the award of the trial court was excessive and must be modified.

Factors to be considered in the division of property in a divorce case have been stated by this court in numerous opinions and need not be restated here. See, for example, Sanchez v. Sanchez, 186 Neb. 427, 183 N. W. 2d 743; Fry v. Fry, 186 Neb. 521, 184 N. W. 2d 636; Neeman v. Neeman, 183 Neb. 105, 158 N. W. 2d 236.

In Reckling v. Reckling, 172 Neb. 731, 111 N. W. 2d 627, this court stated: "The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case."

The rule for determining alimony or the division of property in a divorce action provides no mathematical formula by which such an award can be exactly determined. Generally speaking, awards of this court in cases of this kind vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case. Kula v. Kula, 181 Neb. 531, 149 N. W. 2d 430; Loukota v. Loukota, 177 Neb. 355, 128 N. W. 2d 809; Jablonski v. Jablonski, 173 Neb. 544, 114 N. W. 2d 1.

In view of what we have stated above, we are of the opinion that the equity in the home of the parties awarded to the plaintiff by the decree of the trial court should be divided equally between the parties, and that the amount awarded to plaintiff as alimony should be reduced. We have heretofore found that the value of the home awarded to plaintiff was $25,000 and was subject to a mortgage balance of $8,102.75, and that the equity awarded to plaintiff was in the amount of $16,897.25 as of the date of the trial. We therefore determine that the plaintiff shall have the right for 30 days from the

issuance of the mandate herein to purchase defendant's equity and interest in said real property for $8,448.63, the plaintiff to assume or pay off the balance of the mortgage indebtedness, with adjustment to be made for any payments made on the mortgage since the date of the decree. If the plaintiff fails to exercise the option within that period, the defendant shall have the right for 30 days thereafter to purchase the plaintiff's interest on the same terms. If neither party exercises the option to purchase, unless the parties agree otherwise, the real property shall be sold at public auction and the net proceeds divided equally between the parties. We also modify the provisions of the decree in this case awarding the plaintiff alimony in the sum of $150 a month, commencing August 1, 1971, and continuing monthly to July 1, 1976, or a period of 60 months. We determine that the amount of the monthly payments should be reduced to $100 a month for said 60 month period or a total of $6,000, with adjustment to be made for excess in the amount of payments made to date.

Defendant also assigns as error in this case the award by the trial court of an attorney's fee to plaintiff's attorney, in the sum of $1,000, which defendant claims was excessive. It is difficult, if not impossible, to determine the amount of an attorney's fee in a divorce action such as this by "color matching" fees allowed in other cases solely on the basis of the amount of property involved. The amount of an award of an attorney's fee is largely within the discretion of the trial court. A reasonable attorney's fee in any proceeding is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorneys concerned. Fotinos v. Fotinos, 184 Neb. 486, 168 N. W. 2d 698; Strasser v. Strasser, 153 Neb. 288, 44 N. W. 2d 508. The transcript in this case reveals that the attorneys for

the plaintiff in addition to participating in the trial itself, which lasted 2 days with 9 witnesses being called for plaintiff, also devoted a great amount of time and effort in the drafting of pleadings and lengthy interrogatories. They attended and participated in numerous court proceedings, including hearings for temporary allowances, and for a restraiinng order; also hearings in resistance to defendant's application for specific property, arguments on defendant's demurrer and motion to make more definite and certain, and a hearing for modification of the final decree; a motion for a new trial; and, presumably, a motion for temporary allowances pending the appeal to this court. In determining the fairness of an award for an attorney's fee in a case such as this, reference may properly be made to the Nebraska State Bar Association Minimum Fee Advisory Schedule adopted in 1970. Moreover, in Specht v. Specht, 148 Neb. 325, 27 N. W. 2d 390, this court stated: " 'While trial courts and appellate courts equally are regarded as experts on the value of legal services, * * * a trial court ordinarily has a better opportunity for practically appraising the situation, and an appellate court will interfere only to correct a patent injustice, where the allowance is clearly excessive or insufficient, * * *.' " In this case we feel the trial court was in a better position to appraise the situation and we have concluded that the award for attorney's fees made to plaintiff in this case was not unreasonable or excessive. Plaintiff is awarded the sum of $250 for the services of her attorneys in this court.

The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. ORVILLE KING, APPELLANT.
198 N. W. 2d 185

Filed June 2, 1972. No. 38396.

1. **Mental Health: Criminal Law.** The Sexual Psychopath Act was intended to permit the removal of a sexual psychopath from society until he is cured or is no longer a menace to the safety of others.
2. ———: ———. The intent of the Sexual Psychopath Act is to require confinement until such time as the offender is not likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his uncontrolled and uncontrollable desires.

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

Hamilton, Geier & German, for appellant.

Paul L. Douglas and William D. Blue, for appellee.

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

BOSLAUGH, J.

The appellant, Orville King, was committed to the Lincoln State Hospital at Lincoln, Nebraska, on December 16, 1955, as a sexual psychopath. On August 17, 1970, a report and recommendation signed by the director of the hospital was filed in the district court. The report stated that the appellant had been given a complete psychiatric evaluation, as provided in section 29-2906, R. S. Supp., 1969, and recommended that the appellant "be discharged from commitment as a sexual psychopath conditioned on his being committed by the Lancaster County Mental Health Board * * *."

On February 10, 1971, an evidentiary hearing was had on the report and recommendation. The appellant was represented by counsel at the hearing. The trial court found that the conditional release and commitment recommended by the director was not authorized by the statute and that the appellant should not be released. The appellant has appealed from this order.

The statute contemplates the removal of a sexual psychopath from society until he is cured or is no longer a menace to the safety of others. State v. Noll, 171 Neb. 831, 108 N. W. 2d 108. The right of discharge rests within the sound discretion of the district court, and the recommendation of the superintendent is only evidentiary. If the district court concurs in the recommendation of the superintendent, the person committed may be released without restriction or released on probation. § 29-2906, R. S. Supp., 1969; State v. Noll, *supra.*

The evidence before the district court consisted of the testimony of Dr. Anderson, the Director of the Lincoln Regional Center. Dr. Anderson testified the appellant was a sexual psychopathic personality; he did not now meet the criteria of a sexual psychopath but was not cured as a sexual psychopath; his power to control his sexual impulses was impaired, but he did not have an "utter lack of power" to control his impulses; and the appellant was not competent enough to be released from the hospital and should not be released "for a rather long time."

Dr. Anderson's testimony disclosed there has been improvement in the appellant's condition since his commitment in 1955, but the appellant should not be released from the hospital at this time. Dr. Anderson felt it would be desirable if the appellant could be treated as on ordinary patient at the hospital and suggested the possibility of vocational rehabilitation treatment.

As we view the record, the evidence before the district court sustains a finding that the appellant should not be discharged from his commitment as a sexual psychopath at this time. The record does not show an abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANNIE E. WILLIAMS, APPELLANT.

198 N. W. 2d 187

Filed June 2, 1972. No. 38397.

Criminal Law: Embezzlement: Public Officers and Employees: Words and Phrases. The crime of embezzlement of public money as defined by section 28-543, R. R. S. 1943, applies only to officers or persons who are charged by law with the performance of the duties therein mentioned, and a police patrolman collecting coins from parking meters as part of the duties designated by his superior cannot properly be informed against thereunder.

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

Robert E. Paulick, for appellant.

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

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

CLINTON, J.

Defendant was charged, tried, and convicted of embezzlement under the provisions of section 28-543, R. R. S. 1943. Several assignments of error are made but they all relate to the question of whether or not the defendant is one of the class of persons within the purview of the above section of the statutes. The information charges the embezzlement was committed by the defendant "while charged with the collection, receipt, safekeeping and transfer of public money." The evidence shows the defendant was at the times pertinent herein a member of the police department of the city of Grand Island and that he had been assigned by his superior officer to the duty of collecting coins from parking meters. The evidence was clearly sufficient to support the finding made by the jury that he converted $74.58 to his own use.

The defendant's position is that section 28-543, R. R. S. 1943, pertains only to persons "charged by law" with the collection, receipt, safekeeping, transfer, or disbursement of the public money, and that he was not "charged by law" with such duties and therefore is not within the class of persons contemplated by this particular statute on embezzlement. We find the defendant's position is well taken, and the judgment of conviction must be reversed and the information dismissed.

This is not an area in which the law is obscure or difficult. It has long been clear that section 28-543, R. R. S. 1943, pertains only to persons upon whom *the law* has placed the duty of "collection, receipt, safekeeping, transfer or disbursement of the public money." This has been abundantly clear since at least 1942 when this court announced its decision in State v. Boatman, 142 Neb. 589, 7 N. W. 2d 159, 144 A. L. R. 585. In that case it was held that an employee in the office of the county clerk did not come within the statute although the county clerk would come within the statute. In that case this court analyzed the statute, the Ohio statute from which it was adapted, and the decisions of that state thereunder, and very clearly pointed out in what cases section 28-543, R. R. S. 1943, applies, citing State v. Meyers, 56 Ohio St. 340, 47 N. E. 138. We will not reiterate here this court's analysis but refer the reader to the opinion in the Boatman case.

We add, however, the following comments. The Nebraska Legislature has enacted several statutes on embezzlement, to wit, sections 28-538, 28-539, 28-540, 28-542, 28-543, 28-544, 28-545, 28-546, 28-547, and 28-548, R. R. S. 1943. Each defines a separate crime of embezzlement usually dependent upon one or more of the following factors: The person or organization from whom or from which the property is embezzled; the class of persons to which the person who does the embezzlement belongs; and in some cases upon what is embezzled. In addition, in some statutes certain acts

give rise to presumptive evidence, which presumptions do not exist under other statutes, and under some statutes felonious intent is an element of the crime and in others it is not. In short, there are significant differences in what must be charged and proved in each case. We set forth just a few of the specific differences. Under section 28-543, R. R. S. 1943, under which the defendant was charged, fraudulent intent is not an essential element of the offense. Haines v. State, 170 Neb. 304, 102 N. W. 2d 609. Under that same section the refusal of the person "to pay any draft, order or warrant which may be drawn upon him by the proper officer" is prima facie evidence of embezzlement. Under section 28-538, R. R. S. 1943, felonious intent is essential. Hamilton v. State, 46 Neb. 284, 64 N. W. 965; State v. Culver, 5 Neb. (Unoff.) 238, 97 N. W. 1015. Under section 28-540, R. R. S. 1943, the state must prove that a bailment existed. Yost v. State, 149 Neb. 584, 31 N. W. 2d 538. Under some of the embezzlement statutes different measures of punishment are applicable. This is true of section 28-543, R. R. S. 1943, where the possible term of imprisonment is 1 to 21 years and a monetary fine in the form of a judgment for twice the amount embezzled.

The State in its brief argues, citing an Indiana case: "It would be unthinkable to hold that only officers charged by law with the collection . . . could be guilty of embezzling public funds." It would be at least surprising if true. However, the evidence clearly would have supported a conviction under section 28-538, R. R. S. 1943, which applies among others to "employees" of any employer and "money . . . belonging to any other persons, body politic or corporate." It is the clear responsibility of prosecutors to examine the evidence, the statutes, and the cases and to make a proper determination of the charge which the evidence will support.

REVERSED AND DISMISSED.

BARKALOW BROS. COMPANY, APPELLANT, V. FLOOR-BRITE, INC., APPELLEE.
198 N. W. 2d 329

Filed June 9, 1972. No. 38232.

1. **Trial: Evidence.** In every case, before the evidence is submitted to the jury, there is the preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
2. **Employer and Employee: Agents: Negligence.** An employer is not liable for the negligence of one whom his employee procures or permits to assist in the work without proof that the employee had authority from the employer to procure or permit the assistance.
3. ———: ———: ———. Where there has been a continuous or customary use of an assistant by the employee, and the employer has known of this practice and acquiesced in it, the employer is liable for the negligence of the assistant as though actually employed by himself.
4. **Trial: Witnesses: Evidence.** While an expert will be permitted to express his opinion, or even his belief, he cannot give his opinion upon the precise or ultimate fact in issue before the jury, which must be determined by it.
5. **Trial: Evidence: Verdicts.** Plaintiff may establish its 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.
6. **Trial: Evidence.** Conjecture, speculation, or choice of possibilities is not proof. There must be something more which will lead a reasoning mind to one conclusion rather than another.
7. ———: ———. Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference.
8. **Trial: Evidence: Negligence.** Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with reasonable certainty the negligent act charged.

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

Haney, Wintroub & Haney, for appellant.

Emil F. Sodoro, Richard P. Jeffries, and Ronald H. Stave, for appellee.

Heard before WHITE, C. J., BOSLAUGH, McCOWN, and CLINTON, JJ., and WARREN, District Judge.

WARREN, District Judge.

This is an action brought by plaintiff Barkalow Bros. Company to recover damages resulting from a fire, occurring in plaintiff's Omaha business building on November 20, 1965, and allegedly caused by the negligence of the defendant Floor-Brite, Inc., which was then providing janitorial services for the plaintiff under contract.

At the close of all of the evidence, the defendant's motion for directed verdict was sustained and plaintiff's petition was dismissed. Plaintiff contends that the trial court erred in thus failing to submit the question of defendant's negligence to the jury.

Plaintiff's evidence established that defendant had assigned one employee, James Boeckman, Sr., the responsibility for 5-day-a-week cleaning of the first floor office area and a portion of the basement of plaintiff's building; and that Boeckman, accompanied by his two sons, James (Jim) Boeckman, Jr., then 11 years of age, and Daniel Boeckman, then 13, arrived at the building at about 5 p.m. on the day of the fire, a Saturday. Auditors had been working in the otherwise unoccupied building earlier in the day, but it is not clear from the evidence whether they were in the building during the cleaning process. The two sons aided Boeckman in his customary cleaning duties, which included emptying waste baskets and ash trays, dusting furniture, sweeping floors, and mopping lavatories. A fabric collector bag on a steel frame was wheeled about and used by Daniel as a receptacle into which he emptied both waste-

baskets and ash trays from about 15 desks. Daniel testified that he examined the contents of each ashtray to see whether any cigarette or cigar stubs were still lighted before dumping the contents into the collector bag, and on completion of the rounds emptied the contents of the collector bag into steel waste barrels, located inside the ground floor garage. The empty collector bag was then moved to the basement, where the area immediately surrounding the storage room was swept and about a half cup of dust was placed in the collector bag, which was then folded on its collapsible frame and stored immediately to the right of the door, in a storage room under the basement stairway. The sole evidence relating to pipe smoking in the building was the almost casual testimony of Boeckman, Sr., that he lit his pipe "just before we quit."

Jim testified that right after dumping the dust sweepings into the collector bag and before pushing it into its storage room he told his brother Daniel that he smelled smoke, but Daniel replied that it was just the dust that they had picked up. No smoke was seen, and no further investigation was made. Boeckman, Sr., did not hear the conversation or learn of the incident that day. Boeckman, Sr., then finished cleaning the lavoratories, placed a mop and bucket in the storage room, noticed nothing unusual, and left with his two sons at approximately 6 p.m. A fire alarm was turned in at 8:24 p.m. The Omaha fire department captain who led the first company to the fire testified that the flames were coming from the enclosed storage area under the basement stairs at about the third step up from the bottom landing, which would have been in the south portion of the storage area. The storage room was approximately 17 feet long, with the entrance door opening west at the extreme north end, and the bottom landing at the south end.

Plaintiff's theory of negligence, relying entirely on circumstantial evidence, is that the fire was caused by

the negligence of defendant's employee and his two sons in somehow placing a lighted cigarette, cigar stub, or burning pipe ashes in the collector bag, and leaving them in that receptacle to start the fire when they left the building. Defendant contends that to so find, a jury would have to rest one inference upon another, one presumption upon another.

In every case, before the evidence is submitted to the jury, there is the preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Weston v. Gold & Co., 167 Neb. 692, 94 N. W. 2d 380.

Before the court can apply this rule to the facts, there are two preliminary issues relating to evidence which the court must decide.

First, defendant contends that it is not liable for the negligence, if any, of the two Boeckman sons, because they were not employees of the defendant, and because their employee Boeckman, Sr., had no authority to procure or permit such assistance.

The basic proposition set forth in an extended annotation at 25 A. L. R. 2d 984, is a follows: "An employer is not liable for negligence of one whom his employee procures or permits to assist in the work without proof that the employee had authority from the employer to procure or permit the assistance."

A well recognized exception to that rule is also annotated. "Where there has been a continuous or customary use of an assistant by the employee, and the employer has known of this practice and acquiesced in it, the employer is liable for the negligence of the assistant as though actually employed by himself." 25 A. L. R. 2d 984 at 991. See, also, 57 C. J. S., Master and Servant, § 564a, p. 280.

This court has similarly ruled, although stating the

exception in terms of "implied authority" rather than in terms of "acquiesence." Levin v. City of Omaha, 102 Neb. 328, 167 N. W. 214 (1918).

It is undisputed in the record that the defendant's employee Boeckman, Sr., was paid on a per job basis for each building he cleaned, and had frequently utilized the assistance of one or both of his sons in cleaning plaintiff's building during the 5 months of his employment prior to the fire. The question then presented by the record is whether the defendant through its officers knew of the practice of Boeckman, Sr., in utilizing family help and had acquiesced in that practice.

Without detailing the evidence, the record demonstrates by the testimony of defendant's president, its vice president, and its office manager, that prior to the fire the practice of using family assistance was widespread among the defendant's 475 cleaning employees, that the supervisor of Boeckman, Sr., had to be aware of the practice because he visited the job site on a day-to-day basis, that there was no company policy prohibiting the use of family help, that the policy of paying the employee by the job rather than by the hour did in fact encourage such practice, and that after the fire in question and the realization that the actions of the Boeckman sons might create company liability, a strict rule prohibiting such activity was adopted and enforced by the defendant company. We think the evidence comes squarely within the exception stated above, and the rule most recently stated as follows: An employer is liable for negligence of an assistant where the employer has knowledge of customary and continuous use of an assistant by an employee. Mahan v. Litton (Ky. App.), 321 S. W. 2d 243. The acquiescence of defendant in the use of family assistants by its cleaning employees was well established by the record, and without finding that the Boeckman sons were negligent, we hold that their acts or omissions were those of the defendant under the doctrine of respondeat superior.

Second, we must consider plaintiff's contention that the trial court erred in refusing to allow expert testimony as to the cause of the fire. Plaintiff's first expert, captain George Hamann, properly testified as to the place where the fire originated, based upon his observations during the fire-fighting and on his post-fire inspection of the damaged basement. Following this, the witness was given a voluminous hypothetical question and asked to state his opinion "as to the cause or origin of the fire?" In several attempts to answer, the witness responded: "Careless smoking. Like dumping—might be something lit in the ashtray. The man was supposed to have been smoking a pipe. He dumped his ashes some place. The man was smoking—a pipe. That is it, then." On defendant's motion, the answers were stricken, and we think properly so. "While an expert will be permitted to express his opinion, or even his belief, he cannot give his opinion upon the precise or ultimate fact in issue before the jury, which must be determined by it." Caves v. Barnes, 178 Neb. 103, 132 N. W. 2d 310. It is evident from the nature of the question and the answers given that the purpose of the hypothetical question was to elicit an opinion as to whom was to blame for starting the fire, and not as to the physical cause of the combustion.

The hypothetical question, as posed, was an indirect attempt to get an expert opinion as to the ultimate fact, the determination of which is the sole province of the jury. Plaintiff makes the same complaint with regard to the court's refusal to allow its second expert, Daniel Mulcahey, to answer the same hypothetical question. The question asked was for the same ultimate conclusion as that asked of captain Hamann, and was objectionable for the same reason. It was within the trial court's discretion whether to allow the expert witnesses to answer the hypothetical question, and its ruling will not ordinarily be disturbed on appeal unless there is a clear showing of abuse. Trial courts have broad discretion

in the general conduct of a trial, and we do not believe it was abused in this instance.

Plaintiff maintains that there is a reasonable inference the fire started from a lighted cigarette or cigar butt dumped into the collector bag. No evidence exists that a burning cigarette or cigar was in an ash tray at the Barkalow Bros. building during cleanup on the day in question, or that any burning tobacco product was dumped into the collector bag. On the contrary, plaintiff, itself, adduced proof by the testimony of Daniel Boeckman that he had examined the contents of each ash tray by looking at it and found no cigarettes or cigars that were lighted. Second, plaintiff infers that a burning cigarette or cigar butt was not emptied out, but remained in the collector bag when it was folded and stored away. The evidence of plaintiff directly contradicts such a further inference, in that the testimony was that Daniel Boeckman dumped the first floor accumulation of wastepaper and ash tray contents from his collector bag into a metal waste barrel inside the garage, before proceeding to the basement with the collector bag. Admittedly, there was no fire in the garage where the steel barrels were located. The practice was to take the collector bag off the frame, hold it upside down over the barrel and shake it to empty its contents. There is absolutely no evidence that a lighted cigarette or cigar (of which there is no evidence) stayed in the collector bag after it was emptied. The final necessary inference is that the fire was started within the collector bag and then spread to the building itself. The evidence that the fire in question began in the basement area where the collector bag was stored can hardly give rise to a presumption or inference that there was any relationship between the two. The evidence showed storage of many flammable items in the 17-foot-long room under the stairway, as well as the presence of plaintiff's junk items which had collected therein over many years. The plaintiff's evidence was

that the folded collector bag was placed immediately inside the door to the storage room and to the right, which would have placed it underneath the upper stairs of the staircase. There is no evidence that the collector bag was pushed far enough back in the storage room to proximate the third step. The storage room area contained a pull-chain type of electric light, wiring thereto, a steam pipe running through it, and wooden beams, shelving, and wainscoating, all in a 60-year-old building. The storage room door was closed but not locked. The only restrooms in the building were located in the basement in near proximity to the storage room, and restroom supplies were stored therein. The areas of speculation as to the cause of the fire might well run the gamut from defective wiring to spontaneous combustion to arson to negligence of a third person entirely unconnected with defendant. The smelling of smoke by James Boeckman, Jr., was unexplained, but he and his brother quickly determined he was mistaken and nothing more transpired in that respect. The reasonableness of the actions of the Boeckman sons, at the time one thought he smelled smoke and the other instantly denied its existence, must be judged as of that moment in the light of what they then knew, and not in the light of the fact that a fire was reported in that basement 2½ hours later. There is no evidence that anything else unusual or suspicious occurred from that time to the time the Boeckmans left the building. The evidence demonstrates that the sons worked under their father's immediate supervision and did their cleaning duties exactly as he directed and in a reasonable manner.

Plaintiff may establish its 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 reason-

ably be drawn therefrom. Or, to phrase it differently, the evidence must be sufficient to make the theory of causation reasonable and not merely possible. Conjecture, speculation, or choice of possibilities is not proof. There must be something more which will lead a reasoning mind to one conclusion rather than another. Raff v. Farm Bureau Ins. Co., 181 Neb. 444, 149 N. W. 2d 52.

Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference. Negligence is a question of fact and may be proved by circumstantial evidence and physical facts. However the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with reasonable certainty the negligent act charged. R & S Corp. v. Barnes, 182 Neb. 431, 155 N. W. 2d 379.

In view of the foregoing, we find that the evidence of negligence on the part of the defendant is too conjectural and speculative to require a reversal of this cause. The judgment of the trial court dismissing plaintiff's petition pursuant to a motion for directed verdict is affirmed.

AFFIRMED.

RUTH D. SCRIPTER, APPELLANT, V. JOSEPH M. SCRIPTER, APPELLEE.
198 N. W. 2d 201

Filed June 9, 1972. No. 38268.

1. **Divorce: Parent and Child.** In determining the question of who should have the care and custody of children upon divorce, the paramount consideration is the best interests and welfare of the children.
2. **Divorce: Parent and Child: Appeal and Error: Evidence.** The discretion of the lower court with respect to awarding the custody of minor children is subject to review, but the deter-

mination 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.

3. **Divorce: Equity: Appeal and Error: Evidence: Witnesses.** Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

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

Thomas L. Anderson, for appellant.

Luebs, Tracy, Huebner & Dowding, James A. Beltzer, and D. Steven Leininger, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

STUART, District Judge.

The plaintiff, Ruth D. Scripter, appeals from a decree divorcing her from the defendant, Joseph M. Scripter. The two assignments of error briefed and argued relate to granting defendant custody of the minor child of the parties and to the division of the property of the parties.

The parties were married in July 1951, and have one daughter, Shawn Marie, born February 12, 1967. At the time of the divorce, plaintiff was 38 years old and defendant was 44 years old. The trial court awarded the custody of the minor child to the defendant. The evidence showed that the plaintiff suffers from rheumatism and arthritis in her left knee and spine, and calcium deposits in her lower back. She was hospitalized for an undisclosed reason for a period of 10 days shortly before the trial. She had previously done baby sitting, but testified that she was physically unable to perform baby sitting or to take care of children, and that she had been advised by her doctor not to perform any

work and to stay off her feet as much as possible. In addition, the evidence showed a continuous state of untidiness in plaintiff's home, either through plaintiff's physical incapacity or for other reasons. In contrast defendant is healthy, is regularly employed, and appears energetic and resourceful.

"In determining the question of who should have the care and custody of children upon divorce, the paramount consideration is the best interests and welfare of the children." Phillips v. Phillips, *ante* p. 89, 195 N. W. 2d 160.

This court, in the case of Hanson v. Hanson, 187 Neb. 108, 187 N. W. 2d 647, citing Fisher v. Fisher, 185 Neb. 469, 176 N. W. 2d 667, stated: " 'We have, of course, given weight to the findings and judgment of the trial court. The decision of the trial judge is peculiarly entitled to respect. The court saw all the parties and witnesses; it was in closer touch with the situation than this court which is limited to a review of a written record. While this case is triable de novo in this court, we cannot overlook the fact that the judgment of the trial court is entitled to great weight in determining the best interests of children in custody proceedings.' We have further recently said in Jones v. Jones, 183 Neb. 223, 159 N. W. 2d 544, with reference to the scope of judicial review of custody orders by this court as follows: '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.' "

In reviewing the cold record before us, we can not see that there has been an abuse of discretion. The decree of the trial court awarding custody to the father is correct and is supported by the weight of the evidence.

All of the property of the parties has been accumulated by them since the date of the marriage. Plaintiff

inherited between $7,000 and $8,000 at the death of her father in 1964 or 1965. The defendant received a workmen's compensation settlement of $6,000 in 1965. At the time of the divorce the parties owned property having a net value of approximately $20,000. The trial court awarded the plaintiff a 1966 Chevrolet Caprice automobile, a residence at 933 South Eddy Street in Grand Island which was purchased in 1964 for $8,000 and is now rented for $100 per month, two cemetery lots worth $200, and the household goods now in her possession. Although the value of the various goods is not set forth in the evidence, it would appear that the trial court awarded plaintiff slightly more than one-half of the total net holdings of the parties.

Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. See Keenan v. Keenan, 187 Neb. 686, 193 N. W. 2d 568.

We are unable to find any abuse of discretion on the part of the trial court and on trial de novo find that a fair and just division of the assets was made by the trial court. No error appearing in this record, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DWIGHT M. WEST, APPELLANT.
198 N. W. 2d 204

Filed June 9, 1972. No. 38271.

1. **Sentences: Appeal and Error: Courts: Criminal Law.** This court may reduce a sentence when in its opinion the sentence is ex-

cessive. In such case the court is under a duty to render such sentence as the evidence warrants.

2. **Criminal Law: Trial.** Anomie in the criminal process is a variable not to be forgotten, although its weight is light in any one case.
3. **Criminal Law: Sentences: Evidence.** A sentence dictated by inordinate emotion is suspect. It is only by coincidence that it finds support in the evidence.

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

Joseph D. Martin and Robert Paulick, for appellant.

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

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

SMITH, J.

Dwight M. West pleaded guilty to a charge of injuring property, causing damage in excess of $100. The district court sentenced him to imprisonment for an indeterminate period of 1 to 2 years. Dwight appeals. He assigns excessiveness of the sentence for error.

Dwight, age 19, hurled a bottle through the window of a jewelry store. The offense was premeditated in the sense that Dwight did not act on the spur of the moment. He held a grudge against the "establishment because of the way they involved me and my (older) brothers." Brothers "Doug" and "Dan," as well as Dwight, had been arrested for burglary; and "Dave," for making a "false" telephone call. At the time of the offense Dwight was free on bond on the burglary charge.

Dwight was single, living with his mother and three younger siblings. He contributed $20 to $30 a month irregularly to their support. His mother was gainfully employed and was paid Social Security benefits. His employment on a construction project ended in July 1971, upon completion of the project.

Dwight had been graduated from high school. He was to be matriculated in Hastings Technical College in September 1971 for a 2-year course in data processing.

Prior offenses committed by Dwight were 3 traffic violations, petty larceny 1 ½ years earlier, and receiving stolen property 5 months earlier. Questioned concerning prior alleged acts of vandalism and larceny, Dwight unequivocally denied participation.

Hearings were held on February 26, May 7, May 17, and July 28, 1971. Dwight withdrew a plea of not guilty and pleaded guilty on May 17. His former counsel, Lloyd Kelly, Sr., had withdrawn on May 7.

At the May 7 hearing Kelly said: ". . . he's charged in breaking something a little over $100. He thought it was a little less." Dwight volunteered, "Sir it was only $109." He also said that he had obtained an estimate from the Watton Glass Company. Counsel for the State said that the window damage was $109.96. Restitution in full had been made prior to the hearing on February 26. The amount, $200, included $109 for the window, $50 which was the retail price of a wooden replica of a boat with a damaged stern and a chip, $25 "bonus," and something for damage to the burglar alarm system. The amount was paid by Dwight's mother for him.

At the sentencing hearing on July 28, Dwight testified as follows: "Q. Do you recall the last time you were in this court with Mr. Kelly? A. Yes, sir. Q. You had a receipt with you, did you not? A. Yes, sir; I did. Q. Did you at that time advise the court that the damages were less than $100? A. Yes, sir. That receipt—that wasn't a receipt, it was an estimate. Mr. Kelly advised me to go to Watton Glass Company to get an estimate, which I did. I took the measurement of the Brodkey window. I got an estimate of $69. . . . Q. However, you did not advise the court of the additional damages you paid? A. The additional—the

damages the court had me charged with was the window. I paid for the window. The other payments I made was bonus."

During the cross-examination the court intervened: "What you are saying, Mr. Kelly told you to show the court the $67 bill? Yes, sir; he told me to get an estimate and present it before the judge." Allocution followed immediately, and Dwight answered, "No, sir." The court then imposed sentence, the record being as follows: "THE COURT . . . Mr. West, you may wonder why (the court imposed imprisonment). You have been less than honest with this court in presenting to me a bill that was not correct. You have been less than honest in the statements here in connection with the payment of damages . . . . If there is ever a time to be absolutely honest it's when you are in the courtroom under oath and before the judge. When you can't be that, you couldn't be to the probation officer. THE DEFENDANT: Sir — THE COURT: Mr. Bosler, you can take him over to the jail. THE DEFENDANT: Your Honor, I was honest. I was always honest to the court. THE MOTHER: What was he dishonest about? THE COURT: You will be right over with him. I don't want any words with you, Mrs. West. THE DEFENDANT: Mom, come on."

In overruling the motion of Dwight for a new trial on August 13, 1971, without the presence of Dwight, the court said to defense counsel: "The situation here was so premeditated, they circled the block three times before they committed this act."

Dwight had acknowledged damage in the sum of $109 on May 7 and prior to withdrawal of his plea of not guilty. A lack of veracity on his part is unproved.

If malicious destruction or injury to property is less than $100, the offense is a misdemeanor. § 28-573, R. R. S. 1943. If the destruction or injury amounts to $100 or more, the offense is a felony punishable by imprisonment not less than 1 year nor more than 3

years, or by a fine not more than $1,000. § 28-572, R. R. S. 1943.

This court may reduce a sentence when in its opinion the sentence is excessive. In such case the court is under a duty to render such sentence as the evidence warrants. See § 29-2308, R. R. S. 1943.

A variable relating to the criminal process is anomie. It means "a condition of society in which its members feel that normative standards of conduct and belief are lacking. The aspect . . . is . . . a feeling on the part of the public that government is permitting certain community values and norms to deteriorate. . . . When government . . . assumes the role of protecting the community from such conduct, it also assumes the role of guardian of the . . . norm that is to be protected from attenuation by that conduct. . . . If the state . . . does not demonstrate an interest in enforcing it, the public—should it feel strongly about the norm—will become anxious. . . . The public will then focus upon the avowed protector of the norm as the cause of its anxiety and unrest and the result will be lack of faith in government with all the ramifications that may follow." New York Governor's Special Committee on Criminal Offenders, "The Penal System: Treatment as Prevention," Gerber & McAnany, Contemporary Punishment 256-7 (1972). Cf. § 29-2260 (2) (c), R. S. Supp., 1971. Anomie is a variable not to be forgotten, although its weight is light in any one case.

Another variable is the emotion of the judge in determining and pronouncing the penal sanction. Should we deny its existence altogether, the illusion might cheat the reader. See Frank, Courts on Trial, 405-15 (1969). On the other hand, a sentence dictated by inordinate emotion is suspect. It is only by coincidence that it finds support in the evidence. See A. B. A., Standards Relating to Appellate Review of Sentences, § 1.2, p. 23 (Approved Draft, 1968). At a sentencing hearing it is especially important that the judge steel himself

against predilection. Otherwise he may fuel the raging fire in youth against "the establishment."

The coincidence of a sentence dictated by inordinate emotion but warranted by the evidence happened in the present case. The judgment is affirmed.

AFFIRMED.

BOSLAUGH and NEWTON, JJ., concur in result.

NEWTON, J., concurring.

I concur in the result arrived at in the opinion of Smith, J. In my judgment the reasoning by which a sentencing judge arrives at a decision to pronounce a certain sentence is neither material nor relevant to a consideration of the sentence on appeal. In determining whether a sentence is excessive, or just and proper, this court must look solely to the record.

IN RE APPLICATION OF WELLS FARGO ARMORED SERVICE CORPORATION OF NEBRASKA, INC.
WELLS FARGO ARMORED SERVICE CORPORATION OF NEBRASKA, INC., APPELLEE, V. BANKERS DISPATCH CORPORATION, APPELLANT.
198 N. W. 2d 195

Filed June 9, 1972. No. 38272.

1. **Public Service Commissions: Appeal and Error.** On appeal from the Nebraska State Railway Commission, judicial review is limited to a determination whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made.
2. **Carriers: Words and Phrases.** A contract carrier is one, other than a common carrier, which furnishes transportation service to meet the special needs of the individual shipper or shippers.
3. **Carriers: Public Service Commissions: Evidence.** In considering an application for a permit as a contract carrier the Nebraska State Railway Commission is required to weigh the special needs of shippers desiring contract carrier service against the adequacy of existing common carrier service. The effect on protesting carriers of a grant of the application and the effect on shippers of a denial are factors to be weighed in de-

termining if the grant of the application would be consistent with the public interest.

4. ———: ———: ———. The burden is upon the applicant for a permit as a contract carrier 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.

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.

6. ———: ———: ———. If competent proof is made by the applicant showing the proposed service to be specialized and needed, and is protested by 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.

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.

8. ———: ———: ———. Where there is evidence to sustain the factors for and against the issuance of a permit to a contract carrier, which is required to be considered by the Nebraska State Railway Commission by sections 75-301 and 75-311, R. R. S. 1943, the determination of the public interest is for the commission and not the courts.

9. ———: ———: ———. Past unlawful actions do not necessarily bar on the grounds of unfitness future grants of operating authority if the public interest will best be served by approval.

Appeal from the Nebraska State Railway Commission. Affirmed.

W. W. Wallin and Acklie & Peterson, for appellant.

James E. Ryan, for appellee.

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

CLINTON, J.

This is an appeal from an order of the Nebraska State

Railway Commission granting the application of the appellee, which we will refer to herein as Wells Fargo, for a permit to operate as a contract carrier intrastate under the provisions of section 75-311, R. R. S. 1943. The appellant, which we will refer to as B.D.C., was the sole protestant before the commission and is the holder of a certificate as a common carrier intrastate of certain commodities which include those authorized under the permit granted Wells Fargo.

The permit to Wells Fargo authorized the carriage of audit and accounting media, business records, cash letters, checks, data processing media, and microfilm over irregular routes between all points in Nebraska subject to the restriction that, "All transportation . . . must originate or terminate at the facilities of the following:" (here in the order are named eight certain financial institutions located in Omaha, Lincoln, and Beatrice, Nebraska). A further restriction was added at the time B.D.C.'s motion for reconsideration was overruled and it was that Wells Fargo, ". . . may not contract for services authorized by this permit except with the above-named banking institutions."

Under the provisions of section 75-311, R. R. S. 1943, the issues before the commission were: (1) Was the proposed service that of a contract carrier; (2) if it was, whether Wells Fargo was fit, willing, and able to perform the service; and (3) whether the service would be consistent with the public interest.

In support of its order granting the permit the commission made a detailed opinion and affirmative findings on all of these issues.

On this appeal we review the findings, order, and record in the light of the principles we now set forth. On appeal from the Nebraska State Railway Commission, judicial review is limited to a determination whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made. Wells Fargo Armored Car Service

Corp. v. Bankers Dispatch Corp., 186 Neb. 261, 182 N. W. 2d 648. A contract carrier is one, other than a common carrier, which furnishes transportation service to meet the special needs of the individual shipper or shippers. § 75-302, R. R. S. 1943. In other words, the commission is required to weigh the special needs of shippers desiring contract carrier service against the adequacy of existing common carrier service. The effect on protesting carriers of a grant of the application and the effect on shippers of a denial are factors to be weighed in determining if the grant of the application would be consistent with the public interest. Hagen Truck Lines, Inc. v. Ross, 174 Neb. 646, 119 N. W. 2d 76.

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., 183 Neb. 229, 159 N. W. 2d 310. 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. D.B.C. Corp., *supra*. If competent proof is made by the applicant showing the proposed service to be specialized and needed, and is protested by 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., *supra*. 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., *supra*. Where there is evidence to sustain the factors for and against the issuance of a permit to a contract carrier, which is required to be considered by the Nebraska State Railway Commission by sections 75-301 and 75-311, R. R. S. 1943, the determination of the public interest is for the commission and not the courts. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., *supra*.

The evidence clearly does support the finding by the commission that the proposed service is specialized and designed to meet the needs of specific shippers. The evidence shows that Wells Fargo has entered into contracts with the eight financial institutions. Representatives of these eight organizations testified on behalf of Wells Fargo and their testimony supports the following conclusions and findings. These organizations furnish computer service for various banks scattered throughout the State of Nebraska. This service includes the pick up from and redelivery to the bank being served all of the items authorized to be transported. If such service is to be performed efficiently and effectively the commodities must be delivered to the computer on schedule and the results picked up on schedule so as to be returned to the bank being served so that they can be used in the next day's transactions. The evidence further supports the finding by the commission that deficiencies exist in the existing common carrier service including: Late deliveries, unwillingness to service correspondents who desire the service, discontinuance of schedules on short notice, unavailability of personnel to telephone communication, and unsatisfactory basis of charges. Most of the witnesses testified that they would not again use the services of B.D.C., but would make other arrangements such as furnishing their own carrier service.

The commission found from the evidence that Wells Fargo had been serving the eight institutions under "color" of authority as defined in Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d

865. All of the witnesses from the contracting banks testified that the service of Wells Fargo met their special requirements in a highly satisfactory manner. Some stated that continued service from Wells Fargo was important or critical to their business and that alternative modes were not satisfactory. The commission finding that Wells Fargo was fit, willing, and able to perform the services is not unreasonable or arbitrary.

The commission made a finding that although the protestant might lose some revenue by reason of the grant of the application this was conjectural and the revenue already lost was attributable in part to unsatisfactory service; and that denial of the application would have an adverse effect on the supporting shippers which would not be in the public interest. This finding is supported by the evidence.

B.D.C. contends Wells Fargo is not fit to perform the service because after the opinion of this court in Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp., *supra*, Wells Fargo continued to perform services as a contract carrier in violation of the mandate in that case. A complaint by B.D.C. to the commission for such violation was consolidated before the commission for trial with the application here being considered. Because of the admitted violation by Wells Fargo the commission imposed as part of its order a suspension of the permit granted, ". . . for a period of fifteen (15) days after the rates for the proposed service have been approved by the commission." We concur with the conclusion of the commission that past unlawful actions do not necessarily bar on the grounds of unfitness future grants of operating authority if the public interest will best be served by approval. Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra*.

One other matter should be noted. B.D.C. argues that Wells Fargo could transport cash letters from all of the state's banks by entering into an arrangement whereby the contracting bank would pay the freight charges

for transportnig cash letters from the noncontracting banks to the eight contracting banks. With reference thereto the commission found that if these speculative arrangements came to pass they were matters for enforcement in the future. We concur.

AFFIRMED.

MAXINE SQUIRES, ADMINISTRATOR OF THE ESTATE OF JAMES R. SQUIRES, AND MAXINE SQUIRES, INDIVIDUALLY, APPELLEES, V. IMPLEMENT DEALERS MUTUAL INSURANCE COMPANY, APPELLANT, IMPLEADED WITH ENO INSURANCE AGENCY, INC., ET AL., APPELLEES.

198 N. W. 2d 469

Filed June 9, 1972. No. 38341.

1. **Courts: Trial: Verdicts: Appeal and Error.** Findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.
2. **Insurance: Principal and Agent.** An insurance agent who solicits an application for insurance is, in a controversy arising between the insured and the company issuing the policy, regarded as representing the company and not the insured.
3. ———: ———. An insurance agent who with authority receives and receipts for money for renewal of an insurance policy is deemed to all intents and purposes an agent of the company.
4. **Insurance: Notice: Cancellation of Instruments: Contracts.** An erroneous statement by the insurer to the insured that an insurance policy has lapsed for alleged nonpayment of premium is not the legal equivalent of a notice of election to cancel under the terms of the policy.
5. **Insurance: Principal and Agent: Payment: Contracts.** Where an insured because of errors in a billing by the agent of an insurance company pays only that portion of the renewal premium set forth in the billing instead of the entire premium, the renewal policy is not void but is voidable at the election of the company under the terms of the policy.

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

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, and J. S. Berry, for appellant.

George O. Kanouff and Curtis Bromm, for appellees Squires et al.

Clarence A. H. Meyer, Attorney General, and James J. Duggan, for appellees Johns et al.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, and CLINTON, JJ., and BRODKEY, District Judge.

CLINTON, J.

This is an action for a declaratory judgment seeking a determination that a certain automobile liability policy issued to the plaintiffs was in full force and effect on November 19, 1967. The trial judge, a jury having been waived, found the policy was in effect on that date. We affirm the judgment.

The controversy is founded upon the alleged failure of the insureds to pay a premium for a renewal or extension of the term of the policy to cover the 6-month period September 1, 1967, to March 1, 1968. Most of the evidence is not in dispute. Where there is a conflict in the evidence and on the basis of which reasonable minds could arrive at different conclusions of fact, we apply the principle that findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. Pester v. American Family Mut. Ins. Co., 186 Neb. 793, 186 N. W. 2d 711. Where there is such a significant conflict in evidence, we will point it out in the following summary.

The plaintiffs, James R. Squires, now deceased, and his wife, Maxine Squires, had procured from the defendant Implement Dealers Mutual Insurance Company, through the Eno Insurance Agency, Lincoln, Nebraska, an automobile liability policy No. FC 96267, covering two motor vehicles for the period March 1, 1966, to March 1, 1967. The annual premium on this policy

was $70. In February 1967 the company in accordance with its apparent usual practice notified the plaintiffs and its agent, Eno Insurance Agency, of the coming expiration of this policy. This notification included a billing of $70 for the renewal period March 1, 1967, to March 1, 1968; it stated: "Make check payable to company"; and gave the name and address of the insurer. Under date of February 20, 1967, the agency in writing notified plaintiffs: ". . . your auto policy runs out March 1, 1967. If it would be any help you could take it out for six months which cost would be $35.00." Under date of February 21, 1967, plaintiff Maxine Squires wrote to the agency: ". . . We are billed for the second time from the Implement Dealers Mutual Insurance Co; for the amount of $70.00 for 12 months—I am wondering Can we pay it for 6 months?" On February 23, 1967, plaintiff Maxine Squires made a check to the company for the $35 which the company received, although whether directly or through the agency is not clear from the record. The company as a result of payment of this check credited the plaintiffs' account and under date of March 2, 1967, the agency transmitted to plaintiffs automobile liability policy No. FC 99877, which is the policy involved in this action. This policy covered the period March 1, 1967, to September 1, 1967, and shows a premium charge of $35. The policy provided: ". . . this policy may be continued in force for successive policy periods by payment of the required continuation premium to the company on or before the effective date of each successive policy period. If such premium is not paid when due, the policy shall terminate as of that date and such date shall be the end of the policy period. Such premium shall be computed in accordance with the manuals then in use by the company." It is with reference to the renewal period that the controversy arises.

On April 24, 1967, the agency sent to the plaintiffs an "invoice" indentified in the record as exhibit 6. It

contained the following: Renewal date: 9-1-67; policy number: 99877; company: Implement Dealers; property and coverage: *renewal of combination automobile insurance;* premium: $35. An employee of the agency, testifying for the company, testified that the above billing was for the original policy period March 1, 1967, to September 1, 1967, and that they billed the plaintiffs each 10 days for this amount until shortly before September 1, 1967. On August 29, 1967, the agency received from the plaintiffs a $35 payment by postal money order dated August 28, 1967. This payment the agency credited on what it believed to be the past due premium. The witness testified the agency was unaware of the premium payment to the company for the first 6 months. The agency did not notify the company of this $35 payment. It issued a receipt to plaintiffs for the amount and indicated thereon payment on account. However the witness testified it would have been credited "on account" whether or not it was for the renewal period or on a past due account. The witness stated the agency would not have billed the plaintiffs if it had known of the payment to the company.

Plaintiff Maxine Squires testified that when she sent the money order she did so in response to the invoice previously mentioned and identified as exhibit 6. At that time she wrote on the invoice paid August 28, 1967. The agency on August 29, 1967, acknowledged receipt of the payment and said: "We are enclosing the receipt for payment of automobile insurance premium. Thank you very much!!! We appreciate your patronage, and desire to be of service whenever possible." Under date of August 28, 1967, the agency had sent to the plaintiffs a notice "PREMIUM PAST DUE." This notice is identified in the record as exhibit 8. It stated: "Premium due: $35.00 (3-1-67 to 9-1-67)" and identified policy No. FC 99877. It also stated: "The credit period allowed by the Insurance Company for payment of the above premium is now past and we are required to

obtain prompt payment to maintain your policy in force. The renewal on this coverage is now due also, for Sept. 1 inception, and naturally it is impossible to continue coverage unless premium is paid in full." The "invoice" and the above "premium past due" notice are the only documentary evidence of the billings by the agency.

The trial court clearly could reasonably find that exhibit 8 was not received by the plaintiffs until after they made payment pursuant to the billing of exhibit 6, which we think as a matter of law was according to its terms for a renewal of policy No. FC 99877. The trial court was not required to accept as fact that the periodic 10-day billings were in fact made or that they gave notice to the plaintiffs that exhibit 6 was an erroneous billing for which premium was already paid.

Witnesses for the company testified that between July 1, 1967, and August 15, 1967, in the course of the ordinary practice lapse notices were mailed to the plaintiffs, which notices advised of the premium due for the period September 1, 1967, to March 1, 1968. These indicated premium for that period of $40 and directed that payment should be made to the company for that amount. Testimony was introduced to show the renewal premium was in fact $40. The company relies upon the presumption that a letter addressed, stamped, and posted is presumed to have reached the plaintiffs in the normal course of the mails; that since Maxine Squires testified only that she did not remember receiving such notices, the presumption is unrebutted and the fact finding must be that the notice was received. The company cites Corcoran v. Leon's, Inc., 126 Neb. 149, 252 N. W. 819. However, we do not think the case turns upon whether or not the notice was in fact received. The trial court may have assumed it was and we will assume it was. The situation would then be that the plaintiffs had received two notices for renewal premiums due, one, the invoice for $35, and the other,

the lapse notice for $40. The trial court could have found Maxine Squires acted upon the invoice either unaware of or having forgotten the lapse notice and when she paid the $35 premium on August 28, 1967, which was received by the Agency on August 29, 1967, and credited "on account," that was receipted by the company; likewise that the invoice billing was a billing by the company. There is nothing in the record to negative the agency's authority in these respects. Sections 44-328 and 44-329, R. R. S. 1943, are applicable. An insurance agent who solicits an application for insurance is, in a controversy arising between the insured and the company issuing the policy, regarded as representing the company and not the insured. An insurance agent who with authority receives and receipts for money for renewal of an insurance policy is deemed to all intents and purposes an agent of the company. Heikes v. Farm Bureau Ins. Co., 181 Neb. 827, 151 N. W. 2d 336.

The company relies upon the alleged failure of a renewal to take effect because of the claimed failure to pay the renewal premium and also upon certain communications from the agency dated September 1, 1967, and Setpember 21, 1967, which the witnesses for the company testified were mailed on those dates to the plaintiffs. The first of these notices stated: ". . . the payment which we received from you covers insurance from 3-1-67 to Sept. 1, 1967. Automobile insurance is payable in advance, *and we had advanced this for you.* You have been billed directly from the company for the new premium, which is $40.00. This should be sent directly to them, and covers from Sept. 1, 1967 to March 1, 1968. It is important that this be taken care of immediately, to keep coverage in effect. Let us know if we may be of any help." (Emphasis supplied.) If the emphasized statement were true, then the company had been paid $70, the original full year's premium since shortly before or shortly after the is-

suance of policy No. FC 99877. Since the company apparently billed for the renewal premium the statement must mean only that the agency felt itself indebted to the company for that amount. This of course was not in fact true since the plaintiffs had made payment for the period March 1, 1967, to September 1, 1967, before the policy was ever issued. The plaintiffs were not responsible for and cannot be charged with whatever confusion existed between the agency and the company.

The invoice constituted a solicitation and billing for an extension of policy No. FC 99877. The plaintiffs accepted that solicitation on August 28, 1967, by making payment. The renewal contract of insurance then arose subject to the right of the company to cancel the same in accordance with the terms of the policy. It at no time elected to cancel the renewal.

The communication of September 21, 1967, notified the plaintiffs: ". . . your insurance has lapsed for nonpayment." This last communication was without legal effect because payment had been made.

On November 19, 1967, the accident occurred which made the coverage important. The agency was notified. The company denied coverage. On December 15, 1967, the agency mailed James Squires a check for $35, accompanied by a letter which contained the following: "I assume that the policy period from March 1, 1967 to September 1, 1967, which was billed out of this office to you was paid for in our office, and also to the Implement Dealers. Therefore, this would make a credit to you of $35.00, which we are including our check for." The check was returned by Maxine Squires to the agency.

The company also argues that even if the $35 paid to the agency on August 28, 1967, is applied to the renewal premium it is not payment in full since the premium was then $40 and the obligation to pay the premium is ordinarily an indivisible obligation to pay the entire premium so that a forfeiture is not prevented

by part payment thereof. The company cites McGarrah v. Stockton (Mo.), 425 S. W. 2d 223. Even if it be assumed the payment was only partial, yet under the circumstances of this case it merely made the policy voidable at the election of the insurers. 2 Long, Law of Liability Insurance, § 7.01 et seq., p. 17-2. The cited case is not applicable for the reason that there the insurer gave notice of cancellation under the terms of the policy. Such is not the case here where the insurer erroneously assumed there was a lapse of the policy because premium had allegedly not been paid. The notice of September 21, 1967, is not the same as a cancellation. Whether or not the policy lapsed would depend upon the underlying fact of whether or not the premium was paid or unpaid. We hold: An erroneous statement by the insurer to the insured that an insurance policy has lapsed for alleged nonpayment of premium is not the legal equivalent of a notice of election to cancel under the terms of the policy. Where an insured because of errors in a billing by the agent of an insurance company pays only that portion of the renewal premium set forth in the billing instead of the entire premium, the renewal policy is not void but is voidable at the election of the company under the terms of the policy.

The trial court properly found that a continuation of policy No. FC 99877 for the 6-month renewal period arose out of the billing by the invoice and payment by plaintiffs on August 28, 1967.

AFFIRMED.

CITIZENS STATE BANK, DECATUR, NEBRASKA, A CORPORATION, APPELLEE, V. BEERMANN BROS. DEHY, A PARTNERSHIP, APPELLANT, IMPLEADED WITH DAVID VAVRA, APPELLEE.
198 N. W. 2d 458

Filed June 9, 1972. No. 38358.

1. **Bills and Notes: Time: Contracts.** Unless otherwise specified,

a consent to extension of a promissory note authorizes a single extension for not longer than the original period of the note. § 3-118, U. C. C.

2. **Bills and Notes: Contracts: Parties.** An agreement by the holder to suspend the right to enforce a promissory note against the maker, without the consent of an endorser and without an express reservation of rights against him, discharges the endorser from liability. § 3-606, U. C. C.

Appeal from the district court for Dakota County: JOSEPH E. MARSH, Judge. Reversed and remanded with directions.

Smith, Smith & Boyd, for appellant.

Ryan & Scoville, for appellee Citizens State Bank.

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

BOSLAUGH, J.

This is an action upon two promissory notes payable to Beermann "Quality" Fertilizers executed on October 2, 1967, by David Vavra. The notes were endorsed in blank and transferred before maturity to the plaintiff bank by the payee for their full value. The payee is a division of Beermann Bros. Dehy, a partnership, and will be referred to as the defendant.

The notes were not paid at maturity on January 2, 1968. On August 29, 1968, Vavra executed two extension notes to the plaintiff which extended the time for payment of the original notes to December 20, 1968. The extension notes were executed without the knowledge or consent of the defendant except as authorized by the original notes.

The extension notes were not paid at maturity. This action was brought on May 2, 1969, against the defendant and Vavra. The defendant appeals from a judgment for the plaintiff.

The principal issue relates to the extension notes executed by Vavra on August 29, 1968. The original notes each provided on their face: "The makers, sureties and

guarantors of this note hereby severally waive presentment for payment, notice of nonpayment, protest, and notice of protest, and diligence in bringing suit against any party thereto and consent that time of payment may be extended without notice thereof * * *."

Under the Uniform Commercial Code, unless otherwise specified, a consent to extension authorizes a single extension for not longer than the original period of the note. § 3-118 (f), U.C.C. The extension here was for 113 days, 21 days longer than the period of the original notes. An agreement by the holder to suspend the right to enforce an instrument against the maker without the consent of an endorser discharges the endorser. § 3-606 (1) (a), U.C.C. There being no reservation of rights against the defendant, the extension to Vavra by the plaintiff beyond the period authorized in the notes discharged the defendant. See, Kratovil v. Thieda, 36 Ill. 2d 247, 222 N. E. 2d 485; Ford v. Loret, 258 Md. 110, 265 A. 2d 202; American State Bank v. Leaver, 261 Iowa 124, 153 N. W. 2d 348.

It is unnecessary to consider the other assignments of error.

The judgment of the district court is reversed and the cause remanded with directions to enter a judgment dismissing the action as to defendant Beermann Bros. Dehy.

REVERSED AND REMANDED WITH DIRECTIONS.

ORILLA E. SHELDON, EXECUTRIX OF THE ESTATE OF LILLIE M. SCHNEIDER, DECEASED, APPELLEE, V. SANDRA WATKINS, APPELLANT, IMPLEADED WITH ORILLA E. SHELDON ET AL., APPELLEES.

198 N. W. 2d 455

Filed June 9, 1972. No. 38363.

1. **Property: Joint Tenancy: Wills.** Property owned in joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of the other and does not

pass by virtue of the provisions of the will of the first joint tenant to die.

2. Wills. In the construction of a joint and mutual will the intention of the testators if ascertainable from the language of the will and not contrary to law must govern.

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

Nate C. Holman and Brian Watkins, for appellant.

Charles S. Reed and Bernard T. Pipher, for appellees.

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

CLINTON, J.

This is an action for a declaratory judgment by the plaintiff as executrix of the estate of Lillie M. Schneider against the defendant Sandra Watkins, a granddaughter of the decedent. The purpose of the action is to have declared illegal and void certain donative transfers made by the decedent in her lifetime to the above-named defendant. Two items of property are involved. The first is a Cadillac automobile, title to which was transferred by the decedent naming the defendant coowner with right of survivorship in the certificate of title. The decedent also named defendant as joint owner of a certificate of deposit in the amount of $20,000. The automobile and the certificate of deposit were delivered to defendant during the lifetime of the decedent. The defendants other than Sandra Watkins are the daughters and heirs-at-law of the decedent and the beneficiaries named in her will.

The petition in addition to declaratory relief prayed for the return of the property or a money judgment. The foundation of the plaintiff's claim as alleged in the petition is that the decedent and her predeceased husband, John Schneider, "by the execution of a joint and severable (sic) Will . . . entered into an irrevocable mutual agreement whereby they mutually agreed that the sur-

vivor would make no disposition of their property or the property of the survivor of them, contrary to the provisions of the Will."

A jury was waived and the cause tried by the court upon a stipulation of facts entered into by the parties and certain documentary evidence on which foundation was waived. The stipulation includes an admission by the plaintiff: "That almost all property owned by John Schneider and Lillie M. Schneider, at the time of the death of John Schneider, was owned jointly by John Schneider and Lillie M. Schneider; that this included a bank account at the Bank of Valley, Valley, Nebraska, the real estate on which the parties resided and the Cadillac automobile described in plaintiff's petition which were owned by them as joint tenants with right of survivorship." Included in the evidence is the inventory of the estate of John Schneider. All the property described in the inventory save the household goods is stated therein to be held in "Joint Tenancy." The inventory of the estate of the decedent describes the same property save a quantity of grain and one bank account which appears only in the inventory of the estate of John Schneider. These inventories are signed by the plaintiff, the first-mentioned as administratrix CTA and the second-mentioned as executrix of the estate of Lillie M. Schneider. We interpret the stipulation taken together with the recitals in the inventories as to the nature of title to constitute an agreement of the parties that the source of the $20,000 certificate of deposit was property which passed from John Schneider to Lillie M. Schneider by survivorship.

The trial court found that: "Lillie M. Schneider, deceased, prior to her death, improperly diverted from her legatees and devisees the $20,000.00 Certificate of Deposit and the 1966 Cadillac automobile." It rendered judgment against Sandra Watkins for $23,200.

We reverse the judgment and direct the plaintiff's petition be dismissed.

As we view this case it presents only questions of law. The will was executed by John Schneider and Lillie M. Schneider in 1954. The record does not show what property was owned by them at that time or the nature of the title. The pertinent provisions of the will are as follows:

"In the name of God, amen. We, JOHN SCHNEIDER and LILLIE M. SCHNEIDER, husband and wife, of Sarpy County, Nebraska, both being of sound mind and disposing memory, blessed be to God for the same, hereby make our joint and mutual Will in manner and form following, that is to say:

"FIRST. The first to die directs that his or her funeral expenses, just debts and the costs and expenses of administering his or her estate be first paid.

"SECOND. The first to die hereby gives, devises and bequeaths to the survivor, absolutely and forever, the remainder of his or her estate, both real and personal, after the payment of the obligations referred to in paragraph one hereof. . . .

"FOURTH. In case the joint makers of this Will should die at or about the same time, or in case the survivor should not live long enough to probate the Will of the first to die, then and in such case the joint makers of this Will hereby make the following distribution of their property and of the property of each of them, to-wit:

"To our daughters, ORILLA E. SHELDON, EDITH M. HARDY and SYBIL T. ANDERSON, to share and share alike, and we hereby appoint our daughter, ORILLA E. SHELDON, Executrix hereof in the event either the Executor or Executrix cannot serve as provided in paragraph three hereof.

"FIFTH. We hereby revoke all former Wills made by either of us.

"SIXTH. Each of us solemnly promises the other

that he or she will not revoke or change this Will or make any disposition of his or her property by Will, contract, gift or otherwise without at least five days' notice in writing to the other of his or her intention to do so; that any disposition of his or her property in violation of this provision shall be void. No change of any kind shall be made by the survivor affecting the disposition of the property by the first to die made by this Will."

John Schneider died December 6, 1969, and the will was admitted to probate as his will on March 13, 1970. Lillie M. Schneider died July 7, 1970, and the will was admitted to probate as her will on August 3, 1970. No further proceedings were had in the estate of John Schneider until after the death of Lillie M. Schneider.

Except for the contingencies mentioned in paragraph FOURTH, i.e., if the makers die at about the same time or the survivor dies before the will is admitted to probate, the will does not by its terms purport to make any disposition of the property of the survivor. The usual dispositive provision by the survivor is absent.

It is apparent that the portion of the first sentence of paragraph SIXTH preceding the semicolon pertains only to dispositions made during the lifetime of both testators because it provides for 5 days' written notice to the other. The literal language of the provisions making void transfers in violation of this provision obviously pertains only to dispositions made contrary to the requirement of "five days' notice in writing."

This leaves for determination the contention of the plaintiff that the last sentence of paragraph SIXTH as follows: "No change of any kind shall be made by the survivor affecting the disposition of the property by the first to die made by this Will," constitutes a binding contractual commitment that the survivor would not dispose of any of his, her, or their property by gift during the survivor's lifetime to anyone other than the beneficiaries named in paragraph FOURTH. The literal

language of that provision makes it apply only to property, disposition of which has been made "by the first to die . . . by this Will." It does not by its terms apply to property passing outside the will. We are not free to rewrite the will to make it apply as the plaintiff contends and as apparently the trial court found. To do so would do violence to the intention of the testators as expressed when and by whatever means they acquired or placed their holdings in joint tenancy. Since the record is silent on the point, this may have been done as far as we know after the will was made and with the very intention of avoiding its restrictions.

It may be argued that because the will makes no disposition of the estate of the survivor except for the contingencies referred to in paragraph FOURTH and the testators would be deemed to be aware of this, that therefore the last sentence of paragraph SIXTH could apply only to property passing outside the will or by intestacy and so the testators must have intended that it so apply. Even if this argument be acceptible as to intestate property we cannot even by a liberal construction of the will ascertain any intent on the part of the two testators to restrict the right of the survivor to dispose of property passing by survivorship outside the will. The intent of a testator must be ascertainable from the provisions of the will itself. Burton v. Defenbaugh, 132 Neb. 851, 273 N. W. 489; Jacobsen v. Farnham, 155 Neb. 776, 53 N. W. 2d 917. Property owned in joint tenancy passes to the surviving joint tenant by virtue of the nature of the tenancy and not under the law of descent and distribution or by virtue of the provisions of the will of the first joint tenant to die. 48 C. J. S., Joint Tenancy, § 1b, p. 910; Arthur v. Arthur, 115 Neb. 781, 215 N. W. 117; McConnell v. McCook Nat. Bank, 142 Neb. 451, 6 N. W. 2d 599; McPherson v. Minier, 179 Neb. 212, 137 N. W. 2d 719.

For the foregoing reasons we are not required to reach and determine the validity of the defendant's con-

tention that the specifications of paragraph SIXTH restricting the power to alienate are repugnant to the apparent fee interest devised by paragraph SECOND of the will. Neither are we required to take note of the plaintiff's contention that the failure of the defendant Sandra Watkins to object to the probate of the will as the will of Lillie M. Schneider in some way estops her from defending this action.

We hold the property here in question having passed to Lillie M. Schneider by virtue of her being the surviving joint tenant therein that she was the absolute owner thereof and had the power of disposition of that property, and further that it is not possible by a construction of the will to ascertain an intent on the part of the testators to make the restrictive provisions thereof applicable to property passing by survivorship outside the will.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

JENNIE HILTON GARWOOD ET AL., APPELLANTS, V. DRAKE UNIVERSITY, A CORPORATION, APPELLEE.
198 N. W. 2d 336

Filed June 9, 1972. No. 38387.

1. **Trusts: Charities: Equity.** Charitable trusts are special favorites of courts of equity which will preserve and enforce them if possible under the rules of law.
2. **Trusts: Charities.** If the dominant purpose of a charitable trust is certain, it will not be denied execution because of absence of perfection of detail or the presence of immaterial and inappropriate language in the instrument creating the trust.
3. **Wills.** The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law.
4. ———. The basic object of will construction is to ascertain the intent and purpose of the testator as shown by the will, and then give that intention effect if not contrary to law.
5. **Wills: Charities: Gifts.** A charitable gift will not be permitted

to fail because of any mistake or ambiguity in describing the intended beneficiary or expressing its purpose if from the language of the bequest, when construed in the light of all the facts, the intent of the donor is reasonably apparent.

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

Ray L. Svehla, John E. Dougherty, and Herman Ginsburg, for appellants.

Davies, Cheuvront & Sutter, for appellee.

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

NEWTON, J.

In this action the residuary legatees under the last will and testament of Estella A. McCloud, deceased, contest a cash bequest to Drake University. Judgment was entered for the university and that judgment is affirmed.

The will of testatrix was executed on August 31, 1960, and admitted to probate on April 4, 1969, following the death of testatrix on March 3, 1969. It contained the following provision: "I give and bequeath to the Divinity School of Drake University * * * for scholarship purposes the sum of $10,000.00 * * * ."

Drake University was originally founded as a bible school by the Disciples of Christ for the purpose of training ministers and christian laymen and this remains its purpose. As the university developed, it instituted various colleges such as Fine Arts, Education, Business Administration, etc. Among these colleges was the Divinity School training students for degrees of Bachelor of Divinity and Master of Religion. In 1968 the Divinity School was phased out and a Department of Religion installed. The Divinity School had been a graduate school or seminary. The new department is primarily an undergraduate college although the same general courses of study are available, with the same

physical and library facilities, and the same instructors or professors. Apparently the identical religious training remains available with the exception of sectarian-type courses and the failure to award strictly religious degrees. In some churches the graduates may still step directly into the ministry although others require additional training in seminaries. Present enrollment in the Department of Religion is approximately 1,100 of whom 19 are preministerial students, all but 2 of whom receive financial assistance. The evidence indicates that many ministerial students now seek a Ph.D. degree rather than the religious degrees. Drake University still maintains separate endowment funds for the Department of Religion and scholarship funds for ministerial students.

The residuary legatees contend that abolition of the Divinity School has caused the bequest to the school to lapse. An analysis of the terms of the bequest is necessary. Although the will states that the bequest is to the "Divinity School," it is apparent this was not intended. The Divinity School was not a legal entity at any time but simply an educational division of Drake University. The bequest was of necessity a bequest to the "University" and the mention of the Divinity School is directory in nature. It is indicative of the testatrix' intent to provide scholarship funds for the use of students in the Divinity School. Since the Divinity School was a school for the education and training of preministerial students, it appears that testatrix intended to assist in the education of this type of student. A preministerial education is still available at the university and it still has students who intend to enter the ministry. The funds may still be applied by the university for the purpose specified by testatrix. It is true that these students are no longer graduate students and that the Department of Religion, unlike its predecessor the Divinity School, is not a graduate college. This does not affect the obvious dominant intent of testatrix to further

or assist in the education of preministerial students.

"Charitable trusts are special favorites of courts of equity which will preserve and enforce them if possible under the rules of law." Hobbs v. Board of Education, 126 Neb. 416, 253 N. W. 627. See, also, Muller v. Nebraska Methodist Hospital, 160 Neb. 279, 70 N. W. 2d 86.

"If the dominant purpose of a charitable trust is certain, it will not be denied execution because of absence of perfection of detail or the presence of immaterial and inappropriate language in the instrument creating the trust." Board of Trustees of York College v. Cheney, 158 Neb. 292, 63 N. W. 2d 177.

"The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law." Trute v. Skeede, 162 Neb. 266, 75 N. W. 2d 672.

"The basic object of will construction is to ascertain the intent and purpose of the testator as shown by the will, and then give that intention effect if not contrary to law.

"A charitable gift will not be permitted to fail because of any mistake or ambiguity in describing the intended beneficiary or expressing its purpose if from the language of the bequest when construed in the light of all the facts, the intent of the donor is reasonably apparent." Nat'l. Bk. of Commerce Trust & Sav. Assn. v. Crowell Memorial Home, 181 Neb. 341, 148 N. W. 2d 304.

We conclude that the intent of testatrix is clear and that it can and will be complied with by the payment of the bequest to Drake University. The bequest has not lapsed.

The judgment of the district court is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent because I want no part in making a new will for the testator.

The bequest was specifically to the Divinity School of Drake University. The Divinity School at the time the will was made was a graduate college or seminary, conferring divinity degrees. Since the making of the will, the Divinity School has passed out of existence. To now hold that the Drake University undergraduate school took its place, because it has some religious courses which are a part of the curriculum of every church-related school, is to strong arm the will and the law.

INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION, APPELLANT, V. COUNTY OF HALL, A BODY POLITIC AND CORPORATE, APPELLEE.
198 N. W. 2d 490

Filed June 16, 1972. No. 38136.

1. **Insurance: Statutes.** Section 44-501, R. R. S. 1943, directly conflicts with section 44-380, R. R. S. 1943.
2. **Insurance: Statutes: Contracts.** Section 44-501, R. R. S. 1943, as amended and reenacted by the 1951 Legislature, provides that a fire insurance policy shall conform as to provisions, agreements, and conditions with the 1943 Standard Fire Insurance Policy of New York, and declares that no other or different provision, agreement, or clause shall be made a part of such fire insurance policy.
3. **Insurance: Statutes: Contracts: Damages.** Under section 44-501, R. R. S. 1943, as amended in 1951, an insured's recovery on a fire insurance policy is limited by the provisions of the policy as written in conformity with the 1943 Standard Fire Insurance Policy of New York.

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

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

Sam Grimminger and Robert Paulick, for appellee.

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

WHITE, C. J.

A house owned by the defendant was completely destroyed by fire. Pursuant to section 44-501, R. R. S. 1943, the policy insured the dwelling "to the extent of the actual cash value of the property at the time of the loss," the "amount of insurance" written in the policy was in the sum of $8,500. Section 44-380, R. R. S. 1943, provides: "* * * the amount of the insurance written on such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages." The question involved is whether the insured may recover the full face value of the policy in the sum of $8,500 or only the actual cash value of the property at the time of the loss. The district court held that the insured could recover the full face amount in the sum of $8,500. We reverse the judgment of the district court.

Section 44-380, R. R. S. 1943, requires a "valued" policy in which the face amount of the insurance becomes liquidated damages and is recoverable irrespective of the actual value of the loss. Section 44-501, R. R. S. 1943, on the other hand, incorporates the provisions of the 1943 Standard Fire Insurance Policy of the State of New York, the provision in the insurance contract here, and requires an "open" policy providing recovery of the actual value of the loss, and the amount of the insurance designated in the policy being a limitation on recovery. Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141 (1953). As a matter of original analysis and on authority, there is a direct conflict between the two statutory provisions. Borden v. General Insurance Co., *supra;* State ex rel. Martin v. Howard, 96 Neb. 278, 147 N. W. 689 (1914); Fadanelli v. National Security Fire Ins. Co., 113 Neb. 830, 205 N. W. 642 (1925). Prior to 1951, section 44-501, R. S. 1943, read

in part as follows: "No fire insurance company shall issue any fire insurance policy covering any property or interest therein in this state other than on a form prescribed by the Department of Insurance *as nearly as practicable* in the form known as the New York standard as adopted by the state in the year 1913 * * *." (Emphasis supplied.) The words "as nearly as practicable" in the pre-1951 statute were seized upon in State ex rel. Martin v. Howard, *supra,* and Fadanelli v. National Security Fire Ins. Co., *supra,* to reconcile the two statutes. Section 44-501, R. R. S. 1943, in its original context, was adopted in 1913, and in 1914 this court in State ex rel. Martin v. Howard, *supra,* stated as follows: "The act which we are now considering consists of nearly 200 sections. Scattered throughout there are sections which are inconsistent with the New York standard form, such as * * * the provision in Section 74 providing for valued policies." That case also stated: "The only matter in which any discretion in this regard is left to the board is that the form it is required to prepare shall be 'as nearly as practicable in a form known as the New York standard, as now or may hereafter be constituted.' This is an exceedingly narrow limitation which was no doubt inserted in order that the form of the New York policy might be modified so as to conform to a number of other provisions in the act which would be inconsistent with it if copied in its original form." In 1925 this court in Fadanelli v. National Security Fire Ins. Co., *supra,* again ruled on the question as follows: " 'We are of the opinion that it was the intention of the legislature that the New York form should be adopted as the basis of the insurance contract, and that the words "as nearly as practicable" should be construed to mean as nearly as practicable considering the other provisions contained in the insurance code which in anywise are inconsistent with or modify the provisions of the New York standard form of contract.' "

See, also, Mayfield v. North River Ins. Co., 122 Neb. 63, 239 N. W. 197 (1931).

This reconciliation was eliminated by the Legislature in 1951 when it enacted a new version of section 44-501, R. R. S. 1943. The new section, as amended in 1951, provides: "No policy or contract of fire and lightning insurance, including a renewal thereof, shall be made, issued, used or delivered by any insurer or by any agent or representative thereof, on property within this state other than such as *shall conform in all particulars* as to blanks, size of type, *context, provisions, agreements and conditions* with the 1943 Standard Fire Insurance Policy of the State of New York, a copy of which shall be filed in the office of the Director of Insurance as standard policy for this state, *and no other or different provision, agreement, condition or clause shall in any manner be made a part of such contract* or policy or be endorsed thereon or delivered therewith except as provided in subsections (1) to (9) of this section." (Emphasis supplied.)

Extended analysis is not indicated. The intent of the Legislature is abundantly clear. The holdings of Howard and Fadanelli were destroyed with the elimination of the words "as nearly as practicable." In this new amendment and act not only were these words of reconciliation eliminated, but the statute affirmatively declares that no other or different provision, agreement, condition, or clause shall in any manner be made a part of such contract or policy.

The fundamental principle of statutory construction is to determine the intent of the Legislature. There is no ambiguity or gap in the new statute which indicates or requires us to resort to any of the traditional rules of statutory construction in order to ascertain the intent of the Legislature. The new statute says what it means and means what it says, and that declaration is that no other or different provision, agreement, condition, or

clause shall in any manner be made a part of such contract or policy.

We observe that the Legislature, when enacting the 1951 amendment, is presumed to have known the preexisting law. In enacting this later amendatory statute there could be no other conclusion but that the language was intentionally changed for the purpose of effecting a change in the law itself. Familiar rules on statutory construction also strongly support this conclusion. See, Hills v. Burnett, 172 Neb. 370, 109 N. W. 2d 739; Hurley v. Brotherhood of R. R. Trainmen, 147 Neb. 781, 25 N. W. 2d 29; Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 283 N. W. 366.

We therefore come to the conclusion that section 44-501, R. R. S. 1943, as amended in 1951, and now the present existing statute, controls the conflict between these statutes and that the defendant's recovery is limited by the provisions of the policy as written in conformity with the 1943 Standard Fire Insurance Policy of New York.

This is a declaratory judgment action to determine which provision of the statute prevails. No issue is presented to us, therefore, as to the resolution of the amount of the actual loss of the defendant under the terms of the policy.

The judgment of the district court is, therefore, reversed and the cause remanded with directions to enter a judgment in conformity with the conclusion reached herein.

REVERSED AND REMANDED WITH DIRECTIONS.

NEWTON, J., dissenting.

I respectfully disagree with the majority opinion. Under that opinion an insurance company may deliberately and knowingly overinsure a property against loss by fire. It may, over a period of years, collect premiums on the basis of the inflated value and then, when a loss occurs, contend that the actual value of the property was less than its insured value and pay

only the actual value. It would seem that if this is to be accepted as the law, equity would require the insurer to at least refund, with interest, all excess premiums collected.

The opinion is based on the theory that Laws 1951, c. 139, § 1, p. 572, repealed by implication section 44-380, R. R. S. 1943. This court stated in Steeves v. Nispel, 132 Neb. 597, 273 N. W. 50: " 'Repeals by implication are not favored, and a construction of a statute which, in effect, repeals another statute will not be adopted, unless such construction is made necessary by the evident intent of the legislature.' "

In Bass v. County of Saline, 171 Neb. 538, 106 N. W. 2d 860, we stated: "Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication." In that case it is further stated that: "Statutes pertaining to the same subject matter should be construed together. Such statutes, being pari materia, must be construed as if they were one law and effect given to every provision."

To the same effect is State ex rel. Retchless v. Cook, 181 Neb. 863, 152 N. W. 2d 23, wherein it is stated: "All statutes relating to the same subject should be construed and considered together for the purpose of giving effect to the legislative intention. All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision."

"In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it."

As pointed out in the majority opinion, section 44-

501, R. R. S., 1943, prior to 1951, stated that the New York standard form of policy should be followed "as nearly as practicable." These words were construed by this court as an indication that it was not the legislative intent to render section 44-380, R. R. S. 1943, nugatory. See, Fadanelli v. National Security Fire Ins. Co., 113 Neb. 830, 205 N. W. 642; State ex rel. Martin v. Howard, 96 Neb. 278, 147 N. W. 689.

In State ex rel. Martin v. Howard, *supra,* it is pointed out that the original act required deviation in many respects from the New York standard form. In Fadanelli v. National Security Fire Ins. Co., *supra,* reasons other than the inclusion of the words "as nearly as practicable" were given for construing the valued policy act in conformity with the requirements of section 44-380, R. R. S. 1943. It is therein stated: "The valued policy act was designed to repress an evil practice, and thereby advance public interest and promote public justice by securing for the assured a policy payment, in the event of total loss, of the full amount of indemnity for which he contracted, and for which he paid. In the present instance we have a recurrence of the evil practices above referred to, to wit: The endeavor to secure a settlement by the insurer for less than his contract in terms imposes upon him. This conclusion certainly cannot be gainsaid. It must be admitted that the purpose of the rebuilding clause in the policy in question, and its only purpose, was and is that it might enable the defendant company, in case of a total loss, to discharge its liability on the policy by an expenditure of a less sum of money than would be required to pay the amount of insurance named in the policy. In no other way could the company derive any benefit from that clause. If the expense of rebuilding would exceed or even equal the amount of the insurance mentioned, there could be neither advantage nor object on the part of the company to undergo that trouble, and when the expense is less the performance of that condition by

rebuilding the destroyed property would be but a mode of satisfying the obligations of the company by payment to persons other than the assured of a sum less than became payable on the policy according to the provisions of the statute. Thus, the evident purpose by this method is to accomplish by indirection the effect of a transaction expressly prohibited by the ordinary construction of the terms of the section of the statute involved."

There never has been a direct attempt to repeal section 44-380, R. R. S. 1943. The section has been consistently enforced by the decisions of this court. Certainly the existence of these court decisions and of the statute were within the knowledge of the legislators, yet the statute was not repealed. The implication is that it was the legislative intent to leave it in full force and effect. Section 44-501, R. R. S. 1943, is a general statute dealing with the New York standard form whereas section 44-380, R. R. S. 1943, is a special statute enforcing the insurance contract according to the amount of insurance stipulated and paid for. Under the rules of statutory construction, the special statute prevails over the general statute. The two must be construed together and effect given to both. Repeals by implication are not favored. Particularly is this true when a long-settled and well-recognized legal doctrine is at issue and there has been no attempt to repeal the statute in controversy.

As pointed out in Fadanelli v. National Security Fire Ins. Co., *supra,* there are good reasons for sustaining section 44-380, R. R. S. 1943. To hold otherwise is tantamount to sanctioning a legal fraud. It promotes a situation whereby, as hereinbefore pointed out, fire insurance companies may knowingly sell excess insurance policies, collect premiums on the excess insurance, and then in the event of a loss pay off for a lesser amount. Certainly, such was not contemplated by the Nebraska Legislature.

SPENCER, J., joins in this dissent.

CLINTON, J., concurring.

I concur in the opinion of White, C. J. In so doing I call attention to the provisions of sections 44-601, 44-602, and 44-603, R. R. S. 1943, which make it unlawful for any insurance company or agent to issue, or any person having an interest in property to procure a fire insurance policy in excess respectively of the fair value of the property, or the value of the insured's interest in the property. While these statutes refer only to the hazard of fire and may be intended primarily to discourage arson they are, since the other hazards to be insured against are normally included in the same policy and therefore the same stated value must apply to all hazards, indicative of a general legislative intent to limit indemnity to actual cash value. In this light section 44-380, R. R. S. 1943, is an anomaly.

As a practical matter under the opinion in this case no unfairness can result if both insurer and insured make an appropriate and mutual determination of the actual cash value to be stated in the policy.

McCOWN, J., dissenting.

I concur generally in the dissent. In addition, it should be noted that the two statutes involved here can be reconciled within the general-special classification limits. The provisions of the New York standard policy apply to "*all* direct loss by fire or lightning" to *any* property, real or personal, insured under such policy. The valued policy act provides: "Whenever any policy of insurance shall be written to insure any *real property* in this state against loss by fire, tornado, or lightning, and the property insured shall be *wholly destroyed*, * * * the amount of the insurance written on such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages." § 44-380, R. R. S. 1943. (Emphasis ours.)

The valued policy legislation was enacted many years

before the amendment to the statute requiring the use of the New York standard form without variation. There are no express words indicating an intent to repeal any other statute contained in either of the two statutes. To assume that the Legislature intended to repeal the valued policy act when it enacted the statute dealing with the complete New York fire insurance policy form many years later ignores practical realities as well as traditional rules of statutory interpretation.

The ancient maxim that repeals by implication are not favored "has peculiar force in the case of laws of special and local application, which are never deemed repealed by general legislation except upon the most unequivocal manifestation of intent to that effect." Mancuso v. State, 123 Neb. 204, 242 N. W. 430. There was no such intent here.

SPENCER, J., joins in this dissent.

FRAZIER, INC., A NEBRASKA CORPORATION, APPELLEE, V. 20TH CENTURY BUILDERS, INC., ET AL., APPELLEES, OMAHA POURED CONCRETE COMPANY, A CORPORATION, THIRD PARTY PLAINTIFF, APPELLEE, V. TRANSAMERICA INSURANCE COMPANY, A CORPORATION, THIRD PARTY DEFENDANT, APPELLANT.

198 N. W. 2d 478

Filed June 16, 1972. No. 38170.

1. **Judgments: Pleadings.** The purpose of a summary judgment proceeding is to pierce allegations of pleadings and to show conclusively that controlling facts are otherwise than alleged and that the moving party is entitled to judgment as a matter of law.
2. **Insurance: Pleadings: Contracts.** The obligation to defend a suit for an insured should be determined on the basis of whether the petition filed against him attempts to allege a liability within the terms of the policy.
3. **Attorneys at Law: Affidavits.** An attorney at law who is an attorney for a party in any proceeding in any court of this

state shall not be disqualified as the person before whom the affidavit is made by reason of such representation.

Appeal from the district court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Haney, Wintroub & Haney, for appellant.

Walsh, Walentine, Wolfe, Miles & Katskee, for appellee Omaha Poured Concrete Co.

Schmid, Ford, Snow, Green & Mooney and Boland, Mullin, Walsh & Cooney, for appellee Frazier, Inc.

Spielhagen, Matejka & Spielhagen and Young, Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellees 20th Century Builders, Inc., et al.

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

SPENCER, J.

This appeal is from the sustaining of a motion for summary judgment in a third party action. The principal action was a mechanic's lien foreclosure brought by Frazier, Inc., against Majors, Inc., et al., in which Omaha Poured Concrete Company was subsequently included as a defendant. Majors filed a cross-petition against Fraizer and Omaha Poured, alleging damages as the result of the negligence of Frazier in the installation of the plumbing system which resulted in the collapse of a cement floor poured by Omaha Poured. Omaha Poured was given leave to file a third party complaint against Transamerica Insurance Company as a third party defendant, to recover under the terms of an insurance policy providing coverage to Omaha Poured for consequential damages. We affirm.

Frazier, as a subcontractor under Omaha Poured, installed the plumbing in a building being erected for Majors. The plumbing was installed with removable sleeves around the floor drain to permit the installation of a poured concrete floor. After the completion of the

building, Majors moved its plastic moulding machines onto the concrete floor and started operations. These machines required the discharge of large quantities of water through the drain. After the first day's operation, the concrete floor pulled away from the wall, buckled, and collapsed. It was then discovered that the sleeves had not been properly installed, and after they were removed the water, instead of running off through the drain, went through an unsealed gap into the ground under the floor, undermining it, causing the floor to sink. Notice was immediately given to Transamerica who investigated the damage. Omaha Poured replaced the floor at its own expense. The present third party action involves the amount paid to settle the consequential damages sustained by Majors because of the collapse of the floor, and does not include any part of the cost of replacing the floor.

Omaha Poured was granted leave to file its third party action against Transamerica January 22, 1969. The petition filed January 30, 1969, alleged that Transamerica is obligated to defend Omaha Poured, and to pay any sums of money which may be awarded against Omaha Poured as the result of consequential damages sustained by Majors. Omaha Poured alleged it complied with all of the conditions precedent of said policy, but Transamerica refused to provide coverage for said incident which falls within the terms and conditions of the policy, and has refused to defend Omaha Poured. On June 5, 1969, the issues raised by the third party petition were ordered separated for trial purposes from the issues raised by the principal pleadings.

On July 14, 1969, the day the main action was called for trial, Omaha Poured made a settlement with the other defendants, and judgment was entered against it for Majors' consequential damages in the amount of $14,298.22. The agreement included a covenant that the judgment creditor would not execute against the personal assets of Omaha Poured for more than $1,500 of

the judgment, and would thereafter look to the Transamerica policy for all remaining sums thereunder.

Immediately previous, and on the day judgment was entered, Majors amended its cross-petition to include a special allegation of negligence against Omaha Poured. No notice was given Transamerica of this amendment, but a copy of the judgment entry was mailed to it the same day the judgment was entered.

The trial court sustained Omaha Poured's motion for summary judgment, specifically finding that there was no substantial controversy as to the following material facts: (1) Transamerica knew of the collapse of the floor shortly after it occurred and knew that the potential loss and claim by Majors, Inc., would include not only damage to the floor itself but the very consequential damages which Majors, Inc., ultimately sought by the instant litigation. (2) Pursuant to investigation by representatives of Transamerica, it unequivocally and unconditionally denied any coverage on the policy of insurance for the incident involved herein. (3) Transamerica refused to accede to the demand of Omaha Poured that it take over and defend the cross-petition filed against Omaha Poured by Majors, Inc. (4) Omaha Poured, without the knowledge or consent of Transamerica, entered into a compromise settlement and agreement with Majors, Inc., resulting in a consent judgment against Omaha Poured for the consequential damage sustained by Majors, Inc., with an agreement that no more than $1,500 of the judgment would be collected from Omaha Poured personally. (5) The amendments to the cross-petition of Majors, Inc., just prior to the entry of the judgment were made without the knowledge or consent of Transamerica. (6) The evidence is sufficient to support a finding of legal liability by Omaha Poured to Majors, Inc., for the consequential damage loss to Majors, Inc., resulting from the collapse of the floor, in the amount of the judgment.

The trial court made the following specific findings

of law: First, the policy in question affords coverage to Omaha Poured for the consequential damage claim asserted by Majors, Inc. Exclusions raised by Transamerica in support of its denial of coverage do not apply.

Second, once Transamerica denied coverage to Omaha Poured in the manner in which it did, Transamerica breached its contract with Omaha Poured, relieving Omaha Poured of any obligation under the contract to notify or deal with Transamerica any further regarding the claim.

Third, the allegations contained in the cross-petition of Majors, Inc., prior to the amendments made on July 14, 1969, together with all the pleadings in the case, were sufficient to compel Transamerica to assume the defense of Omaha Poured, and its refusal of Omaha Poured's demand that it do so constituted a breach of its contract with Omaha Poured.

Fourth, Transamerica's breach of its contract with Omaha Poured, by denying coverage and refusing to defend its insured, entitled Omaha Poured to enter into the most favorable settlement and consent judgment possible, which it did.

Fifth, the consent judgment, supported by the evidence, was obtained in good faith and without fraud or collusion. Therefore, having declined to defend the action when called upon to do so, Transamerica may not again litigate the issues that resulted in the judgment.

Transamerica alleges the following assignments of error: (1) Sustaining the motion for summary judgment; (2) determining that Transamerica unequivocally and unconditionally denied any coverage on the policy of insurance; (3) determining there was no genuine issue of material fact; (4) determining that the consent judgment was obtained in good faith and without fraud and collusion; (5) determining that Omaha Poured owed no duty to Transamerica to notify it of amendments to the cross-petition; (6) determining that Transamerica had a duty to defend Omaha Poured under the allega-

tions contained in the cross-petition prior to its amendment; (7) admitting into evidence affidavits offered by Omaha Poured; and (8) failing to sustain Transamerica's motion to vacate the judgment.

Only one of the court's findings of fact set out above is questioned in Transamerica's brief, that being No. (2), which is made the subject of assignment of error No. 2. However, even as to this assignment, nowhere in the brief does Transamerica point out in what manner this finding is incorrect or the subject of any factual controversy. Dwight Stephens, Transamerica's claim representative who first investigated the claim, stated in his affidavit that after completing his investigation he informed Omaha Poured's representative that no coverage was afforded to the insured for the collapse of the floor for the reason that the aforementioned policy did not provide coverage for completed operations and products liability, and that he thereafter reported his findings to his superior, Harold Pace. The affidavit of Harold Pace states that coverage was denied under said policy shortly after May 27, 1967, for the reason that coverage was not afforded thereunder to the insured for completed operations and products liability coverage. There can be no question that Transamerica at all times was insisting that the damage was for completed operations and products liability coverage and it was not covered under the policy.

Transamerica overlooked the fact that its policy did insure Omaha Poured for consequential damages and that the action brought by Majors, Inc., was for consequential damages resulting from the incident. Nowhere in Transamerica's brief does it challenge, by assignment of error or discussion, the finding of the trial court that the Transamerica policy in question affords coverage to Omaha Poured for the consequential damage claim asserted by Majors, Inc. Nor, incidentally, does Transamerica challenge in any manner the trial court's conclusion that as a matter of law the "exclu-

sions raised by third party defendant in support of its denial of coverage" do not apply. There is no merit to Transamerica's first and second assignments of error.

The purpose of a summary judgment proceeding is to pierce allegations of pleadings and to show conclusively that controlling facts are otherwise than alleged and that the moving party is entitled to judgment as a matter of law. Growers Cattle Credit Corp. of Omaha v. Swanson (1969), 184 Neb. 612, 169 N. W. 2d 692.

As to Transamerica's third assignment of error, when we pierce the allegations of the pleadings there is no question the material issues are those of law and not of fact.

As to Transamerica's fourth assignment of error, there is not the slightest evidence of fraud or collusion. The settlement was consummated on the morning of the scheduled trial of the main action. Omaha Poured, left to its own resources, at the last moment made a settlement to avoid increased liability. Omaha Poured must have realized, as would any reasonable person in its position, that prudence required it to protect its assets as best it could. There was no question about its liability for consequential damages. There is not the slightest merit to this assignment.

Nor is there merit in Transamerica's fifth assignment of error. Transamerica investigated the incident and denied coverage. It further refused to tender a defense for Omaha Poured. Exhibit 84 to the deposition of Transamerica's claim manager, is a letter from attorneys for Omaha Poured to Transamerica under date of January 10, 1969, reminding it of two previous denials of coverage and of a previous letter dated August 31, 1967, to the effect that Omaha Poured was taking steps to protect itself from the effects of the wrongful denial of coverage. The letter of January 10, 1969, gave Transamerica the trial date of the main action, again tendered the defense of Omaha Poured, and advised that in the event it again declined to provide a defense, a third

party petition would be filed. To hold that Omaha Poured had any additional obligation to keep Transamerica informed of the developments would be absurd.

Transamerica's sixth assignment of error misconstrues the decisions of this court on the point in question. In National Union Fire Ins. Co. v. Bruecks (1966), 179 Neb. 642, 139 N. W. 2d 821, we said: "It would seem that the obligation to defend a suit for an insured should be determined on the basis of whether the petition filed against him attempts to allege a liability within the terms of the policy." Clearly, the inference from the cross-petition and the prayer before the amendment included Omaha Poured, and sufficiently inferred liability to require action on the part of Transamerica. If there was the slightest question, certainly the proceedings culminating in the filing of this third party action, which occurred 6 months before the amendment in question, would have removed any doubt.

Transamerica's seventh assignment of error is predicated on its assertion that affidavits offered into evidence, notarized by an attorney of record, are improper and should be excluded. We direct counsels' attention to section 25-1245, R. S. Supp., 1969, which provides: "An affidavit may be made in and out of this state before any person authorized to take depositions, and must be authenticated in the same way. An attorney at law who is attorney for a party in any proceedings in any court of this state shall not be disqualified as the person before whom the affidavit is made by reason of such representation."

In view of previous comment, Transamerica's eighth assignment of error requires no further discussion. The trial court correctly sustained the motion for summary judgment. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BOBBY JOE WEILAND, APPELLANT.
198 N. W. 2d 327

Filed June 16, 1972. No. 38277.

1. **Post Conviction: Appeal and Error.** A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
2. **Post Conviction: Trial: Appeal and Error.** Where the facts and issues which are the grounds of a motion for post conviction relief were known to the defendant and his counsel, and were raised, heard, and determined at the time of the trial resulting in his conviction but were not raised in his direct appeal, those issues will not ordinarily be considered in a post conviction review.

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

Bobby Joe Weiland, pro se.

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

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

MCCOWN, J.

The defendant appeals from the denial of an evidentiary hearing on his motion for post conviction relief. His original conviction and sentence were affirmed on direct appeal in State v. Weiland, 186 Neb. 325, 183 N. W. 2d 244.

The motion essentially asserts (1) that perjury was knowingly used to convict the defendant at the original trial; and (2) that testimony as to a polygraph test of an accomplice witness was improperly introduced. The second issue was considered and decided by this court in the direct appeal.

The factual issues involving the allegations of perjury rest entirely upon inferences drawn from the testimony

at the original trial, all of which was incorporated in the bill of exceptions. Essentially, defendant asserts that two police officers at a preliminary hearing identified one Phyllis Croghan as defendant's accomplice but at the time of trial, identified one Ronald Leffel instead. Leffel then testified for the State. Two fellow prisoners of Leffel testified that Leffel had told them that if he testified against the defendant, he had been assured that charges against him would be dropped. This testimony was directly contradicted. All of the testimony and the possible inferences to be drawn were fully exploited by competent counsel for the defendant in the original trial. The motion for post conviction relief alleges no facts nor grounds for relief which were not known to defendant and his counsel at the time of trial. The original bill of exceptions reflects the inescapable conclusion that the factual issues were heard and determined by the jury.

A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Hizel, 181 Neb. 680, 150 N. W. 2d 217.

Where the facts and issues which are the grounds of a motion for post conviction relief were known to the defendant and his counsel, and were raised, heard, and determined at the time of the trial resulting in his conviction but were not raised in his direct appeal, those issues will not ordinarily be considered in a post conviction review. State v. Lincoln, 186 Neb. 783, 186 N. W. 2d 490.

The judgment of the district court is affirmed.

AFFIRMED.

MAJOR LIQUORS, INC., DOING BUSINESS AS SILVER TAP, ET AL., APPELLEES, IMPLEADED WITH CAESAR'S PALACE, INC., APPELLANT, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
198 N. W. 2d 483

Filed June 16, 1972. No. 38330.

1. **Constitutional Law.** Freedom of speech as guaranteed by the First Amendment may include the right to express thoughts and ideas by means other than speech.
2. **Intoxicating Liquors: States: Powers.** The power of a state to absolutely prohibit the sale of intoxicating liquors includes the power to prescribe conditions under which it may be sold.
3. ———: ———: ———. A state may protect its people against the evils incident to the use of intoxicants, and may exercise a large discretion as to the means employed.
4. **Municipal Corporations: Ordinances: Powers: Constitutional Law.** The use of the police power is ordinarily a matter of public policy and of legislative judgment with which the courts will not interfere unless it exceeds constitutional bounds.
5. ———: ———: ———: ———. A police regulation is not necessarily invalid because it incidentally affects a constitutional right.
6. **Municipal Corporations: Ordinances: Intoxicating Liquors: Powers: Nudity.** An ordinance prohibiting topless female dancing in places licensed for the sale of intoxicating liquors is a valid exercise of the police power.
7. **Constitutional Law: Words and Phrases.** Although "conduct" may entail some elements of expression or speech, when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.
8. **Constitutional Law: Words and Phrases: Intoxicating Liquors: Nudity.** When nudity is employed as a sales promotion in establishments purveying intoxicating liquors, it is essentially "conduct" and subject to regulation or prohibition.
9. **Constitutional Law.** When speech elements are only incidental to a course of conduct or activity, such activity in its entirety is not entitled to the protection of the First Amendment.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Stern, Harris, Feldman, Becker & Thompson, for appellant.

Herbert M. Fitle, Frederick A. Brown, Edward M. Stein, Gary Bucchino, and Roger Stanway, for appellees City of Omaha et al.

Walter J. Matejka, for appellee Major Liquors, Inc.

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

NEWTON, J.

In this action the sole plaintiff to appeal challenges the constitutionality of an ordinance of the city of Omaha which provides for the revocation of a liquor license if topless dancing by a female is permitted on the licensed premises. It is asserted that the ordinance conflicts with the First Amendment to the Constitution of the United States which guarantees freedom of speech and with the provisions of the Fourteenth Amendment for equal protection of the laws. We affirm the judgment of the district court holding the ordinance is valid.

Plaintiff contends that "freedom of speech" as guaranteed by the First Amendment includes the right to express thoughts and ideas by means other than speech. Cited in support of this view is Burstyn, Inc. v. Wilson, 343 U. S. 495, 72 S. Ct. 777, 96 L. Ed. 1098, holding that motion pictures are protected as they are a significant medium for the expression of ideas; In re Giannini, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446 P. 2d 535, cert. den., 395 U. S. 910, which held that topless dancing could not be banned under an ordinance prohibiting "lewd or dissolute conduct"; Glancy v. County of Sacramento, 17 Cal. App. 3d 504, 94 Cal. Rptr. 864, holding an ordinance banning topless dancing without reference to obscenity was overbroad and unconstitutional; and Hudson v. United States (D. C. App.), 234 A. 2d 903, sanctioning a burlesque dance in the absence of proof of obscenity. The Giannini and Hudson decisions

are based upon the premise that obscenity was not present or satisfactorily proved.

In support of the "equal protection" argument under the Fourteenth Amendment, plaintiff asserts, in substance, that persons engaged in an industry handling intoxicating liquors cannot be classified and dealt with differently from people engaged in other callings. The only case cited which is directly in point, in that it deals with the liquor industry, is La Rue v. State of California, 326 F. Supp. 348. This case held that an ordinance prohibiting live entertainers from engaging in certain "sexual conduct" without regard to the question of obscenity was unconstitutional. Portions of the ordinance prohibiting nude or seminude entertainers were voided.

Defendants rely upon three theories to sustain the ordinance. First, that the liquor industry is subject to strict regulation under constitutionally delegated police powers; second, that public dancing by topless female entertainers is "conduct" not speech or expression; and third, that "speech" elements involved are merely incidental to conduct or activity.

In earlier years saloons, barrooms, and taverns dispensing alcoholic liquors were largely unregulated. This gave rise to numerous abuses. Public disgust and denunciation gradually brought about a steady growth of restrictive controls and culminated in a constitutional amendment imposing absolute prohibition. With the repeal of the national prohibition act, the question of "wet or dry" was again left up to the individual states. One by one the states have again authorized the manufacture, distribution, and sale of alcoholic liquors but in so doing have, without exception, made use of the police powers to impose strict controls on the industry.

The following excerpts from 45 Am. Jur. 2d, Intoxicating Liquors, § 23, p. 502, and § 24, p. 503, are indicative of the general police power: "The power of a state to absolutely prohibit the sale of intoxicating liquor

includes the power to permit the sale thereof under definitely prescribed conditions, and such business or traffic may be permitted only under such conditions as will limit to the utmost its evils. * * *

"A state, in the exercise of its undoubted power to protect its people against the evils incident to traffic in and the use of intoxicants, may exercise large discretion as to the means employed. The form or method of regulation and control is one of public policy for the decision of each state, and frequently the prevailing view is reflected by appropriate legislative enactments. * * *

"The state has far broader power and greater latitude to regulate and restrict the use, distribution, or consumption of liquor than to regulate or restrict ordinary business, because of the effect of the former on the health and welfare of the public. The scope and extent of such regulations depend solely upon the judgment of the lawmakers, with the wisdom of which the judiciary has no concern, provided, always, that they do not transcend the limits of state authority by invading rights which are secured by the Constitution of the United States, and provided further that the regulations adopted do not operate a discrimination against the rights of residents or citizens of other states." See, also, § 285, p. 682, wherein it is stated: "Regulations, both municipal and statutory, may properly prohibit the use of attractions or other amusements which may make places where intoxicating liquors are sold attractive to the loiterer. It is not a question, under such regulations, of whether the amusements are of such character as to annoy or disturb persons living nearby or doing business in the vicinity, but whether the prohibited acts will tend to attract or entice people into the place where the liquors are sold."

These general propositions are recognized in federal as well as state law. Ziffrin, Inc. v. Reeves, 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128, recognizes the right of

a state to absolutely prohibit the manufacture, transportation, sale, or possession of intoxicating liquors and holds: A state's power absolutely to prohibit the manufacture, sale, transportation or possession of intoxicants includes the lesser power to permit these things only under definitely prescribed conditions.

A state may protect its people against evil incident to intoxicants; and may exercise large discretion as to means employed. See, also, In re Tahiti Bar, Inc., 395 Pa. 355, 150 A. 2d 112.

In Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U. S. 35, 86 S. Ct. 1254, 16 L. Ed. 2d 336, in approving, as within the police power, certain state price regulations, the court held: It is not the province of courts to draw on their own views as to the morality, legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and by so doing violates due process.

Under the system of government created by the Federal Constitution it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.

Due process does not authorize courts to hold laws unconstitutional when they believe the legislature has acted unwisely.

Courts do not substitute their social and economic beliefs for the judgment of legislative bodies.

Were constitutionally proscribed acts interfering with personal privileges and liberties literally interpreted, in regard to many subjects, we could have no laws whatsoever. Every law affects and restricts individual rights in some manner and to a greater or lesser degree. They all regulate human conduct and interests in one form or another. For this reason rules of necessity and reasonableness are used in determining the validity of many acts legislatively proscribed. "A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid because it may affect incidentally the exer-

cise of some right guaranteed by the constitution." In re Anderson, 69 Neb. 686, 96 N. W. 149.

"Persons, and their rights of liberty and property, are subject to restraints and burdens which legislature imposes upon them for common good, and, although exercise of a police power may inconvenience an individual or group and may curtail the use, or depreciate the value of property, if the measure reasonably tends to accomplish the purpose of its enactment without unreasonably or arbitrarily exceeding the needs of the occasion, it is a valid exercise of the police power." State v. Sullivan, 245 Minn. 103, 71 N. W. 2d 895. See, also, Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729; Central Markets West, Inc. v. State, 186 Neb. 79, 180 N. W. 2d 880.

Other jurisdictions have divided on the question of whether or not topless dancing by females may be prohibited in places dispensing alcoholic liquors. It has been held that in the absence of obscenity such dancing cannot be prohibited as it is in violation of First Amendment rights. See, In re Giannini, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446 P. 2d 535, cert. den., 395 U. S. 910; La Rue v. State of California, 326 F. Supp. 348.

In Paterson T. & G. Owners Assn. v. Borough of Hawthorne, 108 N. J. Super. 433, 261 A. 2d 677, it was held that a "Community has right to ban from premises of alcoholic beverage licensees the 'topless' and 'bottomless' entertainer or dancer." See, also, Philadelphia Retail L. D. Assn. v. Pennsylvania Liquor Control Board, 360 Pa. 269, 62 A. 2d 53; Adams Newark Theatre Co. v. City of Newark, 22 N. J. 472, 126 A. 2d 340; Hodges v. Fitle, 332 F. Supp. 504.

Is the restriction against females dancing when "topless" or seminude an unreasonable regulation of businesses engaged in dispensing alcoholic liquors? We conclude that it is not. The prime objection of plaintiffs to the ordinance, as appears from their pleading and evidentiary exhibits, is that the banning of such

entertainment reduces their patronage and adversely affects their income. This confesses that the object of this type of entertainment is to lure customers and induce them to indulge in the consumption of alcoholic liquors. The consumption of alcoholic liquors is a practice which although legalized, has never been encouraged in American society. If the use of harmful drugs were to be legalized, should we encourage their use? The attendant evils of intoxication, alcoholism, and highway mayhem are well known and understood. One who consumes alcoholic liquors necessarily succumbs to their influence for the time being. He is more susceptible to ideas and emotions generated by the environment and much more likely to accept what transpires in a lewd or obscene manner than if he viewed the same degree of nudity in an art gallery or witnessed the same activities on the legitimate stage. The basic appeal of this type of entertainment in bars is the titillation of erotic instincts. It is that expectation which attracts the clientele. Such an appeal may well vary in its effects on different individuals as well as with the degree of intoxication, but the police power is intended for the protection of all individuals and the fact that some may not need such protection is irrelevant.

The theory that the ordinance violates the constitutional guarantee of freedom of speech is based upon the ground that dancing, like speech or other activities, may be a "medium of expression." In other words, it may be what is known as "interpretative dancing." The cases above cited which sanction topless dancing are based on this premise and draw the line only at obscene performances. This line of demarcation is now, for all practical purposes, nonexistent. Under terms defined by the federal courts the word "obscene" is now obsolete and without meaning. That definition as set out in La Rue v. State of California, 326 F. Supp. 348, is as follows: " 'Under this definition (of obscenity),. as elaborated in subsequent cases, three elements

must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.' " There are few, if any, moves or acts performed by human beings which are not made for some purpose, and which, when simulated, may not be deemed expressive. This being true, adherence to the foregoing definition of obscenity would permit the public performance of almost any type of simulated human behavior.

We do not believe that the line separating the licit from the illicit need be so finely drawn. There is a difference between "conduct" and "speech." In United States v. O'Brien, 391 U. S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672, it is held: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

In City of Portland v. Derrington, 253 Ore. 289, 451 P. 2d 111, cert. den., 396 U. S. 901, 90 S. Ct. 212, 24 L. Ed. 2d 177, it is stated: "When nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employes is as fit a subject for governmental regulation as is the licensing

of the liquor dispensaries and the fixing of their closing hours. * * *

"Whether or not we agree with the wisdom of the city council's attempt to legislate morals, the question is not one of legislative wisdom, but one of constitutional power. The chief aim of the ordinance is to regulate conduct deemed by the lawmakers to be injurious to health, safety, and morals. The city's legislative judgment in the matter should be upheld unless the statute unreasonably impinges upon those elements of communication which may be incidental to the regulated conduct. We do not believe the interference with communication in the case at bar has enough substance to present a First Amendment question. The error in the court below was in treating the problem as one of free speech and nothing more."

In Hoffman v. Carson (Fla.), 250 So. 2d 891, involving a nude go-go dancer, it is said: "Appellant loses sight of the distinction between speech and conduct. The statute is not directed at First Amendment rights of free expression, nor does it concern itself with obscenity * * *. Rather, it is directed at the exposure of sexual organs and nudity, a matter of conduct thought to be a crime under the common law * * *, and generally considered as having a reasonable relationship to the public welfare, and, therefore, within the police power of the Legislature. * * *

"We find that appellant's performance falls short of presenting a 'speech' issue sufficiently important to outweigh the State's interest in curtailing lascivious exposure in public places. Contributing to this conclusion is the fact that appellant admits that she usually was tipped a certain amount for removing her brassiere and was tipped an additional substantial sum for removing her pants. The trial judge found that: 'Apparently the spontaneity of her "self-expression" was in direct proportion to the monetary consideration she received from the barflies rather than from her ab-

sorption in the artistry of her dance.' "

Is the baring of breasts essential to the expressions intended to be conveyed by the female dancers? Three dancers testified. One was silent on this subject; one conceded that it was not; and the third thought it necessary but conceded the same results could be attained if she were completely covered by a leotard. For a great many years various forms of dancing of an interpretative or expressive nature have been popularly recognized. Perhaps the best known and most highly skilled and regarded as a form of art is the ballet. Although practitioners of the highest form of interpretative or expressive dancing, ballet dancers have not found nudity in any degree to be essential to their performance. The story to be told is expressed without resort to nudity. This being true, it would seem that lesser forms of the art of dancing should not find it necessary or essential to resort to varying degrees of nudity as a medium of expression. These factors, in a case such as we have before us, serve to point up the distinction between conduct and speech.

Whether or not a question of free speech is inherent in the situation presented when the speech elements of an activity are merely incidental to the activity, then the activity in its entirety is not by virtue of its speech elements entitled to the protection of the First Amendment. See Paladino v. City of Omaha, 335 F. Supp. 897.

The argument that the ordinance violates the equal protection clause of the Fourteenth Amendment is not strenuously urged. A legislative body has power to make reasonable classifications for purposes of legislation. See State ex rel. Sorensen v. First State Bank, 122 Neb. 109, 239 N. W. 646.

"The right to engage in the sale of intoxicating liquors involves a mere privilege; and restrictive regulations or a suppression of the traffic do not violate provisions of the state and federal Constitutions relating to due process, privileges or immunities, uniformity, nor, un-

less wholly arbitrary in their discrimination between persons, the equal protection of the law." Safeway Stores, Inc. v. Nebraska Liquor Control Commission, 179 Neb. 817, 140 N. W. 2d 668. See, also, Marsh & Marsh, Inc. v. Carmichael, 136 Neb. 797, 287 N. W. 616.

The judgment of the district court is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The rationale of the majority opinion, carried to its obvious conclusion, would authorize the City to ban any or all types of entertainment which intended to induce customers to patronize an establishment which sold alcoholic liquors. Any form of entertainment could be banned, paintings and decor could be banned or strictly regulated, and even the playing of music might be prohibited. On the reasoning of the majority opinion, anything which contributes to the enticement of customers into a drinking establishment may be restricted or banned because the sale of alcoholic liquor is subject to strict regulation by the government. The exercise of the police power, however, is not so unlimited. Neither does the fact that the liquor business may be entirely prohibited authorize the State to legalize the business and then "regulate" it by arbitrary fiat without legally justifiable reason. Under any circumstances and at all times even though the liquor industry is subject to strict regulation, the exercise of the governmental power must be in the form of actions which are within the constitutional authorization, are not unreasonable or arbitrary, and are reasonably related to the attainment of a permissible objective. See Central Markets West, Inc. v. State, 186 Neb. 79, 180 N. W. 2d 880.

The basis upon which the majority opinion avoids First Amendment problems is the conclusion that nudity or partially nude dancing presented as entertainment does not involve speech or expression but is only conduct. This holding stems from City of Portland v. Derrington, 253 Ore. 289, 451 P. 2d 111. It should be noted

first that the Oregon Court's conclusion in that case was directed at "the performances and costumes of female *attendants* in bars and taverns." (Emphasis ours.)

The evidence in the case before us shows that the topless female dancers involved in this case were strictly entertainers and did not participate in any way in the selling, dispensing, or serving of alcoholic liquors. It is difficult to separate "conduct" and "speech" or "expression." It is also apparent that elements of "expression" involved in nude or semi-nude attire on the part of employees primarily engaged in their duties of selling and serving alcoholic liquors are minimal contrasted with their "conduct" as attendants. As to such employees, Derrington may well be applicable. This is not true of a dancer who is hired as an entertainer, and that is the case before us. It is obvious, of course, that nudity is "conduct" and subject to regulation. Nevertheless, "dancing" is "expression" and unless it is shown that the dancing is obscene, it is protected by the First Amendment. As Justice O'Connell said in his dissent in the Derrington case: "* * * the city cannot inhibit defendant's right simply because it decides that her nudity may have an adverse moral effect on the community or that it might cause disturbances in the restaurant. Even if dancing were held to be entitled to less protection than some other forms of expression, certainly it cannot be prohibited merely because a part of the public, even a majority, regards non-obscene nude dancing as unacceptable. See Kingsley International Pictures Corp. v. Regents, 360 U S 684, 79 S Ct 1362, 3 L Ed 2d 1512."

Asserted conflict between First Amendment rights and the state police power calls for careful analysis rather than a broad brush treatment. The majority opinion tacitly concedes that the "conduct" involved here does not meet any current tests of obscenity but still refers to "a lewd or obscene manner" and "the titillation of erotic instincts." If the City of Omaha were

actually concerned with preventing the luring of customers into drinking establishments, it is strange that this ordinance is the only one dealing with the subject. Even this one ordinance prohibits only *live* nude entertainment. (Emphasis ours.) It is quite evident that the concern of the City here was not the protection of the citizenry from the evils of alcohol, but, instead, the prohibition of a certain form of entertainment determined to be morally unacceptable by the City, without observing First Amendment constitutional standards established by the Supreme Court. Because many, or even most, citizens find such performances unpalatable or debasing does not mean they lack an expressive element. Even if the dance be regarded as a lower form of expression, it is still expression and merits First Amendment protection, even though it be in the form of entertainment in a commercialized setting. See, Schacht v. United States, 398 U. S. 58, 90 S. Ct. 1555, 26 L. Ed. 2d 44; Jacobellis v. Ohio, 378 U. S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793; Stanley v. Georgia, 394 U. S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 452; Redrup v. New York, 386 U. S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515.

BOSLAUGH, J., dissenting in part.

I join in that part of Judge McCown's opinion that holds regulation of the liquor industry must be reasonably related to the attainment of a permissible objective and not arbitrary.

JOHANN KOOB, APPELLEE, V. NORTON R. LONG, APPELLANT.
198 N. W. 2d 474

Filed June 16, 1972. No. 38348.

1. **Trial: Evidence: Verdicts.** In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom.

2. **Verdicts: Judgments: New Trial.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
3. **Highways: Streets: Pedestrians: Motor Vehicles.** In the absence of a prohibition by statute or ordinance a person may cross a street at any place and is not limited to crossing at intersections. The driver of an automobile owes to one crossing a street at a point not a regular crossing the duty of reasonable and ordinary care under the circumstances.
4. **Highways: Pedestrians: Motor Vehicles.** No person shall turn a vehicle from a direct course on a highway unless such movement can be made with reasonable safety, and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement.

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

James R. Hancock, for appellant.

Byron M. Johnson, for appellee.

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

SPENCER, J.

This personal injury action arose from a car-pedestrian collision, when Johann Koob, plaintiff was crossing Highway 71 between Gering and Scottsbluff, Nebraska, about 7 p.m., on March 2, 1967. The jury returned a verdict for $25,000. Defendant, Norton R. Long, perfected this appeal, contending the trial court should have sustained either his motions for directed verdict or his motion for judgment notwithstanding the verdict.

There are three questions presented by the appeal: First, whether the contributory negligence of the plaintiff was sufficient as a matter of law to bar recovery; second, whether the court erred in instructing the jury under section 39-7,115, R. R. S. 1943, on giving an audible signal before changing lanes if any pedestrian would be affected by such movement; and, third, whether

the trial court erred in failing to grant a mistrial by reason of the questioning of defendant as to his selling of insurance. We affirm the judgment.

Defendant does not contest the amount of the judgment so no purpose will be served by detailing the extent of plaintiff's injuries and damages herein. We consider the facts in the interpretation of plaintiff's first assignment of error in the light of the following rules of law:

"In determining whether a party is entitled to a directed verdict, the evidence must be considered most favorably to the other party. Every controverted fact must be resolved in his favor, and he is entitled to the benefit of every reasonable inference that may be drawn therefrom." Hacker v. Perez (1971), 187 Neb. 485, 192 N. W. 2d 166.

"Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured." Beshaler v. Helberg (1971), 187 Neb. 584, 193 N. W. 2d 261.

The collision took place in the area of an auction house which is located on the west side of Highway 71, which is a four-lane highway 64 feet 10 inches wide. This four-lane highway divides into two lanes 286 feet 10 inches north of the south driveway of the auction house. The pavement was dry, and the temperature was in the neighborhood of 35 degrees. There are four floodlights in the area of the auction house, and a large lighted auction house sign. The only marked crosswalks for pedestrians in the vicinity of the auction house are 1.1 miles to the north and 1.2 miles to the south. Plaintiff parked his car with other cars on the east side of Highway 71, directly across from the auction house. He then proceeded to cross the highway. There was no direct lighting on the east side of the highway, but witnesses who were standing on the west side of the high-

way in the vicinity of the auction house testified that they were able to see plaintiff on the east side of the highway.

Plaintiff's evidence is that before crossing the two northbound lanes he stood at the curb and looked to the north and to the south for oncoming vehicles. He then crossed the northbound lanes and stopped on the centerline of the highway. At that time he saw headlights of an automobile approximately 350 to 400 feet to the north on the highway. He then proceeded to cross the southbound lane. The evidence is conflicting on the lane being used by the vehicle; how often the plaintiff looked in the direction of the oncoming vehicle; and where the plaintiff was found after the impact. Disinterested witnesses testified defendant's car was straddling the two southbound lanes. Plaintiff's testimony was that he had walked across the innermost southbound lane and was struck by the defendant's vehicle after he entered the curb lane. Plaintiff was struck on the right hip and was carried by the vehicle from 30 to 40 feet south. When the vehicle stopped, plaintiff fell to the pavement in front of the vehicle approximately 3 feet from the curb. Prior to the impact neither plaintiff nor any of the witnesses to the accident heard the sound of brakes or of a horn.

Defendant testified that he was familiar with the area and was traveling 28 to 35 miles per hour approaching the auction house. He observed people "spilling" onto the highway so he put on his blinker light and began to shift to the inside lane. He had shifted fully into the inside lane when he saw the plaintiff illuminated by his left headlight. He did not have time to sound the horn or to apply his brakes. After the impact the plaintiff was knocked clear of the car and was lying behind it when he stopped. Defendant told the highway patrolman who investigated the accident that he did not see the pedestrian until just before the impact. The witnesses who were around the auction house at the

time of the impact did not see people "spilling" onto the highway although some had crossed it prior to the impact. They also testified unequivocally that the plaintiff was carried 30 to 40 feet, slid off the vehicle when it came to a stop, and at that time was in front of the vehicle about 3 feet from the curb.

Was the plaintiff guilty of contributory negligence as a matter of law? The answer must be in the negative. It is only where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom that it is the duty of the court to decide the question as a matter of law. Palmer v. McDonald (1961), 171 Neb. 727, 107 N. W. 2d 655. Here, there were conflicts in the evidence which required the submission of the case to the jury.

The collision occurred at a point more than a mile from a crosswalk in either direction. Plaintiff was within his legal rights in crossing at the point in question. This is not a crossing between two city intersections where an ordinance is applicable. The question as to whether plaintiff exercised due care is one for the jury. "In the absence of a prohibition by statute or ordinance a person may cross a street at any place and is not limited to crossing at intersections. The driver of an automobile owes to one crossing a street at a point not a regular crossing the duty of reasonable and ordinary care under the circumstances." Nisi v. Checker Cab Co. (1960), 171 Neb. 49, 105 N. W. 2d 523. See, also, Miller v. Moeller (1968), 183 Neb. 508, 162 N. W. 2d 224.

Here, although defendant testified he saw people "spilling" onto the highway, he admits that he did not see the plaintiff until just before the impact. The jury could reasonably have found that he was guilty of gross negligence in failing to see plaintiff, even if, in its judgment, plaintiff was guilty of slight negligence and the question became one of comparative negligence. As we held in Nisi v. Checker Cab Co., *supra,* the question

whether the defendant should have seen the plaintiff, and the inferences to be drawn from the evidence adduced, are matters of evidence which a jury must decide.

Defendant's second assignment of error attacks the giving of the following instruction, taken directly from section 39-7,115, R. R. S. 1943: "No person shall turn a vehicle from a direct course on a highway unless such movement can be made with reasonable safety, and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement." Defendant's assignment of error is predicated upon the following erroneous premise, taken from his brief: "The court did give an instruction number twelve on the subject of Long's change of lanes without sounding his horn if a pedestrian will be effected by the change which was extremely erronous and prejudicial. For instance, how can a pedestrian be affected by the failure to give a warning when the pedestrian has no right-of-way or right to be on the street at that place?" As stated heretofore, in the absence of statute or ordinance, a person may cross a street at any place and is not limited to crossings at an intersection. Defendant owed plaintiff a duty of reasonable care which included proper lookout, reasonable control, and the sounding of a horn when changing lanes. The instruction was proper under the evidence.

The defendant's last assignment of error involves the questioning of defendant concerning insurance, as follows: "Q Mr. Long, prior to your selling investments, didn't you, also, sell insurance? A Three different times in my life I have sold insurance for a while, yes. Q Now, what kind of insurance? A Life, fire, casualty. Q By 'casualty' do you mean automobile? A Right. Q You have adjusted losses to automobiles then? A I did no adjusting. Q Have you talked to adjusters that adjusted losses on automobiles? A No, I don't recall ever having been called by an adjuster.

Q Didn't you talk to the adjusters that were assigned to investigate casualty claims on behalf of the — A I don't recall ever having done so." On direct examination, defendant's counsel had asked him about what professions he had had, and the types of his employment, occupations, and the places thereof. He had elicited that for the last 11 years defendant had sold United Fund Investment Trust and had spent considerable time preaching. Defendant had not specifically mentioned the selling of insurance but had opened up the subject sufficiently for cross-examination in that regard. There is nothing in the cross-examination set out above which can be held to be prejudicial to the defendant on this record. The extent of cross-examination rests in the discretion of the trial judge. He is in a position to observe the conduct and demeanor of counsel and parties. The motion for mistrial was properly overruled.

The judgment is affirmed.

AFFIRMED.

HENRY MASTEN, APPELLEE, V. CAMPBELL MANUFACTURING CO., A CORPORATION, APPELLANT.
FRANCIS E. MASTEN, APPELLEE, V. CAMPBELL MANUFACTURING CO., A CORPORATION, APPELLANT.
198 N. W. 2d 326

Filed June 16, 1972. Nos. 38392, 38393.

Trial: Evidence: Damages. A claimant of substantial damages must furnish appropriate data to enable the trier of fact to find the amount of damages with reasonable certainty if the evidence of damages or the amount thereof are susceptible of definite proof. Damages may not be established by conjecture, speculation, or doubtful proof.

Appeals from the district court for Thurston County: JOSEPH E. MARSH, Judge. Reversed and remanded.

Ronald K. Samuelson and Moodie & Moodie, for appellant.

Neil R. McCluhan of Kindig, Beebe, McCluhan, Rawlings & Nieland, for appellees.

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

BOSLAUGH, J.

These actions were brought to recover "commissions" alleged to be due the plaintiffs from the defendant. The trial court found that Henry Masten was entitled to judgment in the amount of $3,102 and Francis E. Masten in the amount of $2,679. The appeals to this court by the defendant were consolidated by stipulation.

The record shows that the defendant is a corporation engaged in the manufacture of sprayers and other agricultural equipment. The plaintiffs had been employed by the defendant and its predecessor for a number of years. Commencing in 1965, the plaintiffs and one other employee were each paid a commission or bonus in addition to their salary, based upon the invested capital and net income of the defendant.

In 1967, a dispute arose concerning participation by the plaintiffs in the management of the defendant. The plaintiffs demanded a greater voice in the management of the business which was refused. The plaintiffs claim, however, that agreements were made whereby they would receive their commissions for 1967 if they remained in the defendant's employment through the sprayer season. They performed this condition and claim they are entitled to commissions at least equal to those paid the preceding year.

The defendant claims the plaintiffs were not entitled to the commissions unless they were employees in good standing at the close of the fiscal year; there was no consideration for agreements regarding the 1967 commissions; and the evidence as to the amounts due was insufficient.

The evidence was conflicting but, when viewed in the light most favorable to the plaintiffs, was sufficient

to sustain a finding that the plaintiffs were entitled to commissions for 1967. The trial court could find that the plaintiffs were not bound to continue in the employment of the defendant and were free to enter into special agreements concerning the 1967 commissions.

The evidence as to the amount of the commissions due the plaintiffs consisted only of their estimates based upon the amount of business done during the time they remained in the defendant's employment. There was no attempt to produce evidence based upon the defendant's books and records and there is no evidence as to the amount of invested capital or net income of the defendant in 1967.

A claimant of substantial damages must furnish appropriate data to enable the trier of fact to find the amount of damages with reasonable certainty if the evidence of damages or the amount thereof are susceptible of definite proof. Damages may not be established by conjecture, speculation, or doubtful proof. Bitler v. Terri Lee, Inc., 163 Neb. 833, 81 N. W. 2d 318. See, also, Ridenour v. Kuker, 185 Neb. 321, 175 N. W. 2d 287.

The judgments of the district court are reversed and each cause is remanded for a new trial on the issue of damages.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. JACK LEE ERNEST, APPELLANT.
198 N. W. 2d 335

Filed June 16, 1972. No. 38398.

Criminal Law: Sentences: Appeal and Error. A sentence imposed within statutory limits will not ordinarily be disturbed in the absence of an abuse of judicial discretion.

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

Jack Lee Ernest, pro se.

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

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

MCCOWN, J.

The defendant pleaded nolo contendere to a charge of receiving stolen goods. He was found guilty and sentenced to a term of 5 years in the Nebraska Penal and Correctional Complex. The only issue on appeal is his claim that the sentence was excessive.

There is no factual dispute. The record affirmatively discloses that as a part of a plea bargain, an habitual criminal charge against the defendant was dismissed. The sentence authorized by statute for the crime of receiving stolen property is 1 to 7 years. The minimum term on an habitual criminal count is 10 years. There is no presentence investigation report in the record.

A sentence imposed within statutory limits will not ordinarily be disturbed in the absence of an abuse of judicial discretion. State v. Meloy, *ante* p. 98, 195 N. W. 2d 173. There was no abuse of discretion on the part of the trial court here.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WAYNE A. EMBREY ET AL., APPELLANTS.
198 N. W. 2d 322

Filed June 16, 1972. No. 38417.

Criminal Law: Evidence: Appeal and Error. It is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence, unless it is so lacking in probative force as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

Appeal from the district court for Cuming County: MERRITT C. WARREN, Judge. Affirmed in part and in part reversed and remanded as to defendant Richard L. Grovijohn. Affirmed as to all other defendants.

Homer E. Hurt, Jr., for appellants.

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

Heard before WHITE, C. J., BOSLAUGH, McCOWN, and CLINTON, JJ., and BRODKEY, District Judge.

McCOWN, J.

Four minors were convicted on charges of minor in possession of alcoholic liquor. Wayne A. Embrey and Gary J. Schlecht were each fined $100. Darrell D. Bunn and Richard L. Grovijohn were sentenced to 10 days in jail and fined $175. Grovijohn was also found guilty of disobeying a lawful order of an officer of the Nebraska State Patrol and received a 10-day concurrent jail sentence on that count.

On May 7, 1971, at approximately 11:30 p.m., Quinton Petz, the chief of police of the Village of Beemer, Nebraska, observed the defendant Richard Grovijohn drive a car up and down Main Street several times and then turn into an alley. At about this time, Officer Tobey of the Nebraska State Patrol drove up. Petz got into the patrol cruiser and the officers drove to the opposite end of the alley and parked in a service station lot. Petz went down the alley on foot and observed the Grovijohn automobile stopped in the alley at the rear of the Pastime Bar, some 100 to 125 feet away from his position. Petz saw the defendant Darrell Bunn come out of the bar with two sacks and get into the Grovijohn car. Petz went back to the patrol cruiser and informed Officer Tobey that he believed beer had been purchased. The Grovijohn car came out of the alley, turned away from the patrol cruiser, and proceeded out of town on Highway 275. The officers followed and

stopped the car about one mile east of Beemer. Officer Tobey checked Grovijohn's driver's license and asked if they had beer in the car. Darrell Bunn responded that they did but that he was old enough. Bunn then produced a draft card which the officers knew was not his. Officer Tobey asked the occupants to get out of the vehicle and directed them to stand by the patrol car. Officer Petz then removed two paper bags, each of which contained a 6-pack of beer, from the floor in the rear seat of the Grovijohn car. Officer Tobey arrested the defendant Darrell Bunn and placed him in the cruiser. The other boys got back in the Grovijohn car and Tobey "advised" or "told" Grovijohn to follow him to the sheriff's office in West Point. Darrell Bunn was the only defendant placed under arrest at that time. Officer Tobey testified he did not indicate that any of the other boys had been placed under arrest at that point, nor were any citations written out or issued at the scene. When the officers started to drive the patrol cruiser to West Point, the defendant Grovijohn followed them for a short distance and then turned off. The officers observed the Grovijohn car departing but proceeded on to West Point.

The defendants contend that the evidence is insufficient to establish knowledge or consciousness of actual or constructive possession of the beer except as to Darrell Bunn, who bought it, and Richard Grovijohn, the driver in control of the car. We cannot agree. The evidence established that all four of the defendants had gone to a party together earlier in the evening. The car occupied by the defendants was parked in an alley behind a bar and Officer Petz watched while defendant Bunn got in the car carrying the beer. When the defendants came out of the alley, they attempted to avoid the patrol cruiser. The Grovijohn car was a two-door car and the beer was on the floor of the back seat when the officers removed it a few minutes later. At the time the officers stopped the car on the highway and

during the proceedings there, one or both of the officers testified that they smelled alcohol on the breath of each of the defendants, although the beer in the car had not been opened. While the defendants' testimony tended to disavow knowledge of actual or constructive possession, nevertheless the evidence was sufficient to establish knowledge and consciousness of possession, and to sustain the verdict of guilty. See State v. Reeder, 183 Neb. 425, 160 N. W. 2d 753.

The case was tried to the court without a jury and the weight and credibility of the evidence were clearly for the determination of the trier of the facts. It is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence, unless it is so lacking in probative force as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Tindell, 185 Neb. 683, 178 N. W. 2d 571. While to some extent the evidence may be circumstantial and marginal, it was sufficient.

Richard Grovijohn was also convicted of failure to obey the lawful order of an officer of the state patrol. Officer Tobey himself testified that at the time the officers stopped the Grovijohn car and he arrested Darrell Bunn, he did not place any of the other boys under arrest. He also testified that he did not indicate to any of the other boys that they were under arrest at that point. No citation was written out or delivered to anyone at the time. The offense involved here did not rest on a violation of any law regulating the operation of vehicles or the use of the highways. Neither did it involve a felony of any kind. The provisions of section 60-435 or section 60-437, R. R. S. 1943, furnish no basis for the authority to issue an order to Grovijohn to follow Officer Tobey to West Point under the circumstances here. The foundation for a lawful order must rest on its connection with an arrest of Grovijohn. Officer Tobey's own testimony establishes that he did

not arrest Grovijohn or even indicate to him that he was under arrest. The evidence was insufficient to support a verdict of guilty on Count II.

The conviction and sentence of Richard Grovijohn on Count II, for failure to obey a lawful order, is set aside and vacated. As to all other convictions and sentences, the judgment of the trial court was correct and is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED AS TO DEFENDANT RICHARD L. GROVIJOHN. AFFIRMED AS TO ALL OTHER DEFENDANTS.

STATE OF NEBRASKA, APPELLEE, V. EDGAR D. REDEMER, APPELLANT.
198 N. W. 2d 325

Filed June 16, 1972. No. 38430.

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

Edgar D. Redemer, pro se.

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

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

NEWTON, J.

This is a second motion filed under the Post Conviction Act on an identical ground, namely, that the sentence is excessive. The first motion was not appealed from. The judgment is final and the point raised is res judicata.

Pertinent are the rulings of this court in State v. Reichel, 187 Neb. 464, 191 N. W. 2d 826, and State v.

Dabney, 183 Neb. 316, 160 N. W. 2d 163. See, also, section 29-3001, R. S. Supp., 1969.

See Rule 20.

AFFIRMED.

GEORGE C. BOROWSKI, APPELLEE, V. ARMCO STEEL CORPORATION, APPELLANT.
198 N. W. 2d 460

Filed June 16, 1972. No. 38431.

1. **Workmen's Compensation.** It is unreasonable to conclude that an injury is not latent merely because the plaintiff suffered pain, when thereafter several physicians were unable to correctly diagnose his injury.
2. **Workmen's Compensation: Master and Servant: Notice: Limitation of Actions.** If an employee suffers an injury, which appears to be slight but which is progressive in its course, and which several physicians were unable to correctly diagnose, his failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.
3. **Workmen's Compensation: Evidence: Appeal and Error.** On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence.

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

Ross & Schroeder, for appellant.

O. William Von Seggern of Cunningham & Blackburn, for appellee.

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

SPENCER, J.

This is an appeal by Armco Steel Corporation, defend-

ant, from a compensation award to George C. Borowski, plaintiff. The only issue involved is whether or not the action was barred by the statute of limitations prior to its commencement on November 30, 1970. We affirm.

On November 15, 1965, while in the employ of the Armco Steel Corporation as an ironworker, plaintiff sustained an injury in the course and scope of his employment. Defendant admits the accident, which occurred when a steel beam fell on plaintiff's right thigh. In the accident his leg was doubled underneath him, and the iron beam was lying across his right thigh. He was taken to St. Francis Hospital, where he was treated by Doctor Bechtel. He was in the hospital for 1½ days but was off work for 2 weeks. When he returned to work he was given lighter chores. He remained with the defendant for 3 or 4 months when his employment was terminated because the job was nearing completion.

The attending physician related plaintiff's physical condition at the time of his injury as follows: "The only positive finding I could find was that he had an obvious injury to the quadriceps muscle of the right lower extremity; the right mid-thigh area; contusions and muscular injuries of the quadriceps muscle of the right thigh." Plaintiff saw Doctor Bechtel for checkups several times during the next 2½ months. All treatments and visits to Doctor Bechtel were paid for by the compensation carrier. Doctor Bechtel informed plaintiff that he suffered damages to the muscles of his upper leg; it would be a slow healing process; and he would feel discomfort or be sore for quite some time, but not to be alarmed. After a period of months the pain subsided.

In the middle part of 1968, plaintiff again began having recurrent discomfort and pain in his leg. He consulted Doctor House, a Grand Island orthopedic surgeon, in August of 1968. He visited Doctor House on seven occasions from that time until the middle of October 1969. The following excerpt from Doctor House' report

is some indication of the condition of the plaintiff during this period of time: "The pain is located in the posterior portion of the patient's thigh, outer portion of the calf with occasion of extension into the patient's foot. The pain that he describes is associated with periods of numbness in the leg and a feeling of heat in the leg. * * * He has had definite back injury prior to this however, in 1966 (1965) his right leg was struck by a beam while working at the New Holland Plant, this laid him up partially for a period of about two to four weeks and then he apparently made a satisfactory recovery although there is still evidence of some transverse creasing of the muscle in the upper third of the thigh anteriorly where he apparently has had some residual muscle damage. * * *

"He has normal motion of the back, forward flexion is slightly uncomfortable. * * *

"On review of x-rays of the lumbrosacral spine other than for evidence of a mild pelvic tilt low on the left and partapes slight narrowing of the L-5, S-1 interspace no other particular abnormality was noted."

Doctor House prescribed the wearing of a built-up right shoe and prescribed muscle relaxants. On January 13, 1970, plaintiff again consulted Doctor Bechtel, who had returned from military service. Doctor Bechtel referred him to Doctor Richard Smith, an orthopedic surgeon, practicing in Omaha. Doctor Smith's history indicates that the plaintiff had no idea that he could conceivably have a back problem. Doctor Smith admitted him to the hospital in April 1970, and performed a myelogram. This revealed a herniated disc at the lumbar sacral inner space, injuring the right first sacral root. It was Doctor Smith's opinion that the herniated disc resulted from the injuries received in the accident in 1965. He also testified that the plaintiff, who had a successful lumbar laminectomy, would have a 10 percent permanent partial disability.

On March 16, 1971, the compensation court awarded

plaintiff total temporary and permanent partial disability and directed the defendant to pay certain medical expenses. Defendant waived hearing before the compensation court sitting en banc, and appealed to the district court for Hall County. After trial in that court, the judgment or award of compensation was affirmed in all respects, and plaintiff allowed the sum of $250 attorneys' fees. This appeal resulted.

Section 48-137, R. R. S. 1943, so far as material herein, reads as follows: "In case of personal injury, all claims for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 48-173." This case is controlled by that statute, unless the plaintiff's injury was latent and progressive. In Clary v. R. S. Proudfit Co. (1933), 124 Neb. 582, 247 N. W. 417, we held: "* * * a latent accidental injury, seeming at first to be trifling and noncompensatory, but subsequently resulting in a progressive disease and a disability, occurs when its true nature is first discovered by him or when the diseased condition culminates in disability."

It seems to be defendant's position that since plaintiff had recurring difficulty with his right leg almost continuously from the time of the accident and this injury was initially compensable, it cannot be contended that the injury herein was latent or progressive within the meaning of our cases. This argument is adequately answered by what we said in Williams v. Dobberstein (1968), 182 Neb. 862, 157 N. W. 2d 776: "It is unreasonable to conclude that an injury is not latent merely because the plaintiff suffered pain, when thereafter several physicians were unable to correctly diagnose his injury. In Welke v. City of Ainsworth, 179 Neb. 496, 138 N. W. 2d 808, we reaffirmed the rule of Astuto v. Ray Gould Co., 123 Neb. 138, 242 N. W. 375: 'If an em-

ployee suffers an injury, which appears to be slight, but which is progressive in its course, and which several physicians were unable to correctly diagnose, his failure to file claim, or bring suit within the time limited by law, will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.' See, also, Ohnmacht v. Peter Kiewit Sons Co., 178 Neb. 741, 135 N. W. 2d 237."

Pain alone is not compensable under our statute. Here, the plaintiff carried on his regular occupation and did not learn of the herniated disc until he was hospitalized in April of 1970. There is no question on this record but that the herniated disc resulted from the injuries plaintiff sustained in the accident of 1965. There also can be little question the defendant did not know he had a back ailment until April of 1970. This action was commenced within 1 year from that date. In 1965, the defendant paid compensation for what appeared to be a minor injury. It is now apparent that the herniated disc resulted from that accident. This is within our rule. Section 48-137, R. R. S. 1943, runs from the time it became apparent that a compensable injury has been sustained. This rule applies where it later becomes apparent that a much more serious injury resulted from the accident than was at first supposed, and the plaintiff had no knowledge that such was the situation, which is this case.

In Gifford v. Ag Lime, Sand & Gravel Co. (1971), 187 Neb. 57, 187 N. W. 2d 285, we said: "On appeal of a workmen's compensation case to the Supreme Court, if there is reasonable competent evidence to support the findings of fact in the trial court, the judgment, order, or award will not be modified or set aside for insufficiency of the evidence." That situation prevails herein.

We affirm the judgment. Plaintiff is allowed an attorneys' fee of $500 for services in this court.

AFFIRMED.

NEWTON, J., concurring.

I concur in the result arrived at in this case. The appellee had been steadily employed since his original injury. The adverse effects of the injuries he received progressively increased until it became apparent that his capacity or ability to work had decreased. Under such circumstances he is entitled to recover. See Peek v. Ayers Auto Supply, 157 Neb. 363, 59 N. W. 2d 564.

STATE OF NEBRASKA, APPELLEE, V. M. L. MILLER, APPELLANT.
198 N. W. 2d 184

Filed June 16, 1972. No. 38458.

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

M. L. Miller, pro se.

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

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

SMITH, J.

Affirmed. See Rule 20.

AFFIRMED.

MARY DEGMETICH, APPELLANT, V. AMIEL LOU BERANEK, APPELLEE.
199 N. W. 2d 8

Filed June 23, 1972. No. 38152.

1. **Executors and Administrators: Trial: Evidence.** The admission of an executor or administrator is not receivable against him as a party in his personal capacity.
2. **Executors and Administrators: Limitations of Actions: Trial:**

Evidence. An allowance by an executrix of a demand against the estate based on a promissory note executed by the executrix and the decedent tolls the statute as to the estate but not as against the executrix in her individual capacity.

3. **Bills and Notes: Limitations of Actions: Evidence.** To remove the bar of the statute, the debtor must unqualifiedly acknowledge an existing liability.
4. **Pleadings.** The mere allegation of the existence of a confidential or fiduciary relationship is a legal conclusion only and insufficient to raise any issue of fact.
5. **Frauds, Statute of: Limitations of Actions: Estoppel.** A naked oral promise to pay a debt will not, in the absence of fraud or a specific agreement not to take advantage of the statute of limitations, estop a defendant or debtor to plead the statute of limitations.

Appeal from the district court for Saunders County: HOWARD V. KANOUFF, Judge. Affirmed.

J. Patrick Green and Jon S. Okun of Eisenstatt, Higgins, Kinnamon & Green, for appellant.

John F. Kerrigan of Kerrigan, Line & Martin, for appellee.

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

WHITE, C. J.

The issue in this case is whether the statute of limitations has run on three demand promissory notes totaling $9,000. The notes involved were executed in favor of the plaintiff by the defendant and his deceased wife, who was the plaintiff's daughter. The notes were for $1,000, $2,000, and $6,000, and were executed February 20, 1963, November 9, 1963, and March 27, 1964, respectively. This suit was filed August 10, 1970. On promissory notes payable on demand, the period of limitations runs from the date of their making. § 3-122, U. C. C. The applicable statute of limitations is section 25-205, R. R. S. 1943, which provides for a 5-year period of limitations. Since the notes appear on their face to be barred by the statute, the plaintiff's petition is sub-

ject to demurrer unless it alleges facts sufficient to suspend or take it outside the statute. Parkin v. Parkin, 123 Neb. 836, 244 N. W. 638. Generally, to sustain this burden, the plaintiff alleged that the defendant executed a written acknowledgment of the debt subsequent to the making of the notes, and further, generally, that he was estopped by his conduct from invoking the statute. The district court sustained the defendant's demurrer and dismissed the case. We affirm the judgment of the district court.

We turn first to the contention that the defendant made a written acknowledgment of the debt on February 27, 1968, and therefore the statute ran from that time. § 25-216, R. R. S. 1943. The record shows that the defendant's wife was killed in an automobile accident on April 12, 1966, and that the defendant on February 27, 1968, acting as administrator of his wife's estate filed an objection to the claim. In his objection as administrator of the estate he alleged that a payment of $400 had been made in the year 1964 and that the proper amount of the claim should therefore be $8,600. The prayer of his objection stated as follows: "WHEREFORE, your administrator respectfully prays that this claim be allowed in the amount of $8,600.00 * * *." This contention must fall because there is no admission of personal liability on the defendant's part, and the admission, if any, was solely limited to his capacity while acting as administrator of his wife's estate. The admission of an executor or administrator is not receivable against him as a party in his personal capacity. 4 Wigmore on Evidence (3d Ed.), § 1076, p. 114. The following from 54 C. J. S., Limitations of Actions, § 318, p. 412, is pertinent: "An allowance by an executrix of a demand against the estate based on a promissory note executed by the executrix and the decedent tolls the statute as to the estate but not as against the executrix in her individual capacity." This principle has been applied in the exact situation present in this case. In

McKennon v. McKennon, 104 Okla. 228, 231 P. 91, 40 A. L. R. 24, the administratrix of an estate, also personally liable on a note, approved the note as a claim against the estate in the capacity of administratrix. When the administratrix was sued individually on the note, she invoked the statute of limitations as a defense and the court held that the approval of the claim in her capacity as administratrix did not bind the widow in any individual capacity and thus was not an acknowledgment of the debt. It seems clear, as a matter of original analysis, that an acknowledgment made while acting in an official capacity, is not an unequivocal acknowledgment of a debt owed by the party himself in his individual capacity. In France v. Ruby, 93 Neb. 214, 140 N. W. 175, this court set out the criteria for a written acknowledgment under this statute: " 'To remove the bar of the statute, the debtor must unqualifiedly acknowledge an existing liability.' * * * 'A mere reference to the indebtedness, although consistent with its existing validity, and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an "acknowledgment" as is contemplated by the statute. This must be an unqualified and direct admission of a present, subsisting debt on which the party is liable.' " The actions of the defendant were purely in an official capacity as administrator, and there was nothing in his acknowledgment which would constitute an admission of liability in a personal sense. There is no merit to this contention.

In order to avoid the bar of the statute the plaintiff further contends that promises were made to the plaintiff during the existence of a confidential relationship between the plaintiff and the defendant, who was her son-in-law. The inadequacy of this pleading is apparent. From an examination of the pleadings it is apparent that the plaintiff has merely alleged the existence of a confidential relationship by virtue of the fact that

the defendant is her son-in-law. The mere existence of this in-law relationship does not raise any inference of a fiduciary relationship or position of trust and confidence. To adequately raise such an issue as an issue of fact, some underlying and supporting facts must be alleged. The pleadings in this case entirely fail to do this. The mere allegation of the existence of a confidential or fiduciary relationship is a legal conclusion only and insufficient to raise any issue of fact. 71 C. J. S., Pleading, § 27, p. 72; Schroeder v. Ely, 161 Neb. 252, 73 N. W. 2d 165; Meyer v. Linch, 145 Neb. 1, 15 N. W. 2d 317.

The plaintiff's case thus resolves itself into the assertion that the defendant's oral promises to pay are themselves sufficient to raise the estoppel. In support of this contention State Farm Mut. Auto. Ins. Co. v. Budd, 185 Neb. 343, 175 N. W. 2d 621, is relied upon. This reliance is misplaced. The Budd case involved a subrogation claim against the defendant's insurance company arising from an automobile accident. The plaintiff's insured, Garafalo, had been involved in a traffic accident with the defendant, who was insured by the Aetna Casualty & Surety Company. The plaintiff paid Garafalo for the damages to his automobile and was subrogated to his claim against the defendant. Upon notification of the claim, Aetna notified the plaintiff that it would not be in a position to honor the subrogation claim until the personal injury claim arising from the same accident was settled, and asked the plaintiff to wait until that time. Aetna maintained that position for over 3 years, until the statute of limitations had run and the claim was rejected. This court held that the defendant was estopped by the representations of his insurance company from asserting the statute of limitations. It appears that in the controversy between insurance companies, the plaintiff relied less on Aetna's promises to pay than upon its representations that, for internal administrative reasons, it would possibly prej-

udice settlement and be more convenient to dispose of the matter all at once, rather than in the piecemeal fashion proposed by the plaintiff. This was the situation with which the plaintiff was doubtlessly familiar and sympathetic. We do not believe the holding in this rather unusual case is properly applicable to an ordinary creditor-debtor relationship. In such a relationship the delinquent debtor will almost always make numerous assurances of payment. If such assurances alone were sufficient to estop the creditor, the purpose of the statute of limitations would be effectively circumvented. We hold that a naked oral promise to pay a debt will not, in the absence of fraud or a specific agreement not to take advantage of the statute of limitations, estop a defendant or debtor to plead the statute of limitations. See, Annotation, 24 A. L. R. 2d 1427; Annotation, 130 A. L. R. 32.

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

AFFIRMED.

DOLLY ROWEDDER, APPELLANT, V. ROYBERT L. ROSE ET AL., APPELLEES.
199 N. W. 2d 18

Filed June 23, 1972. No. 38212.

1. **Motor Vehicles: Negligence.** A left turn across a public highway between intersections is fraught with danger, and one making such a movement is required to exercise a degree of care commensurate with the danger.
2. **Motor Vehicles: Negligence: Trial.** When the driver of a motor vehicle turning across a highway between intersections fails to look to the front and rear for oncoming traffic at a time and place when to look would be effective, or looks and negligently fails to see that which is in plain sight, or is in a position where he cannot see, a question for the court is usually presented.
3. **Motor Vehicles: Negligence.** Driving at the speed defined by statute, when such definition sets a maximum speed and also

includes the requirement that such speed be reasonable and proper, having regard for the traffic, the use of the road, the condition of the road, and a requirement not to exceed a rate of speed such as to endanger the life or limb of any person, is not negligence in absence of other evidence indicating fault.

4. ———: ———. The duty to sound a signal warning of the approach of a motor vehicle depends largely on the circumstances of the particular case.

5. **Trial: Evidence: Appeal and Error.** The admission or rejection of photographs in evidence is largely within the discretion of the trial court. Error may not be predicated thereon in the absence of a showing of an abuse of discretion.

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

Frederick S. Geihs, for appellant.

Baylor, Evnen, Baylor, Curtiss & Grimit, for appellees.

Heard before SPENCER, SMITH, and NEWTON, JJ., and STUART and BUCKLEY, District Judges.

STUART, District Judge.

This is an action for personal injuries and property damage resulting from an automobile accident. At the conclusion of plaintiff's evidence, the trial court dismissed plaintiff's petition on motion of defendants and the plaintiff appeals.

The evidence shows that the collision occurred on May 27, 1969, at approximately 6:30 p.m. on U. S. Highway No. 136 about 6 miles east of Auburn. Plaintiff was riding in her automobile which was being driven easterly by her husband. They were proceeding to the farm home of plaintiff's niece, and at the point of collision were in the act of turning left into this farm driveway at the same time that the automobile owned by defendants Clifton, and being driven easterly by defendant Rose, was overtaking and passing plaintiff's car. The highway was a hard-surfaced roadway, 22 feet wide, with a painted centerline. Visibility was good and the roadway was dry. Prior to the accident,

the defendant Rose was traveling between 55 and 63 miles per hour, and plaintiff's automobile was "going slow." Plaintiff's automobile was in plain sight as defendant Rose overtook it for at least ¼ mile before the collision. Defendant Rose turned on his left-turn signal, moved into the left lane to pass plaintiff, and at this instant the plaintiff's automobile "veered over," defendant applied his power brakes, and the collision followed, the right front of defendants' automobile colliding with the left rear of plaintiff's automobile. Defendant Rose did not sound his horn. At the point of impact defendants' left front wheel was 3 feet south of the north edge of the paved portion of the highway and the plaintiff's left front wheel was 2 feet north of the centerline of the highway.

Five people witnessed the accident; the plaintiff, the plaintiff's husband, the defendant Rose, the defendant Laura A. Clifton (passenger in defendants' car), and Paul L. Edmonds, a disinterested witness who was following defendants' automobile four to six car lengths. All five testified either personally or by deposition. None of these witnesses testified that plaintiff's husband gave any indication of an intention to change direction or speed, either by a hand or arm signal, a signal light or a brake light. The uncontradicted testimony is that he began his left turn across the highway at a point not an intersection without any warning of any kind.

At the conclusion of plaintiff's evidence the trial court found as a matter of law that the proximate cause of the accident was the negligence of plaintiff's husband and that plaintiff's evidence failed to show that the acts of any of the defendants were a proximate cause of the accident.

The applicable statute provides: "(1) No person shall turn a vehicle from the direct course upon a highway unless such movement can be made with reasonable safety, and then only after giving * * * an ap-

propriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement; * * *. (2) A signal of intention to turn right or left shall be given continuously during not less than the last fifty feet traveled by the vehicle before turning; * * *." § 39-7,115, R. R. S. 1943.

This court has stated: "The most dangerous movement on public streets or highways is the left-hand turn. While the left-hand turn at intersections is within the purview of this statement, the left-hand turn across a favored public highway between intersections is a particularly dangerous one. Legislatures have seen fit to regulate such movements and courts have required a degree of care commensurate with the danger. The language of our statute states that no person shall turn a vehicle from the direct course upon a highway unless such movement can be made with reasonable safety, and then only after giving the statutory signal. In other words, the giving of the statutory signal is not enough, one must exercise reasonable care under all the circumstances. He cannot rely on holding out his arm and trust that all may see it. He must take reasonable precautions for his own safety and the safety of others before he undertakes a left turn between intersections where such movements are not anticipated." Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355.

Although plaintiff's husband testified, he was not asked whether or not he saw defendants' car or whether or not he signaled his intention to turn left. Therefore, he did not testify whether or not he observed the approach of defendants' automobile, which was in plain sight. Nevertheless, we think that this case properly comes under the rule enunciated in Petersen v. Schneider, *supra,* as follows: "Where the driver of a vehicle turning across a street or highway between intersections fails to look at all at a time and place where to look would be effective, or looks and negligently fails to see that which is plainly in sight, or is in a position

where he cannot see, a question for the court is usually presented."

Plaintiff complains of the speed of defendants' automobile. The applicable statute provides: "* * * no person shall operate a motor vehicle on any highway outside of a city or village * * * at a rate of speed greater than is reasonable and proper, having regard for the traffic, the use of the road, and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person, nor in any case at a rate of speed exceeding * * * sixty-five miles per hour between the hours of sunrise and sunset, and sixty miles per hour between the hours of sunset and sunrise, upon any concrete, brick, macadamized, or other hard-surfaced highway, or upon any other highway that is a part of the state highway system * * *." § 39-723, R. R. S. 1943.

The highway was hard-surfaced in good condition, the weather was clear and dry, visibility was good, and the time was between the hours of sunrise and sunset. Defendant Rose had no reason to anticipate any danger. It is entirely proper for one vehicle to pass another which is traveling in the same direction, and to do so the passing vehicle must be going faster than the vehicle being passed. The only evidence of defendants' speed was that it was between 55 and 63 miles per hour. This was not a negligent rate of speed under the circumstances shown.

Plaintiff complains that defendant Rose failed to sound his horn, and that this is evidence of negligence. "The duty to sound a horn or give a warning during the operation of a motor vehicle is not an absolute one. The duty in this regard depends upon circumstance." Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496. "One driving in the rear of another car has the right to assume that a motorist will obey the law of the road and is not bound to anticipate that a car will leave its proper side and cross the highway, at least where there is no intersection of public highways, and nothing to lead one in

the exercise of reasonable care to foresee such action." Petersen v. Schneider, *supra*. The evidence in this case fails to show any reason that defendant Rose should have anticipated the left turn, and therefore his overtaking and passing without sounding his horn is not evidence of negligence.

Plaintiff complains of the refusal to admit exhibits 14 to 25 in evidence. These exhibits appear to be photographs taken at some time after the accident. There was no foundation presented by the person taking the photographs. There was some indication that they may have been taken by plaintiff's attorney 5 days after the accident, but there was no evidence that the photographs offered were, in fact, those taken by plaintiff's attorney. The witnesses looking at the photographs were unwilling to state that the skid marks portrayed therein were those made at the time of the accident. "The admission or rejection of photographs in evidence is largely within the discretion of the trial court. In the absence of a showing of an abuse of discretion, error may not be predicated upon such ruling." Peterson v. Skiles, 173 Neb. 470, 113 N. W. 2d 628. Clearly plaintiff did not lay sufficient foundation for the admission of these exhibits.

The dismissal of plaintiff's petition by the district court was correct and is affirmed.

AFFIRMED.

ANDREWS ELECTRIC COMPANY, A CORPORATION, APPELLEE, V. FARM AUTOMATION, INC., A CORPORATION, APPELLANT.
198 N. W. 2d 463

Filed June 23, 1972. No. 38337.

1. **Statutes: Contracts: Account Stated: Account, Action on: Interest.** By statute (1) on money due on an instrument in writing or on settlement of an account from the day the balance shall be agreed upon, interest is allowed; and (2) unsettled

accounts bear interest after 6 months from the date of the last item.

2. **Statutes: Attorney and Client: Account, Action on: Interest.** By statute a party may recover prejudgment interest and an attorney's fee on a claim of $2,000 or less for services rendered, labor done, or materials furnished, provided he presented the claim 90 days prior to commencement of suit. Compliance with the condition is mandatory.
3. **Appeal and Error: Trial.** The court in every stage of an action must disregard any error which does not affect the substantial rights of the adverse party. No judgment shall be reversed by reason of the error.
4. **Appeal and Error: Trial: Pleadings: Parties.** An appeal to the Supreme Court in a civil action will be considered upon the theories presented by the parties at the trial, provided a liberal construction of the pleadings, as construed by the parties, will permit.

Appeal from the district court for Gage County: ERNEST A. HUBKA and WILLIAM B. RIST, Judges. Affirmed in part, and in part reversed and remanded with directions.

Ronald G. Sutter of Everson, Wullschleger, Sutter, Fischer & Muehlberg, for appellant.

Howard F. Ach of Ach & Ach, for appellee.

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

SMITH, J.

Andrews Electric Company alleged two causes of action, one on an account stated and the other for the reasonable and agreed price of goods and services subsequently furnished Farm Automation, Inc. The latter in its answer denied generally and counterclaimed for damages for breaches of contracts upon which Andrews first cause of action rested. The court directed a verdict for Andrews on its causes of action, allowing the prejudgment interest and attorney's fees. It submitted part of Farm's counterclaim to a jury. The verdict went for Andrews.

Farm appeals. It limits its assignments of error to

Andrews first cause of action, arguing as follows: It is entitled to a jury trial on the issue of the existence of an account stated. In the alternative Andrews was not entitled to prejudgment interest or attorney's fees.

From 1964 to 1968 Andrews was a subcontractor of Farm, installing electrical wiring and equipment on premises of Farm's customers. On October 25, 1967, the parties signed an agreement, exhibit 1, as follows: The starting balance owed Andrews as of January 1, 1967, was $5,082.30. The balance due without reservation, addition, or subtraction was $3,935.99. Below that sum exhibit 1 listed five items totaling $2,001.03. Two were credit memoranda "to be issued" in the total sum of $321.40. The other three were: "Holding Leechs 419.63 . . . G. Holtmeier 760.00 . . . O. Meyer 500.00. . . ." After that itemization, receipt of $1,934.96 was acknowledged. The credit memoranda were issued October 26. In January 1968, Farm paid Andrews $500, the amount owing on the Meyer subcontract.

Officers of both parties testified that under exhibit 1 Farm was to pay Andrews upon completion of performance of the subcontracts. It was undisputed that performance by Andrews of all the subcontracts noted in exhibit 1 were not then completed. The date of completion of performance or a demand for payment subsequent to October 25 and prior to commencement of suit was not proved.

Suit had been filed June 30, 1969, and judgment was rendered April 21, 1971. Andrews on its first cause of action recovered the principal sum of $1,179.63, prejudgment interest from May 1, 1968, in the sum of $212.20, and $150 for services of its attorneys.

On the issue of interest, as well as of attorney's fees, the parties rely solely on statute. On money due on an instrument in writing or on settlement of an account from the day the balance shall be agreed upon, interest is allowed. Unsettled accounts bear interest after 6 months from the date of the last item. § 45-104, R.

R. S. 1943. A party may recover prejudgment interest and an attorney's fee on a claim of $2,000 or less for services rendered, labor done, or material furnished, provided he presented the claim 90 days prior to commencement of suit. See § 25-1801, R. S. Supp., 1969. Compliance with the condition is mandatory. See Andrews v. Wilkie, 181 Neb. 398, 148 N. W. 2d 924 (1967).

The court in every stage of an action must disregard any error which does not affect the substantial rights of the adverse party. No judgment shall be affected by reason of the error. See § 25-853, R. R. S. 1943.

An appeal to the Supreme Court in a civil action will be considered upon the theories presented by the parties at the trial, provided a liberal construction of the pleadings, as construed by the parties, will permit. Andrews v. Wilkie, 181 Neb. 398, 148 N. W. 2d 924 (1967).

An account stated is a contract to pay the stated sum. It must ordinarily be set aside in order for the original claims upon which it is based to be tried. See, 6 Williston on Contracts (Rev. Ed., 1938), § 1864, p. 5238; cf. Moore v. Schank, 148 Neb. 228, 27 N. W. 2d 165 (1947).

Farm with a tenable argument requests us to plumb fathomless differences among open account, account stated, executory accord, and evidential admission. See, generally, 6 Corbin on Contracts, c. 72, pp. 233-90 (1962); 6 Holdsworth's History of English Law, pp. 650-51 (1924); 11 id. pp. 526-27 (1938); Jones, The Elizabethan Court of Chancery, p. 280 (1967); Restatement, Contracts, § 422 (1932); Williston, *supra*, §§ 1862-64, pp. 5227-38; Note, 14 Syracuse L. Rev. 653 (1963). We decline.

The assent of Farm to exhibit 1 was conditioned upon completion of performance by Andrews. Reviewing the record, especially Farm's counterclaim and the jury verdict, we conclude that the trial went on confused theories of open account, account stated, executory accord, and evidential admission. Apart from interest

and attorneys' fees, the material factual issue, stripped of form, related only to the Holtmeier subcontract. Specifically, it was the fitness of a device to control and meter the flow of grain, Farm having retained the device. That subcontract was indirectly a part of Andrews first cause of action. Although there was no account stated the finding for Andrews on the items of the account was not prejudicial error in view of the jury verdict.

The evidence is insufficient to prove presentation of the claim to Farm after performance and 90 days prior to commencement of the action. On the first cause of action the allowance of prejudgment interest and an attorney's fee was erroneous.

The judgment on Andrews first cause of action is reversed in part and the cause remanded with directions to disallow the items of interest prior to April 21, 1971, and attorney's fees. The judgment is otherwise affirmed.

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

THE EXCHANGE BANK, GIBBON, NEBRASKA, A CORPORATION, APPELLEE, V. MID-NEBRASKA COMPUTER SERVICES, INC., A CORPORATION, ET AL., APPELLANTS.
199 N. W. 2d 5

Filed June 23, 1972. No. 38342.

1. **Mortgages: Pleadings: Evidence: Trial: Appeal and Error.** Where there is some circumstantial evidence which tends to support the allegation in a petition for the foreclosure of a mortgage that no proceedings at law have been had for the recovery of the debt, and no contrary showing is attempted, a decree of forclosure will not be reversed without a showing that the specific objection was called to the attention of the trial court and also that the defendant has been prejudiced by the omission of direct proof.
2. **Mortgages: Supersedeas: Bonds: Appeal and Error.** In appeal-

ing from a decree of foreclosure which orders the sale of land, the supersedeas bond should be conditioned as set out in subsection (3) of section 25-1916, R. S. Supp., 1971, and the amount of the pledge a matter of judicial discretion. In appealing from a decree of foreclosure which directs the payment of money and also orders the sale of real estate, the court may require a supersedeas bond in an amount computed as specified in subsection (1) and conditioned as provided in subsections (1) and (3) of said statute.

3. **Courts: Bonds: Appeal and Error.** An appellate court is required to permit the amendment of a defective appeal bond or to order the filing of a new bond in the furtherance of justice.
4. **Statutes: Courts: Bonds: Appeal and Error.** An appeal bond is within the purview of the statute which requires the court to disregard defects not affecting the substantial rights of the adverse party.

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

Knapp, Tarrell, State & Yeagley, for appellants.

Tye, Worlock, Tye, Jacobsen & Orr, for appellee.

Heard before SPENCER, SMITH, and NEWTON, JJ., and LYNCH and MORAN, District Judges.

LYNCH, District Judge.

This is an action to foreclose two separate mortgages on the same property. The defendants filed a general denial. The plaintiff proved execution of the notes and mortgages, defaults, and amounts due. The instruments were received in evidence and canceled and merged in judgment. Defendants' counsel cross-examined only as to amounts due and interest and offered no testimony. A decree in proper form was entered which included findings that certain amounts were due to plaintiff. The defendants' motion for new trial, based upon four general allegations of error, was overruled. At an ex parte hearing in chambers, defendants' counsel tendered a supersedeas bond conditioned pursuant to subsection (3) of section 25-1916, R. S. Supp., 1971. The court required a bond under subsection (1) of that statute.

On appeal the defendants contend that: (1) There was not competent evidence to support the allegation that no proceedings at law had been instituted for the recovery of the debts; and (2) the court erred in requiring a bond pursuant to subsection (1) of section 25-1916, R. S. Supp., 1971.

Concerning defendants' first argument, the case of Nielsen v. Central Nebraska Land & Investment Co., 87 Neb. 518, 127 N. W. 897, is controlling: "If there is some circumstantial evidence which tends to sustain the allegation in a petition for the foreclosure of a mortgage that no proceedings at law have been had for the recovery of the debt, and nothing appears to show that the defendant has been prejudiced by the omission of direct proof, this court will observe the provisions of section 145 of the code, and the judgment will not be reversed merely by reason of such defect." Section 145 of the code is now section 25-853, R. R. S. 1943.

Dicta in the Nielsen case states: "The allegation is negative in its nature, and we have said that where there is some evidence tending to support the allegation, and no contrary showing is attempted, a decree of foreclosure will be affirmed." Also, "The record fails to show that this objection was called to the attention of the district court. No error affecting defendants' substantial rights is apparent."

In the instant case there was some circumstantial evidence tending to support the negative allegation in the petition; there was no contrary showing attempted; there was no proof of prejudice; and the objection was not called to the attention of the trial court. Therefore, this assignment of error is not well taken. All of defendants' citations are distinguishable.

In support of their second assignment of error, the defendants rely solely upon section 25-1916, R. S. Supp., 1971, and the case of Kountze v. Erck (1895), 45 Neb. 288, 63 N. W. 804, which was an appeal from an order confirming the sale of real property. In that case the

court held that: "* * * the penalty of a supersedeas bond on appeal from the order of confirmation is not required to be double the amount of the deficiency judgment, but must be in such sum as the court or judge shall fix, and conditioned as prescribed by the third subdivision of section 677 of the Code of Civil Procedure." Section 677 of the code is similar to the present section 25-1916, R. S. Supp., 1971. The court further stated: "The defendant has not appealed, nor attempted to do so, from the amount of the deficiency judgment, but merely from the order confirming the sale of the mortgaged premises, which order does not direct the payment of any sum of money whatever. It is true a deficiency judgment was rendered in the case at the same time, but the defendant had a perfect right to have either or both reviewed at his election." In the case of State ex rel. Baker v. Baxter (1903), 4 Neb. Unoff. 869, 96 N. W. 647, the court held: "Where a decree awards the plaintiff a personal judgment against the defendants and also directs the sale of pledged property by way of foreclosure, the defendants may supersede that portion of the decree providing for foreclosure of the pledge without superseding the money judgment."

In 5A C. J. S., Appeal and Error, § 1635, p. 188, it is stated: "The exercise by the trial court of its discretion with respect to * * * fixing the terms and conditions of a supersedeas bond, will not be interfered with on appeal unless there has been a manifest abuse of discretion or injustice has resulted."

In State v. Kidder, 169 Neb. 181, 98 N. W. 2d 800, this court held: "A defective appeal bond which has been approved by the court rendering the judgment confers jurisdiction on the appellate court to have the defect corrected, and the appellate court is required to permit an amendment of the bond or to order the filing of a new bond in the furtherance of justice."

It is concluded that in superseding a decree of fore-

closure which orders the sale of land, the bond should be conditioned as set out in subsection (3) of section 25-1916, R. S. Supp., 1971, and the amount of the pledge or penalty a matter of judicial discretion; and, in appealing from a decree which directs the payment of money and also orders the sale of real estate, the trial court may require a supersedeas bond in an amount computed as specified in subsection (1) and conditioned as provided in subsections (1) and (3) of the statute.

In the instant case it appears that defendants appealed from the money judgments and the order of sale. There has been no showing of prejudice or abuse of discretion either as to the amount or the conditions of the bond. A copy of the supersedeas bond is not included in the record; however, if it does not contain the conditions prescribed in subsection (3) of section 25-1916, R. S. Supp., 1971, it should be amended if requested by the plaintiff.

Applicable to both aspects of defendants' appeal is section 25-853, R. R. S. 1943, which requires the court to disregard defects not affecting the substantial rights of the adverse party. The case of Jacobitz v. Bussinger, 179 Neb. 524, 138 N. W. 2d 839, holds that, "* * * an appeal bond undertaking is within the purview of the statute."

The judgment of the trial court is affirmed. Defendants directed to amend bond if requested by plaintiff.

AFFIRMED.

IN RE INTERESTS OF CHENA V. JOHNSON AND DONDI T. JOHNSON, CHILDREN UNDER EIGHTEEN YEARS OF AGE. MICHAEL T. HEALEY, APPELLEE, V. INGRID Y. JOHNSON, APPELLANT.

198 N. W. 2d 466

Filed June 23, 1972. No. 38381.

1. **Infants: Parent and Child.** A neglected child is a child under

18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child.

2. **Infants: Statutes.** The child custody statutes of the State of Nebraska are to be liberally construed to accomplish the purposes of serving the best interests of the children involved.
3. **Infants: Parent and Child: Trial: Appeal and Error.** In cases involving child custody determinations in juvenile court and other courts, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of custody, will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence.

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. Affirmed.

Samuel J. Turco of Seminara, Caniglia, Meazell & Turco, for appellant.

Donald L. Knowles, Colleen R. Buckley, and Roger R. Holthaus, for appellee.

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

NEWTON, J.

This is an action brought in the juvenile court of Douglas County, Nebraska, in the interests of Chena V. and Dondi T. Johnson, who were then respectively 3 and 1 years of age. They are children born to appellant Ingrid Y. Johnson out of wedlock by different fathers. The trial court found the children to be neglected, terminated all parental rights, and committed the children to the Department of Public Welfare of the State of Nebraska. We affirm the judgment of the juvenile court.

The fathers of the children, subsequent to their birth, displayed no interest in them, and did not contribute to their support. Appellant received Aid to Dependant Children funds, was consistently unemployed, and had no other means of sustaining herself and the children.

The home was inadequately furnished, due, not to lack of funds, but to indifference on the part of appellant. It was also very filthy and odorous. There was a failure to provide the children with adequate or sufficient clothing. The children were frequently left in a locked apartment without adult supervision other than a request to neighbors to look in on them occasionally. These instances covered various periods of time and on one occasion the appellant told a neighbor she would only be gone 20 minutes and failed to return for 3 days. Appellant served 10 and 30-day stretches under confinement in the county jail, apparently for petit larceny. The record is not entirely clear with reference to the whereabouts of the children on these occasions, but the inference is that they were in the custody of appellant's sister in the apartment and under the conditions above described.

Appellant contends the decision of the juvenile court is not supported by the evidence. The following rules appear to be applicable. "A neglected child is a child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child." Mullikin v. Lutkehuse, 182 Neb. 132, 153 N. W. 2d 361.

"The child custody statutes of the State of Nebraska are to be liberally construed to accomplish the purposes of serving the best interests of the children involved. * * *

"In cases involving child custody determinations in juvenile court and other courts, the findings of the trial court, both as to an evaluation of the evidence and as to the matter of custody, will not be disturbed unless there is a clear abuse of discretion or the decision is against the weight of the evidence." State v. Randall, 187 Neb. 64, 187 N. W. 2d 586.

The evidence reflects that representatives of the Douglas County Welfare Office had been working with appellant for many months in an effort to improve the lot of these children. Such efforts were unavailing and there is no reason to assume that conditions would be improved in the future if the children were left with their mother. The children have clearly been neglected and it is definitely in their interests that they be provided with more acceptable care and surroundings. The findings and order of the juvenile court are not unreasonable and there has not been an abuse of discretion.

We find it to be in the best interests of the children to affirm the judgment of the juvenile court.

AFFIRMED.

VACANTI & RANDAZZO CONSTRUCTION COMPANY, A CORPORATION, APPELLEE, V. H.I.E. FOOD PRODUCTS, INC., ALSO KNOWN AS HOUSE OF ALBERT'S, INC., APPELLANT, IMPLEADED WITH RONALD M. ALBERT, APPELLEE.

198 N. W. 2d 468

Filed June 23, 1972. No. 38402.

Pleadings: Time: Judgments. The fact alone that an answer was filed 10 days after answer day without leave of court is not a sufficient ground for thereafter entering a default judgment against the defendant.

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

Carl I. Klekers and William H. Mecham, for appellant.

Frank Meares, for appellee Vacanti & Randazzo Constr. Co.

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

SMITH, J.

The district court rendered a judgment by default

against defendant H.I.E. Food Products, Inc. The latter on appeal asserts the court erred in denying defendant leave to answer out of time and in rendering the judgment.

On July 9, 1971, plaintiff filed its petition alleging "waste" and nonpayment of rent of $2,050 a month from March 1 through August 1, 1971, on a written lease. The term of the lease was 15 years from September 1, 1969. Plaintiff prayed for judgment of $419,856 under an acceleration clause and for a writ of restitution. On August 26, 1971, 10 days after answer day on an alias summons, counsel for defendant without leave of court filed an answer with certificate of service on counsel for plaintiff. The answer was a general denial. On September 2, 1971, plaintiff moved to strike the answer.

At a hearing on October 14, 1971, counsel for defendant moved for leave to file an amended answer and tendered his affidavit of even date. The affidavit stated as follows: Defendant was "legally nonexistent" and its president in Florida. Counsel notified him of the suit by letter dated July 23, 1971. The travel schedule of the president and delays in the mail resulted in counsel's receiving a reply on August 20, 1971, by letter dated August 12, 1971. The amount due for rent was undetermined and unascertainable on October 14, 1971. Plaintiff had retaken possession of the property and had failed to mitigate damages. The premises "could be reletted to another tenant." See Bernstein v. Seglin, 184 Neb. 673, 171 N. W. 2d 247 (1969). Counsel did not tender a formal answer.

At the hearing counsel for plaintiff mistakenly said that answer day had been July 9, 1971. The court denied defendant's motion outright, declining to grant leave to answer on reasonable conditions; and it sustained a motion of plaintiff to strike the purported answer. It found defendant in default and proceeded to take evidence in the form of a statement by counsel

for plaintiff concerning the amount of the judgment. Counsel for plaintiff stated that the total amount due was $419,856. Counsel for defendant inquired, "Is it possible to cross-examine . . . (counsel for plaintiff)." The court replied, "No, you are not in Court." Judgment in that amount was then rendered.

Counsel for defendant answered without leave of court 10 days after answer day but the court had not adjudged a default. Such a mistake without more is insufficient to warrant a default judgment subject to these conditions: A good defense is pleaded or proved, and no unfair prejudice will result from the grant of a trial on the merits. Cf. Beliveau v. Goodrich, 185 Neb. 98, 173 N. W. 2d 877 (1970).

The rulings and judgment constituted an abuse of discretion. The judgment is reversed and the cause remanded for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

IN RE INTERESTS OF PATRICK MICHAEL HARTMAN ET AL. MICHAEL T. HEALEY, APPELLEE, V. NANCY HARTMAN APPELLANT.

199 N. W. 2d 26

Filed June 30, 1972. No. 38190.

1. **Parent and Child: Infants: Words and Phrases.** A neglected child is a child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child.
2. **Parent and Child: Infants: Trial: Evidence: Appeal and Error.** In cases involving child custody and determinations in juvenile court the findings of the trial court, both as to the evaluation of the evidence and as to the matter of custody, will not be disturbed unless there is a clear abuse of discretion.

3. **Parent and Child: Infants: Trial: Evidence.** A court may terminate parental rights when it finds such action to be in the best interests of the child and it appears from the evidence that the parent has substantially, continuously, and repeatedly neglected the child and refused to give the child the necessary parental care and protection.

Appeal from the separate juvenile court of Douglas County: SEWARD L. HART, Judge. Affirmed.

Spielhagen, Matejka & Spielhagen, for appellant.

Donald L. Knowles and Colleen R. Buckley, for appellee.

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

WHITE, C. J.

This is an appeal from the separate juvenile court of Douglas County in which the court terminated the parental rights of the appellant natural mother of the five minor children involved and held that it was to the best interests of the minor children that they be awarded to the care and custody of the Department of Welfare, State of Nebraska, and that the said Department of Welfare should have authority to consent to the legal adoption of said children. We affirm the judgment and order of the court.

The essential question involved in this case is the determination of fact as to whether the children involved were "neglected" children within the meaning of the statutory definition in section 43-201, R. R. S. 1943, which provides as follows: "Neglected child shall mean any child under the age of eighteen years * * * whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child." This court has recently defined the meaning in this statute in Mullikin v. Lutkehuse, 182 Neb. 132, 153 N. W. 2d 361, by reiterating

the position that was taken in State v. Best, 173 Neb. 483, 113 N. W. 2d 650. In the Mullikin case, we held as follows: "A neglected child is a child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of the fault or habits of the parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child."

A detailed review of the evidence is not necessary in this opinion. We will review the pertinent facts supporting the court's judgment. The evidence shows that the Omaha police and a caseworker for the Douglas County Social Services entered the home of the appellant; found it in complete disorder; found that there were firearms and ammunition within easy reach of all five of the children; that prior to the time they entered the home, the caseworker observed one of the minor children of the appellant playing naked in front of the home; that at the time they entered the home they found the appellant was not at home, and when the caseworker returned with the police they did not find any parent present nor anyone purporting to be in charge of the children. This general testimony was cumulatively corroborated by the most convincing type of evidence. It demonstrates that the entire interior of the home was littered with clothing, old furniture, dirt, and filth; that the five children were in various states of undress; that the kitchen was not only in a state of disorder but there appeared to have been a recent fire in the kitchen area; and that one of the older children was attempting to prepare some food for the younger children. The refrigerator was disconnected and the food therein was spoiled. The authorities were unable to get into the basement area and down the steps due to the litter consisting of clothing, junk, and boxes. Attempts to locate the appellant were futile and it became immediately necessary to take the children into pro-

tective custody. The evidence also indicates that some of the children were peculiarly in need of constant care. One of them was retarded. The appellant had been advised that there were special services available for treatment of retarded youngsters, but she did not register her child for the services available. One of the teachers of the Hartman children testified that during the period of attendance in school their clothing and bodies were dirty; and that on many occasions this condition was brought to the attention of the appellant but there was no substantial improvement in their condition. There were also problems of nonattendance in school with reference to Patrick and Diane which were brought to the attention of the appellant. The evidence in this case almost conclusively shows not only a continuing neglect, but attention far short of the normal standards for caring for children of tender years, and also shows either a refusal or a failure to do anything about the conditions when they were called to the appellant's attention by the authorities. Much of the testimony of the State was corroborated by one of the children, Patrick Hartman, age 11, who also testified that on the date in question, when the investigation was made by the authorities, he did not know the whereabouts of his mother, the appellant; that she had left the evening before and had not returned; that he did not attend school because of this and remained home attempting to take care of his younger brothers and sisters; and that he had little or no contact with Thomas Hartman, his father.

There is no denial of the facts testified to by the State's witnesses, and we may generally characterize the appellant's testimony as being an appeal to the sympathy of the court because of the separation from her husband and the hardships of maintaining a home under the conditions of poverty and strain usual in this situation. She concedes that her home was "very much a mess" and that she had left the home on May 20, 1970, and did not return until May 22, 1970, at about 3 a.m.

The court, in spite of this overwhelming evidence of neglect, continued this case from January 15, 1971, at the request of the appellant, until March 19, 1971. Again the appellant was ordered to be prepared by March 19, 1971, to show cause why her parental rights should not be terminated. The patience of the court in this situation is commendable. Again, the court did not make a final determination of the matter until April 21, 1971, when, after hearing further testimony, it finally came to the conclusion that both the appellant's and the father's rights should be terminated and ordered the children placed with the Department of Public Welfare for adoption.

It requires no argument or detailed analysis of the evidence to come to the conclusion that the court was correct in exercising its discretion and finding that these five children were neglected within the meaning of the statute. We have recently held in cases involving child custody and determinations in juvenile court that the findings of the trial court, both as to the evaluation of the evidence and as to its judgment as to the matter of custody, will not be disturbed unless there is a clear abuse of discretion. Jones v. Jones, 183 Neb. 223, 159 N. W. 2d 544. It is quite plain in this particular case that the court would have been derelict in its duty had it not made the determination of neglect that it did.

The appellant contends that her parental rights, in spite of the conclusive evidence of neglect, should not have been completely terminated. A court may terminate parental rights when it finds such action to be in the best interests of the child and it appears from the evidence that the parent has substantially, continuously, and repeatedly neglected the child and refused to give the child the necessary parental care and protection. Healey v. Naimie, 187 Neb. 494, 192 N. W. 2d 137; Mingus v. Stuchlick, 185 Neb. 139, 174 N. W. 2d 194; Hubbard v. Loewenstein, 181 Neb. 96, 147 N. W. 2d 164.

We find no abuse of discretion by the court in com-

ing to the determination that it did to terminate the parental rights. Particularly persuasive in this respect is not only the nature of the neglect by the appellant of her children, but that she continuously failed or refused to give the children necessary parental care and protection when it was called to her attention by the authorities and other persons. Not only has the appellant shown her unfitness but she has also shown that she has not substantially altered her course of conduct. The findings and the determination of the court that parental rights should be terminated are without error.

The judgment of the separate juvenile court is correct and is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. SAMMY HOWELL, APPELLANT.

199 N. W. 2d 21

Filed June 30, 1972. No. 38316.

1. **Appeal and Error: Time: Judgments.** Where a notice of appeal is not filed within 1 month from the entry of the judgment or final order appealed from as required by section 25-1912, R. R. S. 1943, this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed.
2. **Post Conviction: Trial: Evidence: Pleadings.** In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief.
3. **Criminal Law: Pleadings: Evidence: Appeal and Error.** When a defendant seeks to appeal the original proceedings pertaining to his conviction and fails to show that he is acting in good faith and that the appeal has merit, he has failed to sustain the required burden of proof.
4. **Criminal Law: Motions, Rules, and Orders: Evidence.** A failure to move for the suppression of evidence seized unlawfully waives the objection.
5. **Criminal Law: Trial: Evidence: Appeal and Error.** When the evidence of guilt is clear and the exclusion of erroneous evi-

dence obviously would not have resulted in a different verdict, the admission of such evidence is harmless error.

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

Brock & Seiler, for appellant.

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

Heard before SPENCER, SMITH, and NEWTON, JJ., and LYNCH and MORAN, District Judges.

NEWTON, J.

This is a post conviction proceeding. Defendant alleges he was wrongfully denied the right to appeal from his conviction and the admission of constitutionally inadmissible evidence. We affirm the judgment of the district court overruling the motion to vacate the judgment of conviction.

Defendant was convicted on two counts of unlawfully giving or delivering L.S.D. He was represented by privately employed counsel. Motion for new trial was overruled on August 7, 1970, and defendant was sentenced to serve 2 to 3 years in the Nebraska Penal and Correctional Complex on each count. Sentences were to run concurrently. Defendant states that after confinement, but within the time allowed for appeal, he prepared the necessary papers to effect an appeal, and delivered them to the proper prison authority, but they were not properly forwarded until after the time for appeal had expired. The notice of appeal and accompanying instruments were filed on September 23, 1970. Defendant's allegation of unreasonable delay is not borne out by the instruments filed. The praecipe for a bill of exceptions is dated September 11, 1970, and the jurat on an accompanying affidavit bears the date of September 14, 1970. No reason is given by defendant for not having had his attorney appeal the case. "Where a notice of appeal is not filed within 1 month from the

entry of the judgment or final order appealed from as required by section 25-1912, R. R. S. 1943, this court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed." State v. Pauley, 185 Neb. 478, 176 N. W. 2d 687.

The defendant has failed to allege or prove facts indicating that he is acting in good faith and that his appeal has merit. The following rules appear to be pertinent. "In a post conviction proceeding, the petitioner has the burden of establishing a basis for relief.

"* * * When a defendant seeks to appeal the original proceedings pertaining to his conviction and fails to show that he is acting in good faith and that the appeal has merit, he has failed to sustain the required burden of proof." State v. Myles, 187 Neb. 105, 187 N. W. 2d 584.

As justification for an appeal and for the purpose of raising another constitutional issue, defendant alleges the wrongful admission of one item of evidence. A warrant to search defendant's automobile for narcotics had been issued. No narcotics were found but the contents of the automobile, apparently comprising all of defendant's personal effects, were inventoried. A pamphlet or book on drug awareness which described various drugs and their effects was offered in evidence. The book had been obtained from defendant's automobile and was not within the description of articles authorized to be seized under the search warrant. No motion to suppress this evidence was made, either before or during trial, on the ground that it was obtained as the result of an unlawful search. Counsel did object to its introduction on the ground that it was hearsay, irrelevant, immaterial, incompetent, and without foundation. It was received for the limited purpose of showing that defendant knew the nature of the drugs he was charged with giving or delivering. The objections made were without validity although use of the book in evidence would appear to have been vulnerable to a motion to suppress on the ground of unlawful seizure. A failure

to move for the suppression of evidence seized unlawfully waives the objection. See § 29-822, R. R. S. 1943. See, also, Robinson v. United States, 327 F. 2d 618 (8th Cir., 1964).

Furthermore, the book appears to have been innocuous. It is educational in nature and of a type used to inform people of the harmful effects of certain drugs. Anyone might innocently possess such a book and gain possession of the knowledge it imparted. Had a motion to suppress been made and erroneously rejected, it would not have been grounds for reversal when the nature of the book is considered together with the clear evidence of guilt disclosed by the record. When the evidence of guilt is clear and the exclusion of erroneous evidence obviously would not have resulted in a different verdict, the admission of such evidence is harmless error. See Schneble v. Florida, 405 U. S. 427, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (March 21, 1972).

We affirm the judgment of the district court.

AFFIRMED.

MORAN, District Judge, concurs in result.

ALBERT BELL, APPELLANT, V. THEODORE JANING, APPELLEE.
199 N. W. 2d 24

Filed June 30, 1972. No. 38326.

Extradition: Time: Arrest. The illegality of a prisoner's custody prior to the issuance of a rendition warrant from a sister state does not render the warrant void and unenforceable.

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

Frank B. Morrison, Sr., and Stanley A. Krieger, for appellant.

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

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

WHITE, C. J.

This is an appeal from a denial of relief in a habeas corpus case. The question involved is whether the illegality of the appellant's custody prior to and at the time of the Governor's issuance of a rendition warrant honoring a request from a sister state renders the warrant void and unenforceable. The district court found that it did not, and we affirm the judgment of the district court.

Only the facts necessary for our disposition of this case will be recited in this opinion. The appellant was arrested on May 23, 1971, as a fugitive from justice. Under sections 29-743 and 29-745, R. R. S. 1943, of the Uniform Criminal Extradition Act, the appellant became entitled to release from custody on August 21, 1971, the date on which 90 days had elapsed which is the limit of legal detention under the statute. The appellant remained in custody until August 24, 1971, between 2 and 3 days after he was entitled to release. During this period of time, the Governor of the State of Nebraska received a rendition warrant from a sister state, which was served and the appellant's confinement by the State was continued pursuant to the authority of the rendition warrant.

We must assume, in deciding this case, that the State's custody of the appellant was unlawful during some or all of the time after August 21, 1971. It is obvious that during this very short period of time the appellant would have been entitled to release under the statute on a writ of habeas corpus. The question presented to us though is not the propriety of the custody during this period of time. We are confronted with the question of the propriety of the custody after the State's receipt of the rendition warrant. The decisions and authority in this situation are clear. In a decision on

facts substantially identical to those before the court here, the federal court held, in Lott v. Heyd, 315 F. 2d 350, as follows: "Assuming that the appellant was held for three days without legal authority, no federally-protected rights were violated and to hold that Louisiana's alleged misbehaviour deprived Mississippi of its Constitutional right to the fugitive would amount to allowing the State of Louisiana to amend the Constitution." Further cumulative authority precisely in point is found in Gummow v. Larson, 35 Ill. 2d 280, 220 N. E. 2d 165; State v. Hedman, 280 Minn, 69, 157 N. W. 2d 756; Lombardo v. Tozer (Mo.), 264 S. W. 2d 376; Cohen v. Warden, 252 F. Supp. 666.

It is clear that the cited sections of the Uniform Criminal Extradition Act are to prevent an unreasonable lengthy period of confinement of fugitives pending consummation of extradition proceedings by the demanding state. It is clear that they are entitled to the writ of habeas corpus to enforce the provisions of these sections of the statute. It is even more clear, however, that there is no indication, either under the Constitution of the United States or of any legislative intent to restrict the period within which a sister state may issue a rendition warrant to apprehend a fugitive and to make him respond to criminal proceedings in the sister state. There is no merit to the appellant's contention.

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

AFFIRMED.

MARGARET RAMBO, APPELLANT, V. DONNA M. GALLEY ET AL., APPELLEES.

199 N. W. 2d 14

Filed June 30, 1972. No. 38385.

1. **Equity: Appeal and Error.** When an action in equity is appealed it is the duty of this court to try the issues de novo and to

reach an independent conclusion without reference to the findings of the district court.

2. **Equity: Appeal and Error: Evidence.** Where in an action in equity, the oral evidence in respect to material issues is so conflicting that it cannot be reconciled, this court will 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.
3. **Contracts: Damages: Employer and Employee.** While the measure of damages in an action for the breach of an agreement by an employee not to enter business in competition with the employer is usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact.
4. **Contracts: Damages: Evidence.** In an action for breach of contract, the plaintiff will be called upon, in order to recover substantial damages, to furnish such data to enable the court, with a reasonable degree of certainty and exactness, to estimate the actual damages, and if he fails to do this he can recover only a nominal sum.
5. **Contracts: Damages.** The general rule is that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented, as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach.
6. **Contracts: Employer and Employee.** In the absence of special circumstances, it is beyond question that an employee, unless contractually prohibited, may upon the termination of his employment, compete with his former employer either on his own or on another's behalf.

Appeal from the district court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

William H. Mecham, for appellant.

Lathrop, Albracht & Dolan, for appellees.

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

SPENCER, J.

This is an appeal from the dismissal of an action by Margaret Rambo, plaintiff, owner and operator of an employment agency, against a former employee, Donna

M. Galley, Ralph W. Knapp, her husband, and Personnel Placement, Inc., for an injunction restraining defendants from operating an employment agency in competition with plaintiff, and for damages. We affirm.

Plaintiff opened her employment agency in April of 1966. She hired the defendant, Donna Galley, as an interviewer, in November of 1968. Donna left her employ April 17, 1969. Personnel Placement, Inc., was incorporated in March 1969. It was financed by the defendant Knapp, who subsequently married Donna, and conveyed one-half interest in the corporation to her. Personnel Placement, Inc., opened for business on April 21, 1969, under the management of Donna.

Plaintiff testified that when she hired Donna, although the employment contract was oral, Donna signed an agreement she would not enter the employ of another agency nor open an agency of her own within a 150-mile radius of Omaha for a period of 1 year from the termination of her employment. Donna specifically denies signing any such agreement. Plaintiff further testified that when she heard Donna had opened a competing employment agency she looked for the file containing the agreement in question but the file had disappeared.

Plaintiff's former husband testified that he had seen an agreement not to compete bearing Donna's signature; and that he was able to recognize her signature because he had seen it daily for months. When three signatures were produced in court, with the request that he identify Donna's signature, he was unable to do so. Two of plaintiff's former employees who were there during the period of Donna's employment testified that they had signed such agreements. One was requested to sign a new one after Donna left. One of these employees testified that in a subsequent conversation with Donna, Donna denied that she had ever signed such an agreement.

The contract form used by Personnel Placement, Inc., is identical with the one used by plaintiff. There is little

question the new corporation made use of plaintiff's forms. Plaintiff's testimony would also indicate that at the time Donna left her employ, she took with her all of the applications which she was then processing. This Donna denies. Two of Donna's placements during the last week in April were unprocessed applicants of plaintiff's agency at the time of the termination of Donna's employment. Donna testified these applicants came in response to an ad. Donna concedes that among the employers she contacted there were some she had contacted while in the employ of the plaintiff, because she contacted all possible employers, using the yellow pages of the telephone directory. Plaintiff had no exclusive contracts with any of these employers. The customary procedure for any agency is to call employers about possible vacancies.

Plaintiff did not produce her records, but in an attempt to establish damages testified as to her income for the period from 1966 through 1970. Her testimony on gross and net income for that period was as follows:

	GROSS INCOME	NET INCOME
1966	$ 9,640	$ 1,000.00
1967	21,347	4,563.19
1968	49,503	13,000.00
1969	51,740	- 2,000.00
1970	60,000	16,000.00

Plaintiff's advertising expense for 1966 through 1969, was as follows:

1966	$ 3,000
1967	3,600
1968	9,700
1969	16,000

In 1969, plaintiff's rent was increased over 1968, and because she hired additional personnel, her payroll increased approximately $4,000.

Donna, during the 5 months of her employment with the plaintiff, became familiar with plaintiff's procedures and with some of plaintiff's clientele. It is undisputed

that the business is a very competitive one. Within a brief period after Donna left plaintiff's employ, 10 to 15 other new employment agencies entered the field.

If Donna signed an agreement not to compete for a period of 1 year, it would be enforceable. Personal Finance Co. v. Hynes (1936), 130 Neb. 547, 265 N. W. 541. The question is whether or not there was such an agreement. The testimony of the parties is conflicting and irreconcilable. The inference to be drawn from plaintiff's testimony is that the agreement is unavailable because Donna removed the file which contained those agreements from plaintiff's office. The trial court observed the witnesses, heard their testimony, and found the evidence insufficient to prove the existence of the agreement.

Our law is well settled that when an action in equity is appealed it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the district court. Where in such case the oral evidence in respect to material issues is so conflicting that it cannot be reconciled, this court will 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. Satterfield v. Dunne (1966), 180 Neb. 274, 142 N. W. 2d 345. This we do herein.

In any event, the trial court properly sustained the motion to dismiss the action for the reason that plaintiff failed to adduce sufficient evidence of damages to sustain a recovery. The rules of law applicable herein were well stated in Gallagher v. Vogel (1953), 157 Neb. 670, 61 N. W. 2d 245: "While the measure of damages in an action for the breach of an agreement by the seller not to re-enter business in competition with the buyer is usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact.

"In such an action, the plaintiff will be called upon,

in order to recover substantial damages, to furnish such data to enable the court, with a reasonable degree of certainty and exactness, to estimate the actual damages, and if he fails to do this he can recover only a nominal sum.

"The general rule is that the party injured by a breach of contract is entitled to recover all of his damages, including gains prevented, as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach."

These rules are equally applicable to a contract not to compete, executed by an employee.

We assume it to be plaintiff's contention that she would have had a much greater increase in gross income and a profit in 1969, except for the fact that defendants started a competing agency. There is no way, from the evidence, to tell what this increase might have been. Plaintiff did not put her records in evidence. It is not even possible for comparison purposes to determine what plaintiff's gross income was for the 3½ months in 1969, covering Donna's employment.

Plaintiff adduced some testimony as to what a large national employment agency might charge to franchise an operation such as the defendants. This evidence clearly was immaterial on the issues herein. We agree with plaintiff that damages in these cases are not easily susceptible of accurate proof. However, there must be sufficient evidence to enable the court, with a certain degree of exactness, to estimate plaintiff's damages. Expressed generally, the criterion must include the value of the business lost to the plaintiff, which could be gains prevented as well as losses sustained. However, there is no evidence which might indicate what that figure could be. Plaintiff increased her gross income during 1969. Whether that increase might have been greater except for Donna entering a competing agency is pure speculation on this record. While plaintiff said she sustained a $2,000 loss during the year, her testimony also

is that she considerably increased her advertising expense, her rent, and her payroll. These figures compared to the previous year were sufficient to account for a deficit.

Defendants were in competition with the plaintiff for approximately 8 months in 1969. Yet there was no evidence adduced of gross or net income, or of expenses broken down into monthly periods for 1969. We assume plaintiff's business records would have readily revealed this information, but they are not available to us. It is entirely possible that with increased expenses the net income was diminishing during the early part of 1969. There is evidence that Donna was dissatisfied with her income from the plaintiff. In the absence of special circumstances, which do not exist herein, it is beyond question that an employee, unless contractually prohibited, may upon the termination of his employment, compete with his former employer either on his own or on another's behalf. See Annotation, 28 A. L. R. 3d, § 3, p. 25.

On the record before us, even if Donna had executed an agreement not to compete, the most that could be allowable herein would be nominal damages for its breach. Plaintiff has failed to sustain her proof on damages. The judgment of the district court is affirmed.

AFFIRMED.

ROBERT E. STEPHENS, APPELLANT, V. THEODORE JANING, APPELLEE.

199 N. W. 2d 25

Filed June 30, 1972. No. 38399.

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

Frank B. Morrison, Sr., and Stanley A. Krieger, for appellant.

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

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

WHITE, C. J.

This case is identical to Bell v. Janing, *ante* p. 690, 199 N. W. 2d 24, and is controlled by the holding therein.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES E. MCCLELLAND, APPELLANT.
199 N. W. 2d 11

Filed June 30, 1972. No. 38426.

1. **Criminal Law: Time: Continuances.** 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. **Criminal Law: Venue.** The granting of a change of venue rests in the sound discretion of the court.

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

T. Clement Gaughan, Richard L. Goos, and Paul M. Conley, for appellant.

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

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

WHITE, C. J.

The defendant, Charles E. McClelland, was found

guilty by a jury of unlawfully assaulting, threatening, and detaining two guards for the purpose of compelling or inducing the performance of an act by another person. § 28-743, R. R. S. 1943. The defendant appeals. We affirm the judgment and sentence of the district court.

This is a companion case to State v. Eckstein, *ante* p. 146, 195 N. W. 2d 194. The defendant and Eckstein, both inmates of the Nebraska Penal and Correctional Complex, were joint participants in the commission of the offense. The defendant here contends, as the defendant did in State v. Eckstein, *supra*, that the penalties provided by section 28-743, R. R. S. 1943, are in violation of the Eighth Amendment to the Constitution of the United States and are cruel and unusual. He also contends that section 28-743, R. R. S. 1943, is void for vagueness and providing for an unreasonable classification. These contentions were effectively disposed of in our opinion in State v. Eckstein, *supra*, and will not be repeated here. There is no merit to these contentions.

The defendant asserts that his motion for continuance should have been sustained. The record shows that the defendant was charged with the crime herein on September 28, 1970. His motion for continuance was filed on September 15, 1971. The grounds for the continuance are that the attorney for the defendant, who had already represented Eckstein, desired time so that he might obtain a record of the testimony of the witnesses at the Eckstein trial, who were to be the same witnesses who would testify against the defendant in the case at bar. The record in this case fails to show that the trial court abused its discretion in overruling his motion for continuance on this ground. The opportunity for preparation for trial is not unlimited, and there is nothing in the record to demonstrate any prejudice or an invasion of any right on the part of the defendant's counsel to prepare for possible impeachment of the prosecution's witnesses. 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, 183 Neb. 826, 164 N. W. 2d 649; State v. Meadows, *ante* p. 287, 196 N. W. 2d 171. There is no merit to this contention.

The defendant also contends that he should have been granted a change of venue. A voir dire examination of the jurors in both the Eckstein case and this one demonstrates affirmatively that none of them knew the defendant and they had no recollection of the incident to the extent that it would interfere with their duties as jurors. No juror had a recollection of the names of any persons involved and in this case all of the jurors were specifically asked whether they knew the defendant, Charles E. McClelland, and each juror stated that he did not. The granting of a change of venue rests in the sound discretion of the court and there is no showing of an abuse of discretion in this respect. There is no error in the ruling. Argabright v. State, 62 Neb. 402, 87 N. W. 146; State v. Losieau, 174 Neb. 320, 117 N. W. 2d 775.

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

AFFIRMED.

SPENCER, J., participating on briefs.

IN RE DRAINAGE DISTRICT NO. 10 OF KEARNEY COUNTY, NEBRASKA.

DRAINAGE DISTRICT NO. 10 OF KEARNEY COUNTY, NEBRASKA, ALSO KNOWN AS LOST CREEK DRAINAGE DISTRICT, APPELLANT, V. RUTH CANADAY ET AL., APPELLEES.

199 N. W. 2d 385

Filed July 7, 1972. No. 38083.

1. **Res Judicata: Estoppel.** A variable in issue preclusion is identity of issues in the two trials.

2. **Drains and Drainage Districts.** Exactness of apportionment of benefits among landowners in a drainage district is impossible.
3. **Appeal and Error: Rules of Court: Default.** Failure of an appellee to file a brief in this court is not a concession of error. The record and the brief of appellant must be considered.
4. **Appeal and Error: Drains and Drainage Districts: Trial.** Upon appeal to district court from a decision of the board of supervisors of a drainage district, all original objections made to the classification and assessment of benefits are heard and determined in a summary manner as in equity, and upon appeal to this court the cause is tried de novo.
5. **Appeal and Error: Witnesses: Evidence: Drains and Drainage Districts.** When, as required by statute, the district engineer has examined the land and made his report to the board of supervisors of the drainage district which has approved the report, the report furnishes prima facie evidence of the classification and benefits, and in the absence of fraud, such evidence is sufficient to sustain the decision of the board unless the decision is overcome by competent evidence to the contrary.

Appeal from the district court for Kearney County: EDMUND NUSS and NORRIS CHADDERDON, Judges. Affirmed as modified.

Meier & Adkins, for appellant.

Person, Dier & Person, for appellees.

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

PER CURIAM.

This proceeding to apportion benefits to lands from a drainage project is related to Lost Creek Drainage Dist. v. Elsam, *post* p. 705, 199 N. W. 2d 387.

Landowners Johnson Farms, Ruth Canaday, and Vera Jo Cueva objected at the hearing before the board of supervisors of the district on apportionment. From the determination by the board they appealed to district court. The court decreased the percentage of benefits apportioned to some tracts of Johnson Farms and Canaday. It reversed the decision of the board against Cueva, finding no benefit to her land in accordance with

its judgment of even date in the related proceedings, Lost Creek Drainage Dist. v. Elsam, *supra*.

The district appeals. It contends that (1) issue preclusion applied to the lands of Johnson Farms and Canaday, and (2) on de novo review, we ought to reinstate the decision of the board of supervisors.

Evidence of benefits to the lands of Johnson Farms and Canaday was in conflict. The report and testimony of the engineer for the district was opposed by evidence of no benefit. No one testified to benefits anywhere between nothing, for practical purposes, and the amount stated by the engineer.

The lands of Johnson Farms and Canaday formed part of the original district. The district relies on rules of issue preclusion at common law. A variable in issue preclusion is identity of issues in the two trials. See Vestal, Res Judicata/Preclusion, V-15, V-190-96 (1969). Petersen v. Thurston, 161 Neb. 758, 74 N. W. 2d 528 (1956), decided that an adjudication of organization precluded landowners' contentions that their land was not benefited at all.

The difficulty with the argument of the district is that the issues are not the same, although overlapping exists. The Legislature has prescribed one procedure for determining the existence of any benefit, and another procedure for determining the amount of benefits to a given tract. Evidence of no benefit may possess probative value by implying that benefits are minimal. A court might infer from testimony to no benefits that the benefits would not exceed the minimum amount for inclusion of land within a district. Such an inference would not run afoul of rules of issue preclusion. The decreases adjudged by the court concededly apportioned substantial benefits to the lands of Johnson Farms and Canaday. The benefits were much greater than the minimum required for inclusion of land in the district.

The finding of the district court in an intermediate range between no benefits and the benefits found by

the engineer was permissible. Exactness of apportionment among landowners in a drainage district is impossible. See, Drainage Dist. No. 1 v. Village of Hershey, 145 Neb. 138, 15 N. W. 2d 337 (1944); Nemaha Valley Drainage Dist. v. Stocker, 90 Neb. 507, 134 N. W. 183 (1912). The situation is analogous to an eminent domain proceeding in which the amount of a jury verdict may fall between conflicting opinions of value. See Iske v. Omaha Public Power Dist., 185 Neb. 724, 178 N. W. 2d 633 (1970).

Of the three landowners only Canaday has filed a brief in this court. The district implies a concession of error by Johnson Farms and a discretion in this court to reverse on that ground. See, Berkshire v. Caley, 157 Ind. 1, 60 N. E. 696 (1901); International Security Life Ins. Co. v. Gibson, 448 S. W. 2d 204 (Tex. Civ. App., 1969). Under Rule 16 of this court in such a situation the appellant may proceed ex parte. No other part of our rules is relevant. It follows that failure of an appellee to file a brief in this court is not a concession of error. The record and the brief of appellant must be considered. Cf. Rule 31 (c), United States Courts of Appeals Rules; Teamsters, Chauffeurs, etc., Local 524 v. Billington, 402 F. 2d 510 (9th Cir., 1968).

Upon appeal to district court from a decision of the board of supervisors of a drainage district, all original objections made to the classification and assessment of benefits are heard and determined in a summary manner as in equity, and upon appeal to this court the cause is tried de novo. Petersen v. Thurston, *supra*. See, also, § 31-329, R. R. S. 1943.

When, as required by statute, the district engineer has examined the land and made his report to the board of supervisors of the drainage district which has approved the report, the report furnishes prima facie evidence of the classification and benefits, and in the absence of fraud, such evidence is sufficient to sustain the decision of the board unless the decision is overcome

by competent evidence to the contrary. Petersen v. Thurston, *supra.*

There was no fraud. The evidence raised questions of fact turning largely on the credibility of the witnesses. We affirm the judgment, except a land description, determining the amount of benefits to the tracts of Johnson Farms and Canaday. The north one-half of Section 6 of Johnson Farms lies in Township 7, not Township 8. The judgment respecting the Cueva land is affirmed.

AFFIRMED AS MODIFIED.

IN RE LOST CREEK DRAINAGE DISTRICT OF KEARNEY COUNTY, NEBRASKA.
LOST CREEK DRAINAGE DISTRICT OF KEARNEY COUNTY, NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. HARRY ELSAM ET AL., APPELLEES AND CROSS-APPELLANTS.
199 N. W. 2d 387

Filed July 7, 1972. No. 38084.

1. **Statutes: Res Judicata: Estoppel: Common Law.** Statutory provisions may cut across issue preclusion at common law.
2. **Drains and Drainage Districts.** Land that will not be benefited by an improvement proposed by a drainage district ought not to be annexed to the district.

Appeal from the district court for Kearney County: EDMUND NUSS, Judge. Affirmed as modified.

Meier & Adkins, for appellant.

Person, Dier & Person, for appellees.

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

PER CURIAM.

On petition of Lost Creek Drainage District for an order annexing tracts of land, the district court granted the petition in part. Lost Creek appeals, assigning error

relating to the tracts excluded. Landowners whose tracts were annexed cross-appeal. Lost Creek argues issue preclusion against all landowners except one on the ground of a prior determination that apportioned benefits to the tracts. It and each landowner assert a right to a favorable judgment on evidence pertaining to each tract.

Lost Creek petitioned to increase its size to an area approximately equal to 47 sections of land. The district court granted the petition for 16 tracts and denied the petition for 27 tracts. The latter are equal in area to 6.75 sections of land.

Lost Creek with the boundaries for which it petitioned, would be located in Townships 7 and 8 of Ranges 14, 15, and 16 in Kearney County. The area forms part of the watershed of the Platte River. See Nebraska Soil and Water Conservation Commission, Report on The Framework Study, Appendix C, Land and Water Resources Problems and Needs, Map Section, Key 6 (State Water Plan Publication No. 101C) (1971). The general lay of the land follows the slope of the Platte River from west to east. The improvement project, a ditch, is to run from the western part of the Lost Creek district slightly east of north across two sections within the district to the Platte River.

In 1967 a petition filed for formation of Lost Creek Drainage District included many of the tracts now in controversy. On objection by the owners, petitioners dismissed them without prejudice. The district court in its decree of organization accordingly excluded the tracts.

In May 1969 the board of supervisors of Lost Creek received the report of its engineer on apportionment of benefits. The report apportioned benefits to the 43 tracts outside the district. The board set the matter for hearing in June, and it notified all owners by mail. It also directed the filing of a petition in district court to annex the 43 tracts. On June 23, 1969, the board

confirmed the apportionment in the report of the engineer. Of the tracts in question some owners appeared at the board hearing. Others did not do so. Vera Jo Cueva appealed from the board decision to district court. In the annexation proceeding the decree of the court was rendered in December 1970.

Lost Creek contends that the apportionment decision, except the part against Cueva, precludes the issue whether the tracts will receive benefits for purposes of annexation. The contention necessitates a summary of the statutory provisions for drainage districts organized in district court.

The district engineer is under a duty to report his apportionment of benefits to lands from the proposed improvement. If it appears that lands outside the district will receive benefits, the chairman of the board of supervisors must petition the district court for a decree of annexation. See §§ 31-317 and 31-320, R. R. S. 1943. Provisions for service of summons in civil cases control. See §§ 31-303 and 31-320, R. R. S. 1943. Provisions for tax levies refer to property within the district. See §§ 31-330, 31-332, and 31-364, R. R. S. 1943.

Statutory provisions for hearings on apportionments of benefits are specific. Within 10 days after the filing of the report of the engineer, the chairman of the board of supervisors is to call a meeting of the board to set the matter for hearing. The hearing date must be 40 to 50 days from the date of the meeting. The hearing is to cover all objections by an owner of any land upon which the engineer recommends an assessment of benefits. See § 31-323, R. R. S. 1943. Notification of the hearing is to be given by publication. The notification need not name the interested parties. A sufficient form refers to property "included within (here insert name of drainage district) . . . ," and the hearing in part is "to assess benefits to the property . . . in said drainage district and to classify the same . . . ." § 31-324, R. R. S. 1943. Appeals may be taken to district court which is

to sit in equity and determine all objections in a summary manner. § 31-329, R. R. S. 1943.

Section 31-367, R. R. S. 1943, since enactment in 1905, has provided: "Sections 31-301 to 31-369 shall be liberally construed to promote the drainage and reclamation of wet, overflowed or submerged lands. The establishment of said corporation, and the collection of assessments, shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment of the court, or of the board of supervisors confirming and establishing the assessment of benefits and injuries, but such judgment shall be conclusive and final that all prior proceedings were regular and according to law. No person shall be permitted to take advantage of any error, defect, or informality, unless the person complaining thereof is directly affected thereby, at any stage of the proceedings. If the court or board of supervisors shall deem it just to release any person, or modify his assessment or liability, it shall in no manner affect the right or liability of any other person."

The statutory sections regulating procedures for annexation and apportionment of benefits are ambiguous. We construe them to limit the apportionment hearing to land within the district, our construction being subject to specific statutory exceptions for entities not present here. One reason for our conclusion is the incorporation of general provisions for service of summons in an annexation proceeding and the provisions for publication of notification of the apportionment hearing before the board of supervisors. Another reason is fairness to landowners. It is no answer that in this proceeding the district notified the landowners by mail or that some landowners appeared generally at the apportionment hearing. Statutory provisions may cut across rules of issue preclusion at common law. Cf. Vestal, Res Judicata/Preclusion, V-504 (1969). They have done so in this proceeding. The contention of Lost Creek is not well taken.

Land that will not be benefited by an improvement proposed by a drainage district ought not to be annexed to the district. See Petersen v. Thurston, 157 Neb. 833, 62 N. W. 2d 68 (1954).

It is impossible within the limits that we are justified in devoting to this opinion to set forth the evidence pertaining to drainage of each tract. Cf. Nemaha Valley Drainage Dist. v. Marconnit, 90 Neb. 514, 134 N. W. 177 (1912). Evidence relating to many tracts was in conflict and determinable by the credibility of the witnesses. The court at the trial said, "I have definitely made up my mind that I am going to view the premises . . . ." The journal entry of the judgment states: "All costs taxed to the plaintiff including a charge of Ten Dollars . . . to be paid to John E. Dier, for the use of his car in viewing the premises." We conclude that the district court viewed the tracts.

We determine that the cross-appeal should be sustained and the judgment of the district court modified to exclude the following tracts from the district: Northeast quarter of Section 19, Township 7, Range 16 (Ryan); northwest quarter of Section 18, Township 7, Range 15 (Schneider); north 50 rods of southwest quarter of Section 26, Township 8, Range 15, north one-half of southwest quarter and southwest quarter of southwest quarter of Section 29, Township 8, Range 15 (Lowe); and north one-half of southeast quarter of Section 29, Township 8, Range 15 (Smith); all in Kearney County, Nebraska.

On de novo review we affirm the judgment as modified.

AFFIRMED AS MODIFIED.

JAKE STASCH ET AL., APPELLANTS, V. CLYDE WEBER ET AL., APPELLEES.
199 N. W. 2d 391

Filed July 7, 1972. No. 38354.

1. **Quo Warranto: Evidence: Trial: Officers.** In a quo warranto proceeding, ordinarily the burden of proof in the first instance is on the defendant who claims the right to the office.
2. ———: ———: ———: ———. In a quo warranto proceeding, no legal presumption arises in favor of the defendant merely from his establishment of his possession of the office which he claims.
3. **Quo Warranto: Parties.** Section 25-21,122, R. R. S. 1943, provides any elector of the appropriate county may bring a quo warranto proceeding against any county public office holder when the county attorney of the appropriate county refuses to do so.
4. **Quo Warranto: Evidence: Trial: Officers.** Generally, in a quo warranto proceeding, when a challenged official purports to hold office by virtue of an election, he must show that the election was held and that he was in fact elected.
5. **Quo Warranto: Officers: Time.** Generally, provisions for holding over until a successor is elected and qualified do not prolong the incumbent's term indefinitely, but only for a reasonable time to allow a successor to qualify.

Appeal from the district court for Cherry County: ROBERT R. MORAN, Judge. Reversed and remanded with directions.

Michael V. Smith, for appellants.

W. Gerald O'Kief, John A. Wagoner, and Thomas A. Wagoner, for appellees.

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

WHITE, C. J.

This is a quo warranto action initiated by several residents of Cherry County, Nebraska, seeking to oust the members of the Cherry County Committee for the Reorganization of School Districts, hereinafter referred to as the County Committee. The district court resolved

all of the issues in favor of the defendants. We reverse the judgment of the district court and direct that a judgment of ouster be entered.

The issues presented in this case are whether the defendants, in the first instance, were lawfully elected to office and second, whether they are lawfully holding office at the present time. The statute establishing the procedure for the election to the County Committee is section 79-426.05, R. R. S. 1943, which provides in relevant part: "All of the members of the school boards and boards of education within the county and joint districts under the jurisdiction of that county committee shall, at a meeting called for that purpose by the county superintendent of schools within one hundred twenty days from August 27, 1949, and each four years thereafter, (1) determine by a majority vote of those present the number of members of the county committee within the limits prescribed in this section, and (2) elect for a term of four years all the remaining members of the committee * * *."

Because of the nature and importance of an ouster action, the rules governing the procedure are different than in an ordinary civil action. No presumption arises in a person's favor merely from his physical possession or his attempt to exercise the authority of a public office. In an ouster action, the person claiming the office must make a prima facie showing of his legal right to hold the office. Once that is done, certain presumptions (not applicable herein) arise in his favor which may cause the burden of advancing to shift to the relator, but it is clear that the burden of proof in the first instance is on the defendant whose right to the office is challenged. See, State ex rel. Einstein v. Northup, 79 Neb. 822, 113 N. W. 540; 74 C. J. S., Quo Warranto, § 43, p. 260; 44 Am. Jur., Quo Warranto, § 106, p. 167; Ferris, Extraordinary Legal Remedies, § 136, p. 156.

The relators have standing to bring this action. This is true even though they claim no right to the office

themselves. This result follows from a proper construction of section 25-21,122, R. R. S. 1943. The action, under the statute, must in the first instance be brought by the county attorney of the appropriate county. The statute provides that in the event he refuses to bring such action, a private person acting in the public interest may bring such action to oust an officeholder who is not legally entitled to his office. The relators, having complied with the provisions of the statute, become substituted in interest with the county attorney and it follows that the same rules as to burden of proof and procedure apply as if the action were brought by the Attorney General or the county attorney in the first instance.

We turn to the evidence. Despite the fact that the statute requires an election every 4 years, the only official record in the evidence in this case of an election of or to the County Committee are the minutes of a meeting held for that purpose on *October 15, 1957*. The minutes show that one "Cleo Bloom" was elected in 1957, and that "Cleo Bloom, Jr." is a defendant in this action brought over 10 years later. There is nothing in the record to explain or to show that these names refer to the same person. More important, "Bob Hanna" was elected, according to the minutes, in 1957, and "Samuel K. Hanna" is a defendant herein. There is an oblique reference in the record which indirectly suggests that these may be the same persons, but there is no proof that they are. Surely the identity of an elected public official must be established with certainty and cannot rest upon speculation as to phonic similarity.

The record does show that in January 1963, an information letter was sent to the State Committee for Reorganization of School Districts which shows the names of the members of the County Committee and indicates that they were elected April 5, 1962. But nowhere in the record does there appear the official minutes of the County Committee, the results of the

voting, or a canvass of the votes to establish officially the record of the defendants' election. No explanation of this failure appears in the record. It is not suggested that they were lost, destroyed, or for some other reason secondary evidence could not be introduced to establish the minutes showing that the statutory procedure had been followed and the election held. It becomes apparent there is a total lack of competent proof in this record to establish that a proper election was held under the statute and that the defendants were legally elected by a majority vote of those present to the office they now purport to hold.

Turning now to the situation 4 years later in 1966 we find there is evidence in the record showing the publication of an official notice of an election to be held to select members of the County Committee. This election was to be held, pursuant to the terms of the notice, on April 1, 1966. Assuming that this election was held, pursuant to the notice, there is no record of the results. The lack of all official action and all official record is confirmed by the fact that the only evidence introduced in this respect is that the then county superintendent of schools testified this election was in fact held but *could not remember who had been elected.* Again, there are no official minutes, no showing that the election was held by the proper officers, no showing that the votes were canvassed, or the number of votes cast or that they were cast by the authorized persons. Again, the only evidence in the record in this respect is that almost one and one-half years later, in August 1967, and again in August 1968, an information letter was sent to the State Department of Education which purports to show that the members of the County Committee included most, but not all, of the defendants. Again, the court is left in doubt with reference as to whether any legal election was held, because there is no statement or report of the election and its results in this information letter.

We can come to no other conclusion but that the defendants have failed to meet their burden of proof. Without explanation, there are no official minutes or record of official board action, no official document in the record which entitles the defendants to hold the office that they purport to occupy. When a challenged official purports to hold office by virtue of an election, he must show that the election was held and that he was in fact elected. Holding a public office can rest on nothing less than such evidence, unless a satisfactory and convincing explanation is made as to the lack of an official record. The right to hold a public office is ordinarily shown by producing a certificate of election by the proper officer, or by showing that by the canvass of votes at the election by the authorized persons, the officer has received a plurality or the necessary number of votes to have been elected. 2 Bailey on Habeas Corpus, § 329, p. 1278. There is no showing in this record explaining the failure of proof of the official action in the official minutes of the County Committee. The integrity of the elective process cannot be established by extra-statutory informational letters signed by one person as a substitute for the unexplained absence of any official record of the election and the legal results thereof. There has been an entire failure of the burden of proof on the part of the defendants to establish their right to hold the purported office that they claim.

Also the defendants contend that they are holding over in office by virtue of section 32-1045, R. R. S. 1943, which provides for an incumbent to remain in office after the expiration of his term until his successor is duly qualified. There are two answers to this contention. First, this section obviously has no application in a quo warranto proceeding where the officer cannot show that he was an incumbent who was rightfully in office in the first place. Second, even if the defendants are the same persons who were elected in 1957, they

cannot claim the protection of the statute. The proper rule is stated in 67 C. J. S., Officers, § 48, p. 204, where it is stated: "Provisions for holding over until a successor is elected and qualified do not prolong the incumbent's *term* indefinitely, but only for a reasonable time to *allow a successor to qualify.*" (Emphasis supplied.) The only purpose of the holding over statute is to prevent a temporary vacancy in a public office, and to permit a reasonable time to allow for the exigencies many times present in the transfer of public office from one person to his successor. It was not intended to eliminate the necessity for having a proper and required statutory election, and keeping a proper official record of such election and the results thereof. Otherwise the integrity of the elective process would be emasculated by the indifference or the negligence of the parties responsible under the statute for complying with the mandatory requirements of holding the election and officially reporting the results thereof. All of these principles are particularly applicable where you have the same entity charged with the responsibility of the election of their own successors in office.

In the context presented here the defendants' contention that they are legally holding over in office as incumbents is without merit.

Other issues are presented in the briefs of the parties. The main contention is the unconstitutionality of the enabling statutes for the creation of the County Committee and the exercise of its powers thereunder. It is not necessary to discuss this issue because, from what we have said herein, the defendants are not legally holding office and are subject to ouster. We point out, however, that the only issue in a quo warranto action which may be litigated is the right of the defendant to hold public office, and the action must be strictly confined to that issue. The legality of the official action or the constitutionality of the statutes under which the officer purports to act may not be litigated in a quo warranto

action. State ex rel. Johnson v. Consumers Public Power Dist., 143 Neb. 753, 10 N. W. 2d 784; State ex rel. Good v. Conklin, 127 Neb. 417, 255 N. W. 925; 74 C. J. S., Quo Warranto, § 11, p. 193.

The judgment of the district court is reversed and the cause remanded with directions to enter the proper judgment of ouster against the defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

HAROLD JOHNSON ET AL., APPELLEES, V. FLOYD E. ROUECHE, APELLANT.
199 N. W. 2d 1

Filed July 7, 1972. No. 38364.

1. **Judgments: Trial: Appeal and Error.** The judgment of the trial court in an action where a jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong.
2. **Negligence: Words and Phrases.** The words "slight" and "gross" as employed in the comparative negligence act of this state are comparative terms. The test the statute provides is not based upon absolute degree of negligence but rather upon a comparative test of the relative degrees of negligence between the parties. The negligence of the plaintiff or defendant is not to be evaluated as slight, gross, or otherwise, standing alone. The criterion by which the degree of negligence of plaintiff is to be measured is the extent thereof by comparison with the negligence of the defendant.
3. ———: ———. The meaning of gross negligence under the comparative negligence rule is not the same as the meaning of gross negligence under the guest passenger statute.
4. **Negligence: Trial.** Under the comparative negligence statute, if the fact finder determines the respective parties to be guilty of actionable negligence and contributory negligence, the responsibility is then on it to make the comparison contemplated by the statute.

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

Baskins, Baskins & Schneider, for appellant.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for appellees.

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

McCOWN, J.

This is an action for property damage resulting from an automobile accident at a street intersection in North Platte, Nebraska. Jury trial was waived. The trial court determined that the comparative negligence rule applied and entered judgment for the plaintiff in an amount less than the stipulated amount of damages. The defendant has appealed. The issues on appeal involve the contributory negligence of the plaintiff and the application of the comparative negligence rule.

The accident happened at approximately 8:30 a.m., on a clear, dry day at the intersection of Second and Sherman Streets in the City of North Platte, Nebraska. The plaintiff, Maxine Johnson, was driving her car north on Sherman Street. The defendant, Floyd E. Roueche, was driving his pickup truck east on Second Street. There were no obstructions to vision although there were some cars parked on the south side of Second Street some 150 feet west of the intersection. There were no stop signs or traffic signals at the intersection. Mrs. Johnson was going approximately 15 miles per hour as she approached the intersection. As she approached the crosswalk south of the intersection, she slowed to approximately 5 miles per hour. She looked to the left; to the right; and to the left again but saw no approaching traffic. When her car was a little more than half a car length into the intersection, she saw the defendant's truck approaching from the left. The front of the truck was at the crosswalk just west of the intersection. Mrs. Johnson applied the brakes and her car, if not stopped, was barely moving at the moment of impact.

The defendant was driving his pickup truck at a

speed of approximately 25 miles per hour as he approached the intersection. He did not see Mrs. Johnson's car. He was first made aware of its presence when his daughter screamed immediately before the impact. The defendant did not recall applying the brakes before impact and did not swerve his truck to avoid the impact. The right front of the truck struck the left front of the Johnson car. The impact occurred in the southeast quadrant of the intersection. The Johnson car was spun around and came to rest in the intersection headed southeast. The defendant's truck stopped 75 to 100 feet east of the intersection.

The trial court found that the proximate cause of the collision was the defendant's negligence; and that the plaintiff was negligent, but her negligence, under the comparative negligence rule, was slight when compared to the negligence of the defendant. The damage to plaintiff's car was stipulated in the amount of $1,320.74. The court dismissed defendant's counter-claim and entered judgment for the plaintiff and against the defendant in the sum of $1,000.

Section 25-1151, R. R. S. 1943, provides: "In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury." Here a jury was waived and the case was tried to the court. In the posture of this case, unless the defendant was entitled to a directed verdict as a matter of law, the judgment must be affirmed. The judgment of the trial court in an action where a

jury has been waived has the effect of a verdict of a jury and will not be set aside unless clearly wrong. Belek v. Travelers Indemnity Co., 187 Neb. 470, 191 N. W. 2d 819.

The defendant's contentions here boil down to the assertion that the comparative negligence rule does not apply. It is argued that where a defendant's negligence is less than gross in degree and the plaintiff has been guilty of any negligence, the plaintiff may not recover. It is also argued that wherever the plaintiff's negligence is more than slight in degree, or when the negligence of both defendant and plaintiff stem from an identical failure of duty, there can be no recovery under the comparative negligence rule. In essence, the defendant contends that the statutory comparative negligence terms of "gross" and "slight" are based upon absolute degrees of negligence circumscribed by definitions of the term "gross" applied under other statutes or in abstract terms. We cannot agree.

The defendant's contention that "gross" or "slight" negligence under the comparative negligence statute may be defined or measured by some independent absolute standard was effectively answered in Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246. That case noted that the statutory comparative negligence rule is predicated on a comparison and the terms of "slight" or "gross" negligence as used in the statute are both dependent upon a comparison of the negligence of the parties. The court stated that "all questions of slight or gross negligence in cases in which the comparative negligence act is applicable are to be determined not by satisfying a rule of burden of proof but by comparison made by the jury, or in its absence by the court, of the negligence of the parties, one with the other."

The court also reiterated a former statement: "The words 'slight' and 'gross' as employed in the comparative negligence act of this state are comparative terms. The test the statute provides is not based upon absloute

degree of negligence but rather upon a comparative test of the relative degrees of negligence between the parties. The negligence of the plaintiff or defendant is not to be evaluated as slight, gross, or otherwise, standing alone. The criterion by which the degree of negligence of plaintiff is to be measured is the extent thereof by comparison with the negligence of the defendant." See, also, Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482.

Defendant's contention that gross negligence ought to be defined as a matter of degree in terms similar to the meaning of gross negligence under the guest statute was answered in Brackman v. Brackman, 169 Neb. 650, 100 N. W. 2d 774. In that case, the jury had been instructed that slight negligence meant small or little negligence and that gross negligence meant great or excessive negligence. In holding such instructions erroneous, this court stated that under section 25-1151, R. R. S. 1943, it was necessary to determine whether the negligence of plaintiff or defendant was slight or gross in comparison with the other, "while under the automobile guest passenger statute, section 39-740, R. R. S. 1943, a standard of gross negligence is set up that is not based on the comparison of negligence. Before a guest may recover from the driver of an automobile under the guest passenger statute, the driver must be found guilty of gross negligence, that is, great or excessive negligence. Such is not true under the comparative negligence rule." The meaning of gross negligence under the comparative negligence rule is clearly not the same as the meaning of gross negligence under the guest passenger statute.

The question of the existence of negligence or contributory negligence is for the trier of the facts where different minds may reasonably draw different conclusions from the evidence. Under the comparative negligence statute, if the fact finder determines the respective parties to be guilty of actionable negligence and contributory negligence, the responsibility is then

on it to make the comparison contemplated by the statute. See, Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040; Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250.

The determinations made by the trial court were correct in all respects and the judgment is affirmed.

AFFIRMED.

JOHN WISNIESKI, APPELLANT, V. ERNEST HARMS AND LAMBERT JONAS, ADMINISTRATOR OF THE ESTATE OF ROSIE (ROSE) HARMS, DECEASED, APPELLEES.

199 N. W. 2d 405

Filed July 7, 1972. No. 38395.

1. **Trial: Witnesses.** The credibility of the witnesses and the weight to be given to their testimony are for the jury's consideration, and not for the court.
2. **Brokers: Principal and Agent: Negligence.** A broker is precluded from recovering compensation for his services when selling the land of his principal, if he is guilty of misconduct in negotiating a contract at variance with the one which he is authorized to make, or disobeys his principal's orders or instructions, or he causes loss to his principal by reason of his negligence in drawing or negotiating a contract of sale for his principal.
3. **Instructions: Appeal and Error.** Instructions must be construed together and isolated language, taken out of context, is not sufficient to support a challenge of error if the whole instruction or all of the instructions are not misleading or erroneous.

Appeal from the district court for Colfax County: C. THOMAS WHITE, Judge. Affirmed.

Homer E. Hurt, Jr., for appellant.

Edward Asche, for appellees.

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

WHITE, C. J.

This is an action by a real estate broker to recover

a commission for handling the sale of the vendors' land. The jury denied recovery and John Wisnieski, the broker, has appealed. We affirm the judgment of the district court.

The basic question in this case is whether there was sufficient evidence to support the court's submission to the jury of the issues raised in the affirmative defense set up by the vendors. The vendors allege that the broker had been negligent in drafting the sales contract, had been guilty of misrepresentation, and had been negligent in failing to follow the vendors' instructions.

In reviewing the evidence the defendant is entitled to a resolution in his favor of all conflicts in the evidence and controverted questions of facts, and is entitled to the benefit of all of the reasonable inferences that may be drawn from the evidence. The credibility of the witnesses and the weight to be given to their testimony are for the jury's determination, and not for the court. Sall v. Schnackenberg, 178 Neb. 699, 134 N. W. 2d 808. The evidence must be measured against the yardstick of a broker's obligations under the law to his principal. A broker is precluded from recovering compensation for his services when selling the land of his principal, if he is guilty of misconduct in negotiating a contract at variance with the one which he is authorized to make, or disobeys his principal's orders or instructions, or he causes loss to his principal by reason of his negligence in drawing or negotiating a contract of sale for his principal. 12 Am. Jur. 2d, Brokers, § 168, p. 910; Schepers v. Lautenschlager, 173 Neb. 107, 112 N. W. 2d 767; Mattieligh v. Poe, 57 Wash. 2d 203, 356 P. 2d 328, 94 A. L. R. 2d 464.

Prior to January 1963, the vendors, Mr. and Mrs. Ernest Harms, hereinafter referred to as the Harmses, owned the southeast quarter of the southeast quarter and the east half of the southwest quarter of the southeast quarter, Section 8, Township 20 North, Range 5

East of the 6th P. M., Dodge County, Nebraska. In January 1963, the Harmses sold to Mr. and Mrs. Leonard Wiese a small acreage or tract of land for residence purposes in the southeast corner of the southeast quarter of Section 8. The Wieses also maintained a small machine or workshop on the premises. Along and near the border on the west of this tract was a grove of trees. Also, toward the northeast corner of this small residence tract was a driveway leading from the road which bounded the tract on the east. A survey later showed that the driveway was in the area conveyed by the Harmses but that the border grove of trees still belonged to them. In any event, it was thought by the Harmses, and apparently by all parties concerned, that neither the driveway nor the trees were within the Wieses' tract at the time of the negotiation of the sale contract involved herein. The evidence is that the Wieses expressed the desire to purchase the land where the driveway and the bordering trees were if the Harmses ever decided to sell it, and it was agreed that the Wieses would be given this opportunity.

On August 18, 1965, the Harmses signed a listing contract giving the plaintiff Wisnieski, a licensed real estate broker, the exclusive right to sell their remaining land in the section. Because of the relatively uncertain situation as to the driveway and the grove of trees, it was necessary for the Harmses to give Wisnieski specific instructions as to its disposition. Mr. Harms testified at the trial, in substance, that he had given Wisnieski instructions to offer the Wieses the land which included the trees and the driveway before Wisnieski was to sell to anyone else. To the contrary, Wisnieski testified that no instruction was ever given him as to the trees but only that he was instructed to and did, in fact, inform the Wieses about the driveway.

In any event, subsequent to the listing contract, on September 1, 1965, an agreement to sell "40 acres more or less" was signed by the Harmses as vendors and

by one Joseph Sechovec as purchaser. Again, Mr. Harms testified that prior to the signing of the contract with Sechovec, Wisnieski had told him that the Wieses would be getting the trees and the driveway but later Wisnieski told him that Sechovec was to have the trees and the driveway. Wisnieski, of course, was anxious to sign the agreement with Sechovec and to complete the sale. In direct conflict with Harms' testimony, he testified that he had never mentioned to the Harmses that the tree area would go to the Wieses. It is apparent at this point that there is a direct conflict in the testimony as to what the instructions were to Wisnieski and whether he failed to perform them in negotiating the sale with Sechovec. Supporting the Harms' version of the testimony and the jury's finding in this case is the reasonable inference that the bordering grove of trees, immediately adjacent and coextensive with the west boundary of the Wieses' property, was a natural and integral part of the residence acreage. It therefore follows that the evidence is sufficient to sustain the finding that the Harmses gave specific instructions which were either intentionally or negligently violated by Wisnieski in the execution and negotiation of the contract with Sechovec.

This misunderstanding or dispute led to serious difficulties and litigation concerning the performance of the Sechovec contract. Despite the contractual agreement, containing an agreement to sell "40 acres more or less," a reasonable inference is that the Harmses' refusal to convey title to Sechovec as to the balance of their property, as promised, was because Wisnieski had either negligently or intentionally violated the instructions that the Harmses had given him. Sechovec brought suit for specific performance and the Harmses were ordered to convey approximately 41 acres to Sechovec. In connection with this dispute a survey was conducted in relation to the 1963 conveyance to the Wieses. This survey showed that the 1963 conveyance to the Wieses

had included the driveway, but not the tree area. The court-ordered conveyance to Sechovec *did not include the tree area either.* This finding in the specific performance case is consistent with and is confirmatory of the jury finding in this case that the instructions to Wisnieski had not been followed as directed. Subsequently, the tree area was conveyed by the Harmses to the Wieses. Compounding the difficulty, after the suit for specific performance, Sechovec sought to recover rent for the period that he was wrongfully held out of possession of the land, which failure to render possession arose out of the situation surrounding the conveyance of the trees and the driveway. In this case the trial court found in favor of the Harmses, and we affirmed. Sechovec v. Harms, 187 Neb. 70, 187 N. W. 2d 296. We come to the conclusion that there is sufficient evidence to support the finding of the jury in favor of the Harmses on the affirmative defenses set up by them to this action for the recovery of the commission.

The plaintiff in this case has assigned numerous errors. Many of them are not specifically argued and are therefore not before us. We briefly note those that are worthy of consideration. The Harmses filed a cross-petition in this case for the recovery of their expenses in the specific performance action brought against them. The jury found against them. Neither the plaintiff Wisnieski nor the Harmses, by way of cross-appeal, have appealed from the judgment on the cross-petition. The plaintiff argues that the finding for the plaintiff on the defendants' cross-petition is inconsistent with the finding against Wisnieski on the action for the commission. This contention fails, first, because the judgment on the cross-petition is final and unappealed from and is conclusive on the parties. The only issues properly before us are the issues raised in the plaintiff's petition and the defendants' answer in the action for the recovery of the commission. Second, the issues on the cross-petition were different and the jury may have

well found that the Harmses could not recover on the cross-petition because of the failure to prove that Wisnieski's breach of duty was the proximate cause of the loss suffered by the Harmses or the amount of the damage properly attributable to such breach of duty.

Wisnieski further contends that the successful suit by Sechovec for specific performance against the Harmses is res judicata of the issue of his alleged negligence in drafting the offer to purchase. However, Wisnieski was not a party to the Sechovec suit, and the issues were entirely different. Whether the Harmses were bound by the representations and the contract drawn by Wisnieski, is an entirely different issue than whether Wisnieski breached his duty as an agent of the Harmses in the drafting and in the performance of the sale contract. Res judicata is not applicable. American Province Real Estate Corp. v. Metropolitan Utilities Dist., 178 Neb. 348, 133 N. W. 2d 466.

The plaintiff makes an extensive argument as to error in instructions. As we understand it, this contention, boiled down, is that the court in the sixth instruction provided that: "If the defendant has failed to establish *any* of the propositions * * *, you are instructed to find for the plaintiff * * *." And later on the instruction said: "* * * if the defendants have established * * * *any* one of their affirmative allegations * * *, you shall find for the defendants and against the plaintiff on his petition." (Emphasis supplied.) The plaintiff contends that this instruction is ambiguous and self-contradictory. We disagree. Instructions must be construed together and isolated language, taken out of context, is not sufficient to support a challenge of error if the whole instruction or all of the instructions are not misleading or erroneous. We will not burden this opinion with a recital of the rather lengthy instructions covering these issues. Suffice it to say, the instructions as a whole are consistent and clear and fairly presented the issues to the jury. This contention is without merit.

The evidence is sufficient to support the verdict, there is no error in the instructions, and the other assignments of error are without merit. The judgment of the district court is correct and is affirmed.

AFFIRMED.

HYDROTEX, A CORPORATION, APPELLEE, V. L. D. PUTNAM, APPELLANT.
199 N. W. 2d 395

Filed July 7, 1972. No. 38428.

Judgments: Appeal and Error. No judgment shall be reversed for an error that does not affect the substantial rights of the adverse party.

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

William W. Griffin, for appellant.

Cronin & Hannon and Van Steenberg, Winner & Brower, for appellee.

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

SMITH, J.

A jury returned a general verdict for plaintiff in the sum of $1,921.82, which represented the price of goods plaintiff allegedly sold defendant. On appeal defendant only contends the court erred in giving the jury a single verdict form that required a finding for plaintiff.

The bill of exceptions is a case stated. Defendant admitted receipt of some of the goods and use of a small part. He offered evidence to establish a sale on approval or on return. See §§ 2-326 and 2-327, U. C. C. The district court instructed the jury in substance that defendant was liable for the part used. Defendant does not complain of the instructions except the one that submitted the single form of verdict.

The record omits a description of the items defendant used. Some, such as tar and lube, were consumable goods. The jury necessarily disbelieved defendant's evidence. Otherwise under the instructions it would have found an amount less than the total of plaintiff's claim.

No judgment shall be reversed for an error that does not affect the substantial rights of the adverse party. § 25-853, R. R. S. 1943. The contention of defendant is not well taken.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID L. RICE, APPELLANT.

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

199 N. W. 2d 480

Filed July 14, 1972. Nos. 38157, 38188.

1. **Criminal Law: Searches and Seizures: Constitutional Law: Affidavits.** An affidavit for search warrant is sufficient to meet the standards of the Fourth Amendment to the Constitution of the United States if it complies with the ruling in United States v. Harris, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723.
2. **Criminal Law: Searches and Seizures: Constitutional Law: Evidence: Parties.** The suppression of the product of a Fourth Amendment violation can be successfully urged only by the one whose rights were violated by the search itself, not by one who is aggrieved solely by the introduction of damaging evidence.
3. **Criminal Law: Searches and Seizures: Constitutional Law.** The Fourth Amendment does not clearly delineate between searches which are legal and those which are illegal; it only prohibits the unreasonable, with each particular case being decided on its own circumstances.
4. **Criminal Law: Searches and Seizures: Constitutional Law: Evidence: Arrest.** Seizing from the clothing of a lawfully arrested person evidence that is intimately connected with the crime for which he is arrested is not unreasonable under the Fourth Amendment.
5. **Criminal Law: Evidence: Arrest.** The information supplied to

a judicial officer issuing an arrest warrant on a sworn complaint may be supplemented by additional information which the arresting officers themselves have or have acquired before the arrest and which is corroborative of the complicity of the arrestee in the crime.

6. **Criminal Law: Parties: Intent: Aiders and Abettors.** If the intent of the aider is different from that of the perpetrator, the aider's guilt is measured by the intent that actuated him.
7. **Criminal Law: Parties: Intent: Homicide: Evidence: Trial.** Threats and expressions of ill will are in intentional homicide admissible to show intent, malice, or motive. Malice and motive are relevant and material not merely as evidence of intent, but also on the issue of guilt or innocence as tending to point to the identity of the perpetrator or perpetrators.
8. ———: ———: ———: ———: ———: ———. In a prosecution for intentional homicide committed against one of a class, threats by the defendant against the class are admissible.
9. **Criminal Law: Parties: Trial: Conspiracy.** Two or more defendants may be tried together where each of the defendants is charged with accountability for the offense or offenses or where the offense is part of a common scheme or plan or conspiracy.
10. **Criminal Law: Parties: Trial: Evidence.** Defendants challenging a joint trial must affirmatively demonstrate that the joint trial has prejudiced their individual rights.
11. **Criminal Law: Trial: Evidence.** Irrelevant and immaterial evidence erroneously admitted is not necessarily prejudicial.
12. **Criminal Law: Instructions: Trial: Appeal and Error.** Related instructions must be read and construed as a whole and if when so read and construed they correctly state the law there is no error.
13. **Criminal Law: Witnesses: Trial: Jury.** Questions of credibility are ordinarily for the jury to determine and not the court.

Appeals from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Frank B. Morrison, Sr., Thomas M. Kenny, Bennett G. Hornstein, J. Patrick Green, and David L. Herzog, for appellants.

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

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

CLINTON, J.

The defendants, David L. Rice and Edward Poindexter, in a joint trial, were convicted by a jury of murder in the first degree in the bombing death on August 17, 1970, of an Omaha police officer, Larry D. Minard, Sr., and the jury fixed the penalty at life imprisonment.

On this appeal assignments of error relate to the following: (1) Denial by the trial court of motions of both defendants to suppress evidence seized in a search at 2816 Parker Street in Omaha on August 22, 1970; (2) denial by the trial court of motions by both defendants to suppress the results of scientific analysis of clothing taken from each of them following their arrests; (3) instructions to the jury; and (4) overruling by the trial court of objections to admission in evidence of seven certain purported newsletters of the United Front Against Fascism and National Committee to Combat Fascism, local militant black organizations, and denial of related motions to strike and for mistrial. Errors also were alleged in connection with instructions related to said exhibits. In a separate pro se brief Poindexter makes an assignment of error that the evidence is insufficient to sustain the verdict.

We will note each of the assignments of error in order in separate parts of this opinion and make such reference to the evidence and other matters as may from time to time be required in consideration of the assignments. We first, however, briefly set forth some of the necessary factual information concerning the death of Officer Minard.

In the early morning hours of August 17, 1970, the police department of the city of Omaha received a telephone call purportedly originating from 2865 Ohio Street, which call represented that cries of a girl or woman screaming for help were coming from a vacant house next door at 2867 Ohio Street. The police dispatcher relayed the information by radio and several patrol cars responded to the call, including that of

Officer Minard. Certain officers, including Minard, entered the house at 2867 Ohio Street and in so doing noticed and stepped over a suitcase lying on its side near the doorway. While a search was being conducted an explosion occurred, killing Minard who was standing near the suitcase and apparently inspecting it visually or otherwise. Other officers were injured by the explosion. Scientific analysis of the debris of the explosion established that the source was dynamite contained within the suitcase. Other evidence supported the conclusion that the suitcase contained a dynamite bomb which had been booby trapped and set to explode when moved. Subsequent intensive investigation by the police department led to the apprehension of Duane Peak, age 15, the acknowledged deliverer and planter of the booby trapped suitcase and maker of the false telephone report of the cries for help at 2867 Ohio Street. Peak testified for the State and the defendants were convicted as the instigators of the crime.

I.

On August 22, 1970, police officers procured a search warrant authorizing the search of 2816 Parker Street, the residence of David L. Rice, and the seizure of: "Dynamite and devices which could be used to construct devices which could cause injury to persons and damage to property." The search was conducted and as a result the following items of property, some of which were introduced into evidence at the trial, were seized: "14 Sticks Dupont Red Cross Extra Strength Dynamite, 40 and 50%. 3 DuPont Elect. Blasting Caps., MS 25, 1 DuPont Elect. Blasting Cap. 3 pcs assorted wire. 1 Marathon #499 RR #6 Volt Battery. 1 pr Homecraft wire dykes. 1 CeeTee Co. Pliers. 1 long nose dyke, made in Japan, orange grips. 2 ⅜ X1X¾ inch permanat magnets." It was the foregoing evidence at which the motions to suppress were directed. Prior to trial a hearing was held on the motions to

suppress, evidence was adduced by all parties, and the trial court denied the motions.

The defendants assert that the search and seizure was in violation of the provisions of the Fourth Amendment to the Constitution of the United States which provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The defendants assert that the affidavit upon which the search warrant was issued was invalid in that it does not meet the standards laid down by the Supreme Court of the United States in Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723; and Spinelli v. United States, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637. They further contend that evidence seized in the search should have been excluded under the doctrines of Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 84 A. L. R. 2d 933; and Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726.

The affidavit was prepared by one of the officers in charge of the search while 2816 Parker Street was under surveillance by other officers. It was done under the intensive pressure of the extensive investigation following the bombing and during a time when the officers were working 18 hours day after day.

The affidavit is as follows: "The complaint and affidavit of *Sgt. R. Pfeffer and Sgt. Jack Swanson,* on this *22* day of *August 1970,* who being first duly sworn, upon oath says:

"That he has just and reasonable grounds to believe, and does believe that there is concealed or kept as hereinafter described, the following property, to-wit: *Dynamite and devices which could be used to construct devices which could cause injury to persons and dam-*

age to property. Also illegal weapons which he stated should be used against Police Officers. . . .

"That said property is concealed or kept in, on, or about the following described place or person, to-wit: *A one story white frame house on Parker Street at 2816, In Omaha Douglas County, Nebraska.*

"That said property is under the control or custody of *David Lewis RICE, Minister of Information, National Committee to Combat Fascism.*

"That the following are the grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit: *David Rice is a known member of the National Committee to Combat Fascism, which advocates the violent killing of Police Officers. A violent killing of a Police Officer occurred, in Omaha and arrests were made from the membership of the NCCF. We have been told in the past that RICE keeps explosives, at his residence, and also illegal weapons, which he has said should be used against Police Officers.*

"A warrant authorizing a night-time search is requested because *Nighttime when information was secured, and the property may be removed.*

"WHEREFORE, he prays that a search warrant may issue according to law."

The confused and confusing state of the law of search and seizure is widely recognized. See concurring opinion of Justice Harlan and dissenting opinion of Justice White in Coolidge v. New Hampshire, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564; and Landynski, Fourth Amendment Standards, 45 Conn. B. J. 330. We cite and refer to, on the matter covered in this section of the opinion, only those cases which seem most pertinent.

In Aguilar v. Texas, *supra*, the court held that a search warrant was invalid because of a deficient affidavit where the substance of the affidavit was as follows: " 'Affiants have received reliable information from a credible person and do believe that heroin . . . and other narcotics . . . are being kept at the above

described premises for the purpose of sale and use contrary to the provisions of the law.'" The court held that an affidavit may be based on hearsay, but that the magistrate who was asked to issue the warrant must by the affidavit be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where they were claimed to be and some of the underlying circumstances from which the affiant concluded that the informant was reliable. The affidavit was lacking in these requirements and since it was based solely upon the hearsay testimony of the informant it was invalid. Justice Goldberg, writing for the majority, stated: ". . . when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant, (citing Jones v. United States, 362 U. S. 257, 270, 80 S. Ct. 725, 4 L. Ed. 2d 697, 78 A. L. R. 2d 233), and will sustain the judicial determination so long as 'there was substantial basis for (the magistrate) to conclude that narcotics were probably present . . . .'" Justice Goldberg also quoted from Johnson v. United States, 333 U. S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436, as follows: "'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'"

In Spinelli the defendant was convicted on an interstate gambling charge with the use of evidence seized by virtue of a warrant. The affidavit stated the FBI had "'been informed by a confidential reliable informant'" that the accused was "'operating a handbook and

accepting wagers . . . by means of the telephones.' " The affidavit also set forth that the defendant had been under surveillance by the FBI for 5 days, had traveled interstate, and had entered an apartment which had two telephones. It further stated he was a gambler and an associate of gamblers. The affidavit was held defective because it did not include information on reliability as required by Aguilar, and because the information relative to the surveillance was not corroborative but only indicative of acts which might be perfectly innocent. The court said: "The affidavit, then, falls short of the standards set forth in Aguilar, Draper, and our other decisions that give content to the notion of probable cause. In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, Beck v. Ohio, 379 U. S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, McCray v. Illinois, 386 U. S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, United States v. Ventresca, 380 U. S. 102, 108 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, Jones v. United States, 362 U. S. 257, 270-271 (1960)."

The latest case we have found touching the sufficiency of the affidavit is United States v. Harris, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723. That case involved a charge of possessing nontaxpaid liquor. The affidavit, as summarized in the headnotes of the report, stated: ". . . respondent had a reputation with the investigator for over four years as being a trafficker in nontaxpaid distilled spirits; during that time the local constable had located illicit whiskey in an abandoned house under respondent's control; on the date of the affidavit

the affiant had received sworn oral information from a person whom the affiant found to be a prudent person, and who feared for his life should his name be revealed, that the informant had purchased illicit whiskey from the residence described, for a period exceeding two years, most recently within two weeks; that the informant asserted he knew of another person who bought such whiskey from the house within two days; that he had personal knowledge that such whiskey was consumed in a certain outbuilding; and that he had seen respondent go to another nearby outbuilding to obtain whiskey for other persons." Analysis shows the above affidavit contained two things: (1) Alleged factual information from an informer alleged to be "prudent," and (2) the accused had a reputation with the affiant investigator as a "trafficker in nontaxpaid distilled spirits." The affidavit was held sufficient. The court in that case distinguished Aguilar, pointing out that there: ". . . we held that an affidavit based solely on the hearsay report of an unidentified informant must set forth 'some of the underlying circumstances from which the officer concluded that the informant . . . was "credible" or his information "reliable."'" The court also said: "We cannot conclude that a policeman's knowledge of a suspect's reputation—something that policemen frequently know and a factor that impressed such a 'legal technician' as Mr. Justice Frankfurter—is not a 'practical consideration of everyday life' upon which an officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip. To the extent that Spinelli prohibits the use of such probative information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation."

A reputable legal scholar has stated that Harris "appears to go far in the direction of eroding the force of Aguilar and Spinelli." 45 Conn. B. J., note 51, p. 345.

We now analyze the affidavit here considered in order to determine in the light of the foregoing whether it contains a "sufficient basis for a finding of probable cause" by the magistrate. We conclude it does.

It recites, as we have already noted, that the police department had in the past been informed that Rice kept explosives at his residence and that he had said they should be used against police officers. These allegations standing alone would be insufficient, but they gain force and credibility from the following additional allegations based upon the personal knowledge of the Omaha police department and the affiants: (1) David L. Rice is the Minister of Information, National Committee to Combat Fascism; (2) he is a known member of that organization "which advocates the violent killing of Police Officers"; and (3) the death of a police officer by violence (by means of an explosive booby trap—a fact so notorious at the time in Omaha that even the public had knowledge of it as a fact). That explosives were in fact in the neighborhood was evidenced by their use in the bomb. The facts alleged here over and above the informer's information are much stronger than just the reputation of the suspect which the court found sufficient in Harris.

We call attention to the United States Supreme Court's reference in Spinelli to Draper v. United States, 358 U. S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327, and its approval of that case as viable on "the notion of probable cause." That was a case of arrest upon probable cause without warrant, based upon information from an unidentified informant *whose information was given force by occurrences subsequent to the giving of the information but prior to the arrest.* It is important because the Fourth Amendment by its terms makes no distinction between probable cause for arrest and probable cause for search and seizure. More important, that case permitted proof of probable cause for arrest in search in connection therewith by parole testimony, thus in ef-

fect replacing the necessity for an affidavit. This in accordance with long-established common law practice. In that case the informer had given a description of the suspect, including the clothing which he was expected to wear, and his luggage, and also information as to the train on which he would probably arrive at the Denver railroad station and that he would have drugs in his possession. The court held that the fact that when the police officer arrived at the Denver railroad station he there saw alighting from the train as predicted by the informant a person who met the description as to physical appearance, attire, and luggage given by the informant, verified and gave credibility to the tip and made the arrest valid. We do not see how, as that case relates to "probable cause," it can be distinguished from the one at hand. Rice' position as an officer and key member of an organization openly advocating the violent killing of police officers and his own known advocacy of this end accompanied by the bombing itself is, in our judgment, far more indicative of probable cause for search than were the circumstances in Draper for arrest, which circumstances, apart from the informant's information in the case, were simply neutral as far as the indication of crime is concerned.

It is worthy of mention that in connection with the search for explosives and devices at 2816 Parker Street under the warrant, there was conducted simultaneously therewith a search for Duane Peak for whom the police department of Omaha had at that time a warrant for arrest on a charge of first degree murder in connection with the death of Officer Minard. At that time the police department had the following additional information as shown by the police reports introduced into evidence at the hearing on the motion to suppress: (1) On the morning of August 22, 1970, Donald W. Peak, brother of Duane Peak, was arrested and after having been given the Miranda warnings, voluntarily made a

statement to the police. This statement (a) directly, clearly, and almost conclusively identified Duane Peak as the person who physically delivered the bomb and placed the entrapping phone call; (b) Donald attributed Duane's acts to his membership in the NCCF (sometimes referred to in the record as Panthers); (c) indicated that the bomb had probably been made by Poindexter as head of the organization; and (d) that Duane had been told by headquarters "to lay low." (2) Item (1) (a) above was corroborated by five other identified persons from whom statements had been taken by the police department. (3) An identified informant, based on his own knowledge, stated that on the day following the bombing, David L. Rice had said, ". . . the action was a week late." The informant interpreted the comment as referring to the bombing. (4) Rice and Poindexter were leaders and organizers of the NCCF. (5) A tape recording of the voice which had made the entrapping phone call was identified as that of Duane Peak. (6) Poindexter had been arrested about 6 p.m., on August 22, 1970, and declined to talk. (7) Personal knowledge of the police department that Rice had made statements in party newsletters led to the conclusion that he was an outspoken advocate of violence against police officers. (8) There were reports (plural) from individuals (plural) that Rice stored explosives at his home at 2816 Parker Street. (9) Literature had been found at the headquarters of the NCCF containing "directions on how to make bombs."

All of this information was introduced at the hearing on the motion to suppress. Draper v. United States, *supra*, Whiteley v. Warden, 401 U. S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306, and other cases appear to us to support the proposition that the affidavit may be supplemented by testimony of additional evidence known to the police.

While up to this point we have treated the search of 2816 Parker Street as though both defendants had

standing to raise the Fourth Amendment question, it is our specific holding that Poindexter has under the evidence shown no standing to raise the question. He claimed at hearing and trial no interest in either the premises or the property seized such as would give him standing. "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing." Alderman v. United States, 394 U. S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176. We point out that had Poindexter so chosen he could at the hearing on the order to suppress have testified to such an interest as would have given him standing, and his testimony could not have been used against him at trial. Simmons v. United States, 390 U. S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247.

It is quite clear in this case the officers were doing their very best in good faith to follow the mandates of the Fourth Amendment. At the time the affiants first came to the door at 2816 Parker Street and before they had obtained the warrants, there was no response to their knocks. They could, however, see the television set was on. They concluded someone was there but their requests were being ignored. The fact that the television set was going is verified by police reports of statements of a brother of Rice and a companion who appeared at 2816 Parker Street while the place was under surveillance. These persons explained their appearance by stating they thought the place was being burglarized. This occurrence highlights the possibility of removal of the explosive material. The bombing and the items of information listed (1) through (9) above indicate exigent circumstances which might possibly have justified the search even without a warrant in the light of the highly dangerous nature of the material

and the possibility of continued bombings if the suspected explosives were not seized. Nonetheless the officers took the time to apply for a search warrant even though they might have entered the premises justifiably under the terms of the warrant for the arrest of Duane Peak for whom they were also looking at that time.

This opinion should in no wise be interpreted by law enforcement officers as a relaxation by this court of the rules laid down for us in Mapp and Ker. Search pursuant to warrant is to be much preferred to search without warrant, and a warrant should be applied for absent the exceptions applicable to exigent circumstances and other recognized exceptions. Affidavits in support of warrants should be as inclusive, accurate, and complete as is reasonably possible.

II.

As previously noted, Poindexter was arrested pursuant to warrant on August 22, 1970, and taken to jail. On August 24, 1970, his cothing was taken from him and he was given jail clothing. Shortly thereafter on the same day the clothing was delivered to Treasury Department agents. Following the search of 2816 Parker Street a warrant was issued for the arrest of Rice. He thereafter voluntarily on August 27, 1970, came to the jail, and was placed under arrest. His clothing was also taken from him and shortly thereafter on the same day it was given to Treasury Department agents. In the case of each of the defendants the clothes were taken to Washington, D. C., and analyzed by government chemists, and traces of dynamite were discovered. Each defendant moved to suppress the results. The motions were denied.

It is contended that Rice' arrest was illegal because it was based upon an unlawful search of 2816 Parker Street. This contention has already been disposed of. It is also contended that the examination of the clothing was in violation of the Fourth Amendment stand-

ards against unreasonable search and seizure because the search and scientific examination of it subsequent to arrest was not an incident of the arrest, and because there was no search warrant.

Rice relies primarily upon Brett v. United States, 412 F. 2d 401 (5th Cir., 1969). In that case the court, in a two to one decision, held that a search of the suspect's clothing without warrant 3 days after his arrest and the time his clothing was taken from him violated the Fourth Amendment and that the evidence should have been suppressed. No cases of the United States Supreme Court directly applicable are cited. The State relies upon Golliher v. United States, 362 F. 2d 594 (8th Cir., 1966). In that case, the court said: "Subsequent to appellants' arrest, they were relieved of their clothing. The clothing was subjected to scientific tests which disclosed microscopic particles matching particles taken from a bag discovered by officers at the scene of the offense." We are persuaded to follow the decision of the court in Golliher for the reasons which are set forth in the following extracts from that opinion: "The Fourth Amendment does not clearly delineate between searches that are legal and those that are illegal. It only prohibits the unreasonable with each particular case being decided on its own facts and circumstances. Ker v. State of California, 374 U. S. 23, 33, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963); Rios v. United States, 364 U. S. 253, 255, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960); Frank v. State of Maryland, 359 U. S. 360, 79 S. Ct. 804, 3 L. Ed. 2d 877 (1959). Applying this doctrine to an accused we can see nothing unreasonable about seizing from a validly arrested person, evidence that is intimately connected with the crime for which he is arrested. United States ex rel. Boucher v. Reincke, 341 F. 2d 977 (2 Cir. 1965); United States v. Pisano, 193 F. 2d 361 (7 Cir. 1951). In such a situation the accused is already subject to a general search incident to his arrest for such things as weapons, instrumentali-

ties, and fruits of the crime. Therefore, it is not a question of whether or not we shall allow a search, for the search already has the sanction of the law. It is only a question of whether evidence may be seized during the search. Such a seizure of evidence from an accused already in legal custody, therefore, will not generally subject the accused to any burden or indignity that he has not already suffered. The search allowed is limited to objects under the accused's immediate control and only allows seizure of evidentiary matter pertaining to the crime for which the accused was arrested. This carefully circumscribed seizure, limited in space and subject matter, is certainly distinguishable from a general warrant or the general exploratory search of one's personal effects in the sanctity of his home condemned by Gouled and Lefkowitz. As far as an accused is concerned, we do not believe such a seizure is an unreasonable infringement upon his personal rights.

"In making the determination of what searches are reasonable we must also weigh society's interest in continuing to allow such searches. We first note that scientific examination of dust particles, paint chips, blood stains, etc., is a widespread and necessary part of scientific police investigation. Were we to deny enforcement officials the right to gather this evidence from an accused actually in custody, a necessary weapon in the arsenal of detection would be largely destroyed. In recent years the Supreme Court has announced Constitutional principles that necessarily de-emphasize the use of interrogation, and, at the same time, supposedly encourage scientific investigation. Escobedo v. State of Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964); Mallory v. United States, 354 U. S. 449, 77 S. Ct. 1356, 1 L. Ed. 2d 1479 (1957). As a practical matter we cannot possibly insist that enforcement officials rely upon scientific investigation and at the same time deny them an integral part of this scientific

potential. True, we must be diligent in our protection of the basic rights of an accused, but likewise we must not be derelict in protecting society from the ravages of criminal activity. We must be extremely careful not to completely disarm the enforcement officials of the weapons necessary to maintain order, which in turn would leave us all at the mercy of the unhindered criminal. Were we to uphold appellants in this case the bloody shirt worn into the police station by the murder suspect would be kept from the eyes of the jury. To us this would be deplorable folly. Therefore, we do not propose to initiate a rule that would dictate such a patently unjust result. . . .

"Although the Constitutional issue was not raised, we recently approved the seizure of the arrested persons' clothing and the admission of scientific comparison evidence found thereon. McNeely v. United States, 353 F. 2d 913 (1965). Even when presented with the Constitutional issue, all the cases of which we are aware have specifically upheld, on various grounds, the validity of seizing the clothing worn by the arrested individual and subjecting the same to scientific tests later admitted into evidence. Robinson v. United States, 109 U. S. App. D. C. 22, 283 F. 2d 508 (1960) cert. denied 364 U. S. 919, 81 S. Ct. 282, 5 L. Ed. 2d 259; Whalem v. United States, 346 F. 2d 812 (D. C. Cir. en banc 1965) cert. denied 382 U. S. 862, 86 S. Ct. 124, 15 L. Ed. 2d 100; United States v. Guido, 251 F. 2d 1 (7 Cir. 1958) cert. denied 356 U. S. 950, 78 S. Ct. 915, 2 L. Ed. 2d 843; Nelson v. Hancock, 239 F. Supp. 857 (D. N. H. 1965); United States v. Margeson, 246 F. Supp. 219 (D. Me. 1965); State v. Menard, 331 S. W. 2d 521 (Mo. 1960); State v. Phillips, 262 Wis. 303, 55 N. W. 2d 384 (1952); Sheppard v. State, 394 S. W. 2d 624 (Ark. 1965); People v. Shaw, Cal. App., 47 Cal. Rptr. 96 (1965); State v. Post, 255 Iowa 573, 123 N. W. 2d 11 (1963). Because of the reasons stated above, we feel it is imperative that we follow this long list of authority. It is our

conclusion that the clothing of appellants was validly seized as an incident to their lawful arrest and that the admission of the evidence found thereon did not violate their rights under the Fourth or Fifth Amendment."

As to Poindexter, it is further argued that his arrest was unlawful because the warrant for his arrest was issued without probable cause and therefore the seizure or taking of his clothing was likewise unlawful. He relies upon Whiteley v. Warden, 401 U. S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306, decided March 29, 1971, where the Supreme Court of the United States held that a sworn complaint alleging the commission of a crime was not a sufficient basis to issue an arrest warrant and that the judicial officer issuing the warrant must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant *or* that the officers themselves have acquired additional information which is corroborative of the complicity of the arrestee in the crime.

The factual information in the hands of the police before the search of 2816 Parker Street on August 22, 1970, which we have previously listed, was in their hands before Poindexter's arrest on August 22, 1970, and would justify an arrest of both Poindexter and Rice.

In Whiteley v. Warden, *supra,* the sole basis of the complaint and warrant was the tip of an informer. The law officers had no independent corroborative information. Here the police had additional information which was corroborative of Poindexter's complicity and gave probable cause for his arrest.

The scientific examination of the clothing of the defendants taken from them shortly after their arrest did not violate the Fourth Amendment.

III.

Duane Peak testified at the trial that he did not intend to kill or maim a police officer and when he left the suitcase at 2867 Ohio Street he did not arm it, but his purpose was merely to frighten the officers when

they found it in the hope they would then treat black people better. The defendants argue that this would permit the jury to find Duane Peak was guilty of homicide less than first degree murder and that their guilt could be only derivative as alleged accessories before the fact. They argue, therefore, that the following instruction was in error, to wit, "If the intent of the aider is different from that of the perpetrator, the aider's guilt is measured by the intent that actuated him," because under the law the aider cannot be guilty of a crime of greater degree than the principal.

The argument on this point in the brief is well done, but we do not believe it is valid. The evidence was sufficient to establish a common design to commit murder in the first degree. The fact that the evidence would permit the jury to find that Peak had changed his mind as to his purpose and changed his intended actions (which changes if made were never communicated to the defendants) and so to find that he was guilty only of homicide less than first degree would not change the degree of the instigators' guilt if there was the necessary intent and premeditation on their part. See, 40 C. J. S., Homicide, § 9e(3), p. 848; 22 C. J. S., Criminal Law, § 106, p. 297; Red v. State, 39 Tex. Cr. 667, 47 S. W. 1003; State v. Lord, 42 N. M. 638, 84 P. 2d 80; Fleming v. State, 142 Miss. 872, 108 S. 143; People v. Blackwood, 35 Cal. App. 2d 728, 96 P. 2d 982.

Under the Nebraska statute the common law distinction between principal and accessory before the fact, or aider and abettor, has been abolished and the instigator is tried as a principal. § 28-201, R. R. S. 1943. At common law an instigator not personally present at the crime was called a principal in the second degree. In such cases the intent of the instigator governs his degree of guilt. State v. Lord, *supra;* Red v. State, *supra.* The instruction was not in error.

IV.

Both defendants assign as error the admission into

evidence over their objections of certain newsletters of the United Front Against Fascism and the National Committee to Combat Fascism (exhibits 14, 16, 17, 18, 19, 57, and 58). This assignment has several facets pertaining to motions to strike and for mistrial, as well as the claim that the admission of the exhibits is the source of prejudice to the defendants in the denial of the motion of the defendants for separate trials because of the possible use by the jury of statements or articles in the newsletters of one defendant against the other. In connection with the above it is asserted that instruction No. 21 is erroneous because it did not limit consideration of the statements or articles to the issue of intent.

The newsletters contained articles and statements appearing under the separate bylines of Rice and Poindexter, the general nature of which statements or articles, insofar as they are relevant and material, were expressions of hatred for the Omaha police and advocacy of the use of violence, including lethal violence, against them. These newsletters appeared and were publicly circulated during the several months immediately preceding the bombing.

The articles and statements were logically and legally relevant and material as those two terms are used in the law. 31A C. J. S., Evidence, § 158 et seq., p. 426 et seq. Threats and expressions of ill will are in homicide cases admissible to show intent, malice, or motive. Malice and motive are relevant and material not merely as evidence of intent but also on the issue of guilt or innocence as pointing to the identity of the perpetrator or perpetrators. 22A C. J. S., Criminal Law, §§ 607, 614, pp. 414, 422. Threats made by a person against a class are admissible in a prosecution for a crime committed against one of that class. State v. Dockery, 238 N. C. 222, 77 S. E. 2d 664.

The foundation for the admission of the exhibits is sufficient as to each defendant. That the newsletters

were the organs of the UFAF and NCCF is acknowledged by the defendants. The record completely supports the conclusion that the two defendants were among the organizers and key officers of the organization; that they did in fact compose the article appearing above their names; and that they had detailed knowledge of the contents of the newsletters because of their respective parts in the composition, construction, editing, and publishing of the letters including typing, cutting stencils, art work, and distribution. Poindexter denied authorship of one of the articles appearing under his name, but the general method of procedure in publication and the other evidence would support a contrary conclusion by the triers of fact. Both Poindexter and Rice testified on their own behalf and each, of course, was afforded an opportunity to cross-examine the other.

Instruction No. 21 given by the trial court was as follows: "The State has introduced certain news letters into evidence and they have been received as evidence but it has been agreed by the parties that you are to consider as evidence only the articles written and the art work contained therein, that is related to the individual defendants. You may consider the news letters with that limitation in your deliberations." In this connection two claims of error are made. The first relates to the language, "it has been agreed by the parties," and the second with the reference to the words, "related to the individual defendants." With reference to the first, the argument is that since the record contains no evidence of an agreement by the parties this permitted the jury to think the defendants had withdrawn their objections to the exhibits and consented to the jury considering them. In this connection we point out the evidence justified the jury in considering the pertinent articles and art work. Admissibility is a question for the court, not the jury. We can perceive no error on account of the language used even if inaptly chosen.

With reference to the second claimed error, it would appear that the language, "that is related to the individual defendants," is not as clear as it might have been, but when taken in connection with instructions Nos. 28 and 29, it seems clear to us no prejudice resulted. This portion of the instruction would appear to mean that articles or art work not authored by the defendants were not to be considered. Instruction No. 29 is NJI No. 14.54 which requires the jury to separately consider the guilt or innocence of each defendant and to consider against each defendant only the evidence which applies to him. Instruction No. 28 is in part as follows: "You are instructed that where the evidence shows a common plan, arrangement or design between two or more persons, evidence as to an act done or a statement made by one is admissible against all, provided the act be knowingly done and the statement be knowingly made during the continuance of the arrangement between them, and in furtherance of an object or purpose of the common plan or arrangement." This instruction also left to the jury the determination whether there was a common plan or design to commit the crime. Instruction No. 28 is of course correct. State v. Watson, 182 Neb. 692, 157 N. W. 2d 156. Instructions must be considered as a whole, and when so considered and they fairly reflect the law, there is no error.

In connection with the claimed error as to instruction No. 21 and the failure of the trial court to grant the motion for separate trials, the defendants rely upon Bruton v. United States, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476. The principles of this case appear not to be applicable because as we have noted each defendant testified and was subject to cross-examination by the other. In Bruton one defendant did not testify and his confession or admissions implicating his codefendant were used against said codefendant. This the court held was a denial of the constitutional right to confrontation and could not be cured by a cautionary

instruction. Bruton by its terms appears to apply only to confessions and admissions by one codefendant when used against the other. In this case there was no denial of the constitutional right to confrontation and cross-examination. Also the articles authored by each do not by their contents implicate the other.

One article in one of the exhibits is purportedly jointly authored by both defendants and as to this what we have said in the fourth preceding paragraph is applicable. The jury would be justified from the evidence in finding that it was in fact jointly authored by the two defendants.

There was no error in denying the motion to sever. See, A. B. A. Standards Relating to Joinder and Severance, Approved Draft, 1968, Standard 1.2(a), p. 5, and commentary, p. 14, and Standard 2.2, p. 7, and commentary, p. 29; § 29-2002, R. R. S. 1943. We recognize, of course, that some Nebraska cases may no longer be viable in the light of Bruton v. United States, *supra*, where an out-of-court admission or confession by one defendant is being used against the other without right of confrontation and cross-examination.

The newsletters themselves contain much that is irrelevant and of that most is wholly and simply irrelevant and could not support any claim it was prejudicial. The court when it admitted the newsletters into evidence indicated that irrelevant material and inadmissible items would be excised before being shown to the jury. It appears this was not done. We are therefore called upon to consider the question whether the admission of some of these items through apparent oversight constituted prejudicial error requiring a reversal and new trial.

The most prejudicial articles and the relevant and material articles are those purportedly authored by the defendants, and dealt with hate of the police and the advocacy of violence against them.

Some examples of the irrelevant material purportedly

authored by one or the other of the defendants or by others and which are at least arguably prejudicial are the following: (1) An article purportedly written by Rice attacking racism at North High School and suggesting that if the racists did not understand the logic of words, ". . . maybe they will understand the logic of not having a house or having a burning car." (2) Unsigned articles advocating overthrow of the government. (3) Disclosure of a purported plan by the United States, called the "King Alfred Plan," to use racial unrest as an excuse for a racial war and internment in the concentration camps of racial minorities. The admission of such items into evidence was clearly error and had no place in the trial of these cases.

In determining whether or not this constituted prejudicial error we consider the following: (1) The fact that the relevant and material and admissible articles purportedly authored by the defendants were of a far more virulent and prejudicial nature than any of those erroneously admitted. (2) The strength of the evidence of guilt. About this more will be said when we consider the assignment related to the sufficiency of the evidence to sustain the verdict. (3) The cautionary instructions, No. 21 and No. 28, given to the jury. (4) The great unlikelihood the jury would base its finding of guilt and consequently impose a sentence of life imprisonment upon matters which were not indicative of the guilt of the defendants of the particular crime with which they were charged.

It seems unlikely to us that the admission of the irrelevant statements reaches the dimension of the constitutional error, but nonetheless in accordance with the standards declared by the Supreme Court of the United States in Chapman v. California, 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, 24 A. L. R. 3d 1065, we have concluded the error was harmless beyond a reasonable doubt. In so doing we have applied the same standard of reasonable doubt that this court has ap-

proved as being applicable to the burden of proof of guilt in criminal prosecutions. NJI No. 14.08. This standard seems to conform to and be compatible with that announced in Chapman. We conclude that there is no reasonable possibility of prejudice on account of the failure to delete the irrelevant portions of the newsletters. We have an abiding conviction to a moral certainty that the jury would have convicted Rice irrespective of the irrelevant statement attributed to him and which we have specifically mentioned. The possibility of prejudice to Poindexter is even more remote.

V.

We now turn to the final assignment of error made by Poindexter that the evidence was insufficient to sustain the verdicts. The assignment is not well taken and we substantiate this by very brief résumé of the trial evidence as it pertains to the two defendants, omitting evidence of motive and identity contained in the newsletters and which has been already adequately covered, but will again refer to the finding of the physical evidence in Rice' residence.

Duane Peak, the actual perpetrator of the crime, testified for the State. His testimony would permit the jury to find that the following is true. Peak joined the NCCF in November 1969, the headquarters of which at that time were 2 blocks from 2816 Parker Street. He participated in the activities of the organization until the time he went into hiding on August 17, 1970. His activities included writing for the newspaper, observing its making, selling newspapers, and serving as desk officer. He was well acquainted with Rice and Poindexter, knew their positions in the organizations, and knew their activities.

On August 10, 1967, Poindexter talked to Peak about making a bomb and told him, ". . . he had a beautiful plan to blow up a pig," meaning a policeman. They made arrangements that night to meet at the home of one of the members of the NCCF which they did

and then went to Rice' home. Peak then went with another member and obtained a suitcase which he took to Rice' house through the alley and back door where he was met by Rice and Poindexter. Inside they opened the suitcase. It contained a large quantity of dynamite. Poindexter furnished Peak with plastic gloves and the two of them removed part of the dynamite from the suitcase and placed it in a box which Rice took to the basement. Poindexter then made the bomb in the suitcase using the remaining dynamite and other materials. This was done in the presence of Peak and Rice. Rice furnished tools used in the manufacture. Peak identified the dynamite and the box found in the search at 2816 Parker Street. He identified the tools furnished by Rice. After the bomb had been manufactured inside the suitcase the lid of the suitcase was closed, locked, and put in Rice' bedroom. The following night Peak and Poindexter went to look at the vacant house at 2867 Ohio Street.

On the evening of August 16, 1970, Peak obtained the suitcase from Rice' home pursuant to arrangements which he had made with Rice a short time earlier. At the time he obtained it, Rice gave him tacks which Peak needed to fasten wires projecting through a hole in the suitcase so that the bomb would detonate when the suitcase was moved.

Peak described the route he took and delivery of the bomb to 2867 Ohio Street and his testimony is corroborated by several witnesses. He then made the 911 telephone call from a phone booth at 24th and Grace Streets and gave the operator the story of the woman's screaming at 2867 Ohio Street. Poindexter had earlier told him to do this. Peak was arrested on August 28, 1970.

In addition to the physical evidence found in the search of August 22, 1970, at 2816 Parker Street, Peak's testimony is corroborated by the following. Scientific examination of fragments gathered at 2867 Ohio Street

established the probable cause of the explosion. Scientific examination of a jacket taken from Poindexter disclosed particles of ammonia dynamite which is the type used in the bomb and the type found in Rice' basement. Like particles were found on Rice' pants. Scientific testimony indicated that Rice' pliers had been used to cut a bit of copper wire like that used in the bomb and found in the basement of 2865 Ohio Street, next door to 2867, where the wire had apparently been blown by the force of the explosion which essentially destroyed the house at 2867 and badly damaged that at 2865.

Both Poindexter and Rice were able to establish rather conclusively their whereabouts on the night of August 16-17, 1970, during the hours when the bomb was being planted and when the explosion occurred.

They denied the making of the bomb on August 10, 1970, or being with Peak at that time. Rice denied that Peak was at his home on the evening of August 16. Both denied any part in the making of the bomb, the bombing, or participating in any plan to commit the crime.

Questions of credibility are of course for the jury and not for the court. The evidence was clearly more than sufficient to support the verdict.

Since there was no reversible error the verdicts in both cases No. 38157 and No. 38188 are affirmed.

AFFIRMED.

SMITH, J., concurs in result.

MCCOWN, J., concurring in result.

I cannot agree that the affidavit involved here met standards previously applicable. The United States Supreme Court and this court have uniformly held that where informants are involved, an affidavit for a search warrant must inform the magistrate of (1) some of the underlying circumstances from which the informant concluded that the articles were located where he claimed they were; and (2) some of the underlying circumstances from which the officer concluded that the in-

formant was credible. See, United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684; State v. Holloway, 187 Neb. 1, 187 N. W. 2d 85; State v. LeDent, 185 Neb. 380, 176 N. W. 2d 21.

The majority opinion concedes that recitals in the affidavit that the police had been informed explosives were kept at the residence and defendants had said that explosives should be used against police officers would be insufficient standing alone. The opinion nevertheless validates an otherwise insufficient affidavit upon the theory that allegations of membership in a certain organization and the holding of office in such organization, together with an allegation the defendants advocated violence against police officers and that violence had occurred, somehow constitute "underlying circumstances" and cure the otherwise obvious defects. Whenever active membership in an organization which advocates violence against the police or any other group or segment of society, and a public expression of individual approval of such views, standing alone, become justification for the issuance of a search warrant whenever an incident of such violence occurs, the Fourth Amendment has lost its meaning.

I would place the decision on a different ground. At the time of making the affidavit for the search warrant, the police department had ample information to constitute probable cause for the issuance of the warrant, but much of the information was omitted from the affidavit. To apply the exclusionary rule under such circumstances exalts form over substance. Our cases should be modified to permit supplementing the affidavit at the hearing on a motion to suppress by evidence of additional information proven to have been known to the police at the time the affidavit was made and the warrant issued, but not set out in the affidavit. The facts here indicate the advisability of an ad hoc approach permitting some flexibility in the court's analysis of the individual circumstances of each case.

JOHN H. GAETH ET AL., APPELLEES, V. MARJORIE GAETH NEWMAN, APPELLANT.

199 N. W. 2d 396

Filed July 14, 1972. No. 38340.

1. **Gifts: Evidence: Undue Influence.** The burden of proof is upon the person asserting undue influence to prove by a preponderance of the evidence: (1) That the grantor, testator, or donor was a person who would be subject to such influence; (2) that there was an opportunity to exercise such influence; (3) that there was a disposition to exercise such influence; and (4) that the result was the effect of such influence.
2. **Gifts: Evidence: Undue Influence: Parent and Child.** The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control the will of the donor.
3. **Gifts: Evidence: Trial.** Where the validity of an alleged gift between persons occupying a confidential relationship is attacked, the burden of proving that a confidential relationship existed between the parties rests on the one attacking the gift.
4. **Gifts: Evidence: Trial: Undue Influence.** Where the facts and circumstances show such a confidential, fiduciary, or trust relationship that it would be inequitable to sustain the deed in question, then a presumption of undue influence arises, and the burden of going forward with the evidence rests upon the grantee to show the bona fides thereof.
5. **Evidence: Trial: Undue Influence.** Generally speaking, any presumption of undue influence may be rebutted by competent and sufficient evidence.
6. **Gifts: Deeds: Cancellation of Instruments: Undue Influence.** The mere existence of a confidential relationship between grantor and grantee does not of itself show undue influence invalidating a deed, and does not render the deed void or voidable, when the transaction is open, honest, and fair, or where the deed is made by the grantor with full knowledge of its nature and effect, and because of the deliberate desire of the grantor.
7. **Gifts: Deeds: Undue Influence: Evidence.** In determining whether a presumption of undue influence has been rebutted, the court may consider whether the grantor has received independent advice.
8. ———: ———: ———: ———. The absence of independent advice means the absence of an opportunity to have independent advice, and it is not necessary that the acts of the grantor conform to such advice in order to validate the deed.

9. ———: ———: ———: ———. In order to establish undue influence invalidating a deed, there must be proof that the circumstances of the execution of the deed were inconsistent with any hypothesis but undue influence, which must be proved in connection with the conveyance in suit, and not with other things.
10. **Deeds: Acknowledgments: Evidence: Cancellation of Instruments.** Public policy forbids that deeds and mortgages of real estate, duly authenticated in the mode pointed out by statute, should be set aside except upon clear and convincing proof that the certificate of acknowledgment was false.
11. **Trusts: Contracts: Customs and Usages.** In the case of an informal trust the mingling of funds is proper if such is the understanding of the parties as shown by their agreement or by their custom.

Appeal from the district court for Saunders County: JOHN D. ZEILINGER, Judge. Reversed and remanded with directions.

George O. Kanouff and Curtis Bromm, for appellant.

Haessler, Sullivan & Inbody, for appellees.

Heard before WHITE, C. J., BOSLAUGH, McCOWN, and CLINTON, JJ., and BRODKEY, District Judge.

BRODKEY, District Judge.

This is an action brought by John H. Gaeth and Dennis D. Gaeth, as plaintiffs, against Marjorie Gaeth Newman, defendant, praying that a certain deed from Lydia Gaeth to the defendant, covering the west half of the southeast quarter of Section 3, Township 16, Range 8, Saunders County, Nebraska, be invalidated and set aside. There was no contention made that the grantor was mentally incompetent to make a valid conveyance, but it is claimed that the defendant obtained the deed because of undue influence. The trial court found generally in favor of the plaintiffs and vacated and set aside the deed in question, and defendant has appealed to this court.

Pertinent facts developed by the evidence are as follows: Henry and Lydia Gaeth were husband and wife

and were the parents of John H. Gaeth and Dennis D. Gaeth, the plaintiffs in this action, and also of Marjorie Gaeth Newman, the defendant. At the time of his death, Henry Gaeth owned 4 80-acre tracts of farm land in Saunders County, Nebraska, in joint tenancy with his wife, Lydia, and the parties also owned certain savings bonds. After the death of Henry Gaeth, and at the suggestion of her late husband's attorney, Lydia Gaeth gave each of her 3 children 80 acres of land, and also made each of the 3 children a joint tenant with her on ⅓ of the U. S. savings bonds. Thereafter, Lydia made a will leaving the 80 acres involved in this action to her 3 children but granting to the defendant, Marjorie Newman, the right to buy it for $350 per acre, or market value, if less. Defendant, Marjorie Gaeth Newman, together with her husband, Hillis, and their 3 children lived on the 80 acres in question owned by Lydia Gaeth, and farmed it on a percentage agreement. John H. Gaeth is a speech pathologist with a PHD degree and resides in Royal Oak, Michigan. The other son, Dennis D. Gaeth, lives in Chevy Chase, Maryland, and is the owner of the majority stock in a corporation. The contacts of the sons with their mother, after the death of the father, were limited to occasional visits, although there was a certain amount of communication between them by means of correspondence, directly and indirectly.

After the death of Henry Gaeth, his widow, Lydia, continued to live on the "home place," near the farm of her daughter, Marjorie. During that period, Marjorie had complete care and supervision of her mother while she was living alone at the home place, telephoned her daily, and checked on her welfare in a regular fashion. On July 9, 1967, the mother, Lydia, became ill and moved into the home of the defendant, where she lived until her death several years later, to be precise, on April 18, 1970. There was an agreement between the defendant and her mother that the defendant was to

use the mother's funds for her care and any other things that were needed. The plaintiffs also claim the existence of a family agreement between them, by which defendant was to take care of their mother, Lydia Gaeth, in consideration of receiving the interest on $45,000 in bonds owned by Lydia Gaeth and the plaintiffs and defendant jointly, the receipt of the social security payments of Lydia Gaeth, and also the use of the 80 acres involved in this case, free from the payment of any rent.

It appears that in October of 1967, Lydia Gaeth informed the defendant that she would like to have Marjorie have the 80 acres and directed the defendant to make arrangements with her attorney to prepare the necessary papers. According to the testimony of the defendant, she told her mother "to think it over," as the brothers John and Dennis might become angry, but her mother said that she was sure and wanted to do it. Defendant further testified that a week or so later, her mother again inquired about the matter and therefore the defendant called an attorney, Arthur C. Sidner, at Fremont, Nebraska, who was a former partner of the attorney who had formerly represented Henry and Lydia Gaeth on various matters prior to Henry Gaeth's death. Mr. Sidner made an appointment to see Lydia and the defendant for November 1, 1967. He also recommended that Lydia Gaeth have a physical examination before coming to his office, and he, himself, made an appointment for such examination with a Dr. Charlotte P. Seiver, who was Lydia's family doctor. On October 24, 1967, Dr. Seiver examined Lydia Gaeth, and on November 1, 1967, the defendant and her mother kept the appointment with the attorney, Arthur C. Sidner, who, at that time presented an instrument previously drafted by him, stating, in effect, that Lydia was giving the deed to the 80 acres to the defendant, who would take care of Lydia for her life, that the deed was not to be recorded, and further

that the defendant was to make a will that the income from the property would go to Lydia for her support and maintenance. Both Lydia and the defendant refused to sign the instrument; whereupon, Mr. Sidner asked the defendant to leave the room while he talked to the mother, Lydia, alone. On returning to the room, Mr. Sidner handed defendant the signed and executed deed and also prepared a will for Marjorie's signature which protected the maker, Lydia, if Marjorie should die first. The defendant did not record the deed to the property prepared by Mr. Sidner until after the death of her mother, and the plaintiffs had no knowledge of said deed until after their mother died, at which time attorney Sidner informed them of such deed. The defendant explains this failure to record the deed on the grounds that her mother requested that she not record the deed until after her death because of the possibility it would stir up strife and friction within the family, and for the further reason that in the original document prepared by the attorney, Sidner, which both defendant and her mother refused to sign, it was also provided that the deed to the defendant was not to be recorded. The original memorandum prepared by Mr. Sidner was received in evidence at the trial and appears to corroborate defendant's claim that the deed to the defendant was not to be recorded.

Other pertinent facts should be mentioned before discussing the main issue in this case, to-wit, whether or not defendant was guilty of undue influence in procuring the deed in question, and as claimed by the plaintiffs was guilty of the breach of the confidential or fiduciary relationship between the defendant and her mother, Lydia Gaeth. It appears that during the time Lydia was living at the home of her daughter, Marjorie, and while Lydia's affairs, financial and otherwise, were being taken care of by the daughter, Marjorie, and her husband, Hillis Newman, there had been a substantial amount of intermingling of funds, and com-

mon use of funds of the mother; and that, on occasion, some of these funds which were in a joint bank account, were not used strictly for the support and maintenance of Lydia only, but on certain occasions, were also used for purposes personal to the Newman family. Defendant's explanation of this course of procedure was that it was with the agreement and understanding of her mother and with her knowledge and consent. Evidence was also adduced by the plaintiffs, particularly by the son, John, the speech pathologist, to the effect that his mother suffered from what he termed "asphasic" speech, which was explained as being the loss of continuity of thought or forgetfulness in the middle of a sentence. The evidence of whether Lydia suffered from this ailment was conflicting, and, in any event, it would not necessarily affect the mental capacity of a grantor to execute a deed. As previously stated, the mental capacity of Lydia to execute the deed in question is not an issue in this case, except, and only to the extent, that it might make her susceptible to undue influence practiced upon her.

The foregoing appear to be the significant and controlling facts, gleaned from the reading of the voluminous record in this case. We must measure these facts against the applicable principles of law involved, and a summary of some of these principles will be helpful to an understanding of this case. Other facts will be alluded to from time to time to clarify the application of the legal principles involved. The propositions of law involved in this case are for the most part well settled. The principal issue involved, as framed by the pleadings in the case, is whether the defendant, Marjorie Gaeth Newman, obtained the deed to the property involved in this case by undue influence exerted upon the grantor, Lydia Gaeth, her mother. The law is well established that the burden of proof is on the person asserting undue influence to prove by a preponderance of the evidence: (1) That the grantor,

testator, or donor was a person who would be subject to such influence; (2) that there was an opportunity to exercise such influence; (3) that there was a disposition to exercise such influence; and (4) that the result was the effect of such influence. Molholm v. Lynes, 185 Neb. 707, 178 N. W. 2d 566; Drew v. Hawley, 164 Neb. 141, 82 N. W. 2d 4; Parkening v. Haffke, 153 Neb. 678, 46 N. W. 2d 117.

The law is also well established that the affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control the will of the donor. Conry v. Langdon, 181 Neb. 53, 146 N. W. 2d 782; Parkening v. Haffke, *supra;* Hacker v. Hoover, 89 Neb. 317, 131 N. W. 734; 26 C. J. S., Deeds, § 64, p. 777.

In this case the plaintiffs claim and the defendant concedes that at the time of the conveyance involved herein, a confidential relationship existed between the defendant and her mother, Lydia Gaeth. Where the validity of an alleged gift between persons occupying a confidential relationship is attacked, the burden of proving that a confidential relationship existed between the parties rests on the one attacking the gift. When the burden is met, the burden then rests on the alleged donee to show the validity of the gift. By virtue of defendant's admission of the existence of a confidential relationship with her mother, the burden of evidence is cast upon her to show that the deed from her mother was not tainted with undue influence but was the deliberate and bona fide act of the grantor. Molholm v. Lynes, *supra;* Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645. This court has stated that where the facts and circumstances show such a confidential, fiduciary, or trust relationship that it would be inequitable to sustain the deed in question, then a presumption of undue influence arises, and the burden of going forward with

the evidence rests upon the grantee to show the bona fides thereof. Cunningham v. Quinlan, 178 Neb. 687, 134 N. W. 2d 822. Generally speaking, any presumption of undue influence may be rebutted by competent and sufficient evidence. 25 Am. Jur. 2d, Duress and Undue Influence, § 46, p. 406. Moreover, the mere existence of a confidential relationship between grantor and grantee does not of itself show undue influence, invalidating a deed, and does not render the deed void or voidable, where the transaction is open, honest, and fair, or where the deed is made by the grantor with full knowledge of its nature and effect, and because of the deliberate desire of the grantor. 26 C. J. S., Deeds, § 63, p. 771. As a general rule, to render such a transaction valid, it is necessary to show only that the party alleged to have been influenced had competent or disinterested advice, or that he performed the act or entered into the transaction voluntarily, deliberately, and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power and influence to which the relation might be supposed to give rise. 25 Am. Jur. 2d, Duress and Undue Influence, § 46, p. 406. One of the most important elements considered by the courts in determining whether a presumption of undue influence has been rebutted is whether the grantor has received independent advice, and there is a theory of law that removes the cloud of undue influence from a deed on a showing that the one allegedly overpersuaded had independent advice. 26 C. J. S., Deeds, § 62, p. 766. The importance of independent advice has also been recognized by this court. In the case of Broeker v. Day, 124 Neb. 316, 246 N. W. 490, in connection with an action to set aside a deed for undue influence executed by a man of advanced age and considerably broken in health, this court specifically noted at page 320: "He sought no independent advice." It should be pointed out, however, that "absence of independent advice" means the absence of an

opportunity to have independent advice; and certainly where the grantor has received independent advice, his act need not conform to such advice in order to validate the deed. In discussing this rule, the Supreme Court of Oklahoma stated in its opinion in the case of Montgomery v. Willbanks, 198 Okla. 684, 181 P. 2d 240 (1947): "It is to be observed that the rule does not go so far as to say that the grantor must make his acts conform to the advice. If the rule did require that, any person who desired to make a deed under circumstances similar to this would be bound to do as he was advised and his ignoring proper independent advice would be seized upon as an evidence of lack of business capacity or an unsoundness of mind. The independence of an individual to act as he chooses with respect to the disposition of his property is too valuable to be restricted by any such rules."

The evidence adduced by the plaintiffs to establish their claim of undue influence on the part of the defendant consists largely of circumstantial evidence and evidence of suspicious circumstances. While circumstantial evidence may be sufficient, the circumstances must not be equally consistent with some other rational theory deducible from the facts proved. 26A C. J. S., Deeds, § 211, p. 112. In order to establish undue influence invalidating a deed, there must be proof that the circumstances of its execution were inconsistent with any hypothesis but undue influence, which must be proved in connection with the conveyance in suit, and not with other things. Blochowitz v. Blochowitz, 122 Neb. 385, 240 N. W. 586; 23 Am. Jur. 2d, Deeds, § 148, p. 194. Of all the evidence adduced during the trial, it appears that the most persuasive upon the question of whether the defendant has sustained her burden to establish that the deed she received was not the result of undue influence on her part was that given by attorney, Arthur C. Sidner, who testified at the trial by deposition. While Mr. Sidner had not person-

ally represented Henry and Lydia Gaeth previous to this occasion, his deceased partner had represented them, and Mr. Sidner was familiar with the Gaeths and their property. When called by the defendant for an appointment for Lydia Gaeth and her daughter, he immediately sensed the problems that might arise and the trouble which might ensue as a result of Lydia preferring one of her children over her others. As a matter of precaution, he made an appointment with Lydia Gaeth's personal physician for a medical examination of Lydia, obviously to fortify himself as to her mental and physical condition, should the question subsequently arise. The doctor to whom he referred Mrs. Gaeth for an examination, thereafter reported that Lydia Gaeth was physically and mentally competent to sign a deed. Subsequent to that examination, Lydia and the defendant came to Mr. Sidner's office in connection with the preparation and execution of the necessary instruments. The following questions and answers taken from Mr. Sidner's deposition admitted in evidence at the trial are enlightening:

"Q- You testified Mr. Sidner, that you had known Lydia Gaeth for about twenty-five years. Do you have an opinion based upon that long acquaintanceship with Lydia Gaeth as to whether or not she seemed to be a woman of courage and character that could or could not be easily influenced?

"A- I have an opinion.

"Q- And what is that opinion?

"A- It is my opinion that she was a rather strong-willed woman and I would say couldn't be easily influenced. Influence is a peculiar thing where you are feeling sorry for a child. I am sure that even strong-willed people can feel sympathy for a child and make them gifts or otherwise taken advantage of.

"Q- Even a weak-willed person will do that?

"A- Yes, but I would say she was a strong-willed person and not subject to influence."

Attorney Sidner further testified that on November 1, 1967, during the discussion he had with Lydia, he had an opportunity to observe her and listen to her, and in his opinion she was very competent. In answer to a question as to whether he would say Lydia was lucid and knew her own mind, Mr. Sidner replied: "A- She certainly knew her own mind. She didn't follow my recommendations." Mr. Sidner also testified that on that occasion Lydia had told him that Marjorie was taking such good care of her, and had quit a job to do so, and that she, Lydia, felt certain obligations in connection with it, which was one of the reasons she was giving Marjorie the land; but another reason for so doing was because she felt sorry for Marjorie because of her "hard luck."

It must also be noted that after Mrs. Gaeth signed the deed prepared for her by Mr. Sidner, she acknowledged it to be her voluntary act and deed before Mr. Sidner, acting in his capacity as a notary public. This court has held that the evidence of the attorney who prepared the deed, of the notary who took the acknowledgment and of the witnesses to the execution of the deed alleged to have been obtained by undue influence exerted by the grantee, that the deed was executed by the grantor understandingly, and voluntarily, is entitled to great weight. Little v. Curson, 114 Neb. 752, 209 N. W. 737; Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311. In the case of Kucaba v. Kucaba, *supra*, this court stated: "In addition thereto, we have the testimony and the certificate of the notary before whom the deed was signed and acknowledged. 'Public policy forbids that deeds and mortgages of real estate, duly authenticated in the mode pointed out by statute, should be set aside except upon clear and convincing proof that the certificate of acknowledgment is false. The presumption is in favor of the certificate, and the burden is upon the party alleging such a defense to prove it.' (Citing cases)."

The testimony of the attorney Arthur C. Sidner, clearly substantiates the opinion expressed by most of the other witnesses who testified at the trial that the grantor, Lydia Gaeth, was a strong-willed person, not easily subjected to influence, and knew her own mind. They also substantiated the general tenor of the evidence to the effect that Lydia Gaeth was grateful to her daughter for her kindnesses to her, and also felt sorry for her because of the hard luck that she and her husband had experienced in life. It was also important because it clearly shows that Lydia Gaeth not only had the opportunity to obtain advice, but actually did obtain it; and while her attorney would have preferred that she executed the original document he drafted for her, nevertheless when she made it clear that she did not wish to do so, he acceded to her demands and drafted the instrument in the form she desired it. This was done after a private conversation with Lydia Gaeth out of the presence of her daughter, the defendant herein. As indicated by the previous citations of authority, the fact that she did not elect to follow the advice given her in no way detracts from the fact that she *had* advice. Her determination to follow her own wishes in the matter indicates her lack of susceptibility to influence on the part of others. As shown by the authorities heretofore cited, the fact she had a feeling of gratitude toward her daughter for the kindnesses demonstrated to her during her life, does not in any way raise a presumption of undue influence on the part of said child.

One point needs further commenting upon. Plaintiffs make much of the fact that the defendant and her husband commingled the funds of Lydia Gaeth with those of their own, and on occasion apparently used some of said funds for their own purposes, notwithstanding the fact of the fiduciary relationship existing between them. As previously stated, it was the testimony of the defendant that her mother, whose property it was, had agreed and consented to the arrangement and had

told her that she might use the funds for whatever purposes were necessary. It must be remembered that the arrangement between Lydia and her daughter was of a very informal nature. The rule is that in the case of an informal trust the mingling of funds is proper if such is the understanding of the parties as shown by their agreement or by custom. Pike v. Triska, *supra*.

In this case there is a total lack of evidence showing any urging by Marjorie to secure the execution of the deed. As a matter of fact, the evidence shows that the transaction was handled by Mrs. Gaeth in a private conference with her attorney, Mr. Sidner. It appears from the evidence that what Marjorie did was to take the necessary steps to carry out the express wishes of her mother, and that she has satisfactorily rebutted any presumption of undue influence which might have arisen by reason of their personal relationship. The evidence adduced at the trial of this case is as consistent with the above hypothesis as it is with the hypothesis of undue influence on the part of the defendant—even more so. In our opinion there is no evidence in the record sufficient to establish any of the required elements of proof of undue influence previously enumerated, except that of "opportunity," which in itself is insufficient. It is not, nor should it be, the purpose of the court to question the righteousness of a conveyance, but only to determine whether it is the voluntary act of the grantor. As this court has stated: " 'Whether her action was right or wrong is not a question for us to decide. The court is not the keeper of her conscience. The question for us to determine is whether she acted freely and voluntarily in the matter. If she did, her action was final and is binding upon the court, no matter what we may think of its justice or equity.' " Broeker v. Day, *supra*.

From a careful consideration of all the evidence, we conclude that the trial court erred in holding that the deed in question was invalid and the result of undue

influence on the part of the defendant. The judgment of the district court is therefore reversed, and the cause remanded with directions to enter judgment in favor of the defendant and against the plaintiffs in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

ARDENE I. SEES, APPELLANT, V. WAYNE W. SEES, APPELLEE.
199 N. W. 2d 496

Filed July 14, 1972. No. 38380.

1. **Divorce: Alimony: Parent and Child.** The division of property and allowance of alimony and child support in divorce actions are always to be determined by the facts in each case, and courts will consider all pertinent facts in reaching an award that is just and equitable.
2. **Divorce: Evidence: Appeal and Error.** In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusions of the trial court will be given great weight, and will not be disturbed on appeal unless good cause is shown.

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

Fisher & Fisher, for appellant.

Edmund Hollstein, for appellee.

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

MCCOWN, J.

This is a divorce action by plaintiff, Ardene I. Sees, against the defendant, Wayne W. Sees. The district court granted a divorce and custody of the minor child to the plaintiff. The plaintiff has appealed solely on the ground that the provisions for property division and child support were insufficient.

Plaintiff and defendant were married in 1961 and

are the parents of one daughter born in 1962, who was 9 years of age at the time of trial. The plaintiff was a beauty operator. She was 39 years old. She had two children by a former marriage for whom she received veteran's or social security payments of $248 per month. She had purchased the residence in which the parties lived. The house was in Gordon, Nebraska, and title was in her name. Evidence as to the value of the residence ranged from $16,000 to $26,000. She operated her beauty shop in the residence. During the 10-year period of the marriage, the plaintiff's net income from her beauty shop operation had reached a peak of $2,035.28 in 1966, but for the 3 years preceding the trial, had averaged a little less than $125 a month.

The defendant was a 46-year-old farmer who owned no land but farmed on 470 acres of land located near Gordon under a partnership arrangement with his parents who owned and lived on the land. The defendant's net income from his farming operations had varied from a loss of $1,197.97 in 1964 to a profit of $6,865.04 in 1969. His average net income for the 3 years preceding trial was approximately $6,250 per year plus an average capital gain from sale of breeding stock of slightly over $800 per year. His financial statement to his bank in July of 1971 showed a net worth of a little over $20,000, which included a pickup truck valued at $1,875 and a Ford automobile valued at $2,550, both of which were jointly owned by plaintiff and defendant. The balance of defendant's assets consisted of livestock and farm machinery.

There were constant financial disputes during the marriage which were the principal basis of the charge of extreme cruelty. The evidence is contradictory and confusing as to expenditures made by the parties. The plaintiff did pay the loan payments and taxes on the residence. Testimony as to the cost of maintaining the 9-year-old daughter was also contradictory, disordered, and confusing.

The court quieted title to the residence in the plaintiff, subject to existing indebtedness. The court also awarded all of the household goods and furnishings and the 1970 Ford automobile to the plaintiff. The defendant was awarded his livestock, equipment, hay, and personal property used in connection with the farm operation, including the pickup truck. He was also required to pay his indebtedness of $3,000 to the bank, all household debts of the parties incurred prior to April 2, 1971, and any medical or dental expenses of the plaintiff or the daughter to date of trial. The decree fixed the amount of child support for the minor daughter at $75 per month and also directed that the defendant was to maintain a medical hospitalization policy for the child. Attorney's fees of $350, plus costs, were also assessed to the defendant.

The division of property and allowance of alimony and child support in divorce actions are always to be determined by the facts in each case, and courts will consider all pertinent facts in reaching an award that is just and equitable. See Foltyn v. Foltyn, 180 Neb. 42, 141 N. W. 2d 433. The parties agree on the rules, but disagree in their interpretaton of the facts.

Plaintiff contends that the trial court erred in failing to grant a new trial on the grounds of newly discovered evidence. Two months following the trial, an affidavit of plaintiff's brother was filed stating that there was a large quantity of hay on the farm operated by the defendant. The affiant had been a witness at the trial. Neither the affiant nor the plaintiff suggest any reason whatsoever why complete evidence as to the extent and value of the defendant's interest in any hay was not easily and fully available at time of trial. The action of the district court in refusing a new trial on the grounds of newly discovered evidence was clearly correct.

Plaintiff complains also that the child support of $75 per month is totally inadequate. While the evidence

was to some degree conflicting and confusing, we believe the trial court was in a better position to assess the local situation with respect to costs, as well as to apply that knowledge to the facts and circumstances of this case. In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusions of the trial court will be given great weight, and will not be disturbed on appeal unless good cause is shown. See, Buchanan v. Buchanan, 186 Neb. 89, 180 N. W. 2d 886; Martin v. Martin, *ante* p. 393, 197 N. W. 2d 388.

The determinations of the district court were correct and are affirmed. The plaintiff is allowed a fee of $350 for the services of her attorney in this court.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent herein because I feel the award to the plaintiff, and the child support, were inadequate on the record.

SCHOOL DISTRICT OF SEWARD EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. SCHOOL DISTRICT OF SEWARD, IN THE COUNTY OF SEWARD, STATE OF NEBRASKA, ALSO KNOWN AS SCHOOL DISTRICT OF SEWARD, APPELLANT.

199 N. W. 2d 752

Filed July 21, 1972. No. 38267.

1. **Constitutional Law.** In construing constitutional amendments, consideration should be given to the circumstances leading to their adoption and the purpose sought to be accomplished.
2. ———. This court has recognized the principle of constitutional interpretation that each and every clause in a constitution has been inserted for a useful purpose. Constitutional provisions should receive even broader and more liberal con-

struction than statutes, and constitutions are not subject to rules of strict construction.

3. ———. We are indebted to the suffrage of the people for the adoption of all amendments submitted and indeed for the adoption of the original Constitution which such amendments changed. From this fact it is patent that, where the language employed is plain, the courts should accord to it the meaning which obviously would be accepted by the layman.
4. **Constitutional Law: Public Service Commissions.** In adopting the constitutional provision authorizing an Industrial Commission, it was made an independent part of the Constitution of Nebraska and not as an amendment to Article II.
5. **Schools and School Districts.** A school district in this State is a creature of statute and possesses no other powers than those granted by the Legislature.
6. **Schools and School Districts: Legislature.** The Legislature has plenary power and control over school districts, including provision for the appointment or election of governing bodies thereof. Consequently, it may provide limitations on any authority to be exercised by a school board.
7. **Statutes.** All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision.
8. **Schools and School Districts: Legislature: Courts: Constitutional Law.** The Legislature has complete control of the actions of school boards. Whether or not the Legislature has acted wisely in the premises is not a matter for judicial determination. The courts are not arbiters of legislative wisdom, but function as a check upon unauthorized and unconstitutional assumptions of power.
9. **Schools and School Districts: Administrative Law.** While there are many nebulous areas that may overlap working conditions, boards should not be required to enter negotiations on matters which are predominately matters of educational policy, management prerogatives, or statutory duties of the board of education.
10. **Court of Industrial Relations: Administrative Law.** The Court of Industrial Relations is an agency within the purview of the Administrative Procedures Act.
11. **Court of Industrial Relations: Administrative Law: Agency of State.** The fact that the Court of Industrial Relations has certain legislative and judicial powers which may distinguish it in certain respects from other agencies which exercise purely administrative powers does not prevent it from being an agency of the State in a broad sense.

Appeal from the Court of Industrial Relations. Affirmed.

Blevins, Bartu & Blevins, for appellant.

Crosby, Pansing, Guenzel & Binning and Theodore L. Kessner, for appellee.

A. C. Sidner, Thomas F. Dowd, William A. Harding, Jack G. Wolfe, Nelson, Harding, Marchetti, Leonard & Tate, and L. Bruce Wright of Cline, Williams, Wright, Johnson & Oldfather, for amici curiae.

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

SPENCER, J.

This is a labor case brought by plaintiff association as representative of the certificated teachers employed by defendant, School District of Seward. The Court of Industrial Relations, hereinafter referred to as court, ordered the defendant to negotiate with plaintiff on wages and conditions of employment. The parties negotiated all of the issues to settlement except a salary schedule. After trial, the court established a salary scale by increasing the 1970-71 base pay $100. Defendant perfected this appeal.

Defendant principally raises the question of the constitutionality of the legislation. Additionally, it questions the court's authority over administrative matters which may be included as conditions of employment; the compelling of negotiation and arbitration; and the right to set wages for school employees.

The provisions of the Constitution of Nebraska which could be pertinent are as follows:

Article I, section 4, provides in part: "* * * it shall be the duty of the Legislature to pass suitable laws * * * to encourage schools and the means of instruction."

Article II, section 1, provides: "The powers of the government of this state are divided into three distinct

departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

Article III, section 1, provides in part: "* * * the legislative authority of the state shall be vested in a Legislature * * *."

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

Article VII, section 14, provides in part: "The State Department of Education shall have general supervision and administration of the school system of the state and of such other activities as the Legislature may direct."

Article VII, section 15, provides in part: "The State Board of Education shall be composed of eight members, * * *. * * * Their duties and powers shall be prescribed by the Legislature * * *."

Article XV, section 9, provides: "Laws may be enacted providing for the investigation, submission and determination of controversies between employers and employees in any business or vocation affected with a public interest, and for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare. An Industrial Commission may be created for the purpose of administering such laws, and appeals shall lie to the Supreme Court from the final orders and judgments of such commission."

The first question requiring consideration herein is the meaning of Article XV, section 9, Constitution of Nebraska. Was it intended to operate as an exception to Article II, and does it create a commission with legislative, executive, and judicial powers? In Engelmeyer v. Murphy (1966), 180 Neb. 295, 142 N. W. 2d 342, we

said: "In construing constitutional amendments, consideration should be given to the circumstances leading to their adoption and the purpose sought to be accomplished."

Article XV, section 9, came into our Constitution in the Constitutional Convention of 1919-1920. An examination of the proceedings of that Convention suggest that the implementation of the amendment by the legislation being questioned is in accord with the intention of its architects.

Substantially all of the work on the judicial article had been completed before Proposal No. 333, which became this section, was presented on the floor of the Convention. The Convention had altered the judicial article to permit the Legislature to establish courts inferior to the Supreme Court. The Committee on Industrial Conditions presented a substitute proposal for the four proposals originally introduced at the Convention. The substitute proposal was considered on the floor of the Convention, and then referred back to a joint committee of the Industrial Courts Committee and the Miscellaneous Subjects Committee for combination with the trade regulation proposal. This joint committee submitted Proposal No. 333. In submitting the proposal, the committee report states: "It is our judgment that a tribunal in the form of a commission with combined administrative, legislative and judicial powers, is the proper governmental agency to be entrusted with the powers and duties to be granted, and prescribed, the judicial power to extend to making findings and orders, leaving measures of enforcement by penalties or summary process with the judicial department of the state government."

In School Dist. No. 8 v. State Board of Education (1964), 176 Neb. 722, 127 N. W. 2d 458, we held: "It is the general rule that the Legislature may not lawfully delegate its legislative powers to an administrative agency. An exception to the rule obtains when a

delegation of legislative power is authorized by the Constitution.

"Article VII, section 14, of the Nebraska Constitution authorizes the grant of administrative and legislative powers to the State Department of Education, subject to implementation and limitation by the Legislature in accordance with Article VII, section 15, of the Constitution."

In Anderson v. Tiemann (1967), 182 Neb. 393, 155 N. W. 2d 322, after holding the Legislature had not made an unconstitutional delegation of legislative power, we said, discussing the matter of separation of powers: "Basically the same issues are involved with respect to delegation of judicial power. Article V, section 1, of the Constitution, vests judicial power in the tribunals therein named but also gives to the Legislature the power to create other courts inferior to the Supreme Court. However, L. B. 377 does not create a court but does grant to a state official or administrative body quasi judicial powers. Powers of the same general nature and character are conferred upon many administrative bodies. Such duties are of a quasi judicial nature and yet such bodies are almost invariably held to be administrative. See Dawson County Irr. Co. v. McMullen, 120 Neb. 245, 231 N. W. 840. The conferring upon state agencies or officers, of executive or administrative functions requiring the exercise of quasi judicial powers, does not conflict with the constitutional provisions regarding officers and bodies upon whom judicial power may be conferred. This is particularly true where such powers and duties relate to matters which are peculiarly affected with a public interest and where provision is made for appeal from decisions of such officers or agencies to the courts."

In Anderson v. Tiemann, *supra,* we further said: "This court has also recognized the principle of constitutional interpretation that each and every clause in a constitution has been inserted for some useful purpose. Con-

stitutional provisions should receive even broader and more liberal construction than statutes, and constitutions are not subject to rules of strict construction. Carpenter v. State, 179 Neb. 628, 139 N. W. 2d 541."

In State ex rel. Meyer v. State Board of Equalization & Assessment (1970), 185 Neb. 490, 176 N. W. 2d 920, we said: " 'We are indebted to the suffrage of the people for the adoption of all amendments submitted and indeed for the adoption of the original Constitution which such amendments changed. From this fact it is patent that, where the language employed is plain, the courts should accord to it the meaning which obviously would be accepted by the layman.' "

Article XV, section 9, Constitution of Nebraska, obviously was intended to be an exception to Article II of the Constitution. The language of the amendment, "Laws may be enacted providing for the investigation, submission and determination of controversies," coupled with the designation "An Industrial Commission," indicates a commission with administrative powers. The last sentence providing for appeals from its *final orders* and *judgments* means a commission with some judicial powers to determine controversies. The report of the joint committee that it was authorizing a commission with combined administrative, legislative, and judicial powers clearly indicates the type of commission or agency the Constitutional Convention was authorizing. In this respect, it is in the same category as Article IV, section 20, which created the Railway Commission. We have heretofore held that the Railway Commission has legislative, executive, and judicial powers as an exception to Article II. See, In re Lincoln Traction Co. (1919), 103 Neb. 229, 171 N. W. 192; Swanson v. Sorensen (1967), 181 Neb. 312, 148 N. W. 2d 197. The same is true with the Court of Industrial Relations. In adopting the constitutional provision authorizing an Industrial Commission, it was made an independent part of the

Constitution of Nebraska, and not as an amendment to Article II.

Article VII, section 14, Constitution of Nebraska, establishes a State Department of Education, and gives it general supervision and administration of the school system of the state. Section 15 of the same Article, however, provides that the State Board of Education shall be composed of eight members, and provides that their duties and powers shall be prescribed by the Legislature. The general supervision and administration of the school system of the state granted to the State Board of Education, while a constitutional grant of power, is dependent upon implementing legislative action. School Dist. No. 8 v. State Board of Education (1964), 176 Neb. 722, 127 N. W. 2d 458. In State ex rel. School Dist. v. Board of Equalization (1958), 166 Neb. 785, 90 N. W. 2d 421, which involved a Class III school district, as does the instant case, we said: "A school district in this state is a creature of statute and possesses no other powers than those granted by the Legislature."

In Campbell v. Area Vocational Technical School No. 2 (1968), 183 Neb. 318, 159 N. W. 2d 817, we said: "A school district is a creation of the Legislature. Its purpose is to fulfill the constitutional duty placed upon the Legislature 'to encourage schools and the means of instruction' * * *."

The Legislature has plenary power and control over school districts, including provision for the appointment or election of governing bodies thereof. Consequently, it may provide limitations on any authority to be exercised by a school board. If the Legislature has such complete control over public school districts, it follows, by the enactment of L. B. 15, Laws 1969, chapter 407, page 1405, it was exercising that control.

Upon application of the plaintiff, the court ordered the school district to conduct negotiations. This presents a two-pronged question. First, does the court have the power to order the district to negotiate about

anything; and second, does it have the power to order negotiations about professional associations, noon duty, dress code, and school calendar?

Section 48-837, R. S. Supp., 1969, provides: "Public employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing. Public employees shall have the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder; Provided, that any such agreements with the State of Nebraska or any agency thereof shall cover a biennial period coinciding with the biennial budgeting period of the state and shall be subject to approval by the Legislature."

Section 48-810, R. S. Supp., 1969, provides: "All industrial disputes involving governmental service, service of a public utility, or other disputes as the Legislature may provide shall be settled by invoking the jurisdiction of the Court of Industrial Relations; Provided, such court shall have no jurisdiction over any persons, organizations, or school districts subject to the provisions of the Nebraska Teachers' Professional Negotiations Act, sections 79-1287 to 79-1295, Revised Statutes Supplement, 1967, until all provisions of such act have been exhausted without resolution of the dispute involved."

Section 48-810.01, R. R. S. 1943, provides: "Notwithstanding any other provision of law, the State of Nebraska and any political or governmental subdivision thereof cannot be compelled to enter into any contract or agreement, written or otherwise, with any labor organization concerning grievances, labor disputes, rates of pay, hours of employment or conditions of work."

Section 48-818, R. S. Supp., 1969, provides: "The findings and order or orders may establish or alter the

scale of wages, hours of labor, or conditions of employment, or any one or more of the same. In making such findings and order or orders, the Court of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions. In establishing wage rates the court shall take into consideration the overall compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employees. Any order or orders entered may be modified on the court's own motion or on application by any of the parties affected, but only upon a showing of a change in the conditions from those prevailing at the time the original order was entered."

In International Brotherhood of Electrical Workers v. City of Hastings (1965), 179 Neb. 455, 138 N. W. 2d 822, we held that a public agency or governmental employer had no legal authority to bargain with a labor union in the absence of express statutory authority, and further that the Court of Industrial Relations had no power to compel a public utility operated by government in its proprietary capacity to bargain or negotiate with a labor union. Subsequent to this case, in 1967, the law was amended to give the court authority to order bargaining when the public corporation was acting in a proprietary capacity, as defined in section 48-801, R. R. S. 1943. L. B. 15 amended section 48-816, R. R. S. 1943, to eliminate "when acting in a proprietary capacity as defined in section 48-801" from the statute, but left the provision permitting the court to order bargaining unchanged, although several other additions were

made to section 48-816, R. R. S. 1943.

L. B. 15 amended sections 48-801, 48-804, 48-810, 48-811, 48-816, and 48-818, and repealed sections 48-810.02, 48-820, and 48-824 to 48-836, R. R. S. 1943. It did not repeal or amend section 48-810.01, R. R. S. 1943, which came into the law in 1967. The question for our consideration, therefore, is whether or not there is a conflict between section 48-810.01, R. R. S. 1943, and section 48-818, R. S. Supp., 1969. Section 48-810.02, R. R. S. 1943, provided that in cities having a population of more than 5,000, or in cities under civil service, the court had jurisdiction to order discussion on the application of either party. Section 48-820, R. R. S. 1943, provided that any industrial dispute not within the jurisdiction of the court could by mutual consent be referred to the court for arbitration. Sections 48-824 to 48-836, R. R. S. 1943, covered arbitration for cities of more than 5,000, or a city under civil service, but any decision or report would be advisory only. It is obvious that by eliminating these sections, the Legislature intended to eliminate advisory arbitration reports, and by L. B. 15 attempted to give the court authority to order bargaining.

Section 48-810, R. S. Supp., 1969, provides that all industrial disputes involving governmental service *shall be settled* by invoking the jurisdiction of the Court of Industrial Relations, but limits the jurisdiction of the court where sections 79-1287 to 79-1295, R. S. Supp., 1967, are involved, *until* those provisions have been exhausted *without a settlement of the dispute.* It may be argued that section 48-810.01, R. R. S. 1943, was inadvertently left in the law. We do not accept this premise, but assume the Legislature acted with full knowledge that it was leaving this section in the statute. Consequently, the section must be given some meaning in relation to the other sections, because all statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to

each provision. City of Grand Island v. Ehlers (1966), 180 Neb. 331, 142 N. W. 2d 770. The court construed section 48-810.01, R. R. S. 1943, to mean that while the court could not order a school district to enter into a contract, the court had the power to settle any controversy pursuant to sections 48-816 and 48-818, R. S. Supp., 1969. In doing so, it was not forcing the district to enter into a contract with the union but was exercising its power to settle a dispute under section 48-818, R. S. Supp., 1969. There is no other construction which would harmonize the sections.

Defendant's position is indicated by the following from its brief: "Whatever jurisdiction the Court of Industrial Relations may have, this much is certain that notwithstanding any other provision of law the School District cannot be compelled to enter into any contract or agreement with any labor organization concerning rates of pay. The Court's judgment is in direct violation of this statute." This, of course, is premised on its interpretation of section 48-810.01, R. R. S. 1943. We have indicated our interpretation.

There have been many dire predictions relative to the possible ramifications of L.B. 15 if we do not find section 48-810.01, R. R. S. 1943, specifically prevents the court from entering a binding order on wages and conditions of employment. As we interpret the Constitution, the Legislature has complete control of the actions of school boards. Whether or not the Legislature has acted wisely in the premises is not a matter for judicial determination. The courts are not arbiters of legislative wisdom, but function as a check upon unauthorized and unconstitutional assumptions of power. If the situation is as critical as defendant and the amici curiae believe, we can only observe, as we did in State v. Workman (1971), 186 Neb. 467, 183 N. W. 2d 911: "* * * defendant is making his contentions in the wrong forum. They might appropriately be addressed to the Nebraska Legislature, but it is the duty of this court

to interpret and enforce laws passed by the Legislature if constitutionally valid, which this one is."

The next question raised involved an interpretation of the language "conditions of employment." While the issue may be moot because the parties did reach agreement on all points referred except wages we do feel some observations are pertinent. Generally, teacher organizations have given the term "conditions of employment" an extremely broad meaning, while boards of education have tried to restrict that term to preserve their management prerogatives and policy-making powers. While there are many nebulous areas that may overlap working conditions, boards should not be required to enter negotiations on matters which are predominately matters of educational policy, management prerogatives, or statutory duties of the board of education. Kansas, by statute, has defined conditions of employment to include hours of work, vacation allowances, sick and injury leave, number of holidays, and wearing apparel. K.S.A. 1971 Supp., § 75-4322(s). Without trying to lay down any specific rule, we would hold that conditions of employment can be interpreted to include only those matters directly affecting the teacher's welfare. Without attempting in any way to be specific, or to limit the foregoing, we would consider the following to be exclusively within the management prerogative: The right to hire; to maintain order and efficiency; to schedule work; to control transfers and assignments; to determine what extracurricular activities may be supported or sponsored; and to determine the curriculum, class size, and types of specialists to be employed. The public policy involved in this legislation is expressed in section 48-802, R. R. S. 1943. With this public policy in mind, school districts and teacher associations should negotiate in good faith within the ambit of their respective responsibilities.

One of the amici curiae raised the point that the court had not complied with the Administrative Pro-

cedures Act. The point was not raised by defendant, and there is nothing in the record to indicate noncompliance with the Act. Because the question may be raised in the future, we hold the Court of Industrial Relations is an agency within the purview of the Administrative Procedures Act.

The Court of Industrial Relations does not come within the definition of a court as used in section 84-901, R. R. S. 1943, nor has it been specifically excepted from the operation of the Act. In this respect, it is in the same situation as the Nebraska Railway Commission. In Yellow Cab Co. v. Nebraska State Railway Commission (1963), 175 Neb. 150, 120 N. W. 2d 922, we held the railway commission to be an agency within the definition in section 84-901, R. R. S. 1943. That section provides, so far as material herein: "Agency means each board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules, except the Adjutant General's office, as provided in Chapter 55, the courts, including the Nebraska Workmen's Compensation Court, and the Legislature; * * *." Section 48-809, R. R. S 1943, grants the court full power to adopt all reasonable rules and regulations.

The following from Yellow Cab Co. v. Nebraska State Railway Commission, *supra*, is pertinent herein: "The fact that the commission has certain legislative and judicial powers which may distinguish it in certain respects from other agencies which exercise purely administrative powers does not prevent it from being an agency of the state in a broad sense."

For the reasons enunciated, the judgment of the court is correct and is affirmed.

AFFIRMED.

NEWTON, J., dissenting.

I find that I cannot agree with the majority opinion adopted as the law of this case. For a great many years the states have opposed and decried the steady and

seemingly inexorable growth of federalism and the centralization of governmental powers in the national capitol. This decision and the legislative act on which it is based is a step toward the creation of similar centralized powers in the Nebraska State Capitol on a statewide basis. It deprives local political subdivisions of the right to manage their own affairs in regard to employment practices. The law of supply and demand is nullified as is also ability to pay. It is replaced by the arbitrary decisions of a Commission operating on a statewide level. Since the wages of employees constitute a very major item in the budgets of all political subdivisions, the decisions of the Commission necessarily interfere with and, to some extent, govern the governmental duties of making budgets, appropriations, and ascertaining the levels of taxation. Although our political subdivisions are, at least for the most part, restricted in authority to powers granted by the Legislature, the theory of local self-government is recognized by our constitutional provisions relating to counties and cities. As was aptly stated in Schulz v. Dixon County, 134 Neb. 549, 279 N. W. 179: "Local self-government, having always been a part of the American system, finds recognition in the provisions of our State Constitution; and even if not expressly recognized, it is still to be understood that these instruments are framed with its present existence and anticipated continuance in view."

The powers conferred by Chapter 48, article 8, R. R. S. 1943, on the Industrial Commission are very broad. If construed as applicable to the State and its political subdivisions, they necessarily conflict with existing statutes, theories of government, and constitutional provisions. Tax levies of certain municipalities, school districts, townships, and other governmental subdivisions are limited by legislative enactment and, in the case of counties, by the Constitution. The power to make appropriations and to levy taxes has been vested in the local governing bodies. There are penalties assessable

for violations such as excess levies or spending unbudgeted and unappropriated funds. Furthermore, tax levies and appropriations are made on an annual basis and are not thereafter subject to change. Can the Commission, under the guise of settling a labor dispute regarding wages or other expense items, direct the governing bodies of these organizations to expend additional funds and, in so doing, violate statutory or constitutional provisions expressly passed or adopted for their government? Can it take over the powers of taxation and appropriation specifically granted these political subdivisions by the Constitution and statutes? This situation would indicate that Article XV, section 9, Constitution of Nebraska, did not contemplate placing public bodies under the Commission's jurisdiction. Furthermore, *not a single one* of the statutes governing these political subdivisions in the manner mentioned has been amended to make the taxation and appropriation authorities subject to tinkering by the Commission. In this respect there has been a violation of Article III, section 14, of the State Constitution.

Also of interest is a situation which could develop on the state level. Nebraska has the standard republican form of government with its basic three-way division of powers. The most fundamental of all constitutional powers awarded to the legislative branch is the exclusive power to appropriate funds and levy taxes. This is a power which it cannot delegate. See, 16 C. J. S., Constitutional Law, § 133, p. 552; Opinion of the Justices, 54 Del. 366, 177 A. 2d 205; Crane v. Frohmiller, 45 Ariz. 490, 45 P. 2d 955; Blaine County Inv. Co. v. Gallet, 35 Idaho 102, 204 P. 1066; El Dorado Independent School Dist. v. Tisdale (Tex. Com. App.), 3 S. W. 2d 420; Opinion of the Justices, 244 Ala. 386, 13 So. 2d 674; Cook v. Up-to-Date Silk Yarn Dyeing Co., 155 Misc. 435, 278 N. Y. Supp. 348.

What then is the effect in an instance where the Legislature has appropriated a sum to recompense state

employees and provided for raising this money by taxation, then in a dispute over wages, the Industrial Commission raises wages? Any excess over the legislative appropriation cannot be paid under constitutional provisions and the attempt to delegate power to the Commission to settle the dispute by raising wages is an attempt to delegate power to the Commission to make a state appropriation. As such it is void and unconstitutional. "It is just as fundamental that the power to tax and the power to provide for the disposition of taxes raised are identical and inseparable, and the Legislature is clothed with full power and control over the disposition of revenues derived from taxation, including those raised by political subdivisions of the state under authority of the state, subject only to constitutional restrictions. * * *

"It should also be construed when the meaning is not clear to conform with fundamental principles of taxation in the levy and collection of taxes and in the apportionment and distribution thereof unless a contrary intent is indicated by its terms. The fundamental principle that the powers of the Legislature on matters of taxation are plenary except where clearly restricted by the Constitution, must also be considered. The powers of the Legislature on matters of taxation cannot be limited by implication or interpretation, and the restriction upon the legislative power must be clear and unequivocal. The construction given the constitutional provision by the Legislature and by administrative officers since its enactment must likewise be given the effect to which it is entitled." State ex rel. School Dist. of Scottsbluff v. Ellis, 168 Neb. 166, 95 N. W. 2d 538.

The act creating the Commission purports to derive its authorization from Article XV, section 9, Constitution of Nebraska. The language of that section and the powers it intended to confer are not clear. Was it intended to apply to the State and its governmental sub-

divisions? I submit that the foregoing indicates it was not.

Article XV, section 9, Constitution of Nebraska, provides: "Laws may be enacted providing for the investigation, submission and determination of controversies between employers and employees *in any business or vocation affected with a public interest*, and for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare. An Industrial Commisison may be created for the purpose of administering such laws, and appeals shall lie to the Supreme Court from the final orders and judgments of such commission." (Emphasis supplied.)

The scope covered is limited to "any business or vocation *affected with a public interest.*" Just what businesses can the Legislature authorize the Industrial Commission to deal with? It will be noted that this section uses the words *"any business or vocation."* What is the common and accepted meaning of these words? A business is "a commercial or industrial enterprise." A vocation is "the work in which a person is regularly employed." Webster's Third New International Dictionary, p. 2561. The terms refer to occupations, activities, and enterprises for gain, advantage, or livelihood. See Black's Law Dictionary (De Luxe, 4th Ed.), p. 248. No governmental unit, whether it be the state or a subdivision, can be classified as a business or vocation. They are only governmental agencies supplying governmental services on a nonprofit basis. As such, the powers conferred in Article XV, section 9, Constitution of Nebraska, are clearly inapplicable to them. Employment by the State, for example, is not a vocation. Vocation means type of employment such as stenographer, accountant, secretary, laborer, etc. In adopting Chapter 48, article 8, R. R. S. 1943, as amended, the Legislature has exceeded its constitutional powers in its attempt to bring governmental agencies within the ambit

of the act and the act is unconstitutional. "The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense." State ex rel. Caldwell v. Peterson, 153 Neb. 402, 45 N. W. 2d 122. See, also, State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1.

What is meant by the term "affected with a public interest"? It is a fundamental principle of constitutional construction that effect must be given to the intent of the framers of the organic law and of the people adopting it. See 16 Am. Jur. 2d, Constitutional Law, § 64, p. 239. In State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502, it is held: "The meaning of a constitutional provision is to be determined as of the time of its adoption, and the intent and understanding of its framers and the people who adopted it is the principal inquiry in construing it." In Ramsey v. County of Gage, 153 Neb. 24, 43 N. W. 2d 593, it is stated: "* * * this court will take judicial notice of the proceedings of the Constitutional Convention." The decision of the court is embodied in the following statement: "It is quite apparent from an examination of the Proceedings of the Constitutional Convention with reference to the subject matter here involved that the people did not only change the language of the provision of the Constitution in question but the construction as well." See, also, Swanson v. State, 132 Neb. 82, 271 N. W. 264.

The constitutional provision in question was adopted pursuant to the Constitutional Convention of 1919-1920. An examination of the Convention proceedings and of the statement made by the drafter of the provision make it crystal clear that it was not intended to bear upon or affect governmental units. The amendment was denominated "Proposal No. 333." As originally introduced, it provided in part as follows: "Section 1. Laws

may be enacted providing for the investigation, submission and determination of controversies between employers and employees in which the *public welfare* is affected; providing against unfair business practices and unconscionable gains in any business or vocation affected with a public interest; and the interest of the public may be protected by law against interruption, *either in the public service, in the operation of public utilities or in the production and distribution of commodities essential to the public welfare.*" (Emphasis supplied.) Note it specifically included *public service,* as well as public utilities, and commodities essential to the public welfare. Considerable discussion ensued resulting in its amendment as finally adopted. At that time the delegate offering the amended version defined the term "affected with a public interest." He distinguished it from the general welfare and then stated: "Business, as I understand it, affected by a public interest is business in which the public surrenders to some person, firm, association or corporation, some right in which the public gives to some individual or corporation, some privilege which it might not otherwise have the right to enjoy. If the Convention will permit me I will read from as good an authority as we have upon definitions, Bouvier's Law Dictionary:

" 'PUBLIC INTEREST. If by public permission one is making use of public property and he chances to be the only one with whom the public can deal with respect to the use of that property, his business is affected with a public interest which requires him to deal with the public on reasonable terms.' That is quotation from Cooley on Constitutional Limitations.

" 'Business affected with a public interest:

" '1. Where the business is one, the following of which is not of right, but is permitted by the state as a privilege or franchise. 2. Where the state on public grounds renders to the business a special assistance by taxation or otherwise. 3. Where for the accommo-

dation of a business special use is allowed to be made of public property or of a public easement. 4. Where the special privileges are granted in consideration of some special return to be made to the public.'

"In other words business that is affected by a public interest is business for which the public as a whole, which society because of some person or corporation and special right, privilege or franchise, and in consideration of the granting of that right of franchise the public interest is affected and the conduct of such corporation or person may be regulated by law."

It is clear that the term "business or vocation affected with a public interest" was used in its narrow legal sense and that this usage was understood by the delegates. The original reference to "public service" which might be interpreted as extending to governmental services was deleted, presumably for good reason. The businesses referred to include *only* private businesses.

"Respecting regulation consistently with due process, businesses 'affected with public interest' are merely those subject to exercise of police power. Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co., Cal., 82 P. 2d 3, 14, 118 A. L. R. 486.

"A business is 'affected with a public interest' when by law or legal authority it is given a virtual monopoly in its field or where the public adapt their business or conduct to the methods used by it. Western Buse Telephone Co. v. Northwestern Bell Telephone Co., 248 N. W. 220, 229, 188 Minn. 524. * * *

"Constitutional provisions requiring 'due process of law' and 'equal protection of the laws' do not preclude a state Legislature from regulating a business 'affected with a public interest,' which means subject to the 'police power,' where regulation is not unreasonable, arbitrary, capricious, or discriminatory, and means are related to object of regulation. Bohannon v. Duncan, 196 S. E. 897, 898, 185 Ga. 840. * * *

"A business is 'affected with a public interest,' where the one engaged in it is acting under a franchise, or has a virtual monopoly in it, or where from the nature of the business the one carrying it on is necessarily intrusted with the property or money of his customers, or where the business has been conducted in such manner that the public have adapted their business to the methods used; but the fact that a license is required does not make the business a public employment. People v. Steele, 83 N. E. 236, 238, 231 Ill. 340, 14 L. R. A., N. S., 361, 121 Am. St. Rep. 321; City of Chicago v. Powers, 83 N. E. 240, 231 Ill. 560.

"The phrase 'affected with a public interest' can mean no more than that an industry, for adequate reason, is subject to control for the public good, and there is no closed class or category of such businesses affected with a public interest. Respecting regulation consistently with due process, businesses 'affected with public interest' are merely those subject to exercise of police power; touchstone of public interest not being enjoyment of any franchise or monopoly. Nebbia v. People of State of New York, N. Y., 54 S. Ct. 505, 291 U. S. 502, 78 L. Ed. 940, 89 A. L. R. 1469." 5A Words and Phrases, Business Affected, pp. 675, 676.

Public or governmental business has never been a subject of the police power. Such an exercise of power is unnecessary because this type of business is subject to direct legislative control at all times and in all respects without resort to the extraordinary remedy provided by the police power. It seems clear that Article XV, section 9, does not authorize legislation bringing political subdivisions or governmental agencies within the jurisdiction of the Industrial Commission. I conclude that insofar as present statutes attempt to delegate such power, they are unconstitutional and void.

In passing it may be well to note that Article XV, section 9, was adopted as a result of similar activity in the State of Kansas, yet in defining businesses "affected

with a public interest," the Kansas statute omits governmental units. See Kansas Statutes Annotated, section 44-603.

Another fundamental rule is that every statement in a state constitution must be interpreted in the light of the entire document, rather than as a sequestered pronouncement and because fundamental constitutional principles are of equal dignity and none must be so enforced as to substantially impair the other, if there is an apparent repugnancy between different provisions, the court should harmonize them if possible. See 16 Am. Jur. 2d, Constitutional Law, § 66, p. 243. In State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1, it is said: "The language of the Constitution is to be interpreted with reference to the established laws, usages and customs of the country at the time of its adoption. * * *

"The Constitution must be read in connection with the facts of history and the development of a representative form of government. * * *

"The Constitution as amended must be construed as a whole." See, also, Swanson v. State, 132 Neb. 82, 271 N. W. 264.

If Article XV, section 9, is limited in its application to public service companies and other private or corporate businesses which bear directly and materially on the public welfare and are therefore "affected with a public interest," there will be no conflict with other constitutional provisions, but if it is not, there is an obvious conflict. As heretofore pointed out, on the state level, the Legislature, and the Legislature only, can control the appropriation of money and the taxes to be levied. See Article III, sections 22 and 25, Constitution of Nebraska. Even the Legislature cannot incur indebtedness in excess of $100,000. See Article XIII, section 1. The division of governmental powers is provided for in the following language: "The powers of the government of this state are divided into three

distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Article II, section 1, Constitution of Nebraska. No direct constitutional provision authorizes such an encroachment by the executive or judicial departments upon the budgetary and appropriative powers of the Legislature.

There is also, as has been pointed out, a conflict with Article VIII, section 5, which places a limit on the amount of taxes which counties may assess or levy. Counties are presently hard pressed to finance their customary duties. To permit a foreign body to impose additional financial burdens by means of increased wages and salaries on a county which is already levying the maximum tax allowed will compel an excess levy or will simply require the abandonment or curtailment of county services rendered in connection with the maintenance of roads and bridges, the administration of social welfare, and of the numerous activities engaged in by various county officers. In the latter case, they will be unable to fulfill the duties imposed upon them by law.

From a practical standpoint, the Commission, by following guidelines it might see fit to adopt, can bring about a statewide wage scale for school district employees with a complete disregard for individual fitness and irrespective of the size and ability to pay of the respective districts. In so doing it can bring about the demise of many school districts and may well impair the operation of Article VII, section 6, which requires the Legislature to provide for free instruction in the common schools. In attempting to interfere with school curriculums, teachers' duties and hours, and local conditions under which teachers are employed and work, it will also clash with Article VII, section 14, which gives to the State Department of Education the general

supervision and administration of our school system.

The conflict with other constitutional provisions indicates two things. First, that Article XV, section 9, was never intended to be so broadly construed. Second, that in construing it in the light of the Constitution as a whole, it cannot be interpreted as a grant of authority over the State and its political subdivisions if it is to be reconciled with other constitutional directives.

I submit that Chapter 48, article 8, R. R. S. 1943, as amended, is unconstitutional and void.

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

CLINTON, J., dissenting.

I respectfully dissent. The majority opinion points out, correctly I believe, that Article XV, section 9, of the Constitution of Nebraska, authorizes the creation of the commission with commingled administrative, executive, and judicial powers. The opinion also points out that this is an independent grant of such power by virtue of the special provisions of Article XV, section 9, and is a constitutional exception to the separation of powers provision of Article II. I agree with this reasoning insofar as it applies to the scope of the matters entrusted to the commission by Article XV, section 9.

The point raised by Judge Newton is not the specific constitutional question raised by the defendant, but I believe it is in part valid. With him I believe Article XV, section 9, does not by its terms apply to employers and employees in the governmental sector. I base this conclusion upon the language of section 9 as adopted and without reference to the language eliminated from the original proposal in the course of this consideration. Section 9 grants power in two areas: (1) In determining controversies between employers and employees "in business or vocations affected with a public interest," and (2) the prevention of "*unfair business practices and unconscionable gains* in any business or vocation affecting the public welfare." (Emphasis supplied.)

It seems apparent to me that the terms "business or vocation" as twice used in Article XV, section 9, refers to profit-making businesses and vocations for the term "unfair business practices and unconscionable gains" can have no reference to the operation of state or governmental subdivisions in their governmental capacities. As first used, those terms refer to the employer's business or vocation and not to the occupation or vocation of the employee, for example, teachers. It is not reasonable to assume that in the first instance government is included in the term "business or vocation" and in the second instance it is not.

Because the statute in question grants a combination of executive, legislative, and judicial powers outside the scope of the matters authorized by Article XV, section 9, it runs afoul of Article II of the constitutional provision pertaining to the separation of powers.

There would, however, seem to be no question that the Legislature may enact independently of Article XV, section 9, labor legislation applicable to public employees, but in so doing the provisions of Article II on the separation of powers must be observed.

BOSLAUGH, J., concurring.

The question concerning the construction of Article XV, section 9, Constitution of Nebraska, raised in the dissenting opinion of Judge Newton, is not without force although not presented in any of the briefs filed in this case.

The section permits the enactment of laws relating to "controversies between employers and employees in any business or vocation affected with a public interest." Although there can be disagreement as to what this language means, it would appear that the terms business *or* vocation were used in an alternative sense and that legislation relating to controversies between employers and employees under this section is not limited to a business affected with a public interest.

The legislative construction of a constitutional pro-

vision, although not controlling, should be given consideration, particularly in doubtful cases and when deliberately made.

McCOWN, J., joins in this concurrence.

WESLEY F. HANSEN, APPELLEE, V. COUNTY OF LINCOLN, NEBRASKA, ET AL., APPELLANTS.
197 N. W. 2d 655

Filed July 21, 1972. No. 38355.

SUPPLEMENTAL OPINION

Appeal from the district court for Lincoln County: HUGH STUART, Judge. On motion for rehearing. See *ante* p. 461, 197 N. W. 2d 651, for original opinion. Motion for rehearing overruled. Affirmed in part, and in part reversed and remanded.

W. R. Mullikin and Richard P. Myers, for appellants.

McGrath, North, Nelson, Shkolnick & Dwyer and August Ross, for appellee.

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

CLINTON, J.

Motion for rehearing in this case cites Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489, and suggests that while section 77-1736.04, R. R. S. 1943, provides the exclusive remedy to obtain a refund of taxes paid prior to a court decree enjoining collection or requiring segregation and accounting, yet as to taxes paid after the entry of decree the court may order refund as to the class of taxpayer who has paid after the entry of the decree. We have seriously examined this contention and find we cannot agree. Gamboni was decided December 10, 1954. Section 77-1736.04, R. R. S. 1943, Laws 1955, chapter 298, page 933, was enacted and

became effective June 15, 1955. It replaces and makes unnecessary that part of the relief afforded by Gamboni insofar as that case provides and approves a class action for refund of taxes. Under section 77-1736.04, R. R. S. 1943. where a court declares the invalidity of a tax, a taxpayer who has paid the tax is entitled to a refund automatically if the tax has not been distributed, and if it has, he is entitled to refund upon the filing and approval of a claim therefor. Insofar as Gamboni approves a class action for a refund of taxes it is disapproved. See State ex rel. Sampson v. Kenny, 185 Neb. 230, 175 N. W. 2d 5.

With this amendment we adhere to our previous opinion and the motion for rehearing is overruled.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

LADISLAV J. NEMECEK, APPELLANT, V. GAYLE ANN NEMECEK, APPELLEE.
199 N. W. 2d 409

Filed July 21, 1972. No. 38445.

Divorce: Parent and Child. In determining child custody, the paramount consideration is the best interests and welfare of the children.

Appeal from the district court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed as modified.

Paul E. Watts, Michael N. Schirber, and Stephen Greenberg, for appellant.

J. William Gallup, for appellee.

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

BOSLAUGH, J.

This is an appeal in a divorce action brought by Ladis-

lav J. Nemecek against Gayle Ann Nemecek. The amended petition alleged that the defendant had been guilty of extreme cruelty and adultery. These allegations were denied in the defendant's answer and cross-petition which alleged that the plaintiff had been guilty of extreme cruelty.

The trial court found the defendant had been guilty of extreme cruelty but the evidence was insufficient to sustain the allegations of adultery; the plaintiff should be granted a divorce from the defendant; and the defendant was a fit and proper person to have the custody of the minor children. It awarded child support in the amount of $80 per month per child until the children became self-supporting or emancipated. The plaintiff appeals.

The principal controversy is over custody of the minor children. The plaintiff contends the evidence established the defendant was guilty of adultery and that the custody of the children should have been awarded to him. The children involved are Lad Thomas, born December 18, 1961; Craig John, born November 17, 1963; and Brian Christopher, born November 2, 1965.

The parties were married in 1961. The evidence shows a course of misconduct by the defendant during the last 6 years of the marriage. This included visiting the apartments of other men in the early morning hours. Although circumstantial, there was evidence which, if believed, was clearly sufficient to establish adultery on the part of the defendant.

In determining child custody, the paramount consideration is the best interests and welfare of the children. Phillips v. Phillips, *ante* p. 89, 195 N. W. 2d 160. In this regard there is evidence in the record concerning the conduct of the plaintiff which makes it doubtful whether the custody of the minor children should be awarded to him.

The evidence relating to the care of the children by the defendant shows they have not been neglected or

mistreated in any way. Under these circumstances the judgment of the district court placing the children in the care of the defendant should not be reversed. However, in view of the evidence as to defendant's past misconduct, the judgment should be modified to provide for supervision of their custody by the chief juvenile probation officer. See Beck v. Beck, 175 Neb. 108, 120 N. W. 2d 585. As so modified, the judgment is affirmed. Defendant's attorney is allowed a fee of $250 for services in this court.

AFFIRMED AS MODIFIED.

SPENCER, J., dissenting.

I respectfully dissent herein on the grounds that the divorce and the custody of the children should have been granted to the plaintiff because of the adulterous conduct of the defendant.

SMITH, J., dissenting.

The majority opinion comes to this: No major variable, except the judgment of the trial court, is significant.

The three sons of the parties were not represented by counsel. No rule of this court even authorized appointment of counsel for them. The Legislature ameliorated this abomination in our adversary system in 1972 —too late for the trial court to act. See Laws 1972, L.B. 820, § 12, p. 249.

Given the insignificance of all but one major variable and the absence of a truly adversary proceeding, I consider expert forensic opinions outside the record. Behavioral scientists have tentatively concluded that an award like the one before us increases the danger of harm to the personality of the boy. See, Burton and Whiting, "The Absent Father and Cross-Sex Identity," Studies in Adolescence 107 (R. Grinder Ed., 1965); Lynn and Sawrey, "The Effects of Father-Absence on Norwegian Boys and Girls," 59 J. Abnormal Soc. Psych. 256 (1959); Wylie and Delgado, "A Pattern of Mother-Son Relationship Involving the Absence of the Father,"

29 Am. J. Orothopsychiatry 644 (1959). See, also, Bradbrook, "The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-Parental Child Custody Disputes," 11 J. Fam. L. 557 at 563, 575, and 580-87 (1972); Kleinfield, "The Balance of Power Among Infants, their Parents and the State," 4 A. B. A., Fam. L. Q. 320 at 330 and 335-36 (1970).

I would award custody of the boys in this suit to their father.

NEWTON, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. MARCILYN C. WILLIAMS, APPELLANT.
199 N. W. 2d 611

Filed July 21, 1972. No. 38594.

1. **Statutes.** All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision.
2. **Post Conviction: Jurisdiction: Appeal and Error.** An appeal of a post conviction proceeding from a court inferior in jurisdiction to the district court may only be taken to the district court.

Appeal from the municipal court of Omaha. JOHN E. CLARK, Judge. Appeal dismissed.

Terrence J. Ferguson, Vard R. Johnson, Robert V. Broom, and Charles I. Scudder, for appellant.

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

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

NEWTON, J.

Defendant was convicted on misdemeanor charges in the municipal court of the city of Omaha pursuant to

her pleas of guilty. She subsequently commenced a proceeding under the Post Conviction Act in the municipal court alleging a violation of her constitutional rights. She now seeks to appeal directly to this, the Supreme Court.

The sole question presently at issue is whether such a direct appeal can be taken from a municipal court. The Post Conviction Act was adopted in 1965. At that time there was considerable concern regarding violations of the constitutional rights of defendants in felony cases which were and are not cognizable in the municipal or other inferior courts. The constitutional rights theories then applicable in felony cases were not applicable in misdemeanor cases but have since been made so by decisions of the United States Supreme Court. As a consequence of this situation, the Act is ambiguous with reference to the question of appeal.

The Act requires a post conviction proceeding to be brought in the sentencing court, provides for appointment of defense attorneys by the district court, and states that an appeal may be taken to the Supreme Court. See §§ 29-3001 to 29-3004, R. S. Supp., 1969. Defendant contends the legislative intention was to permit appeals directly from the municipal court to the Supreme Court. Such an interpretation would fly in the face of reality. As pointed out, the Act when adopted was considered applicable only in felony cases which were beyond the jurisdiction of courts inferior to the district court. It was not then contemplated that such proceedings would ever be entertained in the inferior courts and by no stretch of the imagination can it be said that the Legislature contemplated direct appeals from such courts to the Supreme Court.

Sections 26-1,104 and 25-1901, R. R. S. 1943, provide that appeals from municipal courts shall be taken to the district court. In view of the circumstances outlined above, we are not convinced that the appeal permitted under section 29-3002, R. S. Supp., 1969, should

be regarded as a special act excepting such appeals from the general appeal statutes. On the contrary, we hold that it must be construed in pari materia with the general statutes governing appeals from municipal courts. "* * * All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision." State ex rel. Retchless v. Cook, 181 Neb. 863, 152 N. W. 2d 23.

We conclude that an appeal under the Post Conviction Act may not be taken directly to the Supreme Court from any court inferior to the district court and that this appeal must be dismissed.

APPEAL DISMISSED.

SMITH, J., concurring.

The need for uniformity in appellate procedure excuses this waste of judicial manpower.

RANCHLAND AUTO, INC., A CORPORATION, APPELLEE, V. DONALD J. CLEVELAND, APPELLANT.
199 N. W. 2d 702

Filed July 28, 1972. No. 38172.

1. **Contracts: Parties: Intent.** The interpretation given a contract by parties themselves while engaged in performance of it is one of best indications of true intent of the contract, and ordinarily, such construction of the contract should be enforced.
2. **Contracts: Parties: Intent: Trial: Evidence.** In interpreting a written contract, the meaning of which is in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings is admissible to discover the meaning which each party had reason to know would be given to the words by the other party.
3. **Contracts: Damages.** The measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed.

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

Kirby & Spittler, for appellant.

Cronin & Hannon, for appellee.

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

WHITE, C. J.

Ranchland sold Cleveland a new 1969 Dodge Polara for $4,449.15, Ranchland agreeing to take $1,250 cash and Cleveland's 1968 Dodge Polara, if repaired to its previous condition from damage resulting from an accident. It was so repaired, with no dispute as to repair price or proper restoration to its previous condition. The dispute here arises because neither Ranchland nor Cleveland, after due notice from the artisan lien holder who performed the repair work, reclaimed the car for the repair bill of $1,006.64 and it was sold at foreclosure auction. In a jury trial, Ranchland recovered a judgment for $3,199.15. On appeal, we reverse the judgment and remand the cause with directions to enter a judgment for Ranchland for the amount of the repair bill in the sum of $1,006.64.

Cleveland assigns error in the failure of the trial court to instruct the jury as to the measure of damages. The transcript reveals a failure to instruct on this issue. It is the duty of the court, on its own motion, to instruct on all material issues raised by the pleadings and evidence. The jury should have been told the manner in which the damages sustained by the plaintiff are to be measured and arrived at. See, Numon v. Stevens, 162 Neb. 339, 76 N. W. 2d 232; Gallagher v. Vogel, 157 Neb. 670, 61 N. W. 2d 245; 17A C. J. S., Contracts, § 641, p. 1290.

Under the law and the undisputed facts, Ranchland is entitled to judgment for the repair bill in the sum of $1,006.64 only. The written contract of sale, signed by the parties, consisted of figure notations on an invoice form, setting up the 1969 Polara price, the cash pay-

ment, and the trade-in allowance of the damaged 1968 Polara. There is no dispute as to these figures. This written memorandum contains no reference to the repair of the trade-in or any duties incident thereto. Parol evidence and the parties' conduct in performing the contract are therefore admissible to explain and show the true nature of the transaction. Ely Constr. Co. v. S & S Corp., 184 Neb. 59, 165 N. W. 2d 562; Fitzsimons v. Frey, 153 Neb. 124, 43 N. W. 2d 531; Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448; Muller Enterprises, Inc. v. Gerber, 178 Neb. 463, 133 N. W. 2d 913; Cook v. Wilkie, 181 Neb. 596, 150 N. W. 2d 124.

On March 12, 1969, a few days after the contract or memorandum was signed, Cleveland came to the Ranchland office. He paid the $1,250, gave the title to the 1968 Polara to Ranchland, assigned it to Ranchland, brought his trailer hitch, and put his license plates on the 1969 Polara. Buzeyn, representing Ranchland throughout, gave the title of the 1969 Polara to Cleveland. The damaged Polara, to Buzeyn's knowledge, was in Fritz's Body Shop at that time. There was a misunderstanding as to Cleveland's collision insurance. Cleveland thought it covered the repair bill but it did not. Buzeyn was aware of this problem and insisted Cleveland straighten it out. Buzeyn visited the body shop, was aware of the progress of the repairs, and instructed the body shop to paint the Polara two-tone. He had the title, had received the cash, and listed and used the 1968 Polara as security for a loan with his bank. In the fall of 1970 Fritz's Body Shop, after demand and notice to both Ranchland and Cleveland, foreclosed its lien and sold the 1968 Polara.

From these undisputed facts it is clear from the conduct of the parties before any dispute arose, that Ranchland had ownership and the complete power and control over the title and possession of the 1968 Polara. It exercised dominion and control, directing the changes in the repair work, and using it for loan purposes. It

assumed all the normal incidents, duties, and responsibilities of ownership. It is true that Cleveland had a personal obligation and commitment to pay the repair bill. But, in the performance of the contract, when he assigned and delivered the title and placed the possessory control flowing from ownership in Buzeyn, and Buzeyn accepted the transfer with full knowledge of the facts, and affirmed the mutual transfer of ownership by delivery of title and possession of the new 1969 Polara, we must assume both parties accepted and assumed the normal benefits and risks of loss incident to such ownership. With knowledge of all the facts the parties themselves mutually transferred the title to the vehicles and by their conduct in partly performing their contract effectively modified and changed their original obligations to protect their respective properties from loss resulting from the normal incidents of ownership. Ranchland cannot create a lien for one purpose and at the same time deny its obligation to protect its own property from another lien that it knew existed. We therefore hold that Cleveland's liability is limited to his personal promissory obligation to pay the repair bill, the amount of which, $1,006.64, is not in dispute.

The measure of damages in the case of a breach of a promissory obligation under a contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of which it has entailed. Numon v. Stevens, *supra;* Gallagher v. Vogel, *supra.*

In the light of our decision on the undisputed facts, it is not necessary to discuss other issues presented. The judgment of the district court is reversed and the cause remanded with directions to enter judgment for the plaintiff in the sum of $1,006.64, each party to pay its own costs.

REVERSED AND REMANDED WITH DIRECTIONS.

NETTIE SACCO, APPELLANT, V. URBAN CORNELIUS GAU ET AL., APPELLEES.
199 N. W. 2d 605

Filed July 28, 1972. No. 38220.

1. **Trial: Evidence: Witnesses.** Ordinarily, a party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, wherever his own is not of the character of a judicial admission, and concerns only some evidential or constituent circumstance of his case. This is especially so as to the circumstances of an accident or similar event, because in such a case the party's testimony is especially subject to inexactness of observation and memory.
2. ———: ———: ———. Where a party testifies clearly and unequivocally to a fact which is within his own knowledge, such testimony may be considered as a judicial admission. That rule has particular application where the party so testifying made no effort to retract, qualify, or otherwise explain the positive force of his own evidence.
3. **Negligence: Motor Vehicles.** Violation of a stop light, standing alone, is not sufficient to prove gross negligence.
4. **Trial: Evidence.** The admission in rebuttal of testimony which should have been offered in chief rests in the sound discretion of the court.
5. **Trial: Instructions.** Instructions must be confined to issues supported by the evidence.
6. ———: ———. 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.

Louis T. Carnazzo and Albert C. Walsh, for appellant.

Cassem, Tierney, Adams & Henatsch, for appellees Gau et al.

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

Heard before SPENCER, SMITH, and NEWTON, JJ., and CHADDERDON and C. THOMAS WHITE, District Judges.

NEWTON, J.

This is an action for damages for personal injuries

sustained in an automobile accident. Plaintiff was a guest passenger in an automobile operated in a northerly direction by the defendant Rose Scapellato. The accident occurred at an intersection controlled by automatic, electrically operated traffic lights. The defendant Gau, acting within the course and scope of his employment by the defendant, Byers Transportation Company, was driving west. At the conclusion of plaintiff's evidence, the court dismissed the action as to the defendant Scapellato. At the conclusion of the trial, a verdict was returned and judgment entered for the remaining defendants. We affirm the judgment of the district court.

Plaintiff's evidence reflects the foregoing facts. In addition, it shows that the Scapellato car, driven at a reasonable rate of speed, approached the intersection, stopped for a red light, and then proceeded. The driver states she did not see the Gau car prior to the impact and her car was struck on the right side. Plaintiff also called defendant Gau who stated he entered the intersection at a speed not exceeding 20 miles per hour; he saw the Scapellato car when a short distance from the intersection; and the light was green for westbound traffic. On seeing the Scapellato car entering the intersection, he applied his brakes and left skid marks 20 feet in length. Her car was going about 20 miles per hour. The plaintiff testified that the Scapellato car stopped for a red light at the intersection and entered it when the light changed to green. She was going about 15 miles per hour at the time of the accident. A police officer stated that the Gau car left 31 feet of skid marks and was told by Gau he had been going 25 miles per hour. He also stated that defendant Scapellato said she was going 5 to 10 miles per hour.

On this state of the record, the court sustained the motion of the defendant Scapellato to dismiss the case as to her. The evidence is barren of any proof of negligence on the part of this defendant except for the

statement of the defendant Gau regarding right-of-way made in contradiction of all the other witnesses, including the plaintiff herself. In other words, the only evidence of negligence on the part of defendant Scapellato is the evidence of Gau to the effect that she ran a red light and this is denied by plaintiff's own testimony. Ordinarily "'* * * a party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, wherever his own is not of the character of a judicial admission, and concerns only some evidential or constituent circumstance of his case. This is especially so as to the circumstances of an accident or similar event, because in such a case the party's testimony is especially subject to inexactness of observation and memory.'" Vermaas v. Heckel, 170 Neb. 321, 102 N. W. 2d 647.

On the other hand, this court has held that: "Where a party testifies clearly and unequivocally to a fact which is within his own knowledge, such testimony may be considered as a judicial admission. That rule has particular application where the party so testifying made no effort to retract, qualify, or otherwise explain the positive force of his own evidence." Southwestern Truck Sales & Rental Co. v. Johnson, 165 Neb. 407, 85 N. W. 2d 705.

In the present instance, plaintiff's petition alleges that defendant Gau entered the intersection against a red light, but does not allege that defendant Scapellato negligently did so or violated any rule pertaining to right-of-way. Under these circumstances it appears plaintiff was not entitled to a submission of the question of gross negligence on the part of the defendant Scapellato and that the court was correct in dismissing the case as to this defendant. Furthermore, violation of a stop light, standing alone, is not sufficient to prove gross negligence. See, Callen v. Knopp, 180 Neb. 421, 143 N. W. 2d 266; Brugh v. Peterson, 183 Neb. 190, 159 N. W. 2d 321, 29 A. L. R. 3d 236.

After plaintiff rested, the defendant Gau adduced evidence indicating that he had the right-of-way with a green light. Plaintiff then sought to introduce, by the testimony of other witnesses, evidence that Gau had entered the intersection against a red light. The court sustained an objection made on the ground that the evidence offered was improper rebuttal testimony. Plaintiff alleged this fact as one ground of negligence and evidence of it was part of her case-in-chief. The admission in rebuttal of testimony which should have been offered in chief rests in the sound discretion of the court. See, McClellan v. Hein, 56 Neb. 600, 77 N. W. 120; Hutchinson v. Western Bridge & Constr. Co., 97 Neb. 439, 150 N. W. 193; Mutz v. Sanderson, 94 Neb. 293, 143 N. W. 302.

The court, in its instructions, gave the following: "No person shall drive or operate a vehicle upon a street at a rate of speed greater than is reasonable and prudent, having due regard for the traffic, surface, width, and condition of the road, and the hazard at intersections." The jury was not instructed that plaintiff charged defendant Gau with negligence due to unreasonable speed. There is no contention that defendant Gau's speed was in violation of the speed limit, only that it was an "unreasonable and excessive rate of speed under the circumstances then existing of (25) miles per hour, whereby he forfeited any right of way he might otherwise have had." The allegation is in a manner of speaking double-barreled but appears to be aimed at the question of right-of-way rather than that of negligent speed. At the time of this accident, section 39-751, R. R. S. 1943, governing right-of-way at open or unprotected intersections provided that a driver traveling at an unlawful speed forfeited the right-of-way. That subsection of the statute has since been deleted. It was not applicable in the present case. There is no evidence of unlawful, excessive, or unreasonable speed on the part of defendant Gau. He was driving

at a normal rate of speed and had a right to assume, if he had the right-of-way, that other drivers would respect his right-of-way and not run a red light. If this occurred, by the time he became aware of that fact, it was too late for him to avoid the accident. Ordinarily issues regarding speed, lookout, and control are for determination by the jury. See Zavoral v. Pacific Intermountain Express, 178 Neb. 161, 132 N. W. 2d 329. One ground on which that case was reversed was the failure to submit a disputed question of unlawful speed to the jury. Evidence as to which motor vehicle had the right-of-way at the intersection controlled by automatic lights was also in conflict. There was evidence that one was traveling at a speed exceeding the speed limit and although the verdict favored this motorist, it was held that even if he had the right-of-way, he could be held negligent due to excessive speed. In this respect, that case differs from the present one.

Since the court submitted the question of right-of-way, it is evident that the jury in rendering a verdict for defendant Gau found that he had the right-of-way. There is no contention that he violated the speed limit or was driving at an abnormal rate of speed. The only remaining question in this regard pertains to whether or not his speed was negligent under the circumstances then existing. We do not believe that the mere fact an accident occurs is sufficient to find one negligent in this respect. Negligence is defined as doing something which an ordinary, prudent person would not have done under similar circumstances or failing to do something which an ordinary, prudent person would have done under similar circumstances. See NJI No. 3.02.

Defendant Gau entered the intersection at a moderate rate of speed in response to a green light giving him the right-of-way as against crossing vehicles not already in the intersection. He was maintaining a reasonable

lookout, as evidenced by the fact he saw the Scapellato car before it entered the intersection, and he exercised reasonable control of his automobile by locking the brakes immediately on becoming aware of the fact that the Scapellato car had failed to stop and yield the right-of-way.

In view of the fact that Gau was entitled to assume that the Scapellato car would stop for the red light and could not reasonably have been expected to avoid the accident when it failed to do so, we cannot perceive wherein he was negligent. What did he do or fail to do that an ordinary, prudent motorist would or would not have done? The answer is nothing. He simply drove at a speed and under such circumstances as to lookout and control as were being followed by all other motorists using the same intersection. For similar cases see: Schultheis v. Levin, 372 Pa. 513, 94 A. 2d 740; Call Carl, Inc. v. Deadwyler (D. C.), 187 A. 2d 701; State v. Marvil Package Co., 202 Md. 592, 98 A. 2d 94; Sun Cab Co., Inc. v. Cusick, 209 Md. 354, 121 A. 2d 188; Robinson v. Ferguson, 105 Ohio App. 311, 149 N. E. 2d 152; Larson v. Evans, 12 Utah 2d 245, 364 P. 2d 1088; Texas-Arizona Motor Freight, Inc. v. Mayo, 70 Ariz. 323, 220 P. 2d 227; Wilson v. Overbey, 223 Ore. 256, 354 P. 2d 319; Loving v. Whitton, 241 N. C. 273, 84 S. E. 2d 919; Weil v. Longyear, 263 Mich. 22, 248 N. W. 536; McGuire v. Rabaut, 354 Mich. 230, 92 N. W. 2d 299.

His *speed* was not a proximate cause of the accident. The actual or proximate cause was that one or the other of the drivers concerned disobeyed the traffic signals. Instructions must be confined to issues supported by the evidence. See Lund v. Mangelson, 183 Neb. 99, 158 N. W. 2d 223.

Plaintiff's complaint of a failure to further instruct on speed and consequent forfeiture of right-of-way is without merit.

Plaintiff maintains that instructions on concurrent

negligence and defendant Gau's liability thereunder were inadequate. We cannot agree. Standard instructions defining proximate cause and result and concurring cause were given. See NJI Nos. 3.41 and 3.42.

In another instruction, the court set out the elements which plaintiff was required to prove and therein included the following: "That the negligence of Urban Cornelius Gau, if any, was the proximate cause of the accident; or that the negligence of the said Urban Cornelius Gau concurred or combined in any degree, if any, with the negligence of Rose Caniglia Scapellato, the driver of the car in which the plaintiff was riding as a passenger, and was a proximate cause of the collison. * * *

"If the plaintiff has established by a preponderance of the evidence all of the above-numbered propositions, then your verdict will be for the plaintiff and against the defendants in the amount of such damages."

The instructions appear to be clear and to adequately explain the elements of proximate cause and concurrent negligence. "Instructions given to a jury must be construed together, and if when considered as a whole they properly state the law, that is sufficient." Lucht v. American Propane Gas Co., 183 Neb. 583, 162 N. W. 2d 891.

Plaintiff also contends that the evidence is insufficient to sustain the verdict or a finding that defendant Gau entered the intersection with a green light. This assignment of error is without merit. The defendant Gau and two other witnesses, one driving behind the Gau car and the other behind the Scapellato car, testified unequivocally that Gau had the right-of-way. The evidence was sufficient so that a jury might well have found this to have been the case and to justify a verdict for the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD L. REED, APPELLANT.

199 N. W. 2d 707

Filed July 28, 1972. No. 38285.

Criminal Law: Searches and Seizures. An exception to the exclusionary rules of search and seizure is the rule of harmless error beyond a reasonable doubt.

Appeal from the district court for Douglas County: C. THOMAS WHITE, Judge. Affirmed.

David L. Herzog and J. Patrick Green, for appellant.

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

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

SMITH, J.

A jury returned a verdict of guilty against Ronald L. Reed on these counts: (1) Entry into a bank with intent to take property of the bank by violence or intimidation; (2) use of a firearm in commission of a felony; and (3) shooting "at" William Tate with intent to kill, wound, or maim. § 28-410, R. S. Supp., 1969. Ronald appeals. He asserts a violation of the exclusionary rules of search and seizure and insufficiency of the evidence.

Three men respectively armed with a carbine, a shotgun, and two revolvers attempted to rob the Ames Plaza Bank in Omaha on October 20, 1970, at 8 p.m., closing time. One visitor and 13 bank employees were present.

William Tate, an Omaha police sergeant and a part-time guard at the bank, testified as follows: Ronald pushed a carbine against Tate's back, ordering him to lie on the floor. Tate turned, grabbed the barrel of the carbine with his left hand, and forced the muzzle downward between his knees before Ronald fired. At

the same time he drew and fired his .38 calibre service revolver toward Ronald, who stood 6 inches away. Tate looked at Ronald's midriff. He thought 2 bullets struck Ronald in the stomach, although he saw no sign of a wound.

The other intruders were attempting to shoot Tate. The latter, having emptied his revolver and crawling toward the rear of the bank to reload, suffered shotgun wounds. The assailants fled.

Another employee identified Ronald as the man with the revolvers. No one else in the group of 14 except Tate knew whether or not Ronald had been one of the assailants.

Irma Reed testified as follows: She and Ronald, her cousin, on October 7, 1970, rented a house at 4267 Wirt Street in Omaha. Ronald used the name "Duane Reed" in signing the lease. He, not Irma, occupied the house, but she visited him there several times the following week or two. Ronald visited her and other relatives at the home of Irma's mother in Omaha. She saw him in Omaha several days after October 20, and there were no signs of a stomach wound or nervousness. Absence of a stomach wound was conclusively established by testimony of a physician.

A plumber who had been called, was admitted to the house at 4267 Wirt Street on October 23, 1970. A holstered pistol hung from a doorknob. The plumber before departure noticed that the pistol and holster were no longer there.

Ronald was arrested at Minneapolis, Minnesota, the city of his residence, in an apartment where he was a guest. From clothing in the apartment an officer removed four items—identification, social security, and credit cards, and a Nebraska driver's license bearing the name "Dana W. Hudson." Seizure of the license led to discovery of latent fingerprints of Ronald on the license application, dated October 20, 1970, in Omaha. A motion by Ronald to suppress the items was over-

ruled, and they were received in evidence.

An exception to the exclusionary rules of search and seizure is the rule of harmless error beyond a reasonable doubt. See Chambers v. Maroney, 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970); Cannito v. Sigler, 449 F. 2d 542 (8th Cir., 1971).

It is possible that the alias "Dana W. Hudson" prejudiced Ronald. Defense counsel argues prejudice in that the date, place, and fingerprints on the license application proved the presence of Ronald in Omaha on October 20, 1970. We need not reach the ruling in question, for such error would have been harmless beyond a reasonable doubt.

The jury could properly find Ronald guilty beyond a reasonable doubt. See State v. Leary, 185 Neb. 76, 173 N. W. 2d 520 (1970). The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLANT, V. WILLIAM E. PETERS, TAX COMMISSIONER OF THE STATE OF NEBRASKA, APPELLEE.

199 N. W. 2d 738

Filed July 28, 1972. No. 38418.

1. **Attorney General: Powers: Taxation.** The Attorney General may on his own relation in the name of the State of Nebraska bring an action for a declaratory judgment challenging the constitutionality of a statute which the Tax Commissioner of the State proposes to implement by enforcement and regulation pursuant to the duties imposed upon that officer by statute and the Constitution.
2. **Attorney General: Powers.** The rule that a person may not attack the constitutionality of a statute where his rights are not thereby affected applies to private persons and not to the Attorney General who is acting in the public interest.
3. **Declaratory Judgments.** The Declaratory Judgments Act is remedial and is to be liberally construed and administered.

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

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

Crosby, Pansing, Guenzel & Binning and Theodore L. Kessner, for appellee.

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

CLINTON, J.

This is an action for a declaratory judgment instituted in the name of the State of Nebraska by the Attorney General on the relation of the Attorney General himself against the Tax Commissioner, alleging the unconstitutionality of L.B. 945, 1971 Legislature. It prays for a determination of the unconstitutionality of the act in whole or in part and for a construction of such parts as may be valid. L.B. 945 amends various sections of the property tax laws, but the apparent main purposes of the act are the provisions for equalizing assessments and adjusting levies where a taxing district overlaps county lines. The petitioner alleges the statutory duties of the Tax Commissioner in connection with the administration of the revenue laws of the State and alleges that he will implement the act by regulation and enforcement unless the act or portions of the act are declared unconstitutional.

The Tax Commissioner entered an appearance and demurred to the petition on the following grounds: (1) The court has no jurisdiction of the subject matter of the relator's alleged cause of action. (2) The relator lacks legal capacity to maintain the action. (3) The amended petition of the relator does not state facts sufficient to constitute a cause of action. The district court sustained the demurrer, the Attorney General elected to stand on his amended petition, and the court

dismissed the action. The Attorney General then perfected this appeal.

The principal issues argued here are the authority of the Attorney General to sue on his own relation and whether or not there exists a present controversy and justiciable issue within the meaning of the Declaratory Judgments Act. For reasons we hereafter set forth we determine these issues favorably to the Attorney General. We must, however, examine the issues of constitutionality (which are briefed only by the Attorney General), since if the act is in whole patently and clearly constitutional then no cause of action is stated. We determine that certain sections of the act are clearly unconstitutional, certain sections are clearly constitutional, and some are of doubtful constitutionality, concerning which the taking of evidence may be necessary. Accordingly we reverse the order of dismissal and remand the cause for trial.

This court long ago laid down the principles which we believe are determinative of the authority of the Attorney General to bring an action such as this. In the case of State ex rel. Sorensen v. State Board of Equalization & Assessment, 123 Neb. 259, 242 N. W. 609, the Attorney General was held to have authority to invoke the jurisdiction of this court by writ of error to the State Board of Equalization and Assessment. In that case the statute gave the right of appeal only to "any person, county, or municipality affected thereby." The court cited the early Nebraska case of State v. Pacific Express Co., 80 Neb. 823, 115 N. W. 619, in which the Attorney General was held to be authorized to bring an action in the name of the state to enjoin the defendant from charging illegal and unauthorized rates. The court in this latter case quoted an early New Jersey case as follows: " 'In equity, as in the law court, the attorney general has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit, by

what may be called civil information, for their protection. The state is not left without redress in its own courts because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer, on whom it has cast the responsibility and to whom, therefore, it has given the right of appearing in its behalf and invoking the judgment of the courts on such questions of public moment.' " The court in State ex rel. Sorensen v. State Board of Equalization & Assessment, *supra,* further said: "By the great weight of authority, it is now held that the attorney general is clothed and charged with all the common-law powers and duties except in so far as they have been limited by statute. The duties of his office are so numerous and varied that it has not been the policy of different state legislatures to enumerate them. As the chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require." See, also, 7 Am. Jur. 2d, Attorney General, §§ 6, 11, 12, 13, pp. 6, 14-16; 7 C. J. S., Attorney General, § 8, p. 1226.

In State ex rel. Landis v. S. H. Kress & Co., 115 Fla. 189, 155 S. 823, the Supreme Court of Florida held that the rule that a person not affected by a statute cannot challenge its constitutionality did not apply to the Attorney General who was acting in the public interest. That seems applicable here.

It is argued by the appellee that the Attorney General has no standing because every action must be maintained by the real party in interest. § 25-301, R. R. S. 1943. In the present action the Attorney General brings this action in the name of the State in the public interest. See 7 Am. Jur. 2d, Attorney General, § 6, p. 6. Among the exceptions to the provision of section 25-301, R. R. S. 1943, are those provided by section 25-304, R. R. S. 1943, and include the following: "Officers may sue . . . in such name as is authorized by law, . . ."

This is an action "authorized by law" just as much as was the case in State ex rel. Sorensen v. State Board of Equalization & Assessment, *supra*. See, also, State v. Odd Fellows Hall Assn., 123 Neb. 440, 243 N. W. 616, where it was held that the Tax Commissioner in the name of the state could appeal from an order of a county board of equalization to the district court and from an adverse ruling therein to this court. Actions, such as this, by the Attorney General have the sanction of past practice. State ex rel. Meyer v. McNeil, 185 Neb. 586, 177 N. W. 2d 596.

Is there a justiciable issue in the present controversy? In the context of the allegations of the amended petition we find there is. The Tax Commissioner is charged by the Constitution and the statutes of the state with administering its revenue laws. Art. IV, § 28, Constitution of Nebraska; § 77-303, R. R. S. 1943; State v. Odd Fellows Hall Assn., *supra*. The petition alleges that, absent a declaration of unconstitutionality, the Tax Commissioner will implement the act by enforcement and the adoption of regulations. The Attorney General has taken an oath to uphold the Constitution of the State of Nebraska. Art. XV, § 1, Constitution of Nebraska. The Attorney General here acts on behalf and in the name of the state and hence on behalf of the general public. All this constitutes in our judgment a sufficient justiciable issue and present controversy within the meaning of the Declaratory Judgments Act. The act is remedial and is to be liberally construed. § 25-21,160, R. R. S. 1943.

L.B. 945 makes several unrelated changes in the property tax laws. These are contained in sections 1, 2, and 3. Sections 4 to 11 of the act constitute completely new and separate legislation directed toward solving the difficult problem of intercounty equalization where a taxing district overlaps two or more counties. Sections 1, 2, and 3 are not related or interdependent in any way and sections 4 to 11 have no essential rela-

tionship to sections 1, 2, or 3. All the sections have in common is that they relate to property taxation.

Section 1 amends section 77-112, R. S. Supp., 1969. It recites some of the factors to be considered in the determination of actual value of property for taxation. The amendment affects factor (4) which now reads, "reproduction costs less *regular annual* depreciation." The amendment adds the words *"regular annual."* The Attorney General states a portion of his contention with reference to this amendment in the following language: "We are, frankly, at a loss to know exactly what is meant by 'regular annual' depreciation, as applied to reproduction cost. We presume that this section, before its amendment, meant that in determining actual value of property the assessor could, among other things, take into account what it would now cost to reproduce the property, taking into account the fact that the reproduced property would be new, and that the actual property was used, and therefore should be depreciated. But what is 'regular annual' depreciation? Depreciation for federal income tax purposes is based on the cost basis of the property, not on reproduction cost. Are we to deduct depreciation based upon the particular taxpayer's cost basis from the reproduction cost, or are we to find the reproduction cost, and base the depreciation on that cost, and deduct a certain percentage each year? The statute does not say. Furthermore, the reproduction cost for the same property may vary from year to year, as prices and labor costs fluctuate. If we base the depreciation on the reproduction cost, instead of the acquisition cost, it, too, will vary from year to year. We are simply unable to ascertain what the Legislature intended by this amendment." His contentions are well taken.

If the provision as amended is construed to authorize the use of the depreciation used by the taxpayer for federal income tax purposes then several problems are encountered. Depreciation for income tax purposes is applied to the taxpayer basis in that property. This

may or may not be the "value" of the property under Article VIII, section 1, Constitution of Nebraska. Further, as so construed the amendment would violate the uniformity provisions of the same section. In addition, authorized methods of taking depreciation for income tax purposes vary from taxpayer to taxpayer. This too would violate the uniformity provision. Section 1 of L.B. 945 is in our opinion clearly unconstitutional as being in violation of Article VIII, section 1, Constitution of Nebraska.

Section 2 of L. B. 945 amends section 77-202, R. S. Supp., 1969. That section exempts certain classes of personal property including household goods from taxation. Subsection (d) adds the emphasized words so it now reads: "Household goods, *including major appliances either attached or detached to real property,* and personal effects when such property is not owned or used for financial gain or profit to either the owner or user." Article VIII, section 2, Constitution of Nebraska, provides in part as follows: "Household goods and personal effects, as defined by law, may be exempted from taxation in whole or in part, as may be provided by general law, and the Legislature may prescribe a formula for the determination of value of household goods and personal effects." The key question here is the intention of the amenders of the Constitution as they relate to the words "as defined by law." Is the power of definition given to the Legislature? Or did the framers of the amendment intend to adopt the common law concepts relating to fixtures? See § 77-103, R. R. S. 1943. The answer is not immediately apparent. This is a matter on which the court should have the benefit of briefs by both sides. The introduction of evidence on the issue might be pertinent.

Section 3 of L.B. 945 amends section 77-203, R. S. Supp., 1969, by making real property taxes due and payable December 31, next following the date of the

levy, instead of January 1. Clearly this provision creates no constitutional problem.

As already noted, sections 4 to 11 constitute completely new and independent legislation pertaining to the complex problem hereinbefore noted. The constitutionality of these sections is attacked on several grounds. The answers are not readily apparent and again the court should have the aid of briefs by both parties. Evidence may be pertinent and helpful.

The Attorney General attacks the constitutionality of the act because it contains more than one subject contrary to the provisions of Article III, section 14, Constitution of Nebraska. The act contains a severability clause. It appears to us that sections 1, 2, and 3, and sections 4 to 11 are not interdependent and none are the inducement of the passage of the other. We reject the constitutional attack based on Article III, section 14.

The order of dismissal by the trial court is reversed and the cause remanded to the district court for further action in accordance with this opinon.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, BOARD OF EDUCATIONAL LANDS AND FUNDS, APPELLANT, V. JOHN M. BUSH ET AL., APPELLEES.
199 N. W. 2d 704

Filed July 28, 1972. No. 38303.

1. **Public Lands: Improvements: Landlord and Tenant.** The burden of establishing the ownership of a compensable interest in "improvements" on school land leases is on the lessee. That burden may be satisfied by proof of purchase, or proof that the lessee personally placed the improvements on the land, or proof that they were acquired by gift.
2. ———: ———: ———. The presence of "improvements" (except crops) on school lands, standing alone, does not establish ownership in the tenant nor satisfy the burden of proving ownership.

3. ———: ———: ———. The fact of ownership of improvements does not establish a right to receive compensation nor determine any valuation of such improvements.
4. **Public Lands: Improvements.** Fencing by tenants of school lands does not require approval from the Board of Educational Lands and Funds.
5. **Public Lands: Crops: Landlord and Tenant.** In the absence of agreement, a tenant on school lands has a compensable interest in the crops, annual or perennial, growing on such lands on the date of termination of his lease.
6. **Public Lands: Improvements: Landlord and Tenant: Statutes.** In the event of the sale of school lands to a third person, a tenant has a right to compensation resulting from "improvements" or crops compensable under the school land lease statutes.

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

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

No appearance for appellees.

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

MCCOWN, J.

This is a statutory declaratory judgment action to determine the ownership of certain fencing and alfalfa located on school land in Franklin County, Nebraska. The district court determined that the defendants lessees held a compensable interest in the fencing and the alfalfa and dismissed the action. The Board of Educational Lands and Funds has appealed.

The plaintiff Board of Educational Lands and Funds is the owner of the quarter section of land involved here, which is a part of the school lands of the State of Nebraska. Approximately 2½ miles of permanent wood post and wire fencing is located on the land. There were also 11 acres of alfalfa which had been on the land for 8 years at the time of the trial. No permission had been requested or given to construct any of the fencing. The defendants leased the land from the plaintiff for a period

of 12 years effective January 1, 1958, and expiring December 31, 1969. The lease had been extended on a year-to-year basis until December 31, 1971. Prior to the defendants acquiring the lease, the land had been leased to a Mrs. McCracken. There was no evidence as to who put the fences on the land originally. The evidence of a fieldman for the plaintiff indicated that the fences were 50 or 60 years old, while the defendants lessees believed the fencing was placed on the land in 1930. Defendant John Bush testified that at the time he entered upon his lease, he made an agreement with Mrs. McCracken, the previous lessee on the land, as to the fences. She told him that he could have them and she voluntarily gave them to him, although she didn't think they were "any good." Thereafter during the period of defendants' lease, approximately $500 was expended by the defendants in repairing and maintaining the fences.

The board asserts that the common law rules apply and the fencing and alfalfa become the property of the board at the expiration of the lease. In effect the board contends that since the defendants paid nothing for the fences at the time they acquired their interest in them from the preceding lessee, they cannot have any ownership or compensable interest in the fences.

The burden of establishing the ownership of a compensable interest in "improvements" on school land leases is on the lessee. That burden may be satisfied by proof of purchase, or proof that the lessee personally placed the improvements on the land, or proof that they were acquired by gift. The evidence here was sufficient to establish a gift of the fencing to the defendants.

The presence of "improvements" (except crops) on school lands, standing alone, does not establish ownership in the tenant nor satisfy the burden of proving ownership. The fact of ownership of improvements does not establish a right to receive compensation nor determine any valuation of such improvements.

The board relies upon the fact that no permission was requested or granted for the fences. That position ignores the holding in Banks v. State, 181 Neb. 106, 147 N. W. 2d 132. We held there that because fencing was specified for appraisal and compensation between succeeding tenants but was not specified as one of the "improvements" requiring approval by the board, tenants were not required to obtain approval for fencing, even though it was placed on the land after 1953. Banks also held that the lessee of school lands had a compensable interest in growing crops derivative from the school land statutes entirely distinct from common law rules.

At least since 1953, statutes requiring appraisal and compensation as between successive lessees have continuously included "plowing for future crops, and alfalfa or other crops growing thereon." See §§ 72-240.06, R. S. Supp., 1953 (repealed 1967), and 72-240.18, R. S. Supp., 1969. The statutes since 1967 have specified separate standards for determining the value of annual and perennial crops and both of them must be valued as of the date of expiration of the lease. See § 72-240.18, R. R. S. 1943. In the absence of agreement, a tenant on school lands has a compensable interest in the crops, annual or perennial, growing on such lands on the date of termination of his lease. We find no reason to depart from Banks v. State, *supra*, nor from State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769. In the event of the sale of school lands to a third person, a tenant has a right to compensation resulting from "improvements" or crops compensable under the school land lease statutes.

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

AFFIRMED.

SPENCER, J., dissenting.

I dissent on the ground set forth in my dissent in State v. Rosenberger, 187 Neb. 726, 193 N. W. 2d 769.

I additionally dissent for the reason that the record very clearly shows the fences were on the land when the defendants acquired the lease; that they paid nothing for the fences; and that there is no record of anyone ever requesting or receiving permission to put the fences on the land.

With reference to the alfalfa, the defendants offered no evidence of their claimed ownership, and the plaintiff's ownership of it is supported by Peterson v. Vak, 160 Neb. 450, 70 N. W. 2d 436.

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

CARL L. BARTLETT, APPELLANT, V. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLEE.
199 N. W. 2d 828

Filed July 28, 1972. No. 38350.

1. **Administrative Law: Constitutional Law.** The granting of administrative discretion is not an unconstitutional delegation of a legislative function where adequate standards to guide the exercise of such discretion are provided by the statute authorizing it.
2. **Administrative Law: Licenses and Permits.** The power to withhold a license for good cause as well as standards defining good cause need not be expressly delegated where, by fair implication, in light of the statutory purpose, such power has been implicitly delegated.
3. ———: ———. In the absence of mandatory statutory requirements, the power vested in an officer or board to grant licenses carries with it, expressly or impliedly, the power to exercise reasonable discretion in granting or refusing licenses.
4. ———: ———. The power to refuse a license is coextensive with the power to revoke.
5. ———: ———. Where the State Real Estate Commission has power to revoke a salesman's license upon specific grounds, it may properly refuse to issue a license initially upon the same grounds.

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

Swartz, Wieland and Marolf, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

McCOWN, J.

The State Real Estate Commission, after a hearing, denied plaintiff Carl L. Bartlett a license as a real estate salesman. The district court affirmed the decision of the commission and dismissed the appeal.

Plaintiff made application to the State Real Estate Commission for a license as a real estate salesman and passed the written examination. The commission thereafter ordered plaintiff to show cause why his application for a real estate salesman's license should not be denied. Specific charges were set out in the order. The hearing before the State Real Estate Commission was held on October 6, 1970. At that hearing evidence was introduced which established that on January 7, 1970, the Department of Insurance of the State of Nebraska had revoked the plaintiff's insurance salesman's license after finding he had engaged in multiple acts of fraud, misrepresentation, and dishonest practices. These acts involved commingling and improper use of funds of several insurance clients in various amounts, totalling approximately $8,000. The order of revocation of the Department of Insurance provided that the plaintiff would not be allowed to apply for any license or permit from the Nebraska Department of Insurance for a period of 5 years from the date of revocation.

In addition to the evidence of the proceedings before the Department of Insurance, it was also established that on April 3, 1970, a misdemeanor complaint had been filed in the county court of Lancaster County, Nebraska, charging the plaintiff with having obtained money by false pretenses with intent to cheat and defraud. Plaintiff entered a plea of nolo contendere, was found guilty as charged, and fined $100.

The plaintiff contends that the commission has no authority to deny a license to any individual who possesses the qualifications required by statute for the issuance of a license. He also contends that if discretion were granted by statute to the commission, it was undefined and without standards, and constitutes an unconstitutional delegation of legislative power.

Section 81-876, R. R. S. 1943, provides that no salesman's license shall be issued to any person who has not attained legal age; or is not a citizen of the United States; or is not a high school graduate or the holder of a certificate of equivalency. The applicant for a license must pass a written examination covering generally the matters confronting real estate brokers and salesmen. Failure to pass the examination shall be grounds for denial of the license without further hearing.

Section 81-879, R. R. S. 1943, provides: "The commission shall have the full power to regulate the issuance of licenses and to revoke or suspend licenses issued under the provisions of sections 81-862 to 81-887."

Section 81-881, R. R. S. 1943, provides in part: "The commission may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any real estate broker or any real estate salesman and shall have the power to revoke or suspend any license, issued under sections 81-862 to 81-887, whenever the broker or salesman has been found guilty of any of the following unfair trade practices: * * *." There follow 20 numbered specifications among which the following are relevant: "(3) failing to account for and remit any money coming into his possession belonging to others; * * * (15) the broker or salesman has demonstrated his unworthiness or incompetency to act as a broker or salesman, whether of the same or of a different character as hereinbefore specified; (16) commingling the money or other property of his principals with his own or failure to maintain and deposit in a separate account all money received by a real

estate broker acting in said capacity, or as escrow agent, or the temporary custodian of the funds of others, in a real estate transaction; * * * (20) the broker or salesman shall have been convicted of a felony * * *."

Section 81-882(1), R. R. S. 1943, provides: "Before the commission shall deny any application for a license or before revoking or suspending such license, it shall give the applicant or holder of the license, as the case may be, a hearing on the matter and shall, at least twenty days prior to the date set for the hearing, notify the applicant or license holder in writing. Such notice shall contain an exact statement of the charges against him and the date and place of hearing." This statute obviously constitutes a specific delegation of discretionary authority as to the granting of an application for a license as well as for the revocation or suspension of a license already granted. The statute was fully complied with here. It must be noted, however, that nowhere in the real estate statutes is the commission given the authority in so many words to exercise its discretion to determine whether or not an applicant is a fit and proper person to engage in the licensed business nor has the commission adopted any rules of its own applicable to this issue.

Plaintiff's argument is that once the examination has been passed and the statutory qualifications have been met, the duty of the commission in issuing a license is purely ministerial. Plaintiff's position is that any United States citizen who is of legal age, has been graduated from high school, and passed the examination must be given a real estate salesman's license; and that any purported exercise of discretion by the commission would be unconstitutional as an improper delegation of legislative power. We disagree.

It is elemental that the method and manner of enforcing a law must of necessity be left to the reasonable discretion of administrative officers. The granting of

administrative discretion is not an unconstitutional delegation of a legislative function where adequate standards to guide the exercise of such discretion are provided by the statute authorizing it. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451.

While the statute here does not expressly provide that applicants for a real estate salesman's license must be of good moral character or must be fit and proper persons to engage in the business, we think such a requirement is implicit in the qualifications necessary for a license. It is also made more explicit in other portions of the commission statutes. The power to withhold a license for good cause as well as standards defining good cause need not be expressly delegated where, by fair implication, in light of the statutory purpose, such power has been implicitly delegated. See Barton Trucking Corp. v. O'Connell, 7 N. Y. 2d 299, 165 N. E. 2d 163. Under sections 81-876 and 81-879, R. R. S. 1943, the commission has implicit discretion to pass upon the fitness of an applicant for a license.

A thorough examination of the statutes here reflects the clear intent of the Legislature to vest full power in the commission to regulate the issuance of licenses. The rule is that in the absence of mandatory statutory requirements, the power vested in an officer or board to grant licenses carries with it, expressly or impliedly, the power to exercise reasonable discretion in granting or refusing licenses. See Arrow Express Forwarding Co. v. Iowa State Commerce Commission, 256 Iowa 1088, 130 N. W. 2d 451.

The plaintiff takes the position that section 81-881, R. R. S. 1943, has no application to an applicant for a license nor to the conduct of an applicant prior to his application, but instead applies only to revocations or suspensions of persons already licensed. Of course, the language of the section specifically applies only to revocations or suspensions, but it does contain extensive legislative standards for the guidance of commission

discretion. At least some of those standards which are relevant here are not limited to the actions done in carrying on the real estate business. Failing to account for and remit any money coming into his possession belonging to others; demonstrating unworthiness or incompetency to act as a broker or salesman, whether of the same or a different character as previously specified; and conviction of a felony are at least three specific standards which are not limited to carrying on the particular business of real estate. The power of the commission to revoke or suspend is unquestioned and the standards are thoroughly and adequately expressed. Courts have consistently taken the position that the power to refuse a license is coextensive with the power to revoke. See Arrow Express Forwarding Co. v. Iowa State Commerce Commission, 256 Iowa 1088, 130 N. W. 2d 451; Bankers Union Life Ins. Co. v. Read, 182 Okla. 103, 77 P. 2d 26.

Where the commission has power to revoke a salesman's license upon specific grounds, it may properly refuse to issue a license initially upon the same grounds. It would be an exercise in pure futility to require the commission to issue a license and then immediately revoke it. There is also no reasonable justification for requiring the commission to ignore the character or fitness of an applicant and to shut its eyes to all prior conduct of an applicant simply because the statute failed to specify those requirements in detail.

There was evidence in the record that an unrelated individual who held a real estate broker's license had been convicted of a felony and that his license was revoked for that reason. After that individual had served time in the Nebraska Penal and Correctional Complex, he was released from confinement and sometime thereafter his real estate broker's license was reinstated by the commission. The record does not reflect the evidence before the commission at the time of reinstatement of that license, nor the circumstances surrounding

that action of the commission. Neither is the reasonableness of that action at issue here. What the commission may or may not have done with respect to some other license and whether or not that action was reasonable does not change the facts of this case. An administrative determination within the jurisdiction of the commission, supported by substantial evidence in the record and a reasonable basis in the law, is not arbitrary nor capricious. See Barton Trucking Corp. v. O'Connell, 7 N. Y. 2d 299, 165 N. E. 2d 163.

The action of the commission here was reasonable and did not constitute an abuse of discretion. The judgment of the district court is affirmed.

AFFIRMED.

THE TILDEN BANK, A STATE BANKING CORPORATION, APPELLEE, V. MILTON M. RETZLAFF, APPELLANT, IMPLEADED WITH EDITH RETZLAFF, APPELLEE.

199 N. W. 2d 734

Filed July 28, 1972. No. 38416.

1. **Pleadings: Actions: Set-Off and Counterclaim.** A cross-petition or cross-claim is not limited to an equitable action under our procedure. It is the substance of the action rather than the form of it which will determine the availability of the relief. The criterion to be applied is that the issues raised by the cross-bill must be so closely connected with the cause of the action in the original suit that a cross-claim is a mere auxiliary or dependency upon the original action.
2. ———: ———: ———. New and distinct matter not maintainable under the provisions of the code as a counterclaim and not involved in a proper determination of the subject matter of the original suit must be litigated in a separate action.
3. ———: ———: ———. The matters set up in the cross-petition must be germane to the original suit under the code quite as much as under the chancery practice.
4. **Motions, Rules, and Orders: Set-Off and Counterclaim.** The proper manner in which to challenge the appropriateness of a counterclaim is by motion to strike.

5. **Pleadings: Torts: Contracts: Set-Off and Counterclaim: Bills and Notes.** A claim for damages for tort cannot be used as a set-off against actions on contracts or suits on promissory notes secured by real estate mortgages.

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

Nelson, Harding, Marchetti, Leonard & Tate, Kenneth Cobb, Richard H. Williams, and Lynn Hutton, for appellant.

Thomas E. Brogan, for appellee Tilden Bank.

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

WHITE, C. J.

This is an action to foreclose a real estate mortgage. The note and mortgage in issue were dated April 24, 1968, in the principal amount of $358,000. The undisputed evidence and the stipulations of the parties entered into show that at the time of the decree of foreclosure there was a principal balance due the plaintiff bank of $121,895.59. The only real issue in this case is whether the district court was correct in striking a pleading filed by the defendants entitled "Amended Answer and Cross-Petition." After the striking of the amended answer and cross-petition, there being no issue under the stipulation of the parties in the evidence as to the consideration for, the execution and the signature of the note and mortgage, or the balance due, the district court entered a judgment and the decree of foreclosure. We affirm the judgment of the district court.

The cross-petition sounds in tort. A desire for brevity forbids setting it out in full. The defendants allege that the plaintiff bank conspired to financially and personally ruin and destroy the defendant, his personal life, and his business interests; that the plaintiff conspired with one Gary P. Bauman, its president, and intention-

ally disrupted Milton Retzlaff's feeding program by not allowing Milton Retzlaff to cut enough ensilage; that the plaintiff bank conspired to force such defendant to take his livestock to market at inopportune times; that the plaintiff bank and Gary P. Bauman maliciously, in bad faith, and without justification revealed confidential aspects of defendant Milton Retzlaff's dealings with the Tilden bank, and made unjustified, bad faith statements regarding the business and financial condition of said Milton Retzlaff; that the plaintiff bank interfered with the personal life and marriage of defendant; that the plaintiff bank forced defendant against defendant's will, and for personal reasons, to discontinue purchasing commercial feed; and that the plaintiff bank conspired to employ improper banking methods toward the account of the defendant and did mishandle the money that was paid to the plaintiff bank from sales of livestock by defendant.

Our statute, section 25-813, R. S. Supp., 1969, permits the filing of a counterclaim or a cross-petition in response to the claim of a plaintiff, under certain circumstances. This court has long interpreted this statute as requiring the counterclaim to be *germane* to the original suit. Armstrong v. Mayer, 69 Neb. 187, 95 N. W. 51. We have recently reaffirmed that holding in Rogers v. Western Electric Co., Inc., 179 Neb. 359, 138 N. W. 2d 423, in which we reviewed the authorities and discussed the elements of a proper cross-petition in detail as follows: "The criterion to be applied is that the issues raised by the cross-bill must be so closely connected with the cause of action in the original suit that a cross-claim is a mere auxiliary or dependency upon the original action. The new issues which a defendant may introduce by a cross-claim are to be limited to such as it is necessary for the court to have before it in deciding the questions raised in the original suit in order to do complete justice to all parties with respect to the cause of action on which the plaintiff bases his claim for relief. If a defendant in

filing a cross-bill attempts to go beyond this and to introduce new and distinct matter not essential to the proper determination of the issue put in litigation by the original bill, although he may show a perfect case against either the plaintiff or one or more of his co-defendants, his pleading will not be permitted as a cross-bill. New and distinct matter not maintainable under the provisions of the code as a counterclaim and not involved in a proper determination of the subject matter of the original suit must be litigated in a separate action."

It is clear from the record in this case that there is no dispute as to the consideration for, and the execution and validity of, the real estate mortgage in the original sum of $358,000. The subject matter of the original petition was the simple issue of the determination of the validity of a promissory note and mortgage and the amount due thereon. From what we have said it appears that new and distinct matter not necessary for the determination of these issues was injected into the case by the purported cross-petition. The alleged conspiracy is not connected with the original foreclosure petition, and the new issues sought to be injected into the case are not necessary for a just and complete resolution of the issues raised in the petition to foreclose the note and mortgage. It is an attempt to litigate a tort action for conspiracy, a completely independent cause of action, serving to distort and confuse the resolution of the action to determine the validity of a contract and the mortgage security therefor. See, Weller v. Putnam, 184 Neb. 692, 171 N. W. 2d 767; Glissmann v. Bauermeister, 149 Neb. 131, 30 N. W. 2d 649: O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540; 20 Am. Jur. 2d, Counterclaim, Recoupment, Etc., § 70, p. 287. We come to the conclusion that the claim set out in the purported cross-petition is independent and unrelated to the original cause of action and cannot be litigated by cross-action in the nature of a cross-petition or counterclaim. The proper manner in which to challenge the appro-

priateness of a counterclaim is by motion to strike. Weller v. Putnam, *supra.*

The conclusionary allegation that the claim for conspiracy arose from the mortgagor-mortgagee relationship, described in the original petition, is not sufficient. See, Benes v. Matulka, 182 Neb. 744, 157 N. W. 2d 382; Watts v. Gantt, 42 Neb. 869, 61 N. W. 104; Brugman v. Burr, 30 Neb. 406, 46 N. W. 644.

A claim for damages for tort cannot be used as a set-off against actions on contracts or suits on promissory notes secured by real estate mortgages. 55 Am. Jur. 2d, Mortgages, § 615, p. 581; Benes v. Matulka, *supra;* Watts v. Gantt, *supra;* Vanderlip v. Barnes, 101 Neb. 573, 163 N. W. 856.

The defendant appellant still insists that his amended answer should not have been stricken because he asserts he alleged in the amended answer that the plaintiff had fraudulently induced the execution of the mortgage by "promising Defendant that the Tilden Bank would charge him one per cent less interest than the Credit Production was charging Defendant, and that Defendant would save money by dealing with Plaintiff bank." This is insufficient. None of the plaintiff's actions constituting the alleged fraud are set out. There is no allegation of what the interest rate of "Credit Production" was, and no allegation that such a representation, if made, had been breached by the plaintiff bank. See Nelson v. Nelson, 152 Neb. 741, 42 N. W. 2d 654. Furthermore, it is clear that such an allegation could not be a defense to the foreclosure of the mortgage, but would only relate to a mitigation of the amount due as interest.

It further appears that the note and mortgage were executed on April 25, 1968. This action was filed on February 5, 1971. The amended answer containing the allegation referred to was filed on June 14, 1971. The parties are bound by a stipulation which they jointly filed in this case on November 29, 1971, over 5 months

after the filing of the amended answer herein. In this stipulation, paragraph 1(e), they stated that they had executed an agreement on June 6, 1969, relative to the liquidation of the defendants' assets, and agreed that it should be incorporated into the stipulation. Exhibit E recites (over 1 year after the incurrence of the original indebtedness) that the defendants were indebted to the First National Bank of Omaha in the principal amount of $225,044.72 and the Tilden Bank in the principal amount of $35,000. The stipulation on November 29, 1971, paragraph 1(f), recites as follows: "(f) That the record of this loan transaction with the defendants, including the dates of advances, amounts of advances, credits to defendants, payments by defendants, participation by the First National Bank of Omaha, and the loan balances from time to time, and presently, *are* as set forth on Exhibit 'F' attached hereto, and incorporated herein by reference." (Emphasis supplied.) The balance due on principal and interest recited in the judgment and decree in this case is in conformity with the amounts set out in exhibit F. This stipulation and the recitals therein are binding on the parties hereto and obviously foreclose any claim as to a reduction of the balance due arising from the misrepresentation as to the interest rate, especially since it was filed in the action subsequent to the time of the allegation of the amended answer.

The judgment of the district court in striking the amended answer and the cross-petition and finding for plaintiff is correct and is affirmed.

AFFIRMED.

ROGER L. GREEN, APPELLANT, V. VILLAGE OF TERRYTOWN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
199 N. W. 2d 610

Filed July 28, 1972. No. 38545.

Judgments: Parties: Appeal and Error. Where there are multiple defendants and a judgment is entered dismissing the action as to one or more, but not all, defendants, the judgment is a final and appealable order.

Appeal from the district court for Scotts Bluff County: TED R. FIEDLER, Judge. On motion to dismiss appeal. Appeal dismissed as to defendant Terrytown.

Lyman, Meister & Olsen, for appellant.

Wright & Simmons, for appellees.

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

NEWTON, J.

In this action plaintiff sued the Village of Terrytown and two individual defendants alleging negligence resulting from leaving an unlighted obstruction in a street where new paving had been laid. The pleadings do not indicate the relationship existing between the village and the other two defendants. They may have been employees of the village or employees of the contractor. The court dismissed the action as to the defendant Terrytown. No appeal was taken from this judgment within the time allowed by statute. Subsequently the court dismissed the action as to the other two defendants and plaintiff seeks to appeal as to all three of the defendants. Terrytown has moved for a dismissal of the appeal as to it because it was not taken within 1 month from the order dismissing the action and overruling the motion for new trial as to Terrytown.

Nebraska does not appear to have passed directly on this proposition. The basic reasons are highlighted in 4 Am. Jur. 2d, Appeal and Error, § 48, p. 570. It is

therein stated that a paramount consideration is to be liberal in permitting appeals, but, on the other hand, that piecemeal or successive appeals are not desirable. It would appear there is a further consideration, namely that where there are multiple defendants and the action is dismissed as to one defendant, that defendant no longer has a voice in the determination of the litigation and if the remaining parties permit the litigation to drag on for months or years, he has no way of bringing an end to the litigation or ascertaining whether or not it has been finally determined as to him. This is a very important consideration in determining whether or not such an order of dismissal is a "final order."

In 4 Am. Jur. 2d, Appeal and Error, § 54, p. 576, and in 4 C. J. S., Appeal & Error, § 104 b, p. 292, the impression is conveyed that under the majority rule a dismissal or nonsuit as to one or more of several parties is not ordinarily regarded as final. Some comparatively recent cases sustaining this view and holding that the dismissal as to a codefendant is not appealable are: McDaniel v. Lovelace (Mo. App.), 392 S. W. 2d 422; Dudeck v. Ellis (Mo.), 376 S. W. 2d 197; Linkous v. Darch (Ky. App.), 299 S. W. 2d 120; Pan American Petroleum Corp. v. Texas Pac. C. & O. Co. (Tex. Civ. App.), 320 S. W. 2d 915; Bradley v. Holmes, 242 Miss. 247, 134 So. 2d 494; In re Old Colony Coal Co., 49 N. J. Super. 117, 139 A. 2d 302; Reuter v. City of Oskaloosa, 253 Iowa 768, 113 N. W. 2d 716; Wilmurth v. State, 79 Nev. 490, 387 P. 2d 251; Martin v. City of Ashland, 233 Ore. 512, 378 P. 2d 711. These cases apparently hold that an order is not final unless it disposes of *all* the issues as to *all* parties.

On the other hand, there are several cases which hold that dismissal of an action as to one party is appealable. See, Newberger v. Pokrass, 27 Wis. 2d 405, 134 N. W. 2d 495; Schneider v. Manheimer (Fla. App.), 170 So. 2d 75; Adams v. Allstate Ins. Co., 58 Wash. 2d

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We hold that the dismissal, as to the defendant Terrytown, was a final and appealable order and that the failure to complete an appeal within the required time necessitates a dismissal of the appeal as to this defendant.

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23. Instructions to jury considered as whole; when thus considered, if law correctly stated, case fairly submitted, and jury could not have been misled, claim of prejudicial error in instructions not available. Wright v. Haffke ---------- 270
24. Supreme Court may reduce sentence when in its opinion sentence excessive, and is under duty to render such sentence against accused as in its opinion may be warranted by evidence. State v. Thunder Hawk ---------- 294
State v. West ---------- 579
25. Discretion of court respecting custody and support of minor children subject to review; determination

of trial court, however, ordinarily not disturbed unless has been clear abuse of discretion or clearly against weight of evidence. Oberg v. Oberg ------ 316
26. Supreme Court will not interfere with sentence imposed by lower court unless appears to be result of abuse of discretion. State v. Claire ---------- 373
State v. Koch ---------- 392
27. In order to obtain review of alleged errors occurring during trial, such errors must be pointed out to trial court in motion for new trial and ruling obtained thereon. State v. Ryan ---------- 381
28. Not province of Supreme Court in reviewing record in action at law to resolve conflicts in or weigh evidence. Weiner v. Hroch ---------- 389
Melcher v. Boesch Motor Co. ---------- 522
29. Actions in equity on appeal to Supreme Court triable de novo, subject, however, to rule that when credible evidence on material questions of fact in irreconcilable conflict, Supreme Court will, in determining weight of evidence, consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Martin v. Martin ---------- 393
Scripter v. Scripter ---------- 576
30. Order of juvenile court regarding custody of children not disturbed unless clear abuse of discretion or decision against weight of evidence. Anderson v. Doeschot ---------- 444
31. In proceeding in error, review solely upon record made by tribunal whose action being reviewed; no new facts or evidence can enter into consideration of court. Harnett v. City of Omaha ---------- 449
32. Where appears in error proceeding that administrative agency acted within its jurisdiction and is some competent evidence to sustain its findings and order, order of administrative agency will be affirmed. Harnett v. City of Omaha ---------- 449
33. Matter of determination of public convenience and necessity peculiarly within discretion and expertise of Railway Commission and its action will not be disturbed by Supreme Court in absence of showing that such action illegal or arbitrary, capricious, and unreasonable. Robinson v. National Trailer Convoy, Inc. ---------- 474
34. If there is evidence to sustain findings of Railway Commission, Supreme Court may not intervene; is

only where findings of commission are against all evidence that Supreme Court may hold commission's findings arbitrary and capricious. Robinson v. National Trailer Convoy, Inc. ---------- 474

35. Verdict of jury based upon conflicting evidence not set aside unless clearly wrong. Department of Banking v. Colburn ---------- 500
Melcher v. Boesch Motor Co. ---------- 522

36. Execution and approval of undertaking required in cited statute directory only. Neumeyer v. Omaha Public Power Dist. ---------- 516

37. Insofar as Jacobitz v. Bussinger, 179 Neb. 524, 138 N. W. 2d 839, and Gebhart v. Tri-State Generation & Transmission Assn., 181 Neb. 457, 149 N. W. 2d 41, hold section 76-716, R. R. S. 1943, mandatory and jurisdictional, they are overruled. Neumeyer v. Omaha Public Power Dist. ---------- 516

38. Where discretionary duty imposed upon district court to determine whether or not good cause shown to grant leave to party to plead out of time, its decision not ordinarily disturbed absent showing of abuse of discretion. Neumeyer v. Omaha Public Power Dist. 516

39. In testing sufficiency of evidence to support judgment, evidence must be considered in light most favorable to successful party. Melcher v. Boesch Motor Co. ---------- 522

40. If jury finds defendant not liable in breach of warranty action, error relating to subject of damages necessarily harmless. Melcher v. Boesch Motor Co. 522

41. In testing sufficiency of evidence to support verdict, must be considered in light most favorable to successful party; every controverted fact must be resolved in his favor and he should have benefit of every inference that can be reasonably drawn therefrom. Lake v. Southwick ---------- 533
Dahl v. Robinson ---------- 547

42. On appeal in action for divorce, cause tried de novo in Supreme Court. Gydesen v. Gydesen ---------- 538

43. On appellate review of workmen's compensation case in Supreme Court, cause not considered de novo unless findings of fact not supported by evidence as disclosed by record. Swartz v. Hess, Inc. ---------- 542

44. Verdict may be set aside as excessive only when so clearly exorbitant as to indicate was result of passion, prejudice, or mistake or clear that jury disregarded evidence or controlling rules of law. Dahl

v. Robinson ---------- 547
45. In determining sufficiency of evidence to sustain verdict, must be considered most favorably to successful party and all conflicts resolved in his favor. Ristine v. Geigy Agricultural Chemicals ---------- 550
46. Divorce action triable de novo upon issues presented by appeal. Junker v. Junker ---------- 555
47. Discretion of lower court with respect to awarding custody of minor children subject to review, but determination of lower court not ordinarily disturbed unless clear abuse of discretion shown or clearly against weight of evidence. Scripter v. Scripter ---------- 576
48. On appeal from Railway Commission, judicial review limited to determination whether commission acted within scope of its authority and whether order in question reasonable and not arbitrarily made. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584
49. Findings of court in law action in which jury waived have effect of verdict of jury and will not be disturbed on appeal unless clearly wrong. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
50. Motion to vacate judgment and sentence under Post Conviction Act cannot be used as substitute for appeal or to secure further review of issues already litigated. State v. Weiland ---------- 626
51. Where facts and issues which are ground for motion for post conviction relief known to defendant and his counsel, and raised, heard, and determined at time of trial resulting in conviction but not raised in direct appeal, those issues not ordinarily considered in post conviction review. State v. Weiland 626
52. Not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence, unless so lacking in probative force as matter of law that is insufficient to support finding of guilt beyond reasonable doubt. State v. Embrey ---------- 649
53. Admission or rejection of photographs in evidence largely within discretion of trial court; error may not be predicated thereon in absence of showing of abuse of discretion. Rowedder v. Rose ---------- 664
54. Court in every stage of action must disregard any error which does not affect substantial rights of adverse party; no judgment shall be reversed by

reason of error. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669
55. Appeal to Supreme Court in civil action will be considered upon theories presented by parties at trial, provided liberal construction of pleadings, as construed by parties, will permit. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669
56. Where is some circumstantial evidence which tends to support allegation in petition for foreclosure of mortgage that no proceedings at law have been attempted, decree of foreclosure not reversed without showing that specific objection called to attention of trial court and also that defendant prejudiced by omission of direct proof. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---- 673
57. In appealing from decree of foreclosure which orders sale of land, supersedeas bond should be conditioned as set out in cited statute, and amount of pledge matter of judicial discretion; in appealing from decree of foreclosure which directs payment of money and also orders sale of real estate, court may require supersedeas bond in amount computed as specified in said statute. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. -------- 673
58. Appellate court required to permit amendment of defective appeal bond or order filing of new bond in furtherance of justice. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---------- 673
59. Appeal bond within purview of statute which requires court to disregard defects not affecting substantial rights of adverse party. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---- 673
60. In cases involving child custody determinations in juvenile court and other courts, findings of trial court, both as to evaluation of evidence and as to matter of custody, not disturbed unless clear abuse of discretion shown or decision against weight of evidence. Healey v. Johnson ---------- 677
61. In cases involving child custody and determinations in juvenile court, findings of trial court, both as to evaluation of evidence and as to matter of custody, will not be disturbed unless clear abuse of discretion shown. Healey v. Hartman ---------- 682
62. Where notice of appeal not filed within 1 month from entry of judgment or final order appealed from as required by cited statute, Supreme Court obtains

no jurisdiction to hear appeal and appeal must be dismissed. State v. Howell ---------- 687
63. When defendant seeks to appeal original proceedings pertaining to his conviction and fails to show he is acting in good faith and appeal has merit, he has failed to sustain required burden of proof. State v. Howell ---------- 687
64. When evidence of guilt clear and exclusion of erroneous evidence obviously would not have resulted in different verdict, admission of such evidence harmless error. State v. Howell ---------- 687
65. When action in equity appealed, duty of Supreme Court to try issues de novo and reach independent conclusion without reference to findings of district court. Rambo v. Galley ---------- 692
66. Where in action in equity, oral evidence in respect to material issues so conflicting that it cannot be reconciled, Supreme Court will consider fact that trial court observed witnesses and their manner of testifying and must have accepted one version of facts rather than opposite. Rambo v. Galley ---- 692
67. Failure of appellee to file brief in Supreme Court not concession of error; record and brief of appellant must be considered. Drainage Dist. No. 10 v. Canaday ---------- 701
68. Upon appeal to district court from decision of board of supervisors of drainage district, all original objections made to classification and assessment of benefits heard and determined in summary manner as in equity, and upon appeal to Supreme Court, cause tried de novo. Drainage Dist. No. 10 v. Canaday ---------- 701
69. When, as required by statute, district engineer has examined land and made his report to board of supervisors of drainage district which approved report, report furnishes prima facie evidence of classification and benefits, and in absence of fraud, such evidence sufficient to sustain decision of board unless decision overcome by competent evidence to contrary. Drainage Dist. No. 10 v. Canaday ---- 701
70. Judgment of trial court in action where jury waived has effect of verdict of jury and will not be set aside unless clearly wrong. Johnson v. Roueche - 716
71. Instructions must be construed together and isolated language, taken out of context, not sufficient to support challenge of error if whole instruction

or all instructions not misleading or erroneous. Wisnieski v. Harms ---------- 721
72. No judgment shall be reversed for error that does not affect substantial rights of adverse party. Hydrotex v. Putnam ---------- 727
73. Related instructions must be read and construed as whole and if when so read and construed they correctly state the law there is no error. State v. Rice 728
74. In action for divorce, if evidence principally oral and in irreconcilable conflict and determination of issues depends to reasonable extent upon reliability of respective witnesses, conclusion of trial court given great weight, and will not be disturbed on appeal unless good cause shown. Sees v. Sees -- 769
75. Appeal of post conviction proceeding from court inferior in jurisdiction to district court may only be taken to district court. State v. Williams -------- 802
76. Where there are multiple defendants and judgment entered dismissing action as to one or more, but not all, defendants, judgment is final and appealable order. Green v. Village of Terrytown ------- 840

Arraignment.

1. Record of arraignment at which plea of guilty entered must show that court determined was factual basis for plea. State v. Simmons ---------- 365
2. Standard for determining validity of guilty plea whether plea represents voluntary and intelligent choice among alternative courses of action open to defendant. State v. Simmons ---------- 365

Arrest.

1. Illegality of prisoner's custody prior to issuance of rendition warrant from sister state does not render warrant void and unenforceable. Bell v. Janing -- 690
2. Seizing from clothing of lawfully arrested person evidence intimately connected with crime for which he is arrested not unreasonable under Fourth Amendment. State v. Rice ---------- 728
3. Information supplied to judicial officer issuing arrest warrant on sworn complaint may be supplemented by additional information which arresting officers themselves have or have acquired before arrest and which is corroborative of complicity of arrestee in crime. State v. Rice ---------- 728

Assumption of Risk.

Where reasonable minds might differ as to whether risk assumed, jury question presented. Demont v. Mattson ---------- 277

Attorney and Client.

By statute, party may recover prejudgment interest and an attorney's fee on claim of $2,000 or less for services rendered, labor done, or materials furnished, provided he presented claim 90 days prior to commencement of suit; compliance with condition mandatory. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669

Attorney General.

1. Attorney General may on his own relation in name of State of Nebraska bring action for declaratory judgment challenging constitutionality of statute which Tax Commissioner of State proposes to implement by enforcement and regulation pursuant to duties imposed upon that officer by statute and Constitution. State ex rel. Meyer v. Peters ------- 817
2. Rule that person may not attack constitutionality of statute where his rights not thereby affected applies to private persons and not to Attorney General who is acting in public interest. State ex rel. Meyer v. Peters ---------- 817

Attorneys at Law.

1. Record must support claim of ineffective counsel. State v. Rose ---------- 84
2. Guilty plea motivated by existence of coerced confession not subject to collateral attack where defendant had counsel unless counsel incompetent. State v. Hall ---------- 130
3. When counsel has advised defendant to plead guilty, defendant who heeded such advice may not subsequently attack voluntariness of guilty plea so long as counsel's advice within range of competence demanded of attorneys in criminal cases. State v. Hall 130
4. That guilty plea must be intelligently made, not a requirement that all advice offered by defendant's lawyer withstand retrospective examination in post conviction hearing. State v. Hall ---------- 130
5. Absolute privilege to publish false and defamatory matter in complaint made to committee on inquiry

of Nebraska State Bar Association regarding alleged misconduct of attorney where defamatory matter related thereto. Sinnett v. Albert ---------- 176
6. Against sound principles of professional ethics for one who knows he is to be called as material witness in case to appear as attorney therein. Sinnett v. Albert ---------- 176
7. Party who appears pro se subject to and will receive same consideration as if he had been represented by attorney. Martin v. Martin ---------- 393
8. Stipulations voluntarily entered into between parties to cause or their attorneys, for government of their conduct and control of their rights during trial or progress of cause, will be respected and enforced by courts, where such stipulations not contrary to good morals or sound public policy. Martin v. Martin -- 393
9. Reasonable attorney's fee to be determined by nature of case, amount involved in controversy, results obtained, and services actually performed therein, including length of time necessarily spent in case, care and diligence exhibited, and character and standing of attorney. Junker v. Junker ---------- 555
10. In determining fairness of award for attorney's fee, consideration may be given to provisions of Nebraska State Bar Association Minimum Fee Advisory Schedule. Junker v. Junker ---------- 555
11. While trial courts and appellate courts equally regarded as experts on value of legal services, trial court ordinarily has better opportunity for practically appraising situation, and appellate court will interfere only to correct patent injustice where allowance clearly excessive or insufficient. Junker v. Junker ---------- 555
12. Attorney at law who is attorney for party in any proceeding in any court of this state shall not be disqualified as person before whom affidavit made by reason of such representation. Frazier, Inc. v. 20th Century Builders, Inc. ---------- 618

Banks and Banking.

Director of bank must exercise ordinary care and prudence in administration of affairs of bank; must exercise that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances and give same degree of care and prudence as generally exercised by men in their

own affairs. Department of Banking v. Colburn -- 500

Bills and Notes.

1. Issue means first delivery of an instrument to a holder or a remitter. State of Kansas v. Holeb -- 319
2. Delivery means voluntary transfer of possession. State v. Kansas v. Holeb ---------- 319
3. When person is first party to transaction to make use of mails and thereby effects delivery of instrument, he has made postal service his agent. State of Kansas v. Holeb ---------- 319
4. Unless otherwise specified, consent to extension of promissory note authorizes single extension for not longer than original period of note. Citizens State Bank v. Beermann Bros. Dehy ---------- 597
5. Agreement by holder to suspend right to enforce promissory note against maker, without consent of endorser and without express reservation of rights against him, discharges endorser from liability. Citizens State Bank v. Beermann Bros. Dehy ---- 597
6. To remove bar of statute, debtor must unqualifiedly acknowledge existing liability. Degmetich v. Beranek ---------- 659
7. Claim for damages for tort cannot be used as setoff against actions on contracts or suits on promissory notes secured by real estate mortgages. The Tilden Bank v. Retzlaff ---------- 834

Bonds.

1. Execution and approval of undertaking required in cited statute directory only. Neumeyer v. Omaha Public Power Dist. ---------- 516
2. Insofar as Jacobitz v. Bussinger, 179 Neb. 524, 138 N. W. 2d 839, and Gebhart v. Tri-State Generation & Transmission Assn., 181 Neb. 457, 149 N. W. 2d 41, hold section 76-716, R. R. S. 1943, mandatory and jurisdictional, they are overruled. Neumeyer v. Omaha Public Power Dist. ---------- 516
3. In appealing from decree of foreclosure which orders sale of land, supersedeas bond should be conditioned as set out in cited statute, and amount of pledge matter of judicial discretion; in appealing from decree of foreclosure which directs payment of money and also orders sale of real estate, court may require supersedeas bond in amount computed as specified in said statute. The Exchange Bank v. Mid-

Nebraska Computer Services, Inc. ---------- 673
4. Appellate court required to permit amendment of defective appeal bond or order filing of new bond in furtherance of justice. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---------- 673
5. Appeal bond within purview of statute which requires court to disregard defects not affecting substantial rights of adverse party. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. --- 673

Boundaries.

1. Where conveyances from common grantor to adjoining landowners describe premises conveyed by lot numbers, but adjoining owners purchase with reference to boundary line then marked on ground, boundary line, as marked on ground by common grantor, binding upon such adjoining landowners and all persons claiming under them irrespective of length of time elapsed thereafter. Phillippe v. Horns ---------- 304
2. Fixed monuments and surveys staked out on ground control over field notes showing courses, distances, and quantities; or description of survey in words; or picturization of survey in plat. Phillippe v. Horns ---------- 304

Brokers.

1. Under provisions of cited statute, contract between broker and owner must be in writing and signed by both parties, and must describe land to be sold and set forth compensation of broker. Wisnieski v. Coufal ---------- 200
2. Under provisions of cited statute, terms under which owner willing to sell land need not be included in contract between broker and owner. Wisnieski v. Coufal ---------- 200
3. Broker entitled to his commission in accordance with terms of his listing contract and right to compensation not impaired by subsequent inability or unwillingness of owner to consummate sale on terms prescribed. Wisnieski v. Coufal ---------- 200
4. Broker precluded from recovering compensation for his services when selling land of his principal if guilty of misconduct in negotiating contract at variance with one which he is authorized to make, or disobeys his principal's orders or instructions,

or causes loss to his principal by reason of his negligence in drawing or negotiating contract of sale for his principal. Wisnieski v. Harms ------ 721

Buildings.

1. In absence of some contractual provision to contrary, risk of loss or damage by windstorm, fire, etc., to new building in course of construction normally on builder. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308
2. Building contractor as well as owner has insurable interest in building in course of construction. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. 308

Cancellation of Instruments.

1. Erroneous statement by insurer to insured that insurance policy has lapsed for alleged nonpayment of premium not legal equivalent of notice of election to cancel under terms of policy. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
2. Mere existence of confidential relationship between grantor and grantee does not of itself show undue influence invalidating deed, and does not render deed void or voidable, when transaction open, honest, and fair, or where deed made by grantor with full knowledge of its nature and effect, and because of deliberate desire of grantor. Gaeth v. Newman -- 756
3. Public policy forbids that deeds and mortgages of real estate, duly authenticated in mode pointed out by statute, should be set aside except upon clear and convincing proof that certificate of acknowledgment false. Gaeth v. Newman ---------- 756

Carriers.

1. Failure of Railway Commission previous to January 1, 1968, to enunciate rule and regulation on tacking cannot be construed to imply right to tack inherent in certificates heretofore issued unless specifically restricted. Nebraska State Railway Commission v. Seward Motor Freight, Inc. ---------- 223
2. Right to prohibit tacking of regular to irregular route authorities, or irregular to irregular route authorities, policy determination within inherent authority of Railway Commission. Nebraska State Railway Commission v. Seward Motor Freight, Inc. 223
3. Common carriers cannot acquire prescriptive rights

by virtue of unauthorized use of routes. Nebraska State Railway Commission v. Seward Motor Freight, Inc. ---------- 223

4. Tacking is extension of authorized service; must be and is under regulation of Railway Commission rather than being left to unbridled discretion of carriers subject to regulation by commission. Nebraska State Railway Commission v. Seward Motor Freight, Inc. ---------- 223

5. In determining issue of public convenience and necessity, in cases where new or extended operating rights sought, controlling questions whether operation will serve useful purpose responsible to public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in specified operation without endangering or impairing operations of existing carriers contrary to public interest. Petroleum Transport Service, Inc. v. Wheeler Transport Service, Inc. ---------- 400

6. Purpose of Nebraska Motor Carrier Act was regulation for public interest. Purpose not to stifle legitimate competition but to foster it; purpose not to create monopolies in transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition normal attribute of free enterprise system and must be permitted to exist and law contemplates that it shall. Petroleum Transport Service, Inc. v. Wheeler Transport Service, Inc. ---------- 400

7. In granting certificate of public convenience and necessity, Railway Commission, under cited statute, required to find first, that applicant fit, willing, and able to perform proposed service, and second, that service offered is or will be required by present and future public convenience and necessity. Robinson v. National Trailer Convoy, Inc. ---------- 474

8. Contract carrier one, other than common carrier, which furnishes transportation service to meet special needs of individual shipper or shippers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

9. In considering application for permit as contract carrier, Railway Commission required to weigh special needs of shippers desiring contract carrier serv-

ice; effect on protesting carriers of grant of application and effect on shippers of denial factors to be weighed in determining if grant of application consistent with public interest. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

10. Burden upon applicant for permit as contract carrier to show that proposed service specialized and fits need of proposed contracting shippers, that applicant fit, willing, and able to perform service, and that proposed operation will be consistent with public interest. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

11. Where transportation of specified commodities can be performed as well by common carriers as by contract carriers, need for contract carriers not established. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

12. If competent proof made by applicant showing proposed service specialized and needed, and protested by common carriers showing willingness and ability to perform it, applicant must then establish he is better equipped and qualified to meet special needs of proposed contracting shippers than protesting common carriers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

13. Adequacy of existing services to perform normal needs of proposed contracting shippers not conclusive where new service better designed to fit special requirements of proposed contracting shippers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

14. Where is evidence to sustain factors for and against issuance of permit to contract carrier, required to be considered by Railway Commission by cited statutes, determination of public interest for commission and not courts. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

15. Past unlawful actions do not necessarily bar on grounds of unfitness future grants of operating authority if public interest will best be served by approval. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

Case Overruled.

Insofar as Jacobitz v. Bussinger, 179 Neb. 524, 138 N. W. 2d 839, and Gebhart v. Tri-State Generation

& Transmission Assn., 181 Neb. 457, 149 N. W. 2d 41, hold section 76-716, R. R. S. 1943, mandatory and jurisdictional, they are overruled. Neumeyer v. Omaha Public Power Dist. ---------- 516

Charities.

1. Charitable trusts are special favorites of courts of equity which will preserve and enforce them if possible under rules of law. Garwood v. Drake University ---------- 305
2. If dominant purpose of charitable trust certain, it will not be denied execution because of absence of perfection of detail or presence of immaterial and inappropriate language in instrument creating trust. Garwood v. Drake University ---------- 605
3. Charitable gift not permitted to fail because of any mistake or ambiguity in describing intended beneficiary or expressing its purpose if from language of bequest, when construed in light of all facts, intent of donor reasonably apparent. Garwood v. Drake University ---------- 605

Comity.

Ordinarily, effect given to prior judgment of another state determining custody of child as matter of comity unless change in circumstances requires different result. Loveall v. Loveall ---------- 457

Common Law.

Statutory provisions may cut across issue preclusion at common law. Lost Creek Drainage Dist. v. Elsam 705

Confessions.

Guilty plea motivated by existence of coerced confession not subject to collateral attack where defendant had counsel unless counsel incompetent. State v. Hall ---------- 130

Conspiracy.

1. Common purpose among two or more persons to commit crime need not be shown by positive evidence but may be inferred from circumstances surrounding act and from defendant's conduct subsequent thereto. Wright v. Haffke ---------- 270
   State v. Claire ---------- 373
2. Participation in criminal intent may be inferred

from presence, companionship, and conduct. State v. Claire ---------- 373
3. Two or more defendants may be tried together where each of defendants charged with accountability for offense or offenses or where offense part of common scheme, plan, or conspiracy. State v. Rice ------- 728

Constitutional Law.
1. Not unconstitutional for public school district to use or lease classrooms in church or other sectarian building for public school purposes if property used or leased under control of public school authorities and instruction offered secular and nonsectarian. State ex rel. School Dist. of Hartington v. State Board of Education ---------- 1
2. Legislature has plenary legislative authority limited only by state and federal Constitutions. Dwyer v. Omaha-Douglas Public Building Commission ----- 30
3. Language of Constitution to be interpreted with reference to established laws, usages, and customs of country at time of its adoption. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
4. Constitution must be read in connection with facts of history and development of representative form of government. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
5. Constitution as amended must be construed as a whole. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
6. Legislative construction of statutory or constitutional provision, although not conclusive on courts, when deliberately made, entitled to great weight. Dwyer v. Omaha-Douglas Public Building Commission 30
7. Power to tax being sovereign power, constitutional provisions relating thereto do not operate as grants of power of taxation to government, but merely limitations on power which would otherwise be unrestricted. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
8. Constitutional limitations on power to tax must be strictly construed. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
9. In construing act of Legislature, all reasonable doubts must be resolved in favor of constitutionality. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30

10. One-half mill levy made by Omaha-Douglas Public Building Commission under authority of L. B. 1003, 82nd Legislative Session, not county tax subject to provisions of Article VIII, section 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
11. One-half mill levy authorized to be made by cities of metropolitan class for purposes of L. B. 1003, 82nd Legislative Session, does not contravene Omaha city charter adopted under provisions of Article XI, section 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ------ 30
12. L. B. 1003, 82nd Legislative Session, which enabled cities of metropolitan class and county in which such city located to create public building commission authorized to furnish facilities for joint use of city and county pertains to matter of state concern and not just strictly municipal affair. Dwyer v. Omaha-Douglas Public Building Commission -- 30
13. L. B. 1003, 82nd Legislative Session, does not amend either section 23-119, R. R. S. 1943, or section 23-120, R. S. Supp., 1971, and therefore does not violate Article III, section 14, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
14. Power of classification rests with Legislature, and cannot be interfered with by courts unless clearly apparent that Legislature has by artificial and baseless classification attempted to evade and violate provisions of Constitution prohibiting local and special legislation. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
15. L. B. 1003, 82nd Legislative Session, does not contravene provisions of Article III, section 18, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
16. L. B. 1003, 82nd Legislative Session, does not contravene provisions of Article IX, sections 2, 4, or 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
17. Building for governmental purposes not work of internal improvement under provisions of Article XIII, section 2, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ----- 30
18. Tax authorized to be levied by city of metropolitan class under provisions of L. B. 1003, 82nd Legisla-

tive Session, not a tax for corporate purposes and is one levied by local authority; does not contravene Article VIII, section 7, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30

19. Nebraska system of selecting jurors by use of voter registration lists constitutionally permissible. State v. Casados ---------- 91

20. Defendant in criminal case not constitutionally entitled to demand proportionate number of his race on jury which tries him nor on venire or jury roll from which petit jurors drawn. State v. Casados -- 91

21. Issued motor vehicle operator's license gives rise to such legal entitlement as may not be taken away without procedural due process. Stauffer v. Weedlun 105

22. Due process does not require notice and hearing before order of revocation issued by Director of Motor Vehicles for point violations under cited statutes; in such cases, likelihood of error and irreparable harm to individual so slight that compelling governmental interest in removing from highway drivers who have by record of convictions demonstrated unsafe driving habits outweighs need for prior notice and hearing. Stauffer v. Weedlun ---- 105

23. Due process of law provisions of federal and state Constitutions do not in every case prevent administrative agency from issuing order affecting private rights of individual without formal notice of hearing before such order. Stauffer v. Weedlun -------- 105

24. Due process requirements may under some circumstances be satisfied if full hearing in courts available after administrative order with judicial power to stay irreparable injury pending court hearing. Stauffer v. Weedlun ---------- 105

25. Annexation legislative matter and no constitutional requirement that affected landowners be notified before passage of annexation ordinance; failure to give such notice not denial of due process of law. Holden v. City of Tecumseh ---------- 117

26. A State not constrained in exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. State v. Eckstein ---------- 146

27. Cited statute not violative of constitutional clauses concerning unreasonable classification and equal protection, nor does it violate provisions of Eighth Amendment prohibiting cruel and unusual punish-

ments. State v. Eckstein ---------- 146
28. Question of constitutionality of city ordinance not considered by Supreme Court unless properly presented or offered in evidence in district court. State v. Radcliff ---------- 236
29. Ordinances and statutes presumed constitutional; unconstitutionality must be clearly established and courts will not pass on question of constitutionality if issue may be disposed of on other grounds. State v. Lessert ---------- 243
30. Unless particular traffic ordinance or statute judicially declared unconstitutional, motorist convicted of violation of that ordinance or statute cannot challenge its constitutionality in collateral proceeding to revoke his driver's license under point system provided by cited statutes. State v. Lessert ------ 243
31. Constitutions of Nebraska and United States provide that no person shall be compelled to give evidence against himself of an incriminating nature. State v. Bittner ---------- 298
32. Right to confrontation provided by Sixth Amendment to Constitution of United States not violated when witness' claim of privilege restricts cross-examination on collateral matters bearing only on credibility and not on facts brought out on direct examination or pertaining to defendant's guilt or innocence. State v. Bittner ---------- 298
33. Substantial rights of citizens must be protected, but constitutional and statutory provisions relating to interstate extradition must be liberally construed to effectuate their purpose, and courts of one state must avoid view of their duties so narrow as to afford permanent asylum to offenders against laws of another state. State of Kansas v. Holeb ---- 319
34. Classifications limited to and necessary for accomplishment of legitimate purposes of legislation; question always whether things or persons classified by act form by themselves proper and legitimate class with reference to purposes of act. Sandberg v. State ---------- 335
35. Fundamental law of this State that Legislature vested with taxing power without limit, subject only to restrictions contained in Constitution. Axiomatic, therefore, that provisions of Constitution in relation to taxation not grants of power but limitations on taxing power of State, lodged in Legislature. Sandberg v. State ---------- 335

36. Not denied that since adoption of Fourteenth Amendment, State taxing power can be exerted only to effect public purpose and does not embrace raising of revenue for private purposes, but requirements of due process leave free scope for exercise of wide legislative discretion in determining what expenditures will serve public interest. Sandberg v. State ---------- 335
37. Nothing more familiar in taxation than imposition of tax upon class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for condition to be remedied. Sandberg v. State ---------- 335
38. Legislative bill, passed with emergency clause, vetoed by Governor, within ambit of Article IV, section 15, Constitution, and requires only three-fifths vote to override veto. Sandberg v. State ---------- 335
39. In eminent domain proceeding, on appeal by condemner from award of county court appraisers, interest added or allowed only from date on which condemner deposited amount of appraisers' award and became entitled to enter into possession of property involved. This is not constitutionally impermissible. Petersen v. School Dist. of Bellevue 354
40. Lessee of common school land possesses compensable interest in improvements covered by statute and placed by him or his predecessor in interest on land prior to September 14, 1953, in accordance with statute, notwithstanding subsequent determination of unconstitutionality of statute or absence of permission from Board of Educational Lands and Funds. State v. Carman ---------- 466
41. Ordinarily, if amendatory act invalid, original statute remains in effect. State v. Anderson -------- 491
42. Freedom of speech as guaranteed by First Amendment may include right to express thoughts and ideas by means other than speech. Major Liquors, Inc. v. City of Omaha ---------- 628
43. Use of police power ordinarily matter of public policy and of legislative judgment with which courts will not interfere unless exceeds constitutional bounds. Major Liquors, Inc. v. City of Omaha ---- 628
44. Police regulation not necessarily invalid because it incidentally affects a constitutional right. Major Liquors, Inc. v. City of Omaha ---------- 628
45. Although "conduct" may entail some elements of expression or speech, when "speech" and "nonspeech"

elements combined in same course of conduct, a sufficiently important governmental interest in regulating nonspeech element can justify incidental limitations on First Amendment freedoms. Major Liquors, Inc. v. City of Omaha ---------- 628
46. When nudity employed as sales promotion in establishments purveying intoxicating liquors, it is essentially "conduct" and subject to regulation or prohibition. Major Liquors, Inc. v. City of Omaha 628
47. When speech elements only incidental to course of conduct or activity, such activity in its entirety not entitled to protection of First Amendment. Major Liquors, Inc. v. City of Omaha ---------- 628
48. Affidavit for search warrant sufficient to meet standards of Fourth Amendment to Constitution of United States if complies with ruling in United States v. Harris, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723. State v. Rice ---------- 728
49. Suppression of product of Fourth Amendment violation can be successfully urged only by one whose rights violated by search itself, not by one aggrieved solely by introduction of damaging evidence. State v. Rice ---------- 728
50. Fourth Amendment does not clearly delineate between searches which are legal and those which are illegal; only prohibits unreasonable, with each particular case being decided on own circumstances. State v. Rice ---------- 728
51. Seizing from clothing of lawfully arrested person evidence intimately connected with crime for which he is arrested not unreasonable under Fourth Amendment. State v. Rice ---------- 728
52. In construing constitutional amendments, consideration should be given to circumstances leading to their adoption and purpose sought to be accomplished. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772
53. Supreme Court has recognized principle of constitutional interpretation that each and every clause in a constitution has been inserted for useful purpose; constitutional provisions should receive even broader and more liberal construction than stautes, and constitutions are not subject to rules of strict construction. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772
54. We are indebted to the suffrage of the people for adoption of all amendments submitted and in-

deed for adoption of the original Constitution which such amendments changed. From this fact it is patent that, where language employed plain, courts should accord to it meaning which obviously would be accepted by layman. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

55. In adopting constitutional provision authorizing an Industrial Commission, it was made an independent part of Constitution of Nebraska and not as an amendment to Article II. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

56. Legislature has complete control of actions of school boards; whether or not Legislature acted wisely in premises not matter of judicial determination; courts are not arbiters of legislative wisdom, but function as a check upon unauthorized and unconstitutional assumptions of power. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

57. Granting of administrative discretion not an unconstitutional delegation of legislative function where adequate standards to guide exercise of such discretion provided by statute authorizing it. Bartlett v. State Real Estate Commission ---------- 828

Continuances.

1. Granting of continuance is matter within sound discretion of trial judge and denial of motion for continuance not disturbed in absence of abuse of discretion. State v. Meadows ---------- 287

2. Application for postponement of time of trial of criminal case addressed to sound discretion of trial court and, in absence of abuse of discretion disclosed by record, denial thereof not error. State v. McClelland 699

Contracts.

1. Not unconstitutional for public school district to use or lease classrooms in church or other sectarian building for public school purposes if property used or leased under control of public school authorities and instruction offered secular and nonsectarian. State ex rel. School Dist. of Hartington v. State Board of Education ---------- 1

2. Disclaimer clause in bargain relevant to issue whether claimant in fact relied on false representation disclaimed in clause. Abbott v. Abbott ---------- 61

3. In absence of otherwise binding agreement, express or implied, no privity of contract between subcon-

tractor and owner. Boyd v. Benkelman Public Housing Authority ---------- 69
4. Mutual manifestations of assent, in themselves sufficient to make contract, not prevented from so operating by mere fact parties also manifest intention to prepare and adopt written memorial thereof. Boyd v. Benkelman Public Housing Authority ---------- 69
5. Final settlement not synonymous with final payment; precedes payment and denotes proper administrative determination with respect to amount due. Boyd v. Benkelman Public Housing Authority ---------- 69
6. Final settlement occurred when administrative determination made with respect to amount due, following completion of project, which was accepted by owner. Boyd v. Benkelman Public Housing Authority ---- 69
7. As general rule, question of whether sum mentioned in contract considered as liquidated damages or penalty question of law, dependent on construction of contract by court. Abel Constr. Co. v. School Dist. of Seward ---------- 166
8. If damages arising from breach of contract difficult of ascertainment or admeasurement, and if stipulated amount not disproportionate to amount of damages reasonably anticipated from breach, usually regarded as provision for liquidated damages. Abel Constr. Co. v. School Dist. of Seward ---------- 166
9. Liquidated damages in fixed sum for each day's delay in performing construction contract, which in effect grades damages according to extent of breach, and where effect of delay difficult to estimate and daily amounts not clearly unreasonable, not penal. Abel Constr. Co. v. School Dist. of Seward -------- 166
10. Provisions in construction contracts providing requests for additional time, necessitated by cause beyond contractor's control, to complete contract must be in writing, generally binding. Abel Constr. Co. v. School Dist. of Seward ---------- 166
11. Must be evidence to support finding that inaction of certain parties for whose actions owner allegedly responsible in fact cause of delay in completion of construction contract. Abel Constr. Co. v. School Dist. of Seward ---------- 166
12. Apparent authority is power to affect legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with other's manifestations to such

third persons. Abel Constr. Co. v. School Dist. of Seward ---------- 166
13. Engineer's authority under terms of construction contract to observe, inspect, suspend, or reject work, or make decisions in connection with technical specifications does not extend to waiving general contractual requirements relating to written request for time extensions and waiver of liquidated damages. Abel Constr. Co. v. School Dist. of Seward ------ 166
14. Under cited section of Uniform Commercial Code, buyer given right to reject whole if goods fail in any respect to conform to contract. Maas v. Scoboda -- 189
15. After rescission any use of property by buyer for own benefit or convenience will waive right to rescind. Maas v. Scoboda ---------- 189
16. Under provisions of contract for purchase of silo with 1-year warranty of customer satisfaction, buyer's opinion or decision must be made with entire good faith and not captiously or capriciously, and whether he so acts question of fact for jury. Maas v. Scoboda 189
17. Law regards parties as being competent to contract as they see fit with respect to satisfactory character of equipment sold, and seller assumes hazard of rendering performance according to terms of contract. Maas v. Scoboda ---------- 189
18. Under provisions of cited statute, contract between broker and owner must be in writing and signed by both parties, and must describe land to be sold and set forth compensation of broker. Wisnieski v. Coufal ---------- 200
19. Under provisions of cited statute, terms under which owner willing to sell land need not be included in contract between broker and owner. Wisnieski v. Coufal ---------- 200
20. Description of land in contract under cited statute sufficient if contains data from which land may be identified and ascertained with certainty; parol evidence admissible to apply description to subject matter, if parol evidence does not vary or contradict written instrument. Wisnieski v. Coufal ---------- 200
21. Broker entitled to his commission in accordance with terms of his listing contract and right to compensation not impaired by subsequent inability or unwillingness of owner to consummate sale on terms prescribed. Wisnieski v. Coufal ---------- 200
22. Contract should be so construed as to give effect to

intention of parties rather than defeat purpose for which it was executed. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308
23. In absence of some contractual provision to contrary, risk of loss or damage by windstorm, fire, etc., to new building in course of construction normally on builder. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308
24. Building contractor as well as owner has insurable interest in building in course of construction. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. 308
25. Owner who contracts to procure insurance to cover contractor and fails to do so or who procures such insurance and fails to have contractor named as an insured becomes insurer of contractor. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ------ 308
26. Insurer cannot recover by right of subrogation from his own insured nor can rights of subrogated insurer rise higher than rights of its insured against third party. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308
27. Under Uniform Commercial Code, adequacy or insufficiency of price for which collateral sold at private sale after default and repossession one of "terms" of sale, and relevant along with other issues in determining whether sale commercially reasonable. First Nat. Bank of Bellevue v. Rose ---------- 362
28. Rule that mutuality essential element of executory contract not applicable to executed contracts or where party not bound performed its conditions. Weiner v. Hroch ---------- 389
29. General rule that for most purposes when deed made in execution of contract of sale, provisions of contract merged in deed. Weiner v. Hroch ---------- 389
30. Agreement to pay existing mortgage, as part of consideration for conveyance of mortgaged premises, need not be inserted in deed, neither must it necessarily be in writing; such agreement independent undertaking of party making it, conveyance affording sufficient consideration to sustain it when its existence established by preponderance of evidence. Weiner v. Hroch ---------- 389
31. Duty of court to scrutinize settlement agreements closely in divorce actions and protect against fraud, intimidation, and ignorance and guard against unconscionable results; court required to render fair

and equitable result under all circumstances. Martin v. Martin ---------- 393
32. Amount recoverable for breach of agreement by seller of business not to engage in competition with buyer is loss which latter has sustained, naturally resulting from breach. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
33. General rule that party injured by breach of contract entitled to recover all his damages, including gains prevented, as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow breach. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
Rambo v. Galley ---------- 692
34. Plaintiff must not only show in breach of contract case his right of recovery, but elements and facts which compose measure of his recovery, and not leave jury to rove without guide or compass through limitless fields of conjecture and speculation. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
35. Contract restraining person from establishing business competitive with that of other party to it is strictly construed and doubts resolved against latitudinarian construction thereof. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
36. Mere leasing of personal property, without proof of other circumstances, by covenantor to existing competitor of promisee, does not constitute breach of general covenant not to compete. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
37. Terms and provisions which control in construction of coverage afforded by temporary insurance "binder" those contained in ordinary form of policy usually issued by company at that time upon similar risks. Robinson v. State Farm Mut. Auto. Ins. Co. ---------- 470
38. Where insurer's defense based upon exclusionary clause in policy, burden on insurer to prove facts which bring it within exclusion. Robinson v. State Farm Mut. Auto. Ins. Co. ---------- 470
39. Burden of proof on party relying on breach of warranty to show performance of conditions as to which right to assert warranty depends, or waiver thereof, or excuse for nonperformance. Melcher v. Boesch Motor Co. ---------- 522
40. Issue of whether provision of express warranty unconscionable presents question of law for court. Mel-

cher v. Boesch Motor Co. ---------- 522
41. Insurance policy insuring against all risks of direct physical loss covers damage caused by failure of boom clutch on lifting crane unless otherwise excluded in policy. Peter Kiewit Sons' Co. v. Hartford Fire Ins. Co. ---------- 553
42. Erroneous statement by insurer to insured that insurance policy has lapsed for alleged nonpayment of premium not legal equivalent of notice of election to cancel under terms of policy. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
43. Where insured because of errors in billing by agent of insurance company pays only that portion of renewal premium set forth in billing instead of entire premium, renewal policy not void but voidable at election of company under terms of policy. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
44. Unless otherwise specified, consent to extension of promissory note authorizes single extension for not longer than original period of note. Citizens State Bank v. Beermann Bros. Dehy ---------- 597
45. Agreement by holder to suspend right to enforce promissory note against maker, without consent of endorser and without express reservation of rights against him, discharges endorser from liability. Citizens State Bank v. Beermann Bros. Dehy ---------- 597
46. Section 44-501, R. R. S. 1943, as amended and reenacted by 1951 Legislature, provides that fire insurance policy shall conform as to provisions, agreements, and conditions with 1943 Standard Fire Insurance Policy of New York, and declares that no other or different provision, agreement, or clause shall be made part of such fire insurance policy. Insurance Co. of North America v. County of Hall ---- 609
47. Under section 44-501, R. R. S. 1943, as amended in 1951, an insured's recovery on fire insurance policy limited by provisions of policy as written in conformity with 1943 Standard Fire Insurance Policy of New York. Insurance Co. of North America v. County of Hall ---------- 609
48. Obligation to defend suit for insured should be determined on basis of whether petition filed against him attempts to allege liability within terms of policy. Frazier, Inc. v. 20th Century Builders, Inc. -- 618
49. By statute (1) on money due on instrument in writing or on settlement of account from day balance

agreed upon, interest allowed; and (2) unsettled accounts bear interest after 6 months from date of last item. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669

50. While measure of damages in action for breach of agreement by employee not to enter business in competition with employer usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact. Rambo v. Galley ---------- 692

51. In action for breach of contract, plaintiff will be called upon, in order to recover substantial damages, to furnish such data to enable court, with reasonable degree of certainty and exactness, to estimate actual damages, and if he fails to do this he can recover only nominal sum. Rambo v. Galley ---------- 692

52. In absence of special circumstances, beyond question that employee, unless contractually prohibited, may upon termination of his employment, compete with his former employer either on his own or on another's behalf. Rambo v. Galley ---------- 692

53. In case of informal trust, mingling of funds proper if such is understanding of parties as shown by their agreement or by their custom. Gaeth v. Newman -- 756

54. Interpretation given contract by parties themselves while engaged in performance of it is one of best indications of true intent of contract, and ordinarily, such construction of contract should be enforced. Ranchland Auto, Inc. v. Cleveland ---------- 804

55. In interpreting written contract, meaning of which in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings admissible to discover meaning which each party had reason to know would be given to words by other party. Ranchland Auto, Inc. v. Cleveland ---------- 804

56. Measure of damages in case of breach of contract is amount which will compensate injured person for loss which fulfillment of contract would have prevented or breach of it has entailed. Ranchland Auto, Inc. v. Cleveland ---------- 804

57. Claim for damages for tort cannot be used as set-off against actions on contracts or suits on promissory notes secured by real estate mortgages. The Tilden Bank v. Retzlaff ---------- 834

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Counties.

1. One-half mill levy made by Omaha-Douglas Public Building Commission under authority of L. B. 1003, 82nd Legislative Session, not county tax subject to provisions of Article VIII, section 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
2. L. B. 1003, 82nd Legislative Session, which enabled cities of metropolitan class and county in which such city located to create public building commission authorized to furnish facilities for joint use of city and county pertains to matter of state concern and not just strictly municipal affair. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30

Corporate Officials.

Director of bank must exercise ordinary care and prudence in administration of affairs of bank; must exercise that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances and give same degree of care and prudence as generally exercised by men in their own affairs. Department of Banking v. Colburn -------- 500

Court of Industrial Relations.

1. Court of Industrial Relations is an agency within purview of Administrative Procedures Act. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772
2. Fact that Court of Industrial Relations has certain legislative and judicial powers which may distinguish it in certain respects from other agencies which exercise purely administrative powers does not prevent it from being an agency of State in a broad sense. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

Courts.

1. Legislative construction of statutory or constitutional provision, although not conclusive on courts, when

deliberately made, entitled to great weight. Dwyer v. Omaha-Douglas Public Building Commission ---- 30

2. Power of classification rests with Legislature, and cannot be interfered with by courts unless clearly apparent that Legislature has by artificial and baseless classification attempted to evade and violate provisions of Constitution prohibiting local and special legislation. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30

3. Due process requirements may under some circumstances be satisfied if full hearing in courts available after administrative order with judicial power to stay irreparable injury pending court hearing. Stauffer v. Weedlun ---------- 105

4. Where upset bid before final confirmation of partition sale, matter of confirmation of sale left to judicial discretion of trial court with due regard to stability of judicial sales; such discretion judicial one which may not be arbitrarily exercised. Supreme Court will not intervene except in case of abuse of such discretion by trial court. Glaser v. Weinberger 205

5. In determining whether to accept or reject upset bid, court must elect between two conflicting duties; ordinarily must strive to obtain best price possible for property sold, especially where interests of minors involved. On other hand, when sale free of fraud and adequate price realized, consideration must be given to rights of purchaser and stability of judicial sales. Glaser v. Weinberger ---------- 205

6. Ordinances and statutes presumed constitutional; unconstitutionality must be clearly established and courts will not pass on question of constitutionality if issue may be disposed of on other grounds. State v. Lessert ---------- 243

7. Trial court, in exercise of sound discretion, must determine whether witness' claim of privilege justifiable. State v. Bittner ---------- 298

8. Courts will enforce valid stipulations unless some good cause shown for declining to do so, especially where stipulations acted upon so that parties could not be placed in status quo. Martin v. Martin ---- 393

9. Where discretionary duty imposed upon district court to determine whether or not good cause shown to grant leave to party to plead out of time, its decision not ordinarily disturbed absent showing abuse of discretion. Neumeyer v. Omaha Public Power Dist. ---- 516

10. Issue of whether provision of express warranty unconscionable presents question of law for court. Melcher v. Boesch Motor Co. ---------- 522
11. While trial courts and appellate courts equally regarded as experts on value of legal services, trial court ordinarily has better opportunity for practically appraising situation, and appellate court will interfere only to correct patent injustice where allowance clearly excessive or insufficient. Junker v. Junker ---------- 555
12. Supreme Court may reduce sentence when in its opinion sentence excessive; in such case, Supreme Court under duty to render such sentence as evidence warrants. State v. West ---------- 579
13. Findings of court in law action in which jury waived have effect of verdict of jury and will not be disturbed on appeal unless clearly wrong. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
14. Appellate court required to permit amendment of defective appeal bond or order filing of new bond in furtherance of justice. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---------- 673
15. Appeal bond within purview of statute which requires court to disregard defects not affecting substantial rights of adverse party. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---------- 673
16. Legislature has complete control of actions of school boards; whether or not Legislature acted wisely in premises not matter of judicial determination; courts are not arbiters of legislative wisdom, but function as a check upon unauthorized and unconstitutional assumptions of power. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

Criminal Law.

1. Burden of proof of exceptions within ambit of Depressant and Stimulant Drugs Act on party attempting to bring himself within exceptions. State v. Minor ---------- 23
2. Wife's incompetency in criminal proceedings against her husband limited to testimonial utterances; she is competent to supply information for presentence report. State v. Minor ---------- 23
3. Sentencing judge has broad discretion in source and type of evidence he may use to assist him in determining kind and extent of punishment to be imposed

within limits fixed by statute; he may consider reports of probation officers, police reports, affidavits, and other information, including his own observations of defendant. State v. Minor ---------- 23
4. Modern concepts individualizing punishment have made it necessary that sentencing judge not be denied opportunity to obtain pertinent information by requirement of rigid adherence to restrictive rules of evidence properly applicable to trial. State v. Minor ---------- 23
5. In determining sufficiency of evidence to sustain conviction in criminal prosecution, not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence. State v. Rose ---------- 84
6. Record must support claim of ineffective counsel. State v. Rose ---------- 84
7. Under circumstances in this case, where plea of guilty induced in part by misunderstanding as to recommendation county attorney would make at sentencing hearing, sentence vacated and cause remanded for resentencing. State v. Kimes ---------- 85
8. Nebraska system of selecting jurors by use of voter registration lists constitutionally permissible. State v. Casados ---------- 91
9. Defendant in criminal case not constitutionally entitled to demand proportionate number of his race on jury which tries him nor on venire or jury roll from which petit jurors drawn. State v. Casados ---- 91
10. Not burden of State to establish no discrimination in jury selection until at least prima facie case of discrimination established. State v. Casados ---------- 91
11. As general rule, evidence of other crimes than that with which accused charged not admissible in criminal prosecution. State v. Casados ---------- 91
12. Evidence of other crimes, similar to that charged, relevant and admissible when tends to prove particular criminal intent necessary to constitute crime charged. State v. Casados ---------- 91
13. Proof of another distinct substantive crime not admissible in criminal prosecution unless some legal connection between the two upon which it can be said one tends to establish the other or some essential fact in issue. State v. Casados ---------- 91
14. Duty of prosecuting attorney to conduct trial in such manner as will be fair and impartial to rights of

accused, no matter how guilty he may be. State v. Casados ---------- 91
15. Sentence imposed within statutory limits not ordinarily disturbed in absence of abuse of judicial discretion. State v. Meloy ---------- 98
State v. Fincher ---------- 376
State v. Arp ---------- 493
State v. Ernest ---------- 648
16. Supreme Court, in criminal action, will not interfere with verdict of guilty based upon conflicting evidence unless so lacking in probative force that, as matter of law, insufficient to support finding of guilt beyond reasonable doubt. State v. Monroe ---------- 100
17. In imposing sentence and denying probation in criminal case, judgment of district court not disturbed on appeal unless record shows abuse of discretion. State v. Cottone ---------- 102
18. Relief cannot be granted on appeal when it is frivolous and completely lacking in merit. State v. Moore 104
State v. Zollars ---------- 369
19. Valid plea of guilty in district court cures any defect may have occurred in proceedings before examining magistrate. State v. Birdwell ---------- 116
20. Matters relating to sentences imposed within statutory limits not basis for post conviction relief. State v. Birdwell ---------- 116
21. Standard for determining validity of guilty plea whether or not it represents voluntary and intelligent choice among alternative courses of action open to defendant. State v. Hall ---------- 130
22. Guilty plea motivated by existence of coerced confession not subject to collateral attack where defendant had counsel unless counsel incompetent. State v. Hall ---------- 130
23. When counsel has advised defendant to plead guilty, defendant who heeded such advice may not subsequently attack voluntariness of guilty plea so long as counsel's advice within range of competence demanded of attorneys in criminal cases. State v. Hall 130
24. That guilty plea must be intelligently made, not a requirement that all advice offered by defendant's lawyer withstand retrospective examination in post conviction hearing. State v. Hall ---------- 130
25. Where actual verbatim record of proceedings on taking plea of guilty lost, reasonably accurate account of what took place established by other evi-

dence not "silent record" within proscription of Boykin v. Alabama. State v. Hall ---------- 130
26. When condition of automobile, indicative of criminal offense in plain sight of officer looking at automobile from outside, examination justified and legal. State v. Etchison ---------- 134
27. Where punishment for statutory offense left to discretion of court, sentence imposed within statutory limits not ordinarily disturbed unless abuse of discretion appears. State v. Etchison ---------- 134
State v. Ferguson ---------- 330
28. When, in opinion of Supreme Court, sentence excessive or not warranted by evidence, statute contemplates correction on appeal. State v. Etchison 134
29. Stealing defined as taking without right or leave, with intent to keep wrongfully. State v. Blotzer - 143
30. Evidence that property taken without right or leave and abandoned at distant place will sustain finding of intent to keep wrongfully. State v. Blotzer --- 143
31. A State not constrained in exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. State v. Eckstein ---------- 146
32. Cited statute not violative of constitutional clauses concerning unreasonable classification and equal protection, nor does it violate provisions of Eighth Amendment prohibiting cruel and unusual punishments. State v. Eckstein ---------- 146
33. Instruction that jury to make no inferences from fact defendant did not testify is cautionary instruction for benefit of defendant. State v. Johnson 151
34. Conviction based on eyewitness identification at trial following pretrial identification by photograph and lineup will be set aside on those grounds only if pretrial identification procedures so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Reed ---------- 195
35. In criminal prosecution right of indigent to assistance of counsel does not encompass an unbridled right to choose his counsel. State v. Reed ---------- 195
36. When competent indigent becomes dissatisfied with court appointed counsel but shows no good cause for removal of counsel, only alternatives to proceed with appointed counsel or proceed pro se. State v. Reed ---------- 195

37. When unjustified obstreperous conduct of competent defendant prevents services of appointed counsel, accused cannot complain of lack of services of counsel caused by such conduct. State v. Reed ------- 195
38. Where criminal statute amended by mitigating punishment, after commission of prohibited act but before final judgment, punishment that provided by amendatory act unless Legislature specifically provided otherwise. State v. Roberts ---------- 209
State v. Anderson ---------- 491
39. Conviction may rest on uncorroborated testimony of accomplice. State v. Oglesby ---------- 211
40. Fact accomplice guilty of willful false swearing on material matter not automatically discredits his testimony as matter of law in all cases; ordinarily, his credibility question for jury under proper cautionary instruction. State v. Oglesby ---------- 211
41. Sentence of not less than 4 nor more than 7 years for manslaughter not excessive. State v. Mathews 251
42. Common purpose among two or more persons to commit crime need not be shown by positive evidence but may be inferred from circumstances surrounding act and from defendant's conduct subsequent thereto. Wright v. Haffke ---------- 270
State v. Claire ---------- 373
43. Ordinarily, firearm may be used if reasonably necessary to prevent commission of felony or to arrest felon after felony committed. Wright v. Haffke -- 270
44. When firearm used, question always is whether force used exceeded permissible limits and is question for jury under proper instructions. Wright v. Haffke -- 270
45. Problem concerning admissibility of evidence of other offenses is special aspect of broad general problem of relevancy; generally test of admissibility of such evidence whether evidence relevant and material to any issue on trial, or whether it fairly tends to prove particular offense charged or an essential element thereof. State v. Meadows ---- 287
46. In criminal prosecution, right of indigent to assistance of counsel does not encompass unbridled right to choose his counsel. State v. Thunder Hawk 294
47. When competent indigent becomes dissatisfied with court-appointed counsel but shows no good cause for removal of counsel, only alternative to proceed pro se. State v. Thunder Hawk ---------- 294
48. Credibility of witness in criminal case cannot be

impeached by showing his reputation for morality bad, but such attack must be addressed directly to his reputation for truth and veracity. State v. Bittner ---------- 298

49. When chastity not an issue, evidence of general reputation that female witness is, or has been, not law-abiding, unchaste, or prostitute, inadmissible for purpose of impeaching witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for purpose of impeachment by evidence as to specific acts or instances. State v. Bittner ---------- 298

50. Right to confrontation provided by Sixth Amendment to Constitution of United States not violated when witness' claim of privilege restricts cross-examination on collateral matters bearing only on credibility and not on facts brought out on direct examination or pertaining to defendant's guilt or innocence. State v. Bittner ---------- 298

51. Ordinarily, uncorroborated testimony of accomplice who has been guilty of conscious falsehood may sustain conviction if proper cautionary instruction given. State v. Bittner ---------- 298

52. Where sentence imposed within statutory limits, will not be disturbed in absence of abuse of discretion. State v. Bittner ---------- 298
State v. Johnson ---------- 486

53. Immaterial that complaint did not specifically allege commission of acts in this state intentionally resulting in crime in Kansas when requisition makes such facts clear. State of Kansas v. Holeb ------ 319

54. Substantial rights of citizens must be protected, but constitutional and statutory provisions relating to interstate extradition must be liberally construed to effectuate their purpose, and courts of one state must avoid view of their duties so narrow as to afford permanent asylum to offenders against laws of another state. State of Kansas v. Holeb -- 319

55. One who commits act in one state intentionally resulting in crime in another state may be extradited, and statement in Governor's warrant that accused is fugitive from justice from Kansas and has taken refuge in Nebraska must be disregarded as surplusage. State of Kansas v. Holeb ---------- 319

56. Under law of Nebraska, accused charged with rape cannot be convicted solely on testimony of prosecutrix. State v. Ferguson ---------- 330

57. In prosecution for rape, while evidence of prompt complaint standing alone insufficient corroboration, such evidence for consideration of jury as corroboration of main facts in issue. State v. Ferguson -- 330
58. In prosecution for rape, not essential that prosecutrix be corroborated by other witnesses as to particular acts which constitute offense; sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to principal fact in issue. State v. Ferguson ---- 330
59. Record of arraignment at which plea of guilty entered must show that court determined was factual basis for plea. State v. Simmons ---------- 365
60. Standard for determining validity of guilty plea whether plea represents voluntary and intelligent choice among alternative courses of action open to defendant. State v. Simmons ---------- 365
61. Criminal prosecution cannot be maintained under statute requiring permit be obtained from Department of Environmental Control "as required by it," i. e., department, in absence of rules, regulations, or standards fixing circumstances under which such permit "required." State v. West ---------- 371
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67. Instruction that criminal negligence or culpable neglect not slight breach of duty but gross failure to do what is required not prejudicially erroneous. State v. Crawford ---------- 378
68. In criminal cases, the Supreme Court will not interfere with verdict of guilty based upon evidence un-

less so lacking in probative force that it can say as matter of law that is insufficient to support finding of guilt beyond reasonable doubt. State v. Ryan ---- 381
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70. Supreme Court will not interfere with sentence imposed by district court unless sentence appears to be abuse of discretion. State v. Koch ---------- 392
71. Trial judge vested with broad discretion to properly circumscribe inquiry into criminal defendant's past conduct when that subject raised during cross-examination of defense character witness. State v. Newte ---------- 412
72. While particular facts inadmissible in evidence upon direct examination for purpose of sustaining or overthrowing character, doctrine does not extend to cross-examination. State v. Newte ---------- 412
73. Upon cross-examination of witness who has testified to general reputation, questions may be propounded for purpose of eliciting source of witness' information, and particular facts may be called to his attention. State v. Newte ---------- 412
74. Extent of cross-examination of witness must be left to discretion of trial court. State v. Newte ------ 412
75. Character witness may be cross-examined as to an arrest whether or not it culminated in conviction of defendant. State v. Newte ---------- 412
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79. Affidavit for search warrant not defective simply because based on hearsay, so long as affidavit discloses substantial basis for crediting hearsay. State v. Howard ---------- 494
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81. Where files and records show defendant not entitled to post conviction relief, motion properly denied. State v. Ransom ---- 499
82. Sexual Psychopath Act intended to permit removal of sexual psychopath from society until he is cured or no longer menace to safety of others. State v. King ---- 563
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84. Crime of embezzlement of public money as defined by cited statute applies only to officers or persons charged by law with performance of duties therein mentioned, and police patrolman collecting coins from parking meters as part of duties designated by his superior cannot properly be informed against thereunder. State v. Williams ---- 565
85. Supreme Court may reduce sentence when in its opinion sentence excessive; in such case, Supreme Court under duty to render such sentence as evidence warrants. State v. West ---- 579
86. Anomie in criminal process is variable not to be forgotten, although its weight is light in any one case. State v. West ---- 579
87. Sentence dictated by inordinate emotion suspect; is only by coincidence that it finds support in evidence. State v. West ---- 579
88. Not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence, unless so lacking in probative force as matter of law that is insufficient to support finding of guilt beyond reasonable doubt. State v. Embrey ---- 649
89. When defendant seeks to appeal original proceedings pertaining to his conviction and fails to show he is acting in good faith and appeal has merit, he has failed to sustain required burden of proof. State v. Howell ---- 687
90. Failure to move for suppression of evidence seized unlawfully waives objection. State v. Howell ---- 687
91. When evidence of guilt clear and exclusion of erroneous evidence obviously would not have resulted in different verdict, admission of such evidence harmless error. State v. Howell ---- 687

92. Application for postponement of time of trial of criminal case addressed to sound discretion of trial court and, in absence of abuse of discretion disclosed by record, denial thereof not error. State v. McClelland ---------- 699
93. Granting of change of venue rests in sound discretion of court. State v. McClelland ---------- 699
94. Affidavit for search warrant sufficient to meet standards of Fourth Amendment to Constitution of United States if complies with ruling in United States v. Harris, 403 U. S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723. State v. Rice ---------- 728
95. Suppression of product of Fourth Amendment violation can be successfully urged only by one whose rights violated by search itself, not by one aggrieved solely by introduction of damaging evidence. State v. Rice ---------- 728
96. Fourth Amendment does not clearly delineate between searches which are legal and those which are illegal; only prohibits unreasonable, with each particular case being decided on own circumstances. State v. Rice ---------- 728
97. Seizing from clothing of lawfully arrested person evidence intimately connected with crime for which he is arrested not unreasonable under Fourth Amendment. State v. Rice ---------- 728
98. Information supplied to judicial officer issuing arrest warrant on sworn complaint may be supplemented by additional information which arresting officers themselves have or have acquired before arrest and which is corroborative of complicity of arrestee in crime. State v. Rice ---------- 728
99. If intent of aider different from that of perpetrator, aider's guilt measured by intent that actuated him. State v. Rice ---------- 728
100. Threats and expressions of ill will in intentional homicide admissible to show intent, malice, or motive; malice and motive relevant and material not merely as evidence of intent, but also on issue of guilt or innocence as tending to point to identity of perpetrator or perpetrators. State v. Rice ------ 728
101. In prosecution for intentional homicide committed against one of a class, threats by defendant against class admissible. State v. Rice ---------- 728
102. Two or more defendants may be tried together where each of defendants charged with accountability for offense or offenses or where offense part of com-

mon scheme, plan, or conspiracy. State v. Rice -- 728
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107. Exception to exclusionary rules of search and seizure is rule of harmless error beyond reasonable doubt. State v. Reed ---------- 815

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1. In eminent domain proceeding where part of property taken, landowner may recover value of land appropriated and depreciation in value of remainder of land; remainder generally considered land owned by same proprietor, contiguous to land taken, and devoted to same use. Verzani v. State 162
2. In eminent domain proceeding, anticipated profits from continued carrying on of business in established location cannot be considered in estimating damages, and profits of business cannot be shown for purpose of proving value of property. Verzani v. State ---------- 162
3. Damage claimed to result from improper design or construction of highway should be pleaded specially. Verzani v. State ---------- 162
4. Damage related to traffic flow not compensable. Verzani v. State ---------- 162
5. As general rule, question of whether sum mentioned in contract considered as liquidated dam-

ages or penalty question of law, dependent on construction of contract by court. Abel Constr. Co. v. School Dist. of Seward ---------- 166
6. If damages arising from breach of contract difficult of ascertainment or admeasurement, and if stipulated amount not disproportionate to amount of damages reasonably anticipated from breach, usually regarded as provision for liquidated damages. Abel Constr. Co. v. School Dist. of Seward -- 166
7. Liquidated damages in fixed sum for each day's delay in performing construction contract, which in effect grades damages according to extent of breach, and where effect of delay difficult to estimate and daily amounts not clearly unreasonable, not penal. Abel Constr. Co. v. School Dist. of Seward ---------- 166
8. Engineer's authority under terms of construction contract to observe, inspect, suspend, or reject work, or make decisions in connection with technical specifications does not extend to waiving general contractual requirements relating to written request for time extensions and waiver of liquidated damages. Abel Constr. Co. v. School Dist. of Seward -- 166
9. Amount recoverable for breach of agreement by seller of business not to engage in competition with buyer is loss which latter has sustained, naturally resulting from breach. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
10. General rule that party injured by breach of contract entitled to recover all his damages, including gains prevented, as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow breach. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
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11. Plaintiff must not only show in breach of contract case his right of recovery, but elements and facts which compose measure of his recovery, and not leave jury to rove without guide or compass through limitless fields of conjecture and speculation. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
12. Duty of district court to refrain from submitting to jury issue of damages when evidence such that it cannot determine such issue except by indulging in speculation and conjecture. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
13. If jury finds defendant not liable in breach of war-

ranty action, error relating to subject of damages necessarily harmless. Melcher v. Boesch Motor Co. 522

14. Process of ascertaining amount of compensation to be awarded for impairment of capacity to work or earn requires (1) determination of extent to which such capacity has been diminished, (2) determination of permanency of decrease in earning capacity, and (3) determined extent and length of impairment, including reduction of award to its present worth. Lake v. Southwick ---------- 533

15. Damages for future loss of earning capacity may not be based on speculation, probabilities, or uncertainty, but must be shown by competent evidence as reasonably certain and proximately resulting from pleaded injury. Lake v. Southwick ---------- 533

16. Insurance policy insuring against all risks of direct physical loss covers damage caused by failure of boom clutch on lifting crane unless otherwise excluded in policy. Peter Kiewit Sons' Co. v. Hartford Fire Ins. Co. ---------- 553

17. Claimant of substantial damages must furnish appropriate data to enable trier of fact to find amount of damages with reasonable certainty if evidence of damages or amount thereof susceptible of definite proof; damages may not be established by conjecture, speculation, or doubtful proof. Masten v. Campbell Manuf. Co. ---------- 646

18. While measure of damages in action for breach of agreement by employee not to enter business in competition with employer usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact. Rambo v. Galley ---------- 692

19. In action for breach of contract, plaintiff will be called upon, in order to recover substantial damages, to furnish such data to enable court, with reasonable degree of certainty and exactness, to estimate actual damages, and if he fails to do this he can recover only nominal sum. Rambo v. Galley -- 692

20. Measure of damages in case of breach of contract is amount which will compensate injured person for loss which fulfillment of contract would have prevented or breach of it has entailed. Ranchland Auto. Inc. v. Cleveland ---------- 804

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Declaratory Judgments Act remedial and to be liber-

ally construed and administered. State ex rel. Meyer v. Peters ---------- 817

Deeds.

1. Where conveyances from common grantor to adjoining landowners describe premises conveyed by lot numbers, but adjoining owners purchase with reference to boundary line then marked on ground, boundary line, as marked on ground by common grantor, binding upon such adjoining landowners and all persons claiming under them irrespective of length of time elapsed thereafter. Phillippe v. Horns 304
2. Fixed monuments and surveys staked out on ground control over field notes showing courses, distances, and quantities; or description of survey in words; or picturization of survey in plat. Phillippe v. Horns 304
3. General rule that for most purposes when deed made in execution of contract of sale, provisions of contract merged in deed. Weiner v. Hroch ---------- 389
4. True consideration for deed of conveyance of real estate may be shown by parol evidence, although deed recites consideration. Weiner v. Hroch ---------- 389
5. Agreement to pay existing mortgage, as part of consideration for conveyance of mortgaged premises, need not be inserted in deed, neither must it necessarily be in writing; such agreement independent undertaking of party making it, conveyance affording sufficient consideration to sustain it when its existence established by preponderance of evidence. Weiner v. Hroch ---------- 389
6. Mere existence of confidential relationship between grantor and grantee does not of itself show undue influence invalidating deed, and does not render deed void or voidable, when transaction open, honest, and fair, or where deed made by grantor with full knowledge of its nature and effect, and because of deliberate desire of grantor. Gaeth v. Newman ---------- 756
7. In determining whether presumption of undue influence rebutted, court may consider whether grantor has received independent advice. Gaeth v. Newman 756
8. Absence of independent advice means absence of opportunity to have independent advice, and not necessary that acts of grantor conform to such advice in order to validate deed. Gaeth v. Newman ---------- 756
9. In order to establish undue influence invalidating deed, must be proof that circumstances of execution

of deed inconsistent with any hypothesis but undue influence, which must be proved in connection with conveyance in suit, and not with other things. Gaeth v. Newman ---------- 756

10. Public policy forbids that deeds and mortgages of real estate, duly authenticated in mode pointed out by statute, should be set aside except upon clear and convincing proof that certificate of acknowledgement false. Gaeth v. Newman ---------- 756

Default.

Failure of appellee to file brief in Supreme Court not concession of error; record and brief of appellant must be considered. Drainage Dist. No. 10 v. Canaday 701

Divorce.

1. In proceeding for modification of order for child support, post-decree birth is change of circumstances, although decree provided for support of unborn child. Schneider v. Schneider ---------- 80

2. Father primarily liable for support of his minor children, his liability being independent of assets of the mother. Schneider v. Schneider ---------- 80

3. Order of trial court in child support proceeding not overturned unless abuse of discretion found. Schneider v. Schneider ---------- 80

4. In determining question of who should have care and custody of children upon divorce, paramount consideration is best interests of welfare of children. Phillips v. Phillips ---------- 89
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5. If circumstances of parties change and in best interests of children, court may from time to time revise or alter divorce decree so far as custody, care, and maintenance of children concerned. Phillips v. Phillips ---------- 89

6. In cases involving determinations of child custody, findings of trial court, both as to evaluation of evidence and as to matter of custody, not disturbed unless clear abuse of discretion shown. Phillips v. Phillips ---------- 89

7. Divorce action for trial de novo in Supreme Court; however it cannot ignore fact that trial court had opportunity to observe parties. Newton v. Newton 242

8. Judgment of trial court fixing amount of alimony

not disturbed on appeal unless good cause shown. Newton v. Newton ---------- 242
Martin v. Martin ---------- 393
9. Amount of alimony granted wife not determined alone from property possessed by husband; many other factors enter into its determination. Newton v. Newton ---------- 242
10. Fixing of amount of alimony rests, in each case, within sound discretion of court. Ramold v. Ramold 314
Hoffmann v. Hoffmann ---------- 408
11. Discretion of court respecting custody and support of minor children subject to review; determination of trial court, however, ordinarily not disturbed unless has been clear abuse of discretion or clearly against weight of evidence. Oberg v. Oberg ---------- 316
12. Duty of court to scrutinize settlement agreements closely in divorce actions and protect against fraud, intimidation, and ignorance and guard against unconscionable results; court required to render fair and equitable result under all circumstances. Martin v. Martin ---------- 393
13. Problems of alimony awards not subject to solution by mathematical formula; generally speaking, awards of Supreme Court in cases of this kind vary from one-half to one-third of value of property, depending on facts and circumstances of particular case. Hoffmann v. Hoffmann ---------- 408
14. Court which has personal jurisdiction of parties, both of whom are domiciled within state, may determine custody of child as between parties even though child absent from jurisdiction. Loveall v. Loveall -- 457
15. Court which has personal jurisdiction of parties may determine custody of child as between parties although child neither domiciled nor present in state. Loveall v. Loveall ---------- 457
16. On appeal in action for divorce, cause tried de novo in Supreme Court. Gydesen v. Gydesen ---------- 538
17. Divorce action triable de novo upon issues presented by appeal. Junker v. Junker ---------- 555
18. Division of property and allowance of alimony in divorce actions always determined by facts of each case. Junker v. Junker ---------- 555
19. Rule for determining alimony or division of property in divorce actions provides no mathematical formula by which such award can be exactly determined; generally speaking, awards of Supreme Court

in such cases vary from one-third to one-half of value of property involved, depending upon facts and circumstances of particular case. Junker v. Junker ---------- 555

20. Discretion of lower court with respect to awarding custody of minor children subject to review, but determination of lower court not ordinarily disturbed unless clear abuse of discretion shown or clearly against weight of evidence. Scripter v. Scripter ---- 576

21. Actions in equity on appeal to Supreme Court triable de novo, subject, however, to rule that when credible evidence on material questions of fact in irreconcilable conflict, Supreme Court will, in determining weight of evidence, consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Scripter v. Scripter ---------- 576

22. Division of property and allowance of alimony and child support in divorce actions always to be determined by facts in each case, and courts will consider all pertinent facts in reaching an award that is just and equitable. Sees v. Sees ---------- 769

23. In action for divorce, if evidence principally oral and in irreconcilable conflict and determination of issues depends to reasonable extent upon reliability of respective witnesses, conclusion of trial court given great weight, and will not be disturbed on appeal unless good cause shown. Sees v. Sees ---------- 769

24. In determining child custody, paramount consideration is best interests and welfare of children. Nemecek v. Nemecek ---------- 799

Domicile.

1. Court which has personal jurisdiction of parties, both of whom are domiciled within state, may determine custody of child as between parties even though child absent from jurisdiction. Loveall v. Loveall -- 457

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Drains and Drainage Districts.

1. Exactness of apportionment of benefits among landowners in drainage district impossible. Drainage Dist. No. 10 v. Canaday ---------- 701

2. Upon appeal to district court from decision of board of supervisors of drainage district, all original objections made to classification and assessment of benefits heard and determined in summary manner as in equity, and upon appeal to Supreme Court, cause tried de novo. Drainage Dist. No. 10 v. Canaday -- 701
3. When, as required by statute, district engineer has examined land and made his report to board of supervisors of drainage district which approved report, report furnishes prima facie evidence of classification and benefits, and in absence of fraud, such evidence sufficient to sustain decision of board unless decision overcome by competent evidence to contrary. Drainage Dist. No. 10 v. Canaday ---------- 701
4. Land that will not be benefited by improvement proposed by drainage district ought not be annexed to district. Lost Creek Drainage Dist. v. Elsam ------ 705

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Crime of embezzlement of public money as defined by cited statute applies only to officers or persons charged by law with performance of duties therein mentioned, and police patrolman collecting coins from parking meters as part of duties designated by his superior cannot properly be informed against thereunder. State v. Williams ---------- 565

Eminent Domain.

1. In eminent domain proceeding where part of property taken, landowner may recover value of land appropriated and depreciation in value of remainder of land; remainder generally considered land owned by

same proprietor, contiguous to land taken, and devoted to same use. Verzani v. State ---------- 162
2. In eminent domain proceeding, anticipated profits from continued carrying on of business in established location cannot be considered in estimating damages, and profits of business cannot be shown for purpose of proving value of property. Verzani v. State ---------- 162
3. Damage claimed to result from improper design or construction of highway should be pleaded specially. Verzani v. State ---------- 162
4. Damage related to traffic flow not compensable. Verzani v. State ---------- 162
5. In eminent domain proceeding, on appeal by condemner from award of county court appraisers, interest added or allowed only from date on which condemner deposited amount of appraisers' award and became entitled to enter into possession of property involved. This is not constitutionally impermissible. Petersen v. School Dist. of Bellevue ---------- 354
6. Execution and approval of undertaking required in cited statute directory only. Neumeyer v. Omaha Public Power Dist. ---------- 516
7. Insofar as Jacobitz v. Bussinger, 179 Neb. 524, 138 N. W. 2d 839, and Gebhart v. Tri-State Generation & Transmission Assn., 181 Neb. 457, 149 N. W. 2d 41, hold section 76-716, R. R. S. 1943, mandatory and jurisdictional, they are overruled. Neumeyer v. Omaha Public Power Dist. ---------- 516

Employer and Employee.

1. Employer not liable for negligence of one whom his employee procures or permits to assist in work without proof that employee had authority from employer to procure or permit assistance. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
2. Where has been continuous or customary use of assistant by employee, and employer has known of this practice and acquiesced in it, employer liable for negligence of assistant as though actually employed by himself. Barkalow Bros. Co. v. Floor-Brite, Inc. 568
3. While measure of damages in action for breach of agreement by employee not to enter business in competition with employer usually difficult of exact computation, he who is damaged will not be precluded from recovering because of that fact. Rambo

v. Galley ---------- 692
4. In absence of special circumstances, beyond question that employee, unless contractually prohibited, may upon termination of his employment, compete with his former employer either on his own or on another's behalf. Rambo v. Galley ---------- 692

Equity.

1. Where certificate of occupancy properly obtained, in accordance with zoning statutes and ordinances, may not be arbitrarily revoked where certificate holder has incurred substantial expenses, commitments, and obligations in good faith reliance upon certificate. A. C. Nelson Enterprises, Inc. v. Cook ------ 184
2. Equity considers statutory provisions concerning nonpayment of rent to secure rent and not to forfeit lease, provided tenant acts in good faith and pays promptly on demand. Marine Equipment & Supply Co. v. Welsh ---------- 385
3. Defenses in forcible entry and detainer actions may be equitable; tenant will be relieved from technical forfeiture in circumstances in which absolute good faith shown and exercise of equitable principles in his behalf necessary that gross injustice may be prevented. Marine Equipment & Supply Co. v. Welsh 385
4. Duty of court to scrutinize settlement agreements closely in divorce actions and protect against fraud, intimidation, and ignorance and guard against unconscionable results; court required to render fair and equitable result under all circumstances. Martin v. Martin ---------- 393
5. Actions in equity on appeal to Supreme Court are triable de novo, subject, however, to rule that when credible evidence on material questions of fact in irreconcilable conflict it will consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Martin v. Martin ---------- 393
6. Charitable trusts are special favorites of courts of equity which will preserve and enforce them if possible under rules of law. Garwood v. Drake University ---------- 605
7. When action in equity appealed, duty of Supreme Court to try issues de novo and reach independent conclusion without reference to findings of district court. Rambo v. Galley ---------- 692

8. Where in action in equity, oral evidence in respect to material issue so conflicting that it cannot be reconciled, Supreme Court will consider fact that trial court observed witnesses and their manner of testifying and must have accepted one version of facts rather than opposite. Rambo v. Galley ---------- 692

Estates.

1. Law favors early vesting of estates; in construing will containing devise of life estate and devise of remainder, inference of vested remainder stronger than inference of contingent remainder if meaning obscure in this respect. Rudy v. Wagner ---------- 508
2. Words "in the event of death," "in case of death," or "at his death" do not have effect of postponing vesting of estate in remainder to time of death of life tenant. Rudy v. Wagner ---------- 508
3. In absence of provisions indicating contrary, remainder granted in will to children of life tenant becomes vested at once in children, defeasibly, despite presence of limitation over in event of death of life tenant leaving no child. Rudy v. Wagner ---------- 508
4. Devise to children as class of remainder over after life estate vests title to estate in remainder in such of them as are living at time of death of testator and in those born during continuance of life estate from moment of their birth; estate in remainder when once vested does not lapse by reason of death of beneficiary prior to expiration of life estate unless will so provides. Rudy v. Wagner ---------- 508
5. Where language conveying remainder interest to class does not provide for defeasance in case of death of one of class during continuance of life estate, vested interest of such member of class does not lapse but descends to his heirs. Rudy v. Wagner -- 508
6. Under specified testamentary language, devise of remainder over after life estate was to children of life tenant as a class; estate in remainder vested in each of them as they were born during continuance of life estate, and did not lapse as to child who predeceased life tenant; remainder defeasible only in event of death of life tenant, leaving no child or children. Rudy v. Wagner ---------- 508

Estoppel.

1. Naked oral promise to pay debt will not, in absence

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2. A variable in issue preclusion is identity of issues in the two trials. Drainage Dist. No. 10 v. Canaday 701
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1. Burden of proof of exceptions within ambit of Depressant and Stimulant Drugs Act on party attempting to bring himself within exceptions. State v. Minor 23
2. Wife's incompetency in criminal proceedings against her husband limited to testimonial utterances; she is competent to supply information for presentence report. State v. Minor---------- 23
3. Sentencing judge has broad discretion in source and type of evidence he may use to assist him in determining kind and extent of punishment to be imposed within limits fixed by statute; he may consider reports of probation officers, police reports, affidavits, and other information, including his own observations of defendant. State v. Minor ---------- 23
4. Modern concepts individualizing punishment have made it necessary that sentencing judge not be denied opportunity to obtain pertinent information by requirement of rigid adherence to restrictive rules of evidence properly applicable to trial. State v. Minor 23
5. Parol evidence rule does not prevent reception or consideration of evidence to prove promissory fraud. Abbott v. Abbott ---------- 61
6. Claim liquidated if evidence furnishes data which, if believed, makes it possible to compute amount, without reliance upon opinion or discretion. Abbott v. Abbott ---------- 61
7. In determining sufficiency of evidence to sustain conviction in criminal prosecution, not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence. State v. Rose ---------- 84
8. Not burden of State to establish no discrimination in jury selection until at least prima facie case of discrimination established. State v. Casados ------ 91
9. As general rule, evidence of other crimes than

that with which accused charged not admissible in criminal prosecution. State v. Casados 91
10. Evidence of other crimes, similar to that charged, relevant and admissible when tends to prove particular criminal intent necessary to constitute crime charged. State v. Casados 91
11. Proof of another distinct substantive crime not admissible in criminal prosecution unless some legal connection between the two upon which it can be said one tends to establish the other or some essential fact in issue. State v. Casados 91
12. Supreme Court, in criminal action, will not interfere with verdict of guilty based upon conflicting evidence unless so lacking in probative force that, as matter of law, insufficient to support finding of guilt beyond reasonable doubt. State v. Monroe .. 100
13. Where actual verbatim record of proceedings on taking plea of guilty lost, reasonably accurate account of what took place established by other evidence not "silent record" within proscription of Boykin v. Alabama. State v. Hall 130
14. When, in opinion of Supreme Court, sentence excessive or not warranted by evidence, statute contemplates correction on appeal. State v. Etchison 134
15. In post conviction cases, rule clear that petitioner has burden of establishing basis for relief. State v. Fusby 139
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16. Evidence that property taken without right or leave and abandoned at distant place will sustain finding of intent to keep wrongfully. State v. Blotzer 143
17. In every case, before evidence on an issue submitted to jury, preliminary question for court, not whether literally no evidence, but whether any upon which jury can proceed to find verdict for party producing it, upon whom burden of proof imposed. Baker v. Daly 156
18. Mere scintilla of evidence not enough to require submission of an issue to jury. Baker v. Daly 156
19. Where an issue, even assuming properly pleaded, affords no basis for recovery under evidence adduced in case, trial court's submission of such issue to jury constitutes error. Baker v. Daly 156
20. Must be evidence to support finding that inaction of certain parties for whose actions owner allegedly responsible in fact cause of delay in completion of constructive contract. Abel Constr. Co. v. School

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21. Apparent authority is power to affect legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with other's manifestations to such third persons. Abel Constr. Co. v. School Dist. of Seward ---------- 166
22. Conviction based on eyewitness identification at trial following pretrial identification by photograph and lineup will be set aside on those grounds only if pretrial identification procedures so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Reed ---------- 195
23. Description of land in contract under cited statute sufficient if contains data from which land may be identified and ascertained with certainty; parol evidence admissible to apply description to subject matter, if parol evidence does not vary or contradict written instrument. Wisnieski v. Coufal ------ 200
24. Conviction may rest on uncorroborated testimony of accomplice. State v. Oglesby ---------- 211
25. Fact accomplice guilty of willful false swearing on material matter not automatically discredits his testimony as matter of law in all cases; ordinarily, his credibility question for jury under proper cautionary instruction. State v. Oglesby ---------- 211
26. Question of constitutionality of city ordinance not considered by Supreme Court unless properly presented or offered in evidence in district court. State v. Radcliff ---------- 236
27. Photographs admissible in evidence if shown true and correct representations of places or subjects purport to represent at times pertinent to inquiry; admission of photographs largely within discretion of trial court and unless abuse of discretion shown, error not predicated thereon. State v. Radcliff -- 236
28. On appeal to district court from order of Director of Motor Vehicles revoking driver's license for point violations, completely void judgments, erroneous or fraudulent records, and abstracts of convictions may be challenged at evidentiary hearing and necessary foundational facts must support validity of order of revocation. State v. Lessert ---------- 243
29. On appeal of workmen's compensation case to Supreme Court, if reasonable competent evidence to

support findings of fact in trial court, judgment, order, or award not modified or set aside for insufficiency of evidence. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
Borowski v. Armco Steel Corp. ---------- 654
30. Test usually employed in this state to determine whether relationship of master and servant exists whether alleged employer has control of workman and of details, mode, and manner of doing work. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
31. Whether accident arises out of and in course of employment must be determined by facts of each case; no fixed formula by which question may be resolved. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
32. In determining whether risk arises out of employment, test to be applied to any act or conduct of employee which does not constitute direct performance of his work whether it is reasonably incident thereto or so substantial a deviation as to constitute break in employment and to create formidable independent hazard. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
33. Burden on one who attacks statute valid on face to prove facts to establish its invalidity. City of Parkview v. City of Grand Island ---------- 267
34. Jury verdict based upon conflicting evidence not set aside unless so clearly wrong as to induce belief on part of Supreme Court that must have been found through passion, prejudice, mistake, or some means not apparent in record. Wright v. Haffke ---------- 270
Moats v. Lienemann ---------- 452
35. In reviewing evidence where jury returned verdict for defendant, defendant must have benefit of any and all reasonable inferences deducible from proof. Wright v. Haffke ---------- 270
36. Common purpose among two or more persons to commit crime need not be shown by positive evidence but may be inferred from circumstances surrounding act and from defendant's conduct subsequent thereto. Wright v. Haffke ---------- 270
37. When firearm used, question always is whether force used exceeded permissible limits and is question for jury under proper instructions. Wright v. Haffke ---------- 270
38. Issue of gross negligence for jury if evidence relating thereto conflicting and from which reasonable minds might arrive at different conclusions.

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39. When evidence resolved most favorably to existence of gross negligence and facts thus determined, inquiry of whether they support finding of gross negligence one of law. Demont v. Mattson ------ 277
40. More than one act of negligence may in combination amount to gross negligence under guest statute; several acts should be weighed as whole. Demont v. Mattson ---------- 277
41. Whether particular act or omission may be termed gross depends upon all facts and circumstances, including other negligent acts or omissions, which may affect quality of conduct in particular case; what would amount to slight negligence under certain circumstances might under different circumstances be gross negligence. Demont v. Mattson -------- 277
42. Before contributory negligence of guest passenger presents jury question, must be evidence that it proximately contributed to accident and injuries. Demont v. Mattson ---------- 277
43. Burden of proof upon claimant in workmen's compensation case to establish by preponderance of evidence that personal injury sustained by employee, arising out of and in course of his employment. Breed v. Interstate Glass Co. ---------- 284
44. Problem concerning admissibility of evidence of other offenses is special aspect of broad general problem of relevancy; generally test of admissibility of such evidence whether evidence relevant and material to any issue on trial, or whether it fairly tends to prove particular offense charged or an essential element thereof. State v. Meadows ------ 287
45. Whenever point reached at which trier of fact being told that which it is entirely equipped to determine without witness' aid, testimony superfluous. State v. Thunder Hawk ---------- 294
46. Supreme Court may reduce sentence when in its opinion sentence excessive, and is under duty to render such sentence against accused as in its opinion may be warranted by evidence. State v. Thunder Hawk ---------- 294
47. Constitutions of Nebraska and United States provide that no person shall be compelled to give evidence against himself of an incriminating nature. State v. Bittner ---------- 298
48. Credibility of witness in criminal case cannot be impeached by showing his reputation for morality

bad, but such attack must be addressed directly to his reputation for truth and veracity. State v. Bittner ---------- 298

49. When chastity not an issue, evidence of general reputation that female witness is, or has been, not law-abiding, unchaste, or prostitute, inadmissible for purpose of impeaching witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for purpose of impeachment by evidence as to specific acts or instances. State v. Bittner ---------- 298

50. Discretion of court respecting custody and support of minor children subject to review; determination of trial court, however, ordinarily not disturbed unless has been clear abuse of discretion or clearly against weight of evidence. Oberg v. Oberg ------ 316

51. In determining whether motion for judgment notwithstanding verdict should have been sustained, evidence must be considered in light most favorable to party who obtained verdict. Haffke v. Grinnell -- 323

52. Under law of Nebraska, accused charged with rape cannot be convicted solely on testimony of prosecutrix. State v. Ferguson ---------- 330

53. In prosecution for rape, while evidence of prompt complaint standing alone insufficient corroboration, such evidence for consideration of jury as corroboration of main facts in issue. State v. Ferguson ---- 330

54. In prosecution for rape, not essential that prosecutrix be corroborated by other witnesses as to particular acts which constitute offense; sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to principal fact in issue. State v. Ferguson ---- 330

55. General denial available to defendant to challenge one or more of elements essential to recovery by plaintiff and effect of denial to put burden on plaintiff to establish by evidence matter denied. First Nat. Bank of Bellevue v. Rose ---------- 362

56. Where answer to petition consists of general denial, defendant may introduce such testimony as will tend to disprove testimony of plaintiff in support of his petition; for such purposes, no other allegations in answer necessary. First Nat. Bank of Bellevue v. Rose ---------- 362

57. Common purpose among two or more persons to commit crime need not be shown by positive evidence but may be inferred from circumstances sur-

rounding act and from defendant's conduct subsequent thereto. State v. Claire ---------- 373
58. In criminal case, Supreme Court will not interfere with verdict of guilty based upon evidence unless so lacking in probative force that it can say as matter of law that is insufficient to support finding of guilt beyond reasonable doubt. State v. Ryan ---------- 381
59. Convictions based on eyewitness identification at trial following pretrial indentification by photograph will be set aside on that ground only if photographic identification procedure so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Nero 383
60. True consideration for deed of conveyance of real estate may be shown by parol evidence, although deed recites consideration. Weiner v. Hroch ----- 389
61. Agreement to pay existing mortgage, as part of consideration for conveyance of mortgaged premises, need not be inserted in deed, neither must it necessarily be in writing; such agreement independent undertaking of party making it, conveyance affording sufficient consideration to sustain it when its existence established by preponderance of evidence. Weiner v. Hroch ---------- 389
62. Not province of Supreme Court in reviewing record in action at law to resolve conflicts in or weigh evidence. Weiner v. Hroch ---------- 389
Melcher v. Boesch Motor Co. ---------- 522
63. Actions in equity on appeal to Supreme Court are triable de novo, subject, however, to rule that when credible evidence on material questions of fact in irreconcilable conflict it will consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Martin v. Martin ---------- 393
64. While particular facts inadmissible in evidence upon direct examination for purpose of sustaining or overthrowing character, doctrine does not extend to cross-examination. State v. Newte ---------- 412
65. Plaintiff must not only show in breach of contract case his right of recovery, but elements and facts which compose measure of his recovery, and not leave jury to rove without guide or compass through limitless fields of conjecture and speculation. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435

66. Duty of district court to refrain from submitting to jury issue of damages when evidence such that it cannot determine such issue except by indulging in speculation and conjecture. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
67. In proceeding in error, review solely upon record made by tribunal whose action being reviewed; no new facts or evidence can enter into consideration of court. Harnett v. City of Omaha ---------- 449
68. Where appears in error proceeding that administrative agency acted within its jurisdiction and is some competent evidence to sustain its findings and order, order of administrative agency will be affirmed. Harnett v. City of Omaha ---------- 449
69. In every case, before evidence submitted to jury, there is preliminary question for court to decide, when properly raised, not whether is literally no evidence, but whether is any upon which jury can properly proceed to find verdict for party producing it, upon whom burden of proof imposed. Moats v. Lienemann ---------- 452
Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
70. Motion for directed verdict or for judgment notwithstanding verdict must be treated as admission of truth of all material and relevant evidence submitted on behalf of party against whom motion directed; such party entitled to have every controverted fact resolved in his favor and to have benefit of every inference that can reasonably be deduced from evidence. Moats v. Lienemann ---------- 452
71. In determining question of whether evidence sufficient to submit issues of negligence to jury, a party is entitled to have all conflicts in evidence resolved in his favor and benefit of every reasonable inference that may be deduced from evidence; if reasonable minds might draw different conclusions from set of facts thus resolved in favor of a party, issues of negligence for jury. Moats v. Lienemann ---------- 452
72. Hypothetical questions propounded to expert, if so framed as to fairly and reasonably reflect facts proved by any of witnesses in case, will be sufficient, provided subject one proper for expert testimony. Moats v. Lienemann ---------- 452
73. Where insurer's defense based upon exclusionary clause in policy, burden on insurer to prove facts which bring it within exclusion. Robinson v. State

Farm Mut. Auto. Ins. Co. ---------- 470
74. In determining whether motion for judgment notwithstanding verdict should have been sustained, evidence must be considered in light most favorable to party who obtained verdict; every controverted fact must be resolved in his favor and he is entitled to benefit of every reasonable inference that may be drawn therefrom. Department of Banking v. Colburn ---------- 500
75. Verdict of jury based upon conflicting evidence not set aside unless clearly wrong. Department of Banking v. Colburn ---------- 500
Melcher v. Boesch Motor Co. ---------- 522
76. Burden of proof on party relying on breach of warranty to show performance of conditions as to which right to assert warranty depends, or waiver thereof, or excuse for nonperformance. Melcher v. Boesch Motor Co. ---------- 522
77. In testing sufficiency of evidence to support judgment, evidence must be considered in light most favorable to successful party. Melcher v. Boesch Motor Co. ---------- 522
78. Damages for future loss of earning capacity may not be based on speculation, probabilities, or uncertainty, but must be shown by competent evidence as reasonably certain and proximately resulting from pleaded injury. Lake v. Southwick ---------- 533
79. In testing sufficiency of evidence to support verdict, must be considered in light most favorable to successful party; every controverted fact must be resolved in his favor and he should have benefit of every inference that can be reasonably drawn therefrom. Lake v. Southwick ---------- 533
Dahl v. Robinson ---------- 547
80. On appellate review of workmen's compensation case in Supreme Court, cause not considered de novo unless findings of fact not supported by evidence as disclosed by record. Swartz v. Hess, Inc. ---------- 542
81. Opinions of experts not binding on trier of facts. Swartz v. Hess, Inc. ---------- 542
82. Verdict may be set aside as excessive only when so clearly exorbitant as to indicate was result of passion, prejudice, or mistake or clear that jury disregarded evidence or controlling rules of law. Dahl v. Robinson ---------- 547
83. In determining sufficiency of evidence to sustain

verdict, must be considered most favorably to successful party and all conflicts resolved in his favor. Ristine v. Geigy Agricultural Chemicals ---------- 550

84. Testimony by plaintiff as to statements of defendants' agent made to third party and related to plaintiff by third party admissible to show statements were related to plaintiff and that he relied on them. Ristine v. Geigy Agricultural Chemicals - 550

85. While expert will be permitted to express his opinion, or even his belief, he cannot give his opinion upon precise or ultimate fact in issue before jury, which must be determined by it. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568

86. Plaintiff may establish its case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence not sufficient to sustain verdict unless circumstances proved by evidence of such nature and so related to each other that conclusion reached by jury only one that can fairly and reasonably be drawn therefrom. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568

87. Conjecture, speculation, or choice of possibilities not proof; must be something more which will lead reasoning mind to one conclusion rather than another. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568

88. Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568

89. Negligence question of fact and may be proved by circumstantial evidence and physical facts; however, law requires that facts and circumstances proved, together with inferences that may properly be drawn therefrom, indicate with reasonable certainty negligent act charged. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568

90. Discretion of lower court with respect to awarding custody of minor children subject to review, but determination of lower court not ordinarily disturbed unless clear abuse of discretion shown or clearly against weight of evidence. Scripter v. Scripter ---------- 576

91. Actions in equity on appeal to Supreme Court triable de novo, subject, however, to rule that when credible evidence on material questions of fact in irreconcilable conflict, Supreme Court will, in de-

termining weight of evidence, consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Scripter v. Scripter -- 576

92. Sentence dictated by inordinate emotion suspect; is only by coincidence that it finds support in evidence. State v. West ---------- 579

93. In considering application for permit as contract carrier, Railway Commission required to weigh special needs of shippers desiring contract carrier service; effect on protesting carriers of grant of application and effect on shippers of denial factors to be weighed in determining if grant of application consistent with public interest. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. - 584

94. Burden upon applicant for permit as contract carrier to show that proposed service specialized and fits need of proposed contracting shippers, that applicant fit, willing, and able to perform service, and that proposed operation will be consistent with public interest. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

95. Where transportation of specified commodities can be performed as well by common carriers as by contract carriers, need for contract carriers not established. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

96. If competent proof made by applicant, showing proposed service specialized and needed, and protested by common carriers showing willingness and ability to perform it, applicant must then establish he is better equipped and qualified to meet special needs of proposed contracting shippers than protesting common carriers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

97. Adequacy of existing services to perform normal needs of proposed contracting shippers not conclusive where new service better designed to fit special requirements of proposed contracting shippers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

98. Where is evidence to sustain factors for and against issuance of permit to contract carrier, required to be considered by Railway Commission by cited statutes, determination of public interest for commission and not courts. Wells Fargo Armored Service

Corp. v. Bankers Dispatch Corp. ---------- 584
99. Past unlawful actions do not necessarily bar on grounds of unfitness future grants of operating authority if public interest will best be served by approval. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584
100. In determining whether party entitled to directed verdict, evidence must be considered most favorably to other party; every controverted fact must be resolved in his favor, and he is entitled to benefit of every reasonable inference that may be drawn therefrom. Koob v. Long ---------- 640
101. Claimant of substantial damages must furnish appropriate data to enable trier of fact to find amount of damages with reasonable certainty if evidence of damages or amount thereof susceptible of definite proof; damages may not be established by conjecture, speculation, or doubtful proof. Masten v. Campbell Manuf. Co. ---------- 646
102. Not province of Supreme Court to resolve conflicts in evidence, pass on credibility of witnesses, or weigh evidence, unless so lacking in probative force as matter of law that is insufficient to support finding of guilt beyond reasonable doubt. State v. Embrey ---------- 649
103. Admission of executor or administrator not receivable against him as party in his personal capacity. Degmetich v. Beranek ---------- 659
104. Allowance by executrix of demand against estate based on promissory note executed by executrix and decedent tolls statute as to estate but not as against executrix in individual capacity. Degmetich v. Beranek ---------- 659
105. To remove bar of statute, debtor must unqualifiedly acknowledge existing liability. Degmetich v. Beranek ---------- 659
106. Admission or rejection of photographs in evidence largely within discretion of trial court; error may not be predicated thereon in absence of showing of abuse of discretion. Rowedder v. Rose ---------- 664
107. Where is some circumstantial evidence which tends to support allegation in petition for foreclosure of mortgage that no proceedings at law have been had for recovery of debt, and no contrary showing attempted, decree of foreclosure not reversed without showing that specific objection called to atten-

tion of trial court and also that defendant prejudiced by omission of direct proof. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---- 673
108. In cases involving child custody and determinations in juvenile court, findings of trial court, both as to evaluation of evidence and as to matter of custody, will not be disturbed unless clear abuse of discretion shown. Healey v. Hartman ---- 682
109. Court may terminate parental rights when it finds such action in best interests of child and it appears from evidence that parent has substantially, continuously, and repeatedly neglected child and refused to give child necessary parental care and protection. Healey v. Hartman ---- 682
110. When defendant seeks to appeal original proceedings pertaining to his conviction and fails to show he is acting in good faith and appeal has merit, he has failed to sustain required burden of proof. State v. Howell ---- 687
111. Failure to move for suppression of evidence seized unlawfully waives objection. State v. Howell --- 687
112. When evidence of guilt clear and exclusion of erroneous evidence obviously would not have resulted in different verdict, admission of such evidence harmless error. State v. Howell ---- 687
113. Where in action in equity, oral evidence in respect to material issues so conflicting that it cannot be reconciled, Supreme Court will consider fact that trial court observed witnesses and their manner of testifying and must have accepted one version of facts rather than opposite. Rambo v. Galley ---- 692
114. In action for breach of contract, plaintiff will be called upon, in order to recover substantial damages, to furnish such data to enable court, with reasonable degree of certainty and exactness, to estimate actual damages, and if he fails to do this he can recover only nominal sum. Rambo v. Galley ---- 692
115. When, as required by statute, district engineer has examined land and made his report to board of supervisors of drainage district which approved report, report furnishes prima facie evidence of classification and benefits, and in absence of fraud, such evidence sufficient to sustain decision of board unless decision overcome by competent evidence to contrary. Drainage Dist. No. 10 v. Canaday ---- 701
116. In quo warranto proceeding, ordinarily burden of

proof in first instance on defendant who claims right to office. Stasch v. Weber ---------- 710
117. In quo warranto proceeding, no legal presumption arises in favor of defendant merely from his establishment of possession of office which he claims. Stasch v. Weber ---------- 710
118. Generally, in quo warranto proceeding, when challenged official purports to hold office by virtue of election, he must show that election was held and that he was in fact elected. Stasch v. Weber ---- 710
119. Suppression of product of Fourth Amendment violation can be successfully urged only by one whose rights violated by search itself, not by one aggrieved solely by introduction of damaging evidence. State v. Rice ---------- 728
120. Seizing from clothing of lawfully arrested person evidence intimately connected with crime for which he is arrested not unreasonable under Fourth Amendment. State v. Rice ---------- 728
121. Information supplied to judicial officer issuing arrest warrant on sworn complaint may be supplemented by additional information which arresting officers themselves have or have acquired before arrest and which is corroborative of complicity of arrestee in crime. State v. Rice ---------- 728
122. Threats and expressions of ill will in intentional homicide admissible to show intent, malice, or motive; malice and motive relevant and material not merely as evidence of intent, but also on issue of guilt or innocence as tending to point to identity of perpetrator or perpetrators. State v. Rice ---- 728
123. In prosecution for intentional homicide committed against one of a class, threats by defendant against class admissible. State v. Rice ---------- 728
124. Defendants challenging joint trial must affirmatively demonstrate that joint trial has prejudiced their individual rights. State v. Rice ---------- 728
125. Irrelevant and immaterial evidence erroneously admitted not necessarily prejudicial. State v. Rice -- 728
126. Burden of proof upon person asserting undue influence to prove by preponderance of evidence: (1) That grantor, testator, or donor was person who would be subject to such influence; (2) that was opportunity to exercise such influence; (3) that was disposition to exercise such influence; and (4) that result was effect of such influence. Gaeth v. New-

man ---------- 756
127. Where validity of alleged gift between persons occupying confidential relationship attacked, burden of proving confidential relationship existed between parties rests on one attacking gift. Gaeth v. Newman ---------- 756
128. Where facts and circumstances show such a confidential, fiduciary, or trust relationship that it would be inequitable to sustain deed in question, then presumption of undue influence arises, and burden of going forward with evidence rests upon grantee to show bona fides thereof. Gaeth v. Newman ----- 756
129. Generally speaking, any presumption of undue influence may be rebutted by competent and sufficient evidence. Gaeth v. Newman ---------- 756
130. In determining whether presumption of undue influence rebutted, court may consider whether grantor has received independent advice. Gaeth v. Newman 756
131. Absence of independent advice means absence of opportunity to have independent advice, and not necessary that acts of grantor conform to such advice in order to validate deed. Gaeth v. Newman 756
132. In order to establish undue influence invalidating deed, must be proof that circumstances of execution of deed inconsistent with any hypothesis but undue influence, which must be proved in connection with conveyance in suit, and not with other things. Gaeth v. Newman ---------- 756
133. Public policy forbids that deeds and mortgages of real estate, duly authenticated in mode pointed out by statute, should be set aside except upon clear and convincing proof that certificate of acknowledgment false. Gaeth v. Newman ---------- 756
134. In action for divorce, if evidence principally oral and in irreconcilable conflict and determination of issues depends to reasonable extent upon reliability of respective witnesses, conclusion of trial court given great weight, and will not be disturbed on appeal unless good cause shown. Sees v. Sees -- 769
135. In interpreting written contract, meaning of which in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings admissible to discover meaning which each party had reason to know would be given to words by other party. Ranchland Auto, Inc. v. Cleveland -------- 804
136. Ordinarily, party entitled to benefit of testimony

of other witnesses in contradiction of his own, wherever his own not of character of judicial admission, and concerns only some evidential or constituent circumstance of his case; this is especially so as to circumstances of accident or similar event, because in such case party's testimony especially subject to inexactness of observation and memory. Sacco v. Gau ---------- 808

137. Where party testifies clearly and unequivocally to fact which is within his own knowledge, such testimony may be considered judicial admission; rule has particular application where party so testifying made no effort to retract, qualify, or otherwise explain positive force of his own evidence. Sacco v. Gau ---------- 808

138. Admission in rebuttal of testimony which should have been offered in chief rests in sound discretion of court. Sacco v. Gau ---------- 808

Executors and Administrators.

1. Admission of executor or administrator not receivable against him as party in his personal capacity. Degmetich v. Beranek ---------- 659
2. Allowance by executrix of demand against estate based on promissory note executed by executrix and decedent tolls statute as to estate but not as against executrix in individual capacity. Degmetich v. Beranek ---------- 659

Extradition.

1. Immaterial that complaint did not specifically allege commission of acts in this state intentionally resulting in crime in Kansas when requisition makes such facts clear. State of Kansas v. Holeb ------ 319
2. Substantial rights of citizens must be protected, but constitutional and statutory provisions relating to interstate extradition must be liberally construed to effectuate their purpose, and courts of one state must avoid view of their duties so narrow as to afford permanent asylum to offenders against laws of another state. State of Kansas v. Holeb ---------- 319
3. One who commits act in one state intentionally resulting in crime in another state may be extradited, and statement in Governor's warrant that accused is fugitive from justice from Kansas and has taken refuge in Nebraska must be disregarded

as surplusage. State of Kansas v. Holeb 319
4. Illegality of prisoner's custody prior to issuance of rendition warrant from sister state does not render warrant void and unenforceable. Bell v. Janing .. 690

Fees.

1. Reasonable attorney's fee to be determined by nature of case, amount involved in controversy, results obtained, and services actually performed therein, including length of time necessarily spent in case, care and diligence exhibited, and character and standing of attorney. Junker v. Junker 555
2. In determining fairness of award for attorney's fee, consideration may be given to provisions of Nebraska State Bar Association Minimum Fee Advisory Schedule. Junker v. Junker 555
3. While trial courts and appellate courts equally regarded as experts on value of legal services, trial court ordinarily has better opportunity for practically appraising situation, and appellate court will interfere only to correct patent injustice where allowance clearly excessive or insufficient. Junker v. Junker 555

Forcible Entry and Detainer.

1. Tenant possesses right to a demand for payment of rent and reasonable opportunity to pay; must be neglect or refusal on his part before landlord may claim forfeiture of lease or judgment of ouster for nonpayment of rent. Marine Equipment & Supply Co. v. Welsh 385
2. Equity considers statutory provisions concerning nonpayment of rent to secure rent and not to forfeit lease, provided tenant acts in good faith and pays promptly on demand. Marine Equipment & Supply Co. v. Welsh 385
3. Defenses in forcible entry and detainer actions may be equitable; tenant will be relieved from technical forfeiture in circumstances in which absolute good faith shown and exercise of equitable principles in his behalf necessary that gross injustice may be prevented. Marine Equipment & Supply Co. v. Welsh 385

Fraud.

1. Parol evidence rule does not prevent reception or

consideration of evidence to prove promissory fraud. Abbott v. Abbott ---------- 61
2. Disclaimer clause in bargain relevant to issue whether claimant in fact relied on false representation disclaimed in clause. Abbott v. Abbott ---------- 61

Frauds, Statute of.

1. Under provisions of cited statute, contract between broker and owner must be in writing and signed by both parties, and must describe land to be sold and set forth compensation of broker. Wisnieski v. Coufal ---------- 200
2. Under provisions of cited statute, terms under which owner willing to sell land need not be included in contract between broker and owner. Wisnieski v. Coufal ---------- 200
3. Description of land in contract under cited statute sufficient if contains data from which land may be identified and ascertained with certainty; parol evidence admissible to apply description to subject matter, if parol evidence does not vary or contradict written instrument. Wisnieski v. Coufal ---------- 200
4. Naked oral promise to pay debt will not, in absence of fraud or specific agreement not to take advantage of statute of limitations, estop defendant or debtor to plead statute of limitations. Degmetich v. Beranek ---------- 659

Gifts.

1. Charitable gift not permitted to fail because of any mistake or ambiguity in describing intended beneficiary or expressing its purpose if from language of bequest, when construed in light of all facts, intent of donor reasonably apparent. Garwood v. Drake University ---------- 605
2. Burden of proof upon person asserting undue influence to prove by preponderance of evidence: (1) That grantor, testator, or donor was person who would be subject to such influence; (2) that was opportunity to exercise such influence; (3) that was disposition to exercise such influence; and (4) that result was effect of such influence. Gaeth v. Newman ---------- 756
3. Affection, confidence, and gratitude of parent to child which inspires gift is natural and lawful influence and will not render it voidable unless such

influence has been so used as to confuse judgment and control will of donor. Gaeth v. Newman ---- 756
4. Where validity of alleged gift between persons occupying confidential relationship attacked, burden of proving confidential relationship existed between parties rests on one attacking gift. Gaeth v. Newman ---------- 756
5. Where facts and circumstances show such a confidential, fiduciary, or trust relationship that it would be inequitable to sustain deed in question, then presumption of undue influence arises, and burden of going forward with evidence rests upon grantee to show bona fides thereof. Gaeth v. Newman ---------- 756
6. Mere existence of confidential relationship between grantor and grantee does not of itself show undue influence invalidating deed, and does not render deed void or voidable, when transaction open, honest, and fair, or where deed made by grantor with full knowledge of its nature and effect, and because of deliberate desire of grantor. Gaeth v. Newman -- 756
7. In determining whether presumption of undue influence rebutted, court may consider whether grantor has received independent advice. Gaeth v. Newman 756
8. Absence of independent advice means absence of opportunity to have independent advice, and not necessary that acts of grantor conform to such advice in order to validate deed. Gaeth v. Newman - 756
9. In order to establish undue influence invalidating deed, must be proof that circumstances of execution of deed inconsistent with any hypothesis but undue influence, which must be proved in connection with conveyance in suit, and not with other things. Gaeth v. Newman ---------- 756

Governor.

Legislative bill, passed with emergency clause, vetoed by Governor, within ambit of Article IV, section 15, Constitution, and requires only three-fifths vote to override veto. Sandberg v. State ---------- 335

Guilty Plea.

1. Under circumstances in this case, where plea of guilty induced in part by misunderstanding as to recommendation county attorney would make at sentencing hearing, sentence vacated and cause re-

manded for resentencing. State v. Kimes ---------- 85
2. Valid plea of guilty in district court cures any defect may have occurred in proceedings before examining magistrate. State v. Birdwell ---------- 116
3. Standard for determining validity of guilty plea whether or not it represents voluntary and intelligent choice among alternative courses of action open to defendant. State v. Hall ---------- 130
State v. Simmons ---------- 365
4. Guilty plea motivated by existence of coerced confession not subject to collateral attack where defendant had counsel unless counsel incompetent. State v. Hall ---------- 130
5. When counsel has advised defendant to plead guilty, defendant who heeded such advice may not subsequently attack voluntariness of guilty plea so long as counsel's advice within range of competence demanded of attorneys in criminal cases. State v. Hall 130
6. That guilty plea must be intelligently made, not a requirement that all advice offered by defendant's lawyer withstand retrospective examination in post conviction hearing. State v. Hall ---------- 130
7. Where actual verbatim record of proceedings on taking plea of guilty lost, reasonably accurate account of what took place established by other evidence not "silent record" within proscription of Boykin v. Alabama. State v. Hall ---------- 130
8. Record of arraignment at which plea of guilty entered must show that court determined was factual basis for plea. State v. Simmons ---------- 365
9. Plea of guilty permits finding conforming to allegations of complaint. Melanson v. State ---------- 446

Habeas Corpus.

1. In child custody action between grandmother and aunt, court will consider best interests of child and make such order for its custody as will be for its welfare. Cain v. Adams ---------- 152
2. In habeas corpus proceeding to determine custody of child, prime consideration is welfare of child. Loveall v. Loveall ---------- 457

Hearings.

Due process does not require notice and hearing before order of revocation issued by Director of Motor Vehicles for point violations under cited statutes; in

such cases, likelihood of error and irreparable harm to individual so slight that compelling governmental interest in removing from highway drivers who have by record of convictions demonstrated unsafe driving habits outweighs need for prior notice and hearing. Stauffer v. Weedlun ---------- 105

Highways.

1. In absence of prohibition by statute or ordinance, person may cross street at any place and not limited to crossing at intersections; driver of automobile owes to one crossing street at point not regular crossing duty of reasonable and ordinary care under circumstances. Koob v. Long ---------- 640
2. No person shall turn vehicle from direct course on highway unless such movement can be made with reasonable safety, and then only after giving clearly audible signal by sounding horn if any pedestrian may be affected by such movement. Koob v. Long 640

Homicide.

1. Sentence of not less than 4 nor more than 7 years for manslaughter not excessive. State v. Mathews 251
2. Person who has care, custody, or control of child and causes death of child by willfully or negligently causing or permitting life of child to be endangered guilty of manslaughter. State v. Crawford ---------- 378
3. Parent who negligently or willfully fails to obtain medical aid for child, thereby causing his death, guilty of manslaughter. State v. Crawford ---------- 378
4. Threats and expressions of ill will in intentional homicide admissible to show intent, malice, or motive; malice and motive relevant and material not merely as evidence of intent, but also on issue of guilt or innocence as tending to point to identity of perpetrator or perpetrators. State v. Rice ---------- 728
5. In prosecution for intentional homicide committed against one of a class, threats by defendant against class admissible. State v. Rice ---------- 728

Husband and Wife.

1. Wife's incompetency in criminal proceedings against her husband limited to testimonial utterances; she is competent to supply information for presentence report. State v. Minor ---------- 23
2. Term family as used in cited statute includes hus-

band who is residing in same household with other members. Nichol v. Clema ---------- 74
3. Medical services furnished husband individually are necessaries within meaning of cited statute for which wife may be liable. Nichol v. Clema -------- 74
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1. Lessee of common school land possesses compensable interest in improvements covered by statute and placed by him or his predecessor in interest on land prior to September 14, 1953, in accordance with statute, notwithstanding subsequent determination of unconstitutionality of statute or absence of permission from Board of Educational Lands and Funds. State v. Carman ---------- 466
2. Burden of establishing ownership of compensable interest in "improvements" on school land leases on lessee; burden may be satisfied by proof of purchase, or proof that lessee personally placed improvements on land, or proof that they were acquired by gift. State v. Bush ---------- 824
3. Presence of "improvements" (except crops) on school lands, standing alone, does not establish ownership in tenant nor satisfy burden of proving ownership. State v. Bush ---------- 824
4. Fact of ownership of improvements does not establish right to receive compensation nor determine any valuation of such improvements. State v. Bush ---- 824
5. Fencing by tenants on school lands does not require approval from Board of Educational Lands and Funds. State v. Bush ---------- 824
6. In event of sale of school lands to third person, tenant has right to compensation resulting from "improvements" or crops compensable under school land lease statutes. State v. Bush ---------- 824

Infants.
1. In child custody action between grandmother and aunt, court will consider best interests of child and make such order for its custody as will be for its welfare. Cain v. Adams ---------- 152
2. In determining whether to accept or reject upset bid,

court must elect between two conflicting duties; ordinarily must strive to obtain best price possible for property sold, especially where interests of minors involved. On other hand, when sale free of fraud and adequate price realized, consideration must be given to rights of purchaser and stability of judicial sales. Glaser v. Weinberger ---------- 205

3. Order of juvenile court regarding custody of children not disturbed unless clear abuse of discretion or decision against weight of evidence. Anderson v. Doeschot ---------- 444

4. Neglected child is child under 18 years of age who is abandoned by his parents, who lacks proper parental care by reason of fault or habits of parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for health, morals, or well-being of such child. Healey v. Johnson ---------- 677
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5. Child custody statutes of Nebraska to be liberally construed to accomplish purposes of serving best interests of children involved. Healey v. Johnson ---- 677

6. In cases involving child custody determinations in juvenile court and other courts, findings of trial court, both as to evaluation of evidence and as to matter of custody, not disturbed unless clear abuse of discretion shown or decision against weight of evidence. Healey v. Johnson ---------- 677

7. In cases involving child custody and determinations in juvenile court, findings of trial court, both as to evaluation of evidence and as to matter of custody, will not be disturbed unless clear abuse of discretion shown. Healey v. Hartman ---------- 682

8. Court may terminate parental rights when it finds such action in best interests of child and it appears from evidence that parent has substantially, continuously, and repeatedly neglected child and refused to give child necessary parental care and protection. Healey v. Hartman ---------- 682

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1. Instruction that jury to make no inferences from

fact defendant did not testify is cautionary instruction for benefit of defendant. State v. Johnson ---- 151
2. Fact accomplice guilty of willful false swearing on material matter not automatically discredits his testimony as matter of law in all cases; ordinarily, his credibility question for jury under proper cautionary instruction. State v. Oglesby ---------- 211
3. When firearm used, question always is whether force used exceeded permissible limits and is question for jury under proper instructions. Wright v. Haffke ---------- 270
4. Instructions to jury considered as whole; when thus considered, if law correctly stated, case fairly submitted, and jury could not have been misled, claim of prejudicial error in instructions not available. Wright v. Haffke ---------- 270
5. Instructions must be considered and construed together. Demont v. Mattson ---------- 277
6. Ordinarily, uncorroborated testimony of accomplice who has been guilty of conscious falsehood may sustain conviction if proper cautionary instruction given. State v. Bittner ---------- 298
7. Instruction that criminal negligence or culpable neglect not slight breach of duty but gross failure to do what is required not prejudicially erroneous. State v. Crawford ---------- 378
8. Instructions must be construed together and isolated language, taken out of context, not sufficient to support challenge of error if whole instruction or all instructions not misleading or erroneous. Wisnieski v. Harms ---------- 721
9. Related instructions must be read and construed as whole and if when so read and construed they correctly state the law there is no error. State v. Rice 728
10. Instructions must be confined to issues supported by evidence. Sacco v. Gau ---------- 808
11. Instructions given to jury must be construed together, and if when considered as whole they properly state law, that is sufficient. Sacco v. Gau ---- 808

Insurance.

1. In absence of some contractual provision to contrary, risk of loss or damage by windstorm, fire, etc., to new building in course of construction normally on builder. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308

2. Building contractor as well as owner has insurable interest in building in course of construction. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. 308
3. Owner who contracts to procure insurance to cover contractor and fails to do so or who procures such insurance and fails to have contractor named as an insured becomes insurer of contractor. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ------ 308
4. Insurer cannot recover by right of subrogation from his own insured nor can rights of subrogated insurer rise higher than rights of its insured against third party. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308
5. Terms and provisions which control in construction of coverage afforded by temporary insurance "binder" those contained in ordinary form of policy usually issued by company at that time upon similar risks. Robinson v. State Farm Mut. Auto. Ins. Co. ------ 470
6. Where insurer's defense based upon exclusionary clause in policy, burden on insurer to prove facts which bring it within exclusion. Robinson v. State Farm Mut. Auto. Ins. Co. ---------- 470
7. Insurance policy insuring against all risks of direct physical loss covers damage caused by failure of boom clutch on lifting crane unless otherwise excluded in policy. Peter Kiewit Sons' Co. v. Hartford Fire Ins. Co. ---------- 553
8. Insurance agent who solicits application for insurance is, in controversy arising between insured and company issuing policy, regarded as representing company and not insured. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
9. Insurance agent who with authority receives and receipts for money for renewal of insurance policy deemed to all intents and purposes agent of company. Squires v. Implement Dealers Mut. Ins. Co. 590
10. Erroneous statement by insurer to insured that insurance policy has lapsed for alleged nonpayment of premium not legal equivalent of notice of election to cancel under terms of policy. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
11. Where insured because of errors in billing by agent of insurance company pays only that portion of renewal premium set forth in billing instead of entire premium, renewal policy not void but voidable at election of company under terms of policy.

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12. Section 44-501, R. R. S. 1943, directly conflicts with section 44-380, R. R. S. 1943. Insurance Co. of North America v. County of Hall ---------- 609
13. Section 44-501, R. R. S. 1943, as amended and reenacted by 1951 Legislature, provides that fire insurance policy shall conform as to provisions, agreements, and conditions with 1943 Standard Fire Insurance Policy of New York, and declares that no other or different provision, agreement, or clause shall be made part of such fire insurance policy. Insurance Co. of North America v. County of Hall _ 609
14. Under section 44-501, R. R. S. 1943, as amended in 1951, an insured's recovery on fire insurance policy limited by provisions of policy as written in conformity with 1943 Standard Fire Insurance Policy of New York. Insurance Co. of North America v. County of Hall ---------- 609
15. Obligation to defend suit for insured should be determined on basis of whether petition filed against him attempts to allege liability within terms of policy. Frazier, Inc. v. 20th Century Builders, Inc. 618

Intent.

1. Evidence of other crimes, similar to that charged, relevant and admissible when tends to prove particular criminal intent necessary to constitute crime charged. State v. Casados ---------- 91
2. Evidence that property taken without right or leave and abandoned at distant place will sustain finding of intent to keep wrongfully. State v. Blotzer ---- 143
3. Participation in criminal intent may be inferred from presence, companionship, and conduct. State v. Claire ---------- 373
4. If intent of aider different from that of perpetrator, aider's guilt measured by intent that actuated him. State v. Rice ---------- 728
5. Threats and expressions of ill will in intentional homicide admissible to show intent, malice, or motive; malice and motive relevant and material not merely as evidence of intent, but also on issue of guilt or innocence as tending to point to identity of perpetrator or perpetrators. State v. Rice ----- 728
6. In prosecution for intentional homicide committed against one of a class, threats by defendant against class admissible. State v. Rice ---------- 728

7. Interpretation given contract by parties themselves while engaged in performance of it is one of best indications of true intent of contract, and ordinarily, such construction of contract should be enforced. Ranchland Auto, Inc. v. Cleveland ---------- 804
8. In interpreting written contract, meaning of which in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings admissible to discover meaning which each party had reason to know would be given to words by other party. Ranchland Auto, Inc. v. Cleveland ---------- 804

Interest.
1. Where amount of claim liquidated, compensation in form of prejudgment interest allowed as matter of right. Abbott v. Abbott ---------- 61
2. Claim liquidated if evidence furnishes data which, if believed, makes it possible to compute amount, without reliance upon opinion or discretion. Abbott v. Abbott ---------- 61
3. In eminent domain proceeding, on appeal by condemner from award of county court appraisers, interest added or allowed only from date on which condemner deposited amount of appraisers' award and became entitled to enter into possession of property involved. This is not constitutionally impermissible. Petersen v. School Dist. of Bellevue - 354
4. By statute (1) on money due on instrument in writing or on settlement of account from day balance agreed upon, interest allowed; and (2) unsettled accounts bear interest after 6 months from date of last item. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669
5. By statute, party may recover prejudgment interest and an attorney's fee on claim of $2,000 or less for services rendered, labor done, or materials furnished, provided he presented claim 90 days prior to commencement of suit; compliance with condition mandatory. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669

Intoxicating Liquors.
1. In workmen's compensation case, burden of proof on defense of intoxication on employer. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
2. Power of a state to absolutely prohibit sale of in-

toxicating liquors includes power to prescribe conditions under which it may be sold. Major Liquors, Inc. v. City of Omaha ---------- 628

3. A state may protect its people against evils incident to use of intoxicants, and may exercise large discretion as to means employed. Major Liquors, Inc. v. City of Omaha ---------- 628

4. Ordinance prohibiting topless female dancing in places licensed for sale of intoxicating liquors valid exercise of police power. Major Liquors, Inc. v. City of Omaha ---------- 628

5. When nudity employed as sales promotion in establishments purveying intoxicating liquors, it is essentially "conduct" and subject to regulation or prohibition. Major Liquors, Inc. v. City of Omaha --- 628

Joint Tenancy.

Property owned in joint tenancy passes by reason of nature of title to surviving joint tenant upon death of other and does not pass by virtue of provisions of will of first joint tenant to die. Sheldon v. Watkins 599

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1. Where amount of claim liquidated, compensation in form of prejudgment interest allowed as matter of right. Abbott v. Abbott ---------- 61

2. Under rule of res judicata, conclusiveness of prior judgment extends not only to matters actually determined but also to matters that could have been raised or were necessarily adjudicated or implied in final judgment, whether raised or not. State v. Lessert ---------- 243

3. In absence of judgment or order finally disposing of case, Supreme Court has no authority nor jurisdiction to act, and in absence of such judgment or order appeal dismissed. Wulf v. Farm Bureau Ins. Co. 258

4. Indispensable parties to suit those who have such interest in controversy that court cannot render judgment without affecting their interest. Ohmart v. Dennis ---------- 260

5. Preclusive effect of administrative decision depends upon many factors. Ohmart v. Dennis ---------- 260

6. In determining whether motion for judgment notwithstanding verdict should have been sustained, evidence must be considered in light most favorable to party who obtained verdict. Haffke v. Grinnell ---- 323

7. Judgment of trial court fixing amount of alimony not disturbed on appeal unless good cause shown. Martin v. Martin ---------- 393
8. Conclusiveness of prior judgment precluding subsequent litigation of same cause of action between same parties much broader in its application than determination of questions actually involved in prior action; conclusiveness of judgment in such case extends not only to matters actually determined but also to other matters which properly could have been raised and determined and those which were necessarily adjudicated or necessarily implied in final judgment, whether formally raised or not. State ex rel. Southeast Rural Fire P. Dist. v. Grossman ---- 424
9. Ordinarily, effect given to prior judgment of another state determining custody of child as matter of comity unless change in circumstances requires different result. Loveall v. Loveall ---------- 457
10. Ordinarily, action may not be maintained as class action by plaintiff on behalf of himself and others unless he has power as member of class to satisfy judgment on behalf of all members of class. Hansen v. County of Lincoln ---------- 461
11. Provisions of cited statute do not contemplate that court which entered judgment declaring invalidity of tax will in class action supervise tax refund or credit procedures. Hansen v. County of Lincoln ---------- 461
12. In testing sufficiency of evidence to support judgment, evidence must be considered in light most favorable to successful party. Melcher v. Boesch Motor Co. ---------- 522
13. Purpose of summary judgment proceeding to pierce allegations of pleadings and show conclusively that controlling facts otherwise than alleged and that moving party entitled to judgment as matter of law. Frazier, Inc. v. 20th Century Builders, Inc. -------- 618
14. Where party has sustained burden and expense of trial and has succeeded in securing judgment of jury on facts in issue, he has right to keep benefit of that verdict unless there is prejudicial error in proceedings by which it was secured. Koob v. Long ------ 640
15. Fact alone that answer filed 10 days after answer day without leave of court not sufficient ground for thereafter entering default judgment against defendant. Vacanti & Randazzo Constr. Co. v. H.I.E. Food Products, Inc. ---------- 680

16. Where notice of appeal not filed within 1 month from entry of judgment or final order appealed from as required by cited statute, Supreme Court obtains no jurisdiction to hear appeal and appeal must be dismissed. State v. Howell ---------- 687
17. Judgment of trial court in action where jury waived has effect of verdict of jury and will not be set aside unless clearly wrong. Johnson v. Roueche ---------- 716
18. No judgment shall be reversed for error that does not affect substantial rights of adverse party. Hydrotex v. Putnum---------- 727
19. Where there are multiple defendants and judgment entered dismissing action as to one or more, but not all, defendants, judgment is final and appealable order. Green v. Village of Terrytown ---------- 840

Jurisdiction.

Appeal of post conviction proceeding from court inferior in jurisdiction to district court may only be taken to district court. State v. Williams ---------- 802

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1. Nebraska system of selecting jurors by use of voter registration lists constitutionally permissible. State v. Casados ---------- 91
2. Defendant in criminal case not constitutionally entitled to demand proportionate number of his race on jury which tries him nor on venire or jury roll from which petit jurors drawn. State v. Casados -- 91
3. Not burden of State to establish no discrimination in jury selection until at least prima facie case of discrimination established. State v. Casados ------ 91
4. In every case, before evidence on an issue submitted to jury, preliminary question for court, not whether literally no evidence, but whether any upon which jury can proceed to find verdict for party producing it, upon whom burden of proof imposed. Baker v. Daly ---------- 156
5. Mere scintilla of evidence not enough to require submission of an issue to jury. Baker v. Daly ------ 156
6. Where an issue, even assuming properly pleaded, affords no basis for recovery under evidence adduced in case, trial court's submission of such issue to jury constitutes error. Baker v. Daly ---------- 156
7. Questions of credibility ordinarily for jury to determine and not for court. State v. Rice ---------- 728

Landlord and Tenant.

1. Tenant possesses right to a demand for payment of rent and reasonable opportunity to pay; must be neglect or refusal on his part before landlord may claim forfeiture of lease or judgment of ouster for nonpayment of rent. Marine Equipment & Supply Co. v. Welsh ---------- 385
2. Equity considers statutory provisions concerning nonpayment of rent to secure rent and not to forfeit lease, provided tenant acts in good faith and pays promptly on demand. Marine Equipment & Supply Co. v. Welsh ---------- 385
3. Defenses in forcible entry and detainer actions may be equitable; tenant will be relieved from technical forfeiture in circumstances in which absolute good faith shown and exercise of equitable principles in his behalf necessary that gross injustice may be prevented. Marine Equipment & Supply Co. v. Welsh ---------- 385
4. Lessee of common school land possesses compensable interest in improvements covered by statute and placed by him or his predecessor in interest on land prior to September 14, 1953, in accordance with statute, notwithstanding subsequent determination of unconstitutionality of statute or absence of permission from Board of Educational Lands and Funds. State v. Carman ---------- 466
5. Burden of establishing ownership of compensable interest in "improvements" on school land leases on lessee; burden may be satisfied by proof of purchase, or proof that lessee personally placed improvements on land, or proof that they were acquired by gift. State v. Bush ---------- 824
6. Presence of "improvements" (except crops) on school lands, standing alone, does not establish ownership in tenant nor satisfy burden of proving ownership. State v. Bush ---------- 824
7. Fact of ownership of improvements does not establish right to receive compensation nor determine any valuation of such improvements. State v. Bush ---- 824
8. In absence of agreement, tenant on school lands has compensable interest in crops, annual or perennial, growing on such lands on date of termination of his lease. State v. Bush ---------- 824
9. In event of sale of school lands to third person, tenant has right to compensation resulting from "im-

provements" or crops compensable under school land lease statutes. State v. Bush ---------- 824

Larceny.

1. Stealing defined as taking without right or leave, with intent to keep wrongfully. State v. Blotzer -- 143
2. Evidence that property taken without right or leave and abandoned at distant place will sustain finding of intent to keep wrongfully. State v. Blotzer ------ 143

Legislature.

1. Legislature has plenary legislative authority limited only by state and federal Constitutions. Dwyer v. Omaha-Douglas Public Building Commission ---- 30
2. Legislative construction of statutory or constitutional provision, although not conclusive on courts, when deliberately made, entitled to great weight. Dwyer v. Omaha-Douglas Public Building Commission ---- 30
3. Legislature may create political corporations or quasi-municipal corporations to deal with matters of general public concern and utility. Dwyer v. Omaha-Douglas Public Building Commission ---- 30
4. In construing act of Legislature, all reasonable doubts must be resolved in favor of constitutionality. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
5. Power of classification rests with Legislature, and cannot be interfered with by courts unless clearly apparent that Legislature has by artificial and baseless classification attempted to evade and violate provisions of Constitution prohibiting local and special legislation. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
6. Fundamental law of this State that Legislature vested with taxing power without limit, subject only to restrictions contained in Constitution. Axiomatic, therefore, that provisions of Constitution in relation to taxation not grants of power but limitations on taxing power of State, lodged in Legislature. Sandberg v. State ---------- 335
7. Not denied that since adoption of Fourteenth Amendment, State taxing power can be exerted only to effect public purpose and does not embrace raising of revenue for private purposes, but requirements of due process leave free scope for exercise of wide legislative discretion in determining what expendi-

tures will serve public interest. Sandberg v. State 335
8. Nothing more familiar in taxation than imposition of tax upon class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for condition to be remedied. Sandberg v. State ---------- 335
9. Legislative bill, passed with emergency clause, vetoed by Governor, within ambit of Article IV, section 15, Constitution, and requires only three-fifths vote to override veto. Sandberg v. State ---------- 335
10. Legislature has plenary power and control over school districts, including provision for appointment or election of governing bodies thereof; consequently, it may provide limitations on any authority to be exercised by school board. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772
11. Legislature has complete control of actions of school boards; whether or not Legislature acted wisely in premises not matter of judicial determination; courts are not arbiters of legislative wisdom, but function as a check upon unauthorized and unconstitutional assumptions of power. School Dist. of Seward Education Assn. v. School Dist. of Seward 772

Lessor and Lessee.

Mere leasing of personal property, without proof of other circumstances, by covenantor to existing competitor of promisee, does not constitute breach of general covenant not to compete. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435

Libel and Slander.

1. Statute of limitations in libel action commences to run upon publication of defamatory matter which forms basis of action. Patterson v. Renstrom ------ 78
2. Absolute privilege attaches to defamatory statements made incident to, and in course of, judicial proceeding if defamatory matter has some relation to proceedings. Sinnett v. Albert ---------- 176
3. Rule of absolute privilege applicable not only to judicial proceedings but to quasi-judicial proceedings as well. Sinnett v. Albert ---------- 176
4. Relevancy of defamatory matter not technical legal relevancy but instead general frame of reference and relationship to subject matter of action. Sinnett v. Albert ---------- 176

5. Absolute privilege to publish false and defamatory matter in complaint made to committee on inquiry of Nebraska State Bar Association regarding alleged misconduct of attorney where defamatory matter related thereto. Sinnett v. Albert ---------- 176

Licenses and Permits.

1. Power to withhold license for good cause as well as standards defining good cause need not be expressly delegated where, by fair implication, in light of statutory purpose, such power implicitly delegated. Bartlett v. State Real Estate Commission 828
2. In absence of mandatory statutory requirements, power vested in officer or board to grant licenses carries with it, expressly or impliedly, power to exercise reasonable discretion in granting or refusing licenses. Bartlett v. State Real Estate Commission ---------- 828
3. Power to refuse license coextensive with power to revoke. Bartlett v. State Real Estate Commission -- 828
4. Where State Real Estate Commission has power to revoke a salesman's license upon specific grounds, it may properly refuse to issue license initially upon same grounds. Bartlett v. State Real Estate Commission ---------- 828

Limitations of Actions.

1. Statute of limitations in libel action commences to run upon publication of defamatory matter which forms basis of action. Patterson v. Renstrom ---------- 78
2. If employee suffers injury, which appears slight but progressive in course, and which several physicians unable to correctly diagnose, his failure to file claim or bring suit within time limited by law will not defeat right to recovery, if he gave notice and commenced action within statutory period after he had knowledge that compensable disability resulted from original accident. Borowski v. Armco Steel Corp. -- 654
3. Allowance by executrix of demand against estate based on promissory note executed by executrix and decedent tolls statute as to estate but not as against executrix in individual capacity. Degmetich v. Beranek ---------- 659
4. To remove bar of statute, debtor must unqualifiedly acknowledge existing liability. Degmetich v. Beranek ---------- 659
5. Naked oral promise to pay debt will not, in absence

of fraud or specific agreement not to take advantage of statute of limitations, estop defendant or debtor to plead statute of limitations. Degmetich v. Beranek ---------- 659

Limitations, Statute of.

Order entered denying plea of statute of limitations, after separate hearing on that issue, not final or appealable order. Wulf v. Farm Bureau Ins. Co. - 258

Master and Servant.

1. Test usually employed in this state to determine whether relationship of master and servant exists whether alleged employer has control of workman and of details, mode, and manner of doing work. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
2. In determining whether risk arises out of employment, test to be applied to any act or conduct of employee which does not constitute direct performance of his work whether it is reasonably incident thereto or so substantial a deviation as to constitute break in employment and to create formidable independent hazard. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
3. In tort action based exclusively on alleged negligence of employee or agent, valid release of that employee-agent releases employer or principal from liability, even though release specifically reserves all claims against employer-principal. Dickey v. Meier ---------- 420
4. If employee suffers injury, which appears slight but progressive in course, and which several physicians unable to correctly diagnose, his failure to file claim or bring suit within time limited by law will not defeat right to recovery, if he gave notice and commenced action within statutory period after he had knowledge that compensable disability resulted from original accident. Borowski v. Armco Steel Corp. -- 654

Mental Health.

1. Sexual Psychopath Act intended to permit removal of sexual psychopath from society until he is cured or no longer menace to safety of others. State v. King ---------- 563
2. Intent of Sexual Psychopath Act to require confinement until such time as offender not likely to

attack or otherwise inflict injury, loss, pain, or other evil on objects of his uncontrolled and uncontrollable desires. State v. King ---------- 563

Mortgages.

1. Agreement to pay existing mortgage, as part of consideration for conveyance of mortgaged premises, need not be inserted in deed, neither must it necessarily be in writing; such agreement independent undertaking of party making it, conveyance affording sufficient consideration to sustain it when its existence established by preponderance of evidence. Weiner v. Hroch ---------- 389
2. Where is some circumstantial evidence which tends to support allegation in petition for foreclosure of mortgage that no proceedings at law have been had for recovery of debt, and no contrary showing attempted, decree of foreclosure not reversed without showing that specific objection called to attention of trial court and also that defendant prejudiced by omission of direct proof. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---------- 673
3. In appealing from decree of foreclosure which orders sale of land, supersedeas bond should be conditioned as set out in cited statute, and amount of pledge matter of judicial discretion; in appealing from decree of foreclosure which directs payment of money and also orders sale of real estate, court may require supersedeas bond in amount computed as specified in said statute. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---------- 673

Motions, Rules, and Orders.

1. Due process of law provisions of federal and state Constitutions do not in every case prevent administrative agency from issuing order affecting private rights of individual without formal notice and hearing before such order. Stauffer v. Weedlun ---------- 105
2. Due process requirements may under some circumstances be satisfied if full hearing in courts available after administrative order with judicial power to stay irreparable injury pending court hearing. Stauffer v. Weedlun ---------- 105
3. Failure of Railway Commission previous to January 1, 1968, to enunciate rule and regulation on tacking cannot be construed to imply right to tack inherent

in certificates heretofore issued unless specifically restricted. Nebraska State Railway Commission v. Seward Motor Freight, Inc. ---------- 223
4. Right to prohibit tacking of regular to irregular route authorities, or irregular to irregular route authorities, policy determination within inherent authority of Railway Commission. Nebraska State Railway Commission v. Seward Motor Freight, Inc. 223
5. On appeal from order of Railway Commission administrative or legislative in character, only questions to be determined whether commission acted within scope of its authority and whether order reasonable and not arbitrarily made. Nebraska State Railway Commission v. Seward Motor Freight, Inc. 223
6. Order entered denying plea of statute of limitations, after separate hearing on that issue, not final or appealable order. Wulf v. Farm Bureau Ins. Co. 258
7. Statutory requirement that Oil and Gas Conservation Commission enter its order within 30 days after hearing directory, not mandatory. Ohmart v. Dennis 260
8. In determining whether motion for judgment notwithstanding verdict should have been sustained, evidence must be considered in light most favorable to party who obtained verdict. Haffke v. Grinnell _ 323
9. Criminal prosecution cannot be maintained under statute requiring permit be obtained from Department of Environmental Control "as required by it," i.e., department, in absence of rules, regulations, or standards fixing circumstances under which such permit "required." State v. West ---------- 371
10. After first motion for post conviction relief judicially determined, any subsequent motion for post conviction relief from same conviction and sentence may be dismissed by district court, unless motion affirmatively shows on face that basis relied upon for relief not available at time of filing prior motion for post conviction relief. State v. Smith -------- 388
11. Motion for directed verdict or for judgment notwithstanding verdict must be treated as admission of truth of all material and relevant evidence submitted on behalf of party against whom motion directed; such party entitled to have every controverted fact resolved in his favor and to have benefit of every inference that can reasonably be deduced from evidence. Moats v. Lienemann ---------- 452
12. In determining whether motion for judgment not-

withstanding verdict should have been sustained, evidence must be considered in light most favorable to party who obtained verdict; every controverted fact must be resolved in his favor and he is entitled to benefit of every reasonable inference that may be drawn therefrom. Department of Banking v. Colburn ---------- 500

13. Failure to move for suppression of evidence seized unlawfully waives objection. State v. Howell --- 687

14. Proper manner in which to challenge appropriateness of counterclaim is by motion to strike. The Tilden Bank v. Retzlaff ---------- 834

Motor Vehicles.

1. Issued motor vehicle operator's license gives rise to such legal entitlement as may not be taken away without procedural due process. Stauffer v. Weedlun 105

2. Due process does not require notice and hearing before order of revocation issued by Director of Motor Vehicles for point violations under cited statutes; in such cases, likelihood of error and irreparable harm to individual so slight that compelling governmental interest in removing from highway drivers who have by record of convictions demonstrated unsafe driving habits outweighs need for prior notice and hearing. Stauffer v. Weedlun ---------- 105

3. Due process of law provisions of federal and state Constitutions do not in every case prevent administrative agency from issuing order affecting private rights of individual without formal notice and hearing before such order. Stauffer v. Weedlun ------ 105

4. When condition of automobile indicative of criminal offense in plain sight of officer looking at automobile from outside, examination justified and legal. State v. Etchison ---------- 134

5. Failure of pedestrian with right-of-way to see approaching car within limit of danger or to misjudge its speed not ordinarily contributory negligence as matter of law. Baker v. Daly ---------- 156

6. Director of Motor Vehicles acts ministerially in revoking driver's license for point violations under cited statute. State v. Lessert ---------- 243

7. On appeal to district court from order of Director of Motor Vehicles revoking driver's license for point violations, completely void judgments, erroneous or fraudulent records, and abstracts of convictions may

be challenged at evidentiary hearing and necessary foundational facts must support validity of order of revocation. State v. Lessert ---------- 243
8. Unless particular traffic ordinance or statute judicially declared unconstitutional, motorist convicted of violation of that ordinance or statute cannot challenge its constitutionality in collateral proceeding to revoke his driver's license under point system provided by cited statutes. State v. Lessert ---------- 243
9. Generally negligence, as matter of law, for motorist to drive so fast on highway at night that he cannot stop in time to avoid collision with object within area lighted by his headlights. Fink v. Meister -- 248
10. Exceptions to general rule that motorist who cannot stop his automobile in time to avoid collision with object within range of his vision negligence as matter of law embrace those situations where reasonable minds might differ as to whether motorist exercising due care under particular circumstances. Fink v. Meister ---------- 248
11. Issue of gross negligence for jury if evidence relating thereto conflicting and from which reasonable minds might arrive at different conclusions. Demont v. Mattson ---------- 277
12. When evidence resolved most favorably to existence of gross negligence and facts thus determined, inquiry of whether they support finding of gross negligence one of law. Demont v. Mattson ------ 277
13. More than one act of negligence may in combination amount to gross negligence under guest statute; several acts should be weighed as whole. Demont v. Mattson ---------- 277
14. Whether particular act or omission may be termed gross depends upon all facts and circumstances, including other negligent acts or omissions, which may affect quality of conduct in particular case; what would amount to slight negligence under certain circumstances might under different circumstances be gross negligence. Demont v. Mattson ---------- 277
15. Where head of family owns or maintains car for family use and family member using car with express or implied consent of owner, negligence of family member driver imputed to head of family. Demont v. Mattson ---------- 277
16. Before contributory negligence of guest passenger presents jury question, must be evidence that it

proximately contributed to accident and injuries. Demont v. Mattson ---------- 277
17. Motorist who observes turning signal on automobile preceding him but fails to maintain control over his vehicle sufficient to enable him to avoid collision with automobile when movement indicated made, guilty of contributory negligence as matter of law, more than slight, and sufficient to bar his recovery. Haffke v. Grinnell ---------- 323
18. Motorist under duty to keep proper lookout and watch where he is driving, although he has right-of-way; when in place of relative safety he sees, or in exercise of reasonable care, should have seen, approach of moving vehicle in close proximity, and moves from safe place into path of approaching vehicle and is struck, his conduct constitutes negligence. Van Ostrand v. Beccard ---------- 326
19. Bright sunlight ordinarily condition that does not excuse duty of motorist to look and see approaching vehicles operated without negligence within radius that denotes limit of danger. Van Ostrand v. Beccard ---------- 326
20. Points to be assessed by Director of Motor Vehicles for speeding violation determined by amount by which limit exceeded. Melanson v. State ---------- 446
21. Amount by which limit exceeded not essential element of offense of speeding, but point system statute requires magistrate or judge make such finding; finding of information to be shown on abstract for conviction. Melanson v. State ---------- 446
22. In absence of prohibition by statute or ordinance, person may cross street at any place and not limited to crossing at intersections; driver of automobile owes to one crossing street at point not regular crossing duty of reasonable and ordinary care under circumstances. Koob v. Long ---------- 640
23. No person shall turn vehicle from direct course on highway unless such movement can be made with reasonable safety, and then only after giving clearly audible signal by sounding horn if any pedestrian may be affected by such movement. Koob v. Long 640
24. Left turn across public highway between intersections fraught with danger, and one making such movement required to exercise degree of care commensurate with the danger. Rowedder v. Rose ---- 664
25. When driver of motor vehicle turning across high-

way between intersections fails to look to front and rear for oncoming traffic at time and place when to look would be effective, or looks and negligently fails to see that which in plain sight, or in position where cannot see, question for court usually presented. Rowedder v. Rose ---------- 664

26. Driving at speed defined by statute, when such definition sets maximum speed and also includes requirement that such speed be reasonable and proper, having regard for traffic, use of road, condition of road, and requirement not to exceed rate of speed such as to endanger life or limb of any person, not negligence in absence of other evidence indicating fault. Rowedder v. Rose ---------- 664

27. Duty to sound signal warning of approach of motor vehicle depends largely on circumstances of particular case. Rowedder v. Rose ---------- 664

28. Violation of stop light, standing alone, not sufficient to prove gross negligence. Sacco v. Gau -- 808

Municipal Corporations.

1. Legislature may create political corporations or quasi-municipal corporations to deal with matters of general public concern and utility. Dwyer v. Omaha-Douglas Public Building Commission ------ 30

2. One-half mill levy authorized to be made by cities of metropolitan class for purposes of L. B. 1003, 82nd Legislative Session, does not contravene Omaha city charter adopted under provisions of Article XI, section 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ----- 30

3. L. B. 1003, 82nd Legislative Session, which enabled cities of metropolitan class and county in which such city located to create public building commission authorized to furnish facilities for joint use of city and county pertains to matter of state concern and not just strictly municipal affair. Dwyer v. Omaha-Douglas Public Building Commission -- 30

4. Tax authorized to be levied by city of metropolitan class under provisions of L. B. 1003, 82nd Legislative Session, not a tax for corporate purposes and is one levied by local authority; does not contravene Article VIII, section 7, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30

5. Annexation ordinances may be considered at special

meetings of city council in absence of statutory provision to contrary. Holden v. City of Tecumseh 117
6. Annexation legislative matter and no constitutional requirement that affected landowners be notified before passage of annexation ordinance; failure to give such notice not denial of due process of law. Holden v. City of Tecumseh ---------- 117
7. Agricultural lands, urban or suburban in character, subject to annexation under cited statute. Holden v. City of Tecumseh ---------- 117
8. Location of city streets matter generally within discretion of municipal authorities. Holden v. City of Tecumseh ---------- 117
9. Requirement in cited statute that annexing city have "sewer treatment facilities" with capacity to serve city annexed, intended to insure that residents of annexed city able to receive sewage treatment service from annexing city. City of Parkview v. City of Grand Island ---------- 267
10. City of first class not required to obtain recommendation from planning commission before proceeding with annexation matters. City of Parkview v. City of Grand Island ---------- 267
11. Whether municipal ordinance subject to referendum determined by language of applicable provision for referendum and by facts of each case. Hoover v. Carpenter ---------- 405
12. Use of police power ordinarily matter of public policy and of legislative judgment with which courts will not interfere unless exceeds constitutional bounds. Major Liquors, Inc. v. City of Omaha -- 628
13. Police regulation not necessarily invalid because it incidentally affects a constitutional right. Major Liquors, Inc. v. City of Omaha ---------- 628
14. Ordinance prohibiting topless female dancing in places licensed for sale of intoxicating liquors valid exercise of police power. Major Liquors, Inc. v. City of Omaha ---------- 628

Negligence.

1. Failure of pedestrian with right-of-way to see approaching car within limit of danger or to misjudge its speed not ordinarily contributory negligence as matter of law. Baker v. Daly ---------- 156
2. Generally negligence, as matter of law, for motorist to drive so fast on highway at night that he cannot

stop in time to avoid collision with object within area lighted by his headlights. Fink v. Meister -- 248
3. Exceptions to general rule that motorist who cannot stop his automobile in time to avoid collision with object within range of his vision negligence as matter of law embrace those situations where reasonable minds might differ as to whether motorist exercising due care under particular circumstances. Fink v. Meister ---------- 248
4. Issue of gross negligence for jury if evidence relating thereto conflicting and from which reasonable minds might arrive at different conclusions. Demont v. Mattson ---------- 277
5. When evidence resolved most favorably to existence of gross negligence and facts thus determined, inquiry of whether they support finding of gross negligence one of law. Demont v. Mattson ------ 277
6. More than one act of negligence may in combination amount to gross negligence under guest statute; several acts should be weighed as whole. Demont v. Mattson ---------- 277
7. Whether particular act or omission may be termed gross depends upon all facts and circumstances, including other negligent acts or omissions, which may affect quality of conduct in particular case; what would amount to slight negligence under certain circumstances might under different circumstances be gross negligence. Demont v. Mattson - 277
8. Where head of family owns or maintains car for family use and family member using car with express or implied consent of owner, negligence of family member driver imputed to head of family. Demont v. Mattson ---------- 277
9. Before contributory negligence of guest passenger presents jury question, must be evidence that it proximately contributed to accident and injuries. Demont v. Mattson ---------- 277
10. Motorist who observes turning signal on automobile preceding him but fails to maintain control over his vehicle sufficient to enable him to avoid collision with automobile when movement indicated made, guilty of contributory negligence as matter of law, more than slight, and sufficient to bar his recovery. Haffke v. Grinnell ---------- 323
11. Motorist under duty to keep proper lookout and watch where he is driving, although he has right-

of-way; when in place of relative safety he sees, or in exercise of reasonable care, should have seen, approach of moving vehicle in closs proximity, and moves from safe place into path of approaching vehicle and is struck, his conduct constitutes negligence. Van Ostrand v. Beccard ---------- 326

12. Bright sunlight ordinarily condition that does not excuse duty of motorist to look and see approaching vehicles operated without negligence within radius that denotes limit of danger. Van Ostrand v. Beccard ---------- 326

13. Person who has care, custody, or control of child and causes death of child by willfully or negligently causing or permitting life of child to be endangered guilty of manslaughter. State v. Crawford ---------- 378

14. Parent who negligently or willfully fails to obtain medical aid for child, thereby causing his death, guilty of manslaughter. State v. Crawford ------ 378

15. Instruction that criminal negligence or culpable neglect not slight breach of duty but gross failure to do what is required not prejudicially erroneous. State v. Crawford ---------- 378

16. In tort action based exclusively on alleged negligence of employee or agent, valid release of that employee-agent releases employer or principal from liability, even though release specifically reserves all claims against employer-principal. Dickey v. Meier ---------- 420

17. In determining question of whether evidence sufficient to submit issues of negligence to jury, a party is entitled to have all conflicts in evidence resolved in his favor and benefit of every reasonable inference that may be deduced from evidence; if reasonable minds might draw different conclusions from set of facts thus resolved in favor of a party, issues of negligence for jury. Moats v. Lienemann 452

18. Employer not liable for negligence of one whom his employee procures or permits to assist in work without proof that employee had authority from employer to procure or permit assistance. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568

19. Where has been continuous or customary use of assistant by employee, and employer has known of this practice and acquiesced in it, employer liable for negligence of assistant as though actually em-

ployed by himself. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
20. Negligence question of fact and may be proved by circumstantial evidence and physical facts; however, law requires that facts and circumstances proved, together with inferences that may properly be drawn therefrom, indicate with reasonable certainty negligent act charged. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
21. Left turn across public highway between intersections fraught with danger, and one making such movement required to exercise degree of care commensurate with the danger. Rowedder v. Rose ---- 664
22. When driver of motor vehicle turning across highway between intersections fails to look to front and rear for oncoming traffic at time and place when to look would be effective, or looks and negligently fails to see that which in plain sight, or in position where cannot see, question for court usually presented. Rowedder v. Rose ---------- 664
23. Driving at speed defined by statute, when such definition sets maximum speed and also includes requirement that such speed be reasonable and proper, having regard for traffic, use of road, condition of road, and requirement not to exceed rate of speed such as to endanger life or limb of any person, not negligence in absence of other evidence indicating fault. Rowedder v. Rose ---------- 664
24. Duty to sound signal warning of approach of motor vehicle depends largely on circumstances of particular case. Rowedder v. Rose ---------- 664
25. Words "slight" and "gross" as employed in comparative negligence act comparative terms; test statute provides detailed. Johnson v. Roueche ---- 716
26. Meaning of gross negligence under comparative negligence rule not same as meaning of gross negligence under guest passenger statute. Johnson v. Roueche ---------- 716
27. Under comparative negligence statute, if fact finder determines respective parties to be guilty of actionable negligence and contributory negligence, responsibility then on it to make comparison contemplated by statute. Johnson v. Roueche ---------- 716
28. Broker precluded from recovering compensation for his services when selling land of his principal if guilty of misconduct in negotiating contract at var-

iance with one which he is authorized to make, or disobeys his principal's orders or instructions, or causes loss to his principal by reason of his negligence in drawing or negotiating contract of sale for his principal. Wisnieski v. Harms ---------- 721

29. Violation of stop light, standing alone, not sufficient to prove gross negligence. Sacco v. Gau -- 808

New Trial.

1. In order to obtain review of alleged errors occurring during trial, such errors must be pointed out to trial court in motion for new trial and ruling obtained thereon. State v. Ryan ---------- 381
2. Where party has sustained burden and expense of trial and has succeeded in securing judgment of jury on facts in issue, he has right to keep benefit of that verdict unless there is prejudicial error in proceedings by which it was secured. Koob v. Long 640

Notice.

1. Due process does not require notice and hearing before order of revocation issued by Director of Motor Vehicles for point violations under cited statutes; in such cases, likelihood of error and irreparable harm to individual so slight that compelling governmental interest in removing from highway drivers who have by record of convictions demonstrated unsafe driving habits outweighs need for prior notice and hearing. Stauffer v. Weedlun -- 105
2. Due process of law provisions of federal and state Constitutions do not in every case prevent administrative agency from issuing order affecting private rights of individual without formal notice and hearing before such order. Stauffer v. Weedlun ----- 105
3. Annexation legislative matter and no constitutional requirement that affected landowners be notified before passage of annexation ordinance; failure to give such notice not denial of due process of law. Holden v. City of Tecumseh ---------- 117
4. Real purpose of prescribing manner in which adverse holding will be manifested to give notice to real owner that his title or ownership in danger so that he may, within period of limitation, take action to protect his interest. Whaley v. Mingus ------ 351
5. To be effective against true owner, acts of dominion over land must be so open, notorious, and hostile

as to put ordinarily prudent person on notice of fact that his lands in adverse possession of another. Whaley v. Mingus ---------- 351
6. Provision of cited statute requiring notice be given to record owner of "every piece of real estate which has been assessed at a higher figure than at the last previous assessment" does not apply to increases ordered by State Board of Equalization and Assessment under later enacted statute. Hansen v. County of Lincoln ---------- 461
7. Erroneous statement by insurer to insured that insurance policy has lapsed for alleged nonpayment of premium not legal equivalent of notice of election to cancel under terms of policy. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
8. If employee suffers injury, which appears slight but progressive in course, and which several physicians unable to correctly diagnose, his failure to file claim or bring suit within time limited by law will not defeat right to recovery, if he gave notice and commenced action within statutory period after he had knowledge that compensable disability resulted from original accident. Borowski v. Armco Steel Corp. ---------- 654

Nudity.

1. Ordinance prohibiting topless female dancing in places licensed for sale of intoxicating liquors valid exercise of police power. Major Liquors, Inc. v. City of Omaha ---------- 628
2. When nudity employed as sales promotion in establishments purveying intoxicating liquors, it is essentially "conduct" and subject to regulation or prohibition. Major Liquors, Inc. v. City of Omaha 628

Officers.

1. Authority of de facto officer cannot be challenged by collateral attack. State v. Birdwell ---------- 116
2. In quo warranto proceeding, ordinarily burden of proof in first instance on defendant who claims right to office. Stasch v. Weber ---------- 710
3. In quo warranto proceeding, no legal presumption arises in favor of defendant merely from his establishment of possession of office which he claims. Stasch v. Weber ---------- 710
4. Generally, in quo warranto proceeding, when chal-

lenged official purports to hold office by virtue of election, he must show that election was held and that he was in fact elected. Stasch v. Weber ------ 710
5. Generally, provisions for holding over until successor elected and qualified do not prolong incumbent's term indefinitely, but only for reasonable time to allow successor to qualify. Stasch v. Weber ---- 710

Oil and Gas.
1. State law applies to leasehold interests under Mineral Leasing Act for Acquired Lands where no important threat to any identifiable federal policy or interest appears. Ohmart v. Dennis ---------- 260
2. Favorable determination by Secretary of Interior essential under Mineral Leasing Act for Acquired Lands to inclusion of federal lands with nonfederal lands in state pooling order. Ohmart v. Dennis ---- 260
3. Oil and Gas Conservation Commission possesses power in pooling order concerning federal and nonfederal lands to make order retroactive to date of first production. Ohmart v. Dennis ---------- 260

Ordinances.
1. Annexation ordinances may be considered at special meetings of city council in absence of statutory provision to contrary. Holden v. City of Tecumseh ---- 117
2. Annexation legislative matter and no constitutional requirement that affected landowners be notified before passage of annexation ordinance; failure to give such notice not denial of due process of law. Holden v. City of Tecumseh ---------- 117
3. Question of constitutionality of city ordinance not considered by Supreme Court unless properly presented or offered in evidence in district court. State v. Radcliff ---------- 236
4. Ordinances and statutes presumed constitutional; unconstitutionality must be clearly established and courts will not pass on question of constitutionality if issue may be disposed of on other grounds. State v. Lessert ---------- 243
5. Unless particular traffic ordinance or statute judicially declared unconstitutional, motorist convicted of violation of that ordinance or statute cannot challenge its constitutionality in collateral proceeding to revoke his driver's license under point system provided by cited statutes. State v. Lessert ------ 243

6. Whether municipal ordinance subject to referendum determined by language of applicable provision for referendum and by facts of each case. Hoover v. Carpenter ---------- 405
7. Use of police power ordinarily matter of public policy and of legislative judgment with which courts will not interfere unless exceeds constitutional bounds. Major Liquors, Inc. v. City of Omaha ---------- 628
8. Police regulation not necessarily invalid because it incidentally affects a constitutional right. Major Liquors, Inc. v. City of Omaha ---------- 628
9. Ordinance prohibiting topless female dancing in places licensed for sale of intoxicating liquors valid exercise of police power. Major Liquors, Inc. v. City of Omaha ---------- 628

Parent and Child.

1. In proceeding for modification of order for child support, post-decree birth is change of circumstances, although decree provided for support of unborn child. Schneider v. Schneider ---------- 80
2. Father primarily liable for support of his minor children, his liability being independent of assets of the mother. Schneider v. Schneider ---------- 80
3. Order of trial court in child support proceeding not overturned unless abuse of discretion found. Schneider v. Schneider ---------- 80
4. In determining question of who should have care and custody of children upon divorce, paramount consideration is best interests of welfare of children. Phillips v. Phillips ---------- 89
Scripter v. Scripter ---------- 576
5. If circumstances of parties change and in best interests of children, court may from time to time revise or alter divorce decree so far as custody, care, and maintenance of children concerned. Phillips v. Phillips ---------- 89
6. In cases involving determinations of child custody, findings of trial court, both as to evaluation of evidence and as to matter of custody, not disturbed unless clear abuse of discretion shown. Phillips v. Phillips ---------- 89
7. Discretion of court respecting custody and support of minor children subject to review; determination of trial court, however, ordinarily not disturbed unless has been clear abuse of discretion or clearly against

weight of evidence. Oberg v. Oberg ---------- 316
8. Person who has care, custody, or control of child and causes death of child by willfully or negligently causing or permitting life of child to be endangered guilty of manslaughter. State v. Crawford ------ 378
9. Parent who negligently or willfully fails to obtain medical aid for child, thereby causing his death, guilty of manslaughter. State v. Crawford -------- 378
10. Order of juvenile court regarding custody of children not disturbed unless clear abuse of discretion or decision against weight of evidence. Anderson v. Doeschot ---------- 444
11. Court which has personal jurisdiction of parties, both of whom are domiciled within state, may determine custody of child as between parties even though child absent from jurisdiction. Loveall v. Loveall 457
12. Court which has personal jurisdiction of parties may determine custody of child as between parties although child neither domiciled nor present in state. Loveall v. Loveall ---------- 457
13. In habeas corpus proceeding to determine custody of child, prime consideration is welfare of child. Loveall v. Loveall ---------- 457
14. Ordinarily, effect given to prior judgment of another state determining custody of child as matter of comity unless change in circumstances requires different result. Loveall v. Loveall ---------- 457
15. In determining question of who should have care and custody of children, paramount consideration is best interests of welfare of children. Gydesen v. Gydesen ---------- 538
16. Discretion of lower court with respect to awarding custody of minor children subject to review, but determination of lower court not ordinarily disturbed unless clear abuse of discretion shown or clearly against weight of evidence. Scripter v. Scripter -- 576
17. Neglected child is child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of fault or habits of parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for health, morals, or well-being of such child. Healey v. Johnson ---------- 677
Healey v. Hartman ---------- 682
18. In cases involving child custody determinations in juvenile court and other courts, findings of trial

court, both as to evaluation of evidence and as to matter of custody, not disturbed unless clear abuse of discretion shown or decision against weight of evidence. Healey v. Johnson ---------- 677

19. In cases involving child custody and determinations in juvenile court, findings of trial court, both as to evaluation of evidence and as to matter of custody, will not be disturbed unless clear abuse of discretion shown. Healey v. Hartman ---------- 682

20. Court may terminate parental rights when it finds such action in best interests of child and it appears from evidence that parent has substantially, continuously, and repeatedly neglected child and refused to give child necessary parental care and protection. Healey v. Hartman ---------- 682

21. Affection, confidence, and gratitude of parent to child which inspires gift is natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse judgment and control will of donor. Gaeth v. Newman ---------- 756

22. Division of property and allowance of alimony and child support in divorce actions always to be determined by facts in each case, and courts will consider all pertinent facts in reaching an award that is just and equitable. Sees v. Sees ---------- 769

23. In determining child custody, paramount consideration is best interests and welfare of children. Nemecek v. Nemecek ---------- 799

Parties.

1. In child custody action between grandmother and aunt, court will consider best interests of child and make such order for its custody as will be for its welfare. Cain v. Adams ---------- 152

2. Defendant in Nebraska Penal and Correctional Complex under no disability barring prosecution of action in courts of this state by reason of his imprisonment. Vacek v. Marburger ---------- 180

3. Words "unavoidably prevented" refer to circumstances beyond control of party desiring to file pleading in our courts; law requires diligence on part of clients and attorneys and mere neglect of either will not enable party to relief on that ground. Vacek v. Marburger ---------- 180

4. Indispensable parties to suit those who have such interest in controversy that court cannot render judg-

ment without affecting their interest. Ohmart v. Dennis ---------- 260
5. Where conveyances from common grantor to adjoining landowners describe premises conveyed by lot numbers, but adjoining owners purchase with reference to boundary line then marked on ground, boundary line, as marked on ground by common grantor, binding upon such adjoining landowners and all persons claiming under them irrespective of length of time elapsed thereafter. Phillippe v. Horns -------- 304
6. Contract should be so construed as to give effect to intention of parties rather than defeat purpose for which it was executed. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308
7. Building contractor as well as owner has insurable interest in building in course of construction. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. -- 308
8. Owner who contracts to procure insurance to cover contractor and fails to do so or who procures such insurance and fails to have contractor named as an insured becomes insurer of contractor. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. -------- 308
9. Insurer cannot recover by right of subrogation from his own insured nor can rights of subrogated insurer rise higher than rights of its insured against third party. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308
10. Substantial rights of citizens must be protected, but constitutional and statutory provisions relating to interstate extradition must be liberally construed to effectuate their purpose, and courts of one state must avoid view of their duties so narrow as to afford permanent asylum to offenders against laws of another state. State of Kansas v. Holeb ---------- 319
11. One who commits act in one state intentionally resulting in crime in another state may be extradited, and the statement in Governor's warrant that accused is fugitive from justice from Kansas and has taken refuge in Nebraska must be disregarded as surplusage. State of Kansas v. Holeb ---------- 319
12. Stipulations voluntarily entered into between parties to cause or their attorneys, for government of their conduct and control of their rights during trial or progress of cause, will be respected and enforced by courts, where such stipulations not contrary to good morals or sound public policy. Martin v. Martin 393

13. Courts will enforce valid stipulations unless some good cause shown for declining to do so, especially where stipulations acted upon so that parties could not be placed in status quo. Martin v. Martin ---- 393
14. Parties bound by stipulations voluntarily made and relief from such stipulations after judgment warranted only under exceptional circumstances. Martin v. Martin ---------- 393
15. Generally, suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover taxes alleged to have been illegally assessed. Hansen v. County of Lincoln ---------- 461
16. Ordinarily, action may not be maintained as class action by plaintiff on behalf of himself and others unless he has power as member of class to satisfy judgment on behalf of all members of class. Hansen v. County of Lincoln ---------- 461
17. Provisions of cited statute do not contemplate that court which entered judgment declaring invalidity of tax will in class action supervise tax refund or credit procedures. Hansen v. County of Lincoln -- 461
18. Agreement by holder to suspend right to enforce promissory note against maker, without consent of endorser and without express reservation of rights against him, discharges endorser from liability. Citizens State Bank v. Beermann Bros. Dehy ---------- 597
19. Appeal to Supreme Court in civil action will be considered upon theories presented by parties at trial, provided liberal construction of pleadings, as construed by parties, will permit. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669
20. Cited statute provides any elector of appropriate county may bring quo warranto proceeding against any county public office holder when county attorney of appropriate county refuses to do so. Stasch v. Weber ---------- 710
21. Suppression of product of Fourth Amendment violation can be successfully urged only by one whose rights violated by search itself, not by one aggrieved solely by introduction of damaging evidence. State v. Rice ---------- 728
22. If intent of aider different from that of perpetrator, aider's guilt measured by intent that actuated him. State v. Rice ---------- 728
23. Threats and expressions of ill will in intentional homicide admissible to show intent, malice, or motive;

malice and motive relevant and material not merely as evidence of intent, but also on issue of guilt or innocence as tending to point to identity of perpetrator or perpetrators. State v. Rice ---------- 728

24. In prosecution for intentional homicide committed against one of a class, threats by defendant against class admissible. State v. Rice ---------- 728

25. Two or more defendants may be tried together where each of defendants charged with accountability for offense or offenses or where offense part of common scheme, plan, or conspiracy. State v. Rice ---------- 728

26. Defendants challenging joint trial must affirmatively demonstrate that joint trial has prejudiced their individual rights. State v. Rice ---------- 728

27. Interpretation given contract by parties themselves while engaged in performance of it is one of best indications of true intent of contract, and ordinarily, such construction of contract should be enforced. Ranchland Auto, Inc. v. Cleveland ---------- 804

28. In interpreting written contract, meaning of which in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings admissible to discover meaning which each party had reason to know would be given to words by other party. Ranchland Auto, Inc. v. Cleveland ---------- 804

29. Where there are multiple defendants and judgment entered dismissing action as to one or more, but not all, defendants, judgment is final and appealable order. Green v. Village of Terrytown ---------- 840

Partition.

1. Where upset bid before final confirmation of partition sale, matter of confirmation of sale left to judicial discretion of trial court with due regard to stability of judicial sales; such discretion judicial one which may not be arbitrarily exercised. Supreme Court will not intervene except in case of abuse of such discretion by trial court. Glaser v. Weinberger 205

2. Upset bid following judicial sale and before final confirmation considered only when affords convincing proof that property sold at inadequate price and that just regard for rights of all concerned and stability of judicial sales permits its acceptance. Glaser v. Weinberger ---------- 205

3. In determining whether to accept or reject upset bid, court must elect between two conflicting duties;

ordinarily must strive to obtain best price possible for property sold, especially where interests of minors involved. On other hand, when sale free of fraud and adequate price realized, consideration must be given to rights of purchaser and stability of judicial sales. Glaser v. Weinberger ---------- 205

Payment.

1. Final settlement not synonymous with final payment; precedes payment and denotes proper administrative determination with respect to amount due. Boyd v. Benkelman Public Housing Authority ----- 69
2. Where insured because of errors in billing by agent of insurance company pays only that portion of renewal premium set forth in billing instead of entire premium, renewal policy not void but voidable at election of company under terms of policy. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590

Pedestrians.

1. Failure of pedestrian with right-of-way to see approaching car within limit of danger or to misjudge its speed not ordinarily contributory negligence as matter of law. Baker v. Daly ---------- 156
2. In absence of prohibition by statute or ordinance, person may cross street at any place and not limited to crossing at intersections; driver of automobile owes to one crossing street at point not regular crossing duty of reasonable and ordinary care under circumstances. Koob v. Long ---------- 640
3. No person shall turn vehicle from direct course on highway unless such movement can be made with reasonable safety, and then only after giving clearly audible signal by sounding horn if any pedestrian may be affected by such movement. Koob v. Long 640

Penalties.

1. As general rule, question of whether sum mentioned in contract considered as liquidated damages or penalty question of law, dependent on construction of contract by court. Abel Constr. Co. v. School Dist. of Seward ---------- 166
2. If damages arising from breach of contract difficult of ascertainment or admeasurement, and if stipulated amount not disproportionate to amount of damages reasonably anticipated from breach, us-

ually regarded as provision for liquidated damages. Abel Constr. Co. v. School Dist. of Seward ------ 166

3. Liquidated damages in fixed sum for each day's delay in performing construction contract, which in effect grades damages according to extent of breach, and where effect of delay difficult to estimate and daily amounts not clearly unreasonable, not penal. Abel Constr. Co. v. School Dist. of Seward ------ 166

Plea Bargaining.

Under circumstances in this case, where plea of guilty induced in part by misunderstanding as to recommendation county attorney would make at sentencing hearing, sentence vacated and cause remanded for resentencing. State v. Kimes -------- 85

Pleadings.

1. Where an issue, even assuming properly pleaded, affords no basis for recovery under evidence adduced in case, trial court's submission of such issue to jury constitutes error. Baker v. Daly -------- 156
2. Damage claimed to result from improper design or construction of highway should be pleaded specially. Verzani v. State ---------- 162
3. Words "unavoidably prevented" refer to circumstances beyond control of party desiring to file pleading in our courts; law requires diligence on part of clients and attorneys and mere neglect of either will not enable party to relief on that ground. Vacek v. Marburger ---------- 180
4. Immaterial that complaint did not specifically allege commission of acts in this state intentionally resulting in crime in Kansas when requisition makes such facts clear. State of Kansas v. Holeb ------ 319
5. One who commits act in one state intentionally resulting in crime in another state may be extradited, and statement in Governor's warrant that accused is fugitive from justice from Kansas and has taken refuge in Nebraska must be disregarded as surplusage. State of Kansas v. Holeb ---------- 319
6. General denial available to defendant to challenge one or more of elements essential to recovery by plaintiff and effect of denial to put burden on plaintiff to establish by evidence matter denied. First Nat. Bank of Bellevue v. Rose ---------- 362
7. Where answer to petition consists of general denial,

defendant may introduce such testimony as will tend to disprove testimony of plaintiff in support of his petition; for such purposes, no other allegations in answer necessary. First Nat. Bank of Bellevue v. Rose ---------- 362

8. After first motion for post conviction relief judicially determined, any subsequent motion for post conviction relief from same conviction and sentence may be dismissed by district court, unless motion affirmatively shows on face that basis relied upon for relief not available at time of filing prior motion for post conviction relief. State v. Smith ---- 388

9. Where discretionary duty imposed upon district court to determine whether or not good cause shown to grant leave to party to plead out of time, its decision not ordinarily disturbed absent showing abuse of discretion. Neumeyer v. Omaha Public Power Dist. ---------- 516

10. Purpose of summary judgment proceeding to pierce allegations of pleadings and show conclusively that controlling facts otherwise than alleged and that moving party entitled to judgment as matter of law. Frazier, Inc. v. 20th Century Builders, Inc. -- 618

11. Obligation to defend suit for insured should be determined on basis of whether petition filed against him attempts to allege liability within terms of policy. Frazier, Inc. v. 20th Century Builders, Inc. 618

12. Mere allegation of existence of confidential or fiduciary relationship legal conclusion only and insufficient to raise any issue of fact. Degmetich v. Beranek ---------- 659

13. Appeal to Supreme Court in civil action will be considered upon theories presented by parties at trial, provided liberal construction of pleadings, as construed by parties, will permit. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669

14. Where is some circumstantial evidence which tends to support allegation in petition for foreclosure of mortgage that no proceedings at law have been had for recovery of debt, and no contrary showing attempted, decree of foreclosure not reversed without showing that specific objection called to attention of trial court and also that defendant prejudiced by omission of direct proof. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---------- 673

15. Fact alone that answer filed 10 days after answer

day without leave of court not sufficient ground for thereafter entering default judgment against defendant. Vacanti & Randazzo Constr. Co. v. H.I.E. Food Products, Inc. ---------- 680

16. In post conviction proceeding, petitioner has burden of establishing basis for relief. State v. Howell -- 687

17. When defendant seeks to appeal original proceedings pertaining to his conviction and fails to show he is acting in good faith and appeal has merit, he has failed to sustain required burden of proof. State v. Howell ---------- 687

18. Cross-petition or cross-claim not limited to equitable action under our procedure; is substance of action rather than form of it which will determine availability of relief; criterion to be applied is that issues raised by cross-bill must be so closely connected with cause of action in original suit that cross-claim is mere auxiliary or dependency upon original action. The Tilden Bank v. Retzlaff ---- 834

19. New and distinct matter not maintainable under provisions of code as counterclaim and not involved in proper determination of subject matter of original suit must be litigated in separate action. The Tilden Bank v. Retzlaff ---------- 834

20. Matters set up in cross-petition must be germane to original suit under code quite as much as under chancery practice. The Tilden Bank v. Retzlaff -- 834

21. Claim for damages for tort cannot be used as set-off against actions on contracts or suits on promissory notes secured by real estate mortgages. The Tilden Bank v. Retzlaff ---------- 834

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1. Matters relating to sentences imposed within statutory limits not basis for post conviction relief. State v. Birdwell ---------- 116

2. Guilty plea motivated by existence of coerced confession not subject to collateral attack where defendant had counsel unless counsel incompetent. State v. Hall ---------- 130

3. When counsel has advised defendant to plead guilty, defendant who heeded such advice may not subsequently attack voluntariness of guilty plea so long as counsel's advice within range of competence demanded of attorneys in criminal cases. State v. Hall ---------- 130

4. That guilty plea must be intelligently made, not a requirement that all advice offered by defendant's lawyer withstand retrospective examination in post conviction hearing. State v. Hall ---------- 130
5. In post conviction cases, rule clear that petitioner has burden of establishing basis for relief. State v. Fusby ---------- 139
6. Repetitive applications for post conviction relief may be deemed abuse of judicial process. State v. Pilgrim ---------- 213
7. After first motion for post conviction relief judicially determined, any subsequent motion for post conviction relief from same conviction and sentence may be dismissed by district court, unless motion affirmatively shows on face that basis relied upon for relief not available at time of filing prior motion for post conviction relief. State v. Smith -- 388
8. Where files and records show defendant not entitled to post conviction relief, motion properly denied. State v. Ransom ---------- 499
9. Motion to vacate judgment and sentence under Post Conviction Act cannot be used as substitute for appeal or to secure further review of issues already litigated. State v. Weiland ---------- 626
10. Where facts and issues which are ground of motion for post conviction relief known to defendant and his counsel, and raised, heard, and determined at time of trial resulting in conviction but not raised in direct appeal, those issues not ordinarily considered in post conviction review. State v. Weiland - 626
11. In post conviction proceeding, petitioner has burden of establishing basis for relief. State v. Howell -- 687
12. Appeal of post conviction proceeding from court inferior in jurisdiction to district court may only be taken to district court. State v. Williams ---- 802

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1. A State not constrained in exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treat-

ment. State v. Eckstein ---------- 146
2. Power of a state to absolutely prohibit sale of intoxicating liquors includes power to prescribe conditions under which it may be sold. Major Liquors, Inc. v. City of Omaha ---------- 628
3. A state may protect its people against evils incident to use of intoxicants, and may exercise large discretion as to means employed. Major Liquors, Inc. v. City of Omaha ---------- 628
4. Use of police power ordinarily matter of public policy and of legislative judgment with which courts will not interfere unless exceeds constitutional bounds. Major Liquors, Inc. v. City of Omaha ---------- 628
5. Police regulation not necessarily invalid because it incidentally affects a constitutional right. Major Liquors, Inc. v. City of Omaha ---------- 628
6. Ordinance prohibiting topless female dancing in places licensed for sale of intoxicating liquors valid exercise of police power. Major Liquors, Inc. v. City of Omaha ---------- 628
7. Attorney General may on his own relation in name of State of Nebraska bring action for declaratory judgment challenging constitutionality of statute which Tax Commissioner of State proposes to implement by enforcement and regulation pursuant to duties imposed upon that officer by statute and Constitution. State ex rel. Meyer v. Peters ----- 817
8. Rule that person may not attack constitutionality of statute where his rights not thereby affected applies to private persons and not to Attorney General who is acting in public interest. State ex rel. Meyer v. Peters ---------- 817

Principal and Agent.

1. Insurance agent who solicits application for insurance is, in controversy arising between insured and company issuing policy, regarded as representing company and not insured. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
2. Insurance agent who with authority receives and receipts for money for renewal of insurance policy deemed to all intents and purposes agent of company. Squires v. Implement Dealers Mut. Ins. Co. 590
3. Where insured because of errors in billing by agent of insurance company pays only that portion of renewal premium set forth in billing instead of

entire premium, renewal policy not void but voidable at election of company under terms of policy. Squires v. Implement Dealers Mut. Ins. Co. ----- 590

4. Broker precluded from recovering compensation for his services when selling land of his principal if guilty of misconduct in negotiating contract at variance with one which he is authorized to make, or disobeys his principal's orders or instructions, or causes loss to his principal by reason of his negligence in drawing or negotiating contract of sale for his principal. Wisnieski v. Harms ---------- 721

Privileged Communications.

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2. Under cited section of Uniform Commercial Code, buyer given right to reject whole if goods fail in any respect to conform to contract. Maas v. Scoboda 189
3. After rescission any use of property by buyer for own benefit or convenience will waive right to rescind. Maas v. Scoboda ---------- 189

4. Under provisions of contract for purchase of silo with 1-year warranty of customer satisfaction, buyer's opinion or decision must be made with entire good faith and not captiously or capriciously, and whether he so acts question of fact for jury. Maas v. Scoboda ---------- 189
5. Law regards parties as being competent to contract as they see fit with respect to satisfactory character of equipment sold, and seller assumes hazard of rendering performance according to terms of contract. Maas v. Scoboda ---------- 189
6. Under provisions of cited statute, contract between broker and owner must be in writing and signed by both parties, and must describe land to be sold and set forth compensation of broker. Wisnieski v. Coufal ---------- 200
7. Under provisions of cited statute, terms under which owner willing to sell land need not be included in contract between broker and owner. Wisnieski v. Coufal 200
8. Description of land in contract under cited statute sufficient if contains data from which land may be identified and ascertained with certainty; parol evidence admissible to apply description to subject matter, if parol evidence does not vary or contradict written instrument. Wisnieski v. Coufal ---------- 200
9. Broker entitled to his commission in accordance with terms of his listing contract and right to compensation not impaired by subsequent inability or unwillingness of owner to consummate sale on terms prescribed. Wisnieski v. Coufal ---------- 200
10. Upset bid following judicial sale and before final confirmation considered only when affords convincing proof that property sold at inadequate price and that just regard for rights of all concerned and stability of judicial sales permits its acceptance. Glaser v. Weinberger ---------- 205
11. In determining whether to accept or reject upset bid, court must elect between two conflicting duties; ordinarily must strive to obtain best price possible for property sold, especially where interests of minors involved. On other hand, when sale free of fraud and adequate price realized, consideration must be given to rights of purchaser and stability of judicial sales. Glaser v. Weinberger ---------- 205
12. Amount of alimony granted wife not determined alone from property possessed by husband; many

other factors enter into its determination. Newton v. Newton ---------- 242
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14. Favorable determination by Secretary of Interior essential under Mineral Leasing Act for Acquired Lands to inclusion of federal lands with nonfederal lands in state pooling order. Ohmart v. Dennis ---- 260
15. Oil and Gas Conservation Commission possesses power in pooling order concerning federal and nonfederal lands to make order retroactive to date of first production. Ohmart v. Dennis ---------- 260
16. Where conveyances from common grantor to adjoining landowners describe premises conveyed by lot numbers, but adjoining owners purchase with reference to boundary line then marked on ground, boundary line, as marked on ground by common grantor, binding upon such adjoining landowners and all persons claiming under them irrespective of length of time elapsed thereafter. Phillippe v. Horns ---------- 304
17. Fixed monuments and surveys staked out on ground control over field notes showing courses, distances, and quantities; or description of survey in words; or picturization of survey in plat. Phillippe v. Horns _ 304
18. Visible and hostile possession, with intention to possess land occupied under belief that it belongs to possessor, constitutes its adverse character. Whaley v. Mingus ---------- 351
19. Real purpose of prescribing manner in which adverse holding will be manifested to give notice to real owner that his title or ownership in danger so that he may, within period of limitation, take action to protect his interest. Whaley v. Mingus ------- 351
20. In eminent domain proceeding, on appeal by condemner from award of county court appraisers, interest added or allowed only from date on which condemner deposited amount of appraisers' award and became entitled to enter into possession of property involved. This is not constitutionally impermissible. Petersen v. School Dist. of Bellevue ---- 354
21. True consideration for deed of conveyance of real estate may be shown by parol evidence, although deed recites consideration. Weiner v. Hroch ------ 389

22. Duty of court to scrutinize settlement agreements closely in divorce actions and protect against fraud, intimidation, and ignorance and guard against unconscionable results; court required to render fair and equitable result under all circumstances. Martin v. Martin ---------- 393
23. Division of property and allowance of alimony in divorce actions always determined by facts of each case. Junker v. Junker ---------- 555
24. Rule for determining alimony or division of property in divorce actions provides no mathematical formula by which such award can be exactly determined; generally speaking, awards of Supreme Court in such cases vary from one-third to one-half of value of property involved, depending upon facts and circumstances of particular case. Junker v. Junker -- 555
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3. One-half mill levy authorized to be made by cities of metropolitan class for purposes of L. B. 1003, 82nd Legislative Session, does not contravene Omaha city charter adopted under provisions of Article XI, section 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ------ 30
4. L. B. 1003, 82nd Legislative Session, which enabled cities of metropolitan class and county in which such

city located to create public building commission authorized to furnish facilities for joint use of city and county pertains to matter of state concern and not just strictly municipal affair. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
5. Building for governmental purposes not work of internal improvement under provisions of Article XIII, section 2, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ------ 30
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Public Lands.

1. Lessee of common school land possesses compensable interest in improvements covered by statute and placed by him or his predecessor in interest on land prior to September 14, 1953, in accordance with statute, notwithstanding subsequent determination of unconstitutionality of statute or absence of permission from Board of Educational Lands and Funds. State v. Carman ---------- 466
2. Burden of establishing ownership of compensable interest in "improvements" on school land leases on lessee; burden may be satisfied by proof of purchase, or proof that lessee personally placed improvements on land, or proof that they were acquired by gift. State v. Bush ---------- 824
3. Presence of "improvements" (except crops) on school lands, standing alone, does not establish ownership in tenant nor satisfy burden of proving ownership. State v. Bush ---------- 824
4. Fact of ownership of improvements does not establish right to receive compensation nor determine any valuation of such improvements. State v. Bush -- 824
5. Fencing by tenants of school lands does not require approval from Board of Educational Lands and Funds. State v. Bush ---------- 824
6. In absence of agreement, tenant on school lands has compensable interest in crops, annual or perennial, growing on such lands on date of termination of his lease. State v. Bush ---------- 824
7. In event of sale of school lands to third person, ten-

ant has right to compensation resulting from "improvements" or crops compensable under school land lease statutes. State v. Bush ---------- 824

Public Officers and Employees.

Crime of embezzlement of public money as defined by cited statute applies only to officers or persons charged by law with performance of duties therein mentioned, and police patrolman collecting coins from parking meters as part of duties designated by his superior cannot properly be informed against thereunder. State v. Williams ---------- 565

Public Service Commissions.

1. Failure of Railway Commission previous to January 1, 1968, to enunciate rule and regulation on tacking cannot be construed to imply right to tack inherent in certificates heretofore issued unless specifically restricted. Nebraska State Railway Commission v. Seward Motor Freight, Inc. ---------- 223
2. Right to prohibit tacking of regular to irregular route authorities, or irregular to irregular route authorities, policy determination within inherent authority of Railway Commission. Nebraska State Railway Commission v. Seward Motor Freight, Inc. 223
3. Common carriers cannot acquire prescriptive rights by virtue of unauthorized use of routes. Nebraska State Railway Commission v. Seward Motor Freight, Inc. ---------- 223
4. Tacking is extension of authorized service; must be and is under regulation of Railway Commission rather than being left to unbridled discretion of carriers subject to regulation by commission. Nebraska State Railway Commission v. Seward Motor Freight, Inc. ---------- 223
5. On appeal from order of Railway Commission administrative or legislative in character, only questions to be determined whether commission acted within scope of its authority and whether order reasonable and not arbitrarily made. Nebraska State Railway Commission v. Seward Motor Freight, Inc. 223
6. In determining issue of public convenience and necessity, in cases where new or extended operating rights sought, controlling questions whether operation will serve useful purpose responsible to public demand or need; whether this purpose can or will be served

as well by existing carriers; and whether it can be served by applicant in specified operation without endangering or impairing operations of existing carriers contrary to public interest. Petroleum Transport Service, Inc. v. Wheeler Transport Service, Inc. 400

7. Purpose of Nebraska Motor Carrier Act was regulation for public interest. Purpose not to stifle legitimate competition but to foster it; purpose not to create monopolies in transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition normal attribute of free enterprise system and must be permitted to exist and law contemplates that it shall. Petroleum Transport Service, Inc. v. Wheeler Transport Service, Inc. ---------- 400

8. In granting certificate of public convenience and necessity, Railway Commisison, under cited statute, required to find first, that applicant fit, willing, and able to perform proposed service; and second, that service offered is or will be required by present and future public convenience and necessity. Robinson v. National Trailer Convoy, Inc. ---------- 474

9. Matter of determination of public convenience and necessity peculiarly within discretion and expertise of Railway Commission and its action will not be disturbed by Supreme Court in absence of showing that such action illegal or arbitrary, capricious, and unreasonable. Robinson v. National Trailer Convoy, Inc. ---------- 474

10. If there is evidence to sustain findings of Railway Commission, Supreme Court may not intervene; is only where findings of commission are against all evidence that Supreme Court may hold commission's findings arbitrary and capricious. Robinson v. National Trailer Convoy, Inc. ---------- 474

11. On appeal from Railway Commission, judicial review limited to determination whether commission acted within scope of its authority and whether order in question reasonable and not arbitrarily made. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

12. In considering application for permit as contract carrier, Railway Commission required to weigh special needs of shippers desiring contract carrier service; effect on protesting carriers of grant of appli-

cation and effect on shippers of denial factors to be weighed in determining if grant of application consistent with public interest. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---- 584

13. Burden upon applicant for permit as contract carrier to show that proposed service specialized and fits need of proposed contracting shippers, that applicant fit, willing, and able to perform service, and that proposed operation will be consistent with public interest. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

14. Where transportation of specified commodities can be performed as well by common carriers as by contract carriers, need for contract carriers not established. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

15. If competent proof made by applicant showing proposed service specialized and needed, and protested by common carriers showing willingness and ability to perform it, applicant must then establish he is better equipped and qualified to meet special needs of proposed contracting shippers than protesting common carriers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

16. Adequacy of existing services to perform normal needs of proposed contracting shippers not conclusive where new service better designed to fit special requirements of proposed contracting shippers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

17. Where is evidence to sustain factors for and against issuance of permit to contract carrier, required to be considered by Railway Commission by cited statutes, determination of public interest for commission and not courts. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

18. Past unlawful actions do not necessarily bar on grounds of unfitness future grants of operating authority if public interest will best be served by approval. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584

19. In adopting constitutional provision authorizing an Industrial Commission, it was made an independent part of Constitution of Nebraska and not as an amendment to Article II. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

Quo Warranto.

1. In quo warranto proceeding, ordinarily burden of proof in first instance on defendant who claims right to office. Stasch v. Weber ---------- 710
2. In quo warranto proceeding, no legal presumption arises in favor of defendant merely from his establishment of possession of office which he claims. Stasch v. Weber ---------- 710
3. Cited statute provides any elector of appropriate county may bring quo warranto proceeding against any county public office holder when county attorney of appropriate county refuses to do so. Stasch v. Weber ---------- 710
4. Generally, in quo warranto proceeding, when challenged official purports to hold office by virtue of election, he must show that election was held and that he was in fact elected. Stasch v. Weber ---- 710
5. Generally, provisions for holding over until successor elected and qualified do not prolong incumbent's term indefinitely, but only for reasonable time to allow successor to qualify. Stasch v. Weber 710

Rape.

1. Under law of Nebraska, accused charged with rape cannot be convicted solely on testimony of prosecutrix. State v. Ferguson ---------- 330
2. In prosecution for rape, while evidence of prompt complaint standing alone insufficient corroboration, such evidence for consideration of jury as corroboration of main facts in issue. State v. Ferguson ---- 330
3. In prosecution for rape, not essential that prosecutrix be corroborated by other witnesses as to particular acts which constitute offense; sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to principal fact in issue. State v. Ferguson -- 330
4. Where punishment of statutory offense left to discretion of court, sentence imposed within statutory limits not disturbed unless abuse of discretion appears. State v. Ferguson ---------- 330
5. Previous chastity essential element of offense of statutory rape of female child under age 18 but over age 15. State v. Brionez ---------- 488
6. Woman who is chaste is one who has never had unlawful sexual intercourse with male person; act of sexual intercourse without consent and against

her will if she is capable of consent does not destroy her chastity. State v. Brionez ---------- 488

Records.

1. Record of arraignment at which plea of guilty entered must show that court determined was factual basis for plea. State v. Simmons ---------- 365
2. In proceeding in error, review solely upon record made by tribunal whose action being reviewed; no new facts or evidence can enter into consideration of court. Harnett v. City of Omaha ---------- 449
3. Where appears in error proceeding that administrative agency acted within its jurisdiction and is some competent evidence to sustain its findings and order, order of administrative agency will be affirmed. Harnett v. City of Omaha ---------- 449

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Whether municipal ordinance subject to referendum determined by language of applicable provision for referendum and by facts of each case. Hoover v. Carpenter ---------- 405

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In tort action based exclusively on alleged negligence of employee or agent, valid release of that employee-agent releases employer or principal from liability, even though release specifically reserves all claims against employer-principal. Dickey v. Meier ------ 420

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1. Sentencing judge has broad discretion in source and type of evidence he may use to assist him in determining kind and extent of punishment to be imposed within limits fixed by statute; he may consider reports of probation officers, police reports, affidavits, and other information, including his own observations of defendant. State v. Minor ------ 23
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1. Repetitive applications for post conviction relief may be deemed abuse of judicial process. State v. Pilgrim ---------- 213
2. Under rule of res judicata, conclusiveness of prior judgment extends not only to matters actually determined but also to matters that could have been raised or were necessarily adjudicated or implied in final judgment, whether raised or not. State v. Lessert ---------- 243
3. Conclusiveness of prior judgment precluding subsequent litigation of same cause of action between same parties much broader in its application than determination of questions actually involved in prior action; conclusiveness of judgment in such case extends not only to matters actually determined but also to other matters which properly could have been raised and determined and those which were necessarily adjudicated or necessarily implied in final judgment, whether formally raised or not. State ex rel. Southeast Rural Fire P. Dist. v. Grossman ---------- 424
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2. When competent indigent becomes dissatisfied with court-appointed counsel but shows no good cause for removal of counsel, only alternatives to proceed with appointed counsel or proceed pro se. State v. Reed ---------- 195
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Sales.

1. Under cited section of Uniform Commercial Code, buyer given right to reject whole if goods fail in any respect to conform to contract. Maas v. Scoboda -- 189
2. Under provisions of cited statute, contract between broker and owner must be in writing and signed by both parties, and must describe land to be sold and set forth compensation of broker. Wisnieski v. Coufal 200
3. Under provisions of cited statute, terms under which owner willing to sell land need not be included in contract between broker and owner. Wisnieski v. Coufal ---------- 200
4. Broker entitled to his commission in accordance with terms of his listing contract and right to compensation not impaired by subsequent inability or unwillingness of owner to consummate sale on terms prescribed. Wisnieski v. Coufal ---------- 200
5. Where upset bid before final confirmation of partition sale, matter of confirmation of sale left to judicial discretion of trial court with due regard to stability of judicial sales; such discretion judicial one which may not be arbitrarily exercised. Supreme Court will not intervene except in case of abuse of such discretion by trial court. Glaser v. Weinberger 205
6. Upset bid following judicial sale and before final confirmation considered only when affords convincing proof that property sold at inadequate price and that just regard for rights of all concerned and stability of judicial sales permits its acceptance. Glaser v. Weinberger ---------- 205
7. In determining whether to accept or reject upset bid, court must elect between two conflicting duties; ordinarily must strive to obtain best price possible

for property sold, especially where interests of minors involved. On other hand, when sale free of fraud and adequate price realized, consideration must be given to rights of purchaser and stability of judicial sales. Glaser v. Weinberger ---------- 205

8. Under Uniform Commercial Code, adequacy or insufficiency of price for which collateral sold at private sale after default and repossession one of "terms" of sale, and relevant along with other issues in determining whether sale commercially reasonable. First Nat. Bank of Bellevue v. Rose ---------- 362

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1. Not unconstitutional for public school district to use or lease classrooms in church or other sectarian building for public school purposes if property used or leased under control of public school authorities and instruction offered secular and nonsectarian. State ex rel. School Dist. of Hartington v. State Board of Education ---------- 1

2. A school district in this State is creature of statute and possesses no other powers than those granted by Legislature. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

3. Legislature has plenary power and control over school districts, including provision for appointment or election of governing bodies thereof; consequently, it may provide limitations on any authority to be exercised by school board. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

4. Legislature has complete control of actions of school boards; whether or not Legislature acted wisely in premises not matter for judicial determination; courts are not arbiters of legislative wisdom, but function as a check upon unauthorized and unconstitutional assumptions of power. School Dist. of Seward Education Assn. v. School Dist. of Seward 772

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agement prerogatives, or statutory duties of board of education. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772

Searches and Seizures.

1. When condition of automobile, indicative of criminal offense in plain sight of officer looking at automobile from outside, examination justified and legal. State v. Etchison ---------- 134
2. Affidavit for search warrant not defective simply because based on hearsay, so long as affidavit discloses substantial basis for crediting hearsay. State v. Howard ---------- 494
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5. Suppression of product of Fourth Amendment violation can be successfully urged only by one whose rights violated by search itself, not by one aggrieved solely by introduction of damaging evidence. State v. Rice ---------- 728
6. Fourth Amendment does not clearly delineate between searches which are legal and those which are illegal; only prohibits unreasonable, with each particular case being decided on own circumstances. State v. Rice ---------- 728
7. Seizing from clothing of lawfully arrested person evidence intimately connected with crime for which he is arrested not unreasonable under Fourth Amendment. State v. Rice ---------- 728
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Security Interest.

Under Uniform Commercial Code, adequacy or insufficiency of price for which collateral sold at private sale after default and repossession one of "terms" of sale, and relevant along with other issues in determining whether sale commercially reasonable. First Nat. Bank of Bellevue v. Rose ---------- 362

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1. Constitutions of Nebraska and United States provide that no person shall be compelled to give evidence against himself of an incriminating nature. State v. Bittner ---------- 298
2. By statute, witness cannot ordinarily be compelled to answer when to do so would expose him to public ignominy. State v. Bittner ---------- 298
3. Trial court, in exercise of sound discretion, must determine whether witness' claim of privilege justifiable. State v. Bittner ---------- 298
4. Credibility of witness in criminal case cannot be impeached by showing his reputation for morality bad, but such attack must be addressed directly to his reputation for truth and veracity. State v. Bittner 298
5. When chastity not an issue, evidence of general reputation that female witness is, or has been, not law-abiding, unchaste, or prostitute, inadmissible for purpose of impeaching witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for purpose of impeachment by evidence as to specific acts or instances. State v. Bittner ---------- 298

Sentences.

1. Sentencing judge has broad discretion in source and type of evidence he may use to assist him in determining kind and extent of punishment to be imposed within limits fixed by statute; he may consider reports of probation officers, police reports, affidavits, and other information, including his own observations of defendant. State v. Minor ---------- 23
2. Modern concepts individualizing punishment have made it necessary that sentencing judge not be denied opportunity to obtain pertinent information by requirement of rigid adherence to restrictive rules of evidence properly applicable to trial. State v. Minor ---------- 23
3. Under circumstances in this case, where plea of guilty induced in part by misunderstanding as to recommendation county attorney would make at sentencing hearing, sentence vacated and cause remanded for resentencing. State v. Kimes ---------- 85
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5. In imposing sentence and denying probation in criminal case, judgment of district court not disturbed on appeal unless record shows abuse of discretion. State v. Cottone ---------- 102

6. Matters relating to sentences imposed within statutory limits not basis for post conviction relief. State v. Birdwell ---------- 116

7. Where punishment for statutory offense left to discretion of court, sentence imposed within statutory limits not ordinarily disturbed unless abuse of discretion appears. State v. Etchison ---------- 134
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8. When, in opinion of Supreme Court, sentence excessive or not warranted by evidence, statute contemplates correction on appeal. State v. Etchison ---------- 134

9. Where criminal statute amended by mitigating punishment, after commission of prohibited act but before final judgment, punishment that provided by amendatory act unless Legislature specifically provided otherwise. State v. Roberts ---------- 209
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10. Sentence of not less than 4 nor more than 7 years for manslaughter not excessive. State v. Mathews 251

11. Supreme Court may reduce sentence when in its opinion sentence excessive, and is under duty to render such sentence against accused as in its opinion may be warranted by evidence. State v. Thunder Hawk 294

12. Supreme Court will not interfere with sentence imposed by lower court unless appears to be result of abuse of discretion. State v. Claire ---------- 373

13. Sentence within limits prescribed by statute not disturbed in absence of abuse of discretion. State v. Fincher ---------- 376
State v. Arp ---------- 493

14. Supreme Court will not interfere with sentence imposed by district court unless sentence appears to be abuse of discretion. State v. Koch ---------- 392

15. Supreme Court may reduce sentence when in its opinion sentence excessive; in such case, Supreme Court under duty to render such sentence as evidence warrants. State v. West ---------- 579

16. Sentence dictated by inordinate emotion suspect; is only by coincidence that it finds support in evi-

dence. State v. West ---------- 579

Set-Off and Counterclaim.

1. Cross-petition or cross-claim not limited to equitable action under our procedure; is substance of action rather than form of it which will determine availability of relief; criterion to be applied is that issues raised by cross-bill must be so closely connected with cause of action in original suit that cross-claim is mere auxiliary or dependency upon original action. The Tilden Bank v. Retzlaff ---- 834
2. New and distinct matter not maintainable under provisions of code as counterclaim and not involved in proper determination of subject matter of original suit must be litigated in separate action. The Tilden Bank v. Retzlaff ---------- 834
3. Matters set up in cross-petition must be germane to original suit under code quite as much as under chancery practice. The Tilden Bank v. Retzlaff ---- 834
4. Proper manner in which to challenge appropriateness of counterclaim is by motion to strike. The Tilden Bank v. Retzlaff ---------- 834
5. Claim for damages for tort cannot be used as set-off against actions on contracts or suits on promissory notes secured by real estate mortgages. The Tilden Bank v. Retzlaff ---------- 834

States.

1. State law applies to leasehold interests under Mineral Leasing Act for Acquired Lands where no important threat to any identifiable federal policy or interest appears. Ohmart v. Dennis ---------- 260
2. Favorable determination by Secretary of Interior essential under Mineral Leasing Act for Acquired Lands to inclusion of federal lands with nonfederal lands in state pooling order. Ohmart v. Dennis ---- 260
3. Oil and Gas Conservation Commission possesses power in pooling order concerning federal and nonfederal lands to make order retroactive to date of first production. Ohmart v. Dennis ---------- 260
4. Power of a state to absolutely prohibit sale of intoxicating liquors includes power to prescribe conditions under which it may be sold. Major Liquors, Inc. v. City of Omaha ---------- 628
5. A state may protect its people against evils incident to use of intoxicants, and may exercise large dis-

cretion as to means employed. Major Liquors, Inc. v. City of Omaha ---------- 628

Statutes.

1. In construing act of Legislature, all reasonable doubts must be resolved in favor of constitutionality. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
2. L. B. 1003, 82nd Legislative Session, does not amend either section 23-119, R. R. S. 1943, or section 23-120, R. S. Supp., 1971, and therefore does not violate Article III, section 14, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
3. Power of classification rests with Legislature, and cannot be interfered with by courts unless clearly apparent that Legislature has by artificial and baseless classification attempted to evade and violate provisions of Constitution prohibiting local and special legislation. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
4. L. B. 1003, 82nd Legislative Session, does not contravene provisions of Article III, section 18, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
5. L. B. 1003, 82nd Legislative Session, does not contravene provisions of Article IX, sections 2, 4, or 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
6. Term family as used in cited statute includes husband who is residing in same household with other members. Nichol v. Clema ---------- 74
7. Medical services furnished husband individually are necessaries within meaning of cited statute for which wife may be liable. Nichol v. Clema ---------- 74
8. Each case of what are necessaries and who is included within term family as provided in cited statute must be determined on its own facts. Nichol v. Clema ---------- 74
9. Due process does not require notice and hearing before order of revocation issued by Director of Motor Vehicles for point violations under cited statutes; in such cases, likelihood of error and irreparable harm to individual so slight that compelling governmental interest in removing from highway drivers who have by record of convictions demon-

strated unsafe driving habits outweighs need for prior notice and hearing. Stauffer v. Weedlun ---- 105
10. Agricultural lands, urban or suburban in character, subject to annexation under cited statute. Holden v. City of Tecumseh ---------- 117
11. Cited statute not violative of constitutional clauses concerning unreasonable classification and equal protection, nor does it violate provisions of Eighth Amendment prohibiting cruel and unusual punishments. State v. Eckstein ---------- 146
12. Where criminal statute amended by mitigating punishment, after commission of prohibited act but before final judgment, punishment that provided by amendatory act unless Legislature specifically provided otherwise. State v. Roberts ---------- 209
State v. Anderson ---------- 491
13. Ordinances and statutes presumed constitutional; unconstitutionality must be clearly established and courts will not pass on question of constitutionality if issue may be disposed of on other grounds. State v. Lessert ---------- 243
14. Unless particular traffic ordinance or statute judicialy declared unconstitutional, motorist convicted of violation of that ordinance or statute cannot challenge its constitutionality in collateral proceeding to revoke his driver's license under point system provided by cited statutes. State v. Lessert ----- 243
15. All statutes relating to same subject construed and considered together for purpose of giving effect to legislative intention; all statutes in pari materia considered together and construed as if one law, and, if possible, effect given to each provision. Wulf v. Farm Bureau Ins. Co. ---------- 258
16. Burden on one who attacks statute valid on face to prove facts to establish its invalidity. City of Parkview v. City of Grand Island ---------- 267
17. Requirement in cited statute that annexing city have "sewer treatment facilities" with capacity to serve city annexed, intended to insure that residents of annexed city able to receive sewage treatment service from annexing city. City of Parkview v. City of Grand Island ---------- 267
18. By statute, witness cannot ordinarily be compelled to answer when to do so would expose him to public ignominy. State v. Bittner ---------- 298
19. Referential and qualifying words in statute, where

no contrary intention appears, refer solely to last antecedent. Haiar v. Kessler ---------- 312

20. Amendment to dead man's statute governed any civil action or proceeding, other than those arising upon unintentional tort after effective date of amendment; antecedent of date of amendment is occurrence of tort, not commencement of action or proceeding. Haiar v. Kessler ---------- 312

21. Substantial rights of citizens must be protected, but constitutional and statutory provisions relating to interstate extradition must be liberally construed to effectuate their purpose, and courts of one state must avoid view of their duties so narrow as to afford permanent asylum to offenders against laws of another state. State of Kansas v. Holeb ---------- 319

22. Classifications limited to and necessary for accomplishment of legitimate purposes of legislation; question always whether things or persons classified by act form by themselves proper and legitimate class with reference to purposes of act. Sandberg v. State ---------- 335

23. Fundamental law of this State that Legislature vested with taxing power without limit, subject only to restrictions contained in Constitution. Axiomatic, therefore, that provisions of Constitution in relation to taxation not grants of power but limitations on taxing power of State, lodged in Legislature. Sandberg v. State ---------- 335

24. Not denied that since adoption of Fourteenth Amendment, State taxing power can be exerted only to effect public purpose and does not embrace raising of revenue for private purposes, but requirements of due process leave free scope for exercise of wide legislative discretion in determining what expenditures will serve public interest. Sandberg v. State ---------- 335

25. Legislative bill, passed with emergency clause, vetoed by Governor, within ambit of Article IV, section 15, Constitution, and requires only three-fifths vote to override veto. Sandberg v. State -- 335

26. Criminal prosecution cannot be maintained under statute requiring permit be obtained from Department of Environmental Control "as required by it," i.e., department, in absence of rules, regulations, or standards fixing circumstances under which such permit "required." State v. West ---------- 371

27. Crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. State v. West ---------- 371
28. Equity considers statutory provisions concerning nonpayment of rent to secure rent and not to forfeit lease, provided tenant acts in good faith and pays promptly on demand. Marine Equipment & Supply Co. v. Welsh ---------- 385
29. Defenses in forcible entry and detainer actions may be equitable; tenant will be relieved from technical forfeiture in circumstances in which absolute good faith shown and exercise of equitable principles in his behalf necessary that gross injustice may be prevented. Marine Equipment & Supply Co. v. Welsh ---------- 385
30. Purpose of Nebraska Motor Carrier Act was regulation for public interest. Purpose not to stifle legitimate competition but to foster it; purpose not to create monopolies in transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition normal attribute of free enterprise system and must be permitted to exist and law contemplates that it shall. Petroleum Transport Service, Inc. v. Wheeler Transport Service, Inc. ---------- 400
31. Amount by which limit exceeded not essential element of offense of speeding, but point system statute requires magistrate or judge make such finding; finding of information to be shown on abstract for conviction. Melanson v. State ---------- 446
32. Provision of cited statute requiring notice be given to record owner of "every piece of real estate which has been assessed at a higher figure than at the last previous assessment" does not apply to increases ordered by State Board of Equalization and Assessment under later enacted statute. Hansen v. County of Lincoln ---------- 461
33. Under provisions of cited statute, county assessor has authority to correct valuations which have become erroneous by reason of judicial declaration of invalidity of increase ordered by State Board of Equalization and Assessment. Hansen v. County of Lincoln ---------- 461

34. Provisions of cited statute do not contemplate that court which entered judgment declaring invalidity of tax will in class action supervise tax refund or credit procedures. Hansen v. County of Lincoln -- 461
35. Lessee of common school land possesses compensable interest in improvements covered by statute and placed by him or his predecessor in interest on land prior to September 14, 1953, in accordance with statute, notwithstanding subsequent determination of unconstitutionality of statute or absence of permission from Board of Educational Lands and Funds. State v. Carman ---------- 466
36. In granting certificate of public convenience and necessity, Railway Commission, under cited statute, required to find first, that applicant fit, willing, and able to perform proposed service, and second, that service offered is or will be required by present and future public convenience and necessity. Robinson v. National Trailer Convoy, Inc. ---------- 474
37. Waters which may be discharged into natural depression, draw, or watercourse without liability under provisions of cited statute do not include waste irrigation waters in quantities injurious to neighboring land. Peters v. Langrehr ---------- 480
38. Ordinarily, if amendatory act invalid, original statute remains in effect. State v. Anderson -------- 491
39. Execution and approval of undertaking required in cited statute directory only. Neumeyer v. Omaha Public Power Dist. ---------- 516
40. Insofar as Jacobitz v. Bussinger, 179 Neb. 524, 138 N. W. 2d 839, and Gebhart v. Tri-State Generation & Transmission Assn., 181 Neb. 457, 149 N. W. 2d 41, hold section 76-716, R. R. S. 1943, mandatory and jurisdictional, they are overruled. Neumeyer v. Omaha Public Power Dist. ---------- 516
41. Section 44-501, R. R. S. 1943, directly conflicts with section 44-380, R. R. S. 1943. Insurance Co. of North America v. County of Hall ---------- 609
42. Section 44-501, R. R. S. 1943, as amended and reenacted by 1951 Legislature, provides that fire insurance policy shall conform as to provisions, agreements, and conditions with 1943 Standard Fire Insurance Policy of New York, and declares that no other or different provision, agreement, or clause shall be made part of such fire insurance policy. Insurance Co. of North America v. County of Hall 609

43. Under section 44-501, R. R. S. 1943, as amended in 1951, an insured's recovery on fire insurance policy limited by provisions of policy as written in conformity with 1943 Standard Fire Insurance Policy of New York. Insurance Co. of North America v. County of Hall ---------- 609
44. By statute (1) on money due on instrument in writing or on settlement of account from day balance agreed upon, interest allowed; and (2) unsettled accounts bear interest after 6 months from date of last item. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669
45. By statute, party may recover prejudgment interest and an attorney's fee on claim of $2,000 or less for services rendered, labor done, or materials furnished, provided he presented claim 90 days prior to commencement of suit; compliance with condition mandatory. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669
46. Appeal bond within purview of statute which requires court to disregard defects not affecting substantial rights of adverse party. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. -- 673
47. Child custody statutes of Nebraska to be liberally construed to accomplish purposes of serving best interests of children involved. Healey v. Johnson -- 677
48. Statutory provisions may cut across issue preclusion at common law. Lost Creek Drainage Dist. v. Elsam 705
49. All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision. School Dist. of Seward Education Assn. v. School Dist. of Seward ---------- 772
State v. Williams ---------- 802
50. In event of sale of school lands to third person, tenant has right to compensation resulting from "improvements" or crops compensable under school land lease statutes. State v. Bush ---------- 824

Stipulations.

1. Stipulations voluntarily entered into between parties to cause or their attorneys, for government of their conduct and control of their rights during trial or progress of cause, will be respected and enforced by courts, where such stipulations not contrary to good morals or sound public policy. Martin v.

Martin ---------- 393
2. Courts will enforce valid stipulations unless some good cause shown for declining to do so, especially where stipulations acted upon so that parties could not be placed in status quo. Martin v. Martin ---- 393
3. Parties bound by stipulations voluntarily made and relief from such stipulations after judgment warranted only under exceptional circumstances. Martin v. Martin ---------- 393

Streets.

1. Location of city streets matter generally within discretion of municipal authorities. Holden v. City of Tecumseh ---------- 117
2. In absence of prohibition by statute or ordinance, person may cross street at any place and not limited to crossing at intersections; driver of automobile owes to one crossing street at point not regular crossing duty of reasonable and ordinary care under circumstances. Koob v. Long ---------- 640

Subrogation.

Insurer cannot recover by right of subrogation from his own insured nor can rights of subrogated insurer rise higher than rights of its insured against third party. Midwest Lumber Co. v. Dwight E. Nelson Constr. Co. ---------- 308

Supersedeas.

In appealing from decree of foreclosure which orders sale of land, supersedeas bond should be conditioned as set out in cited statute, and amount of pledge matter of judicial discretion; in appealing from decree of foreclosure which directs payment of money and also orders sale of real estate, court may require supersedeas bond in amount computed as specified in said statute. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---------- 673

Support of Persons.

1. Medical services furnished husband individually are necessaries within meaning of cited statute for which wife may be liable. Nichol v. Clema ---------- 74
2. Each case of what are necessaries and who is included within term family as provided in cited statute must be determined on its own facts. Nichol v. Clema ---------- 74

Taxation.

1. Power to tax being sovereign power, constitutional provisions relating thereto do not operate as grants of power of taxation to government, but merely limitations on power which would otherwise be unrestricted. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
2. Constitutional limitations on power to tax must be strictly construed. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
3. One-half mill levy made by Omaha-Douglas Public Building Commission under authority of L. B. 1003, 82nd Legislative Session, not county tax subject to provisions of Article VIII, section 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ---------- 30
4. One-half mill levy authorized to be made by cities of metropolitan class for purposes of L. B. 1003, 82nd Legislative Session, does not contravene Omaha city charter adopted under provisions of Article XI, section 5, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission ----- 30
5. Tax authorized to be levied by city of metropolitan class under provisions of L. B. 1003, 82nd Legislative Session, not a tax for corporate purposes and is one levied by local authority; does not contravene Article VIII, section 7, Constitution of Nebraska. Dwyer v. Omaha-Douglas Public Building Commission --- 30
6. Fundamental law of this State that Legislature vested with taxing power without limit, subject only to restrictions contained in Constitution. Axiomatic, therefore, that provisions of Constitution in relation to taxation not grants of power but limitations on taxing power of State, lodged in Legislature. Sandberg v. State ---------- 335
7. Not denied that since adoption of Fourteenth Amendment, State taxing power can be exerted only to effect public purpose and does not embrace raising of revenue for private purposes, but requirements of due process leave free scope for exercise of wide legislative discretion in determining what expenditures will serve public interest. Sandberg v. State 335
8. Nothing more familiar in taxation than imposition of tax upon class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for condition to be remedied. Sandberg

v. State ---------- 335
9. Tax not assessment of benefits; is means of distributing burden of cost of government; only benefit to which taxpayer consequently entitled that derived from his enjoyment of privileges of living in organized society, established and safeguarded by devotion of taxes to public purposes. Sandberg v. State ---------- 335
10. Provision of cited statute requiring notice be given to record owner of "every piece of real estate which has been assessed at a higher figure than at the last previous assessment" does not apply to increases ordered by State Board of Equalization and Assessment under later enacted statute. Hansen v. County of Lincoln ---------- 461
11. Under provisions of cited statute, county assessor has authority to correct valuations which have become erroneous by reason of judicial declaration of invalidity of increase ordered by State Board of Equalization and Assessment. Hansen v. County of Lincoln ---------- 461
12. Generally, suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover taxes alleged to have been illegally assessed. Hansen v. County of Lincoln ---------- 461
13. Provisions of cited statute do not contemplate that court which entered judgment declaring invalidity of tax will in class action supervise tax refund or credit procedures. Hansen v. County of Lincoln -- 461
14. Attorney General may on his own relation in name of State of Nebraska bring action for declaratory judgment challenging constitutionality of statute which Tax Commissioner of State proposes to implement by enforcement and regulation pursuant to duties imposed upon that officer by statute and Constitution. State ex rel. Meyer v. Peters ---------- 817

Time.

1. Statute of limitations in libel action commences to run upon publication of defamatory matter which forms basis of action. Patterson v. Renstrom ---- 78
2. Provisions in construction contracts providing requests for additional time, necessitated by cause beyond contractor's control, to complete contract must be in writing, generally binding. Abel Constr. Co. v. School Dist. of Seward ---------- 166

3. Must be evidence to support finding that inaction of certain parties for whose actions owner allegedly responsible in fact cause of delay in completion of construction contract. Abel Constr. Co. v. School Dist. of Seward ---------- 166
4. Engineer's authority under terms of construction contract to observe, inspect, suspend, or reject work, or make decisions in connection with technical specifications does not extend to waiving general contractual requirements relating to written request for time extensions and waiver of liquidated damages. Abel Constr. Co. v. School Dist. of Seward ---------- 166
5. Statutory requirement that Oil and Gas Conservation Commission enter its order within 30 days after hearing directory, not mandatory. Ohmart v. Dennis 260
6. Oil and Gas Conservation Commission possesses power in pooling order concerning federal and nonfederal lands to make order retroactive to date of first production. Ohmart v. Dennis ---------- 260
7. Amendment to dead man's statute governed any civil action or proceeding, other than those arising upon unintentional tort after effective date of amendment; antecedent of date of amendment is occurrence of tort, not commencement of action or proceeding. Haiar v. Kessler ---------- 312
8. Real purpose of prescribing manner in which adverse holding will be manifested to give notice to real owner that his title or ownership in danger so that he may, within period of limitation, take action to protect his interest. Whaley v. Mingus ---------- 351
9. In eminent domain proceeding, on appeal by condemner from award of county court appraisers, interest added or allowed only from date on which condemner deposited amount of appraisers' award and became entitled to enter into possession of property involved. This is not constitutionally impermissible. Petersen v. School Dist. of Bellevue ---------- 354
10. Easement for discharge of waste irrigation waters into natural depression, draw, or watercourse flowing through land of another cannot be acquired until it has been freely exercised without material change under claim of right for full period of 10 years. Peters v. Langrehr ---------- 480
11. Where discretionary duty imposed upon district court to determine whether or not good cause shown to grant leave to party to plead out of time, its deci-

sion not ordinarily disturbed absent showing abuse of discretion. Neumeyer v. Omaha Public Power Dist. ---------- 516

12. Unless otherwise specified, consent to extension of promissory note authorizes single extension for not longer than original period of note. Citizens State Bank v. Beermann Bros. Dehy ---------- 597

13. Fact alone that answer filed 10 days after answer day without leave of court not sufficient ground for thereafter entering default judgment against defendant. Vacanti & Randazzo Constr. Co. v. H.I.E. Food Products, Inc. ---------- 680

14. Where notice of appeal not filed within 1 month from entry of judgment or final order appealed from as required by cited statute, Supreme Court obtains no jurisdiction to hear appeal and appeal must be dismissed. State v. Howell ---------- 687

15. Illegality of prisoner's custody prior to issuance of rendition warrant from sister state does not render warrant void and unenforceable. Bell v. Janing ---- 690

16. Application for postponement of time of trial of criminal case addressed to sound discretion of trial court and, in absence of abuse of discretion disclosed by record, denial thereof not error. State v. McClelland ---------- 699

17. Generally, provisions for holding over until successor elected and qualified do not prolong incumbent's term indefinitely, but only for reasonable time to allow successor to qualify. Stasch v. Weber ---------- 710

Torts.

1. Amendment to dead man's statute governed any civil action or proceeding, other than those arising upon unintentional tort after effective date of amendment; antecedent of date of amendment is occurrence of tort, not commencement of action or proceeding. Haiar v. Kessler ---------- 312

2. Claim for damages for tort cannot be used as set-off against actions on contracts or suits on promissory notes secured by real estate mortgages. The Tilden Bank v. Retzlaff ---------- 834

Trial.

1. Burden of proof of exceptions within ambit of Depressant and Stimulant Drugs Act on party attempting to bring himself within exceptions. State v. Minor ---------- 23

2. Parol evidence rule does not prevent reception or consideration of evidence to prove promissory fraud. Abbott v. Abbott ---------- 61
3. If circumstances of parties change and in best interests of children, court may from time to time revise or alter divorce decree so far as custody, care, and maintenance of children concerned. Phillips v. Phillips ---------- 89
4. Not burden of State to establish no discrimination in jury selection until at least prima facie case of discrimination established. State v. Casados ------ 91
5. As general rule, evidence of other crimes than that with which accused charged not admissible in criminal prosecution. State v. Casados ---------- 91
6. Evidence of other crimes, similar to that charged, relevant and admissible when tends to prove particular criminal intent necessary to constitute crime charged. State v. Casados ---------- 91
7. Proof of another distinct substantive crime not admissible in criminal prosecution unless some legal connection between the two upon which it can be said one tends to establish the other or some essential fact in issue. State v. Casados ---------- 91
8. Duty of prosecuting attorney to conduct trial in such manner as will be fair and impartial to rights of accused, no matter how guilty he may be. State v. Casados ---------- 91
9. Due process requirements may under some circumstances be satisfied if full hearing in courts available after administrative order with judicial power to stay irreparable injury pending court hearing. Stauffer v. Weedlun ---------- 105
10. Where actual verbatim record of proceedings on taking plea of guilty lost, reasonably accurate account of what took place established by other evidence not "silent record" within proscription of Boykin v. Alabama. State v. Hall ---------- 130
11. In post conviction cases, rule clear that petitioner has burden of establishing basis for relief. State v. Fusby ---------- 139
12. Instruction that jury to make no inferences from fact defendant did not testify is cautionary instruction for benefit of defendant. State v. Johnson -- 151
13. In child custody action between grandmother and aunt, court will consider best interests of child and make such order for its custody as will be for its

welfare. Cain v. Adams ---------- 152
14. In every case, before evidence on an issue submitted to jury, preliminary question for court, not whether literally no evidence, but whether any upon which jury can proceed to find verdict for party producing it, upon whom burden of proof imposed. Baker v. Daly ---------- 156
15. Mere scintilla of evidence not enough to require submission of an issue to jury. Baker v. Daly ---- 156
16. Where an issue, even assuming properly pleaded, affords no basis for recovery under evidence adduced in case, trial court's submission of such issue to jury constitutes error. Baker v. Daly ---------- 156
17. Must be evidence to support finding that inaction of certain parties for whose actions owner allegedly responsible in fact cause of delay in completion of construction contract. Abel Constr. Co. v. School Dist. of Seward ---------- 166
18. Absolute privilege attaches to defamatory statements made incident to, and in course of, judicial proceeding if defamatory matter has some relation to proceedings. Sinnett v. Albert ---------- 176
19. Rule of absolute privilege applicable not only to judicial proceedings but to quasi-judicial proceedings as well. Sinnett v. Albert ---------- 176
20. Relevancy of defamatory matter not technical legal relevancy but instead general frame of reference and relationship to subject matter of action. Sinnett v. Albert ---------- 176
21. Absolute privilege to publish false and defamatory matter in complaint made to committee on inquiry of Nebraska State Bar Association regarding alleged misconduct of attorney where defamatory matter related thereto. Sinnett v. Albert ---------- 176
22. Against sound principles of professional ethics for one who knows he is to be called as material witness in case to appear as attorney therein. Sinnett v. Albert ---------- 176
23. Defendant in Nebraska Penal and Correctional Complex under no disability barring prosecution of action in courts of this state by reason of his imprisonment. Vacek v. Marburger ---------- 180
24. Under provisions of contract for purchase of silo with 1-year warranty of customer satisfaction, buyer's opinion or decision must be made with entire good faith and not captiously or capriciously, and

whether he so acts question of fact for jury. Maas v. Scoboda ---------- 189
25. Conviction based on eyewitness identification at trial following pretrial identification by photograph and lineup will be set aside on those grounds only if pretrial identification procedures so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Reed 195
26. Conviction may rest on uncorroborated testimony of accomplice. State v. Oglesby ---------- 211
27. Fact accomplice guilty of willful false swearing on material matter not automatically discredits his testimony as matter of law in all cases; ordinarily, his credibility question for jury under proper cautionary instruction. State v. Oglesby ---------- 211
28. Question of constitutionality of city ordinance not considered by Supreme Court unless properly presented or offered in evidence in district court. State v. Radcliff ---------- 236
29. Photographs admissible in evidence if shown true and correct representations of places or subjects purport to represent at times pertinent to inquiry; admission of photographs largely within discretion of trial court and unless abuse of discretion shown, error not predicated thereon. State v. Radcliff --- 236
30. Divorce action for trial de novo in Supreme Court; however it cannot ignore fact that trial court had opportunity to observe parties. Newton v. Newton - 242
31. Judgment of trial court fixing amount of alimony not disturbed on appeal unless good cause shown. Newton v. Newton ---------- 242
32. On appeal to district court from order of Director of Motor Vehicles revoking driver's license for point violations, completely void judgments, erroneous or fraudulent records, and abstracts of convictions may be challenged at evidentiary hearing and necessary foundational facts must support validity of order of revocation. State v. Lessert ---------- 243
33. Under rule of res judicata, conclusiveness of prior judgment extends not only to matters actually determined but also to matters that could have been raised or were necessarily adjudicated or implied in final judgment, whether raised or not. State v. Lessert ---------- 243
34. Unless particular traffic ordinance or statute judicially declared unconstitutional, motorist convicted

of violation of that ordinance or statute cannot challenge its constitutionality in collateral proceeding to revoke his driver's license under point system provided by cited statutes. State v. Lessert ------ 243

35. In workmen's compensation case, burden of proof on defense of intoxication on employer. Johnson v. Hahn Bros. Constr., Inc. ---------- 252

36. Order entered denying plea of statute of limitations, after separate hearing on that issue, not final or appealable order. Wulf v. Farm Bureau Ins. Co. - 258

37. Burden on one who attacks statute valid on face to prove facts to establish its invalidity. City of Parkview v. City of Grand Island ---------- 267

38. Jury verdict based upon conflicting evidence not set aside unless so clearly wrong as to induce belief on part of Supreme Court that must have been found through passion, prejudice, mistake, or some means not apparent in record. Wright v. Haffke -- 270

39. In reviewing evidence where jury returned verdict for defendant, defendant must have benefit of any and all reasonable inferences deducible from proof. Wright v. Haffke ---------- 270

40. Common purpose among two or more persons to commit crime need not be shown by positive evidence but may be inferred from circumstances surrounding act and from defendant's conduct subsequent thereto. Wright v. Haffke ---------- 270

41. When firearm used, question always is whether force used exceeded permissible limits and is question for jury under proper instructions. Wright v. Haffke ---------- 270

42. Instructions to jury considered as whole; when thus considered, if law correctly stated, case fairly submitted, and jury could not have been misled, claim of prejudicial error in instructions not available. Wright v. Haffke ---------- 270

43. Issue of gross negligence for jury if evidence relating thereto conflicting and from which reasonable minds might arrive at different conclusions. Demont v. Mattson ---------- 277

44. When evidence resolved most favorably to existence of gross negligence and facts thus determined, inquiry of whether they support finding of gross negligence one of law. Demont v. Mattson ---------- 277

45. More than one act of negligence may in combination amount to gross negligence under guest statute;

several acts should be weighed as whole. Demont v. Mattson ---------- 277
46. Whether particular act or omission may be termed gross depends upon all facts and circumstances, including other negligent acts or omissions, which may affect quality of conduct in particular case; what would amount to slight negligence under certain circumstances might under different circumstances be gross negligence. Demont v. Mattson ---------- 277
47. Where head of family owns or maintains car for family use and family member using car with express or implied consent of owner, negligence of family member driver imputed to head of family. Demont v. Mattson ---------- 277
48. Where reasonable minds might differ as to whether risk assumed, jury question presented. Demont v. Mattson ---------- 277
49. Before contributory negligence of guest passenger presents jury question, must be evidence that it proximately contributed to accident and injuries. Demont v. Mattson ---------- 277
50. Instructions must be considered and construed together. Demont v. Mattson ---------- 277
51. Burden of proof upon claimant in workmen's compensation case to establish by preponderance of evidence that personal injury sustained by employee, arising out of and in course of his employment. Breed v. Interstate Glass Co. ---------- 284
52. Granting of continuance is matter within sound discretion of trial judge and denial of motion for continuance not disturbed in absence of abuse of discretion. State v. Meadows ---------- 287
53. Problem concerning admissibility of evidence of other offenses is special aspect of broad general problem of relevancy; generally test of admissibility of such evidence whether evidence relevant and material to any issue on trial, or whether it fairly tends to prove particular offense charged or an essential element thereof. State v. Meadows ---------- 287
54. Whenever point reached at which trier of fact being told that which it is entirely equipped to determine without witness' aid, testimony superfluous. State v. Thunder Hawk ---------- 294
55. Credibility of witness in criminal case cannot be impeached by showing his reputation for morality bad, but such attack must be addressed directly to

his reputation for truth and veracity. State v. Bittner ---------- 298
56. When chastity not an issue, evidence of general reputation that female witness is, or has been, not law-abiding, unchaste, or prostitute, inadmissible for purpose of impeaching witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for purpose of impeachment by evidence as to specific acts or instances. State v. Bittner ---------- 298
57. Right to confrontation provided by Sixth Amendment to Constitution of United States not violated when witness' claim of privilege restricts cross-examination on collateral matters bearing only on credibility and not on facts brought out on direct examination or pertaining to defendant's guilt or innocence. State v. Bittner ---------- 298
58. Ordinarily, uncorroborated testimony of accomplice who has been guilty of conscious falsehood may sustain conviction if proper cautionary instruction given. State v. Bittner ---------- 298
59. Fixing of amount of alimony rests, in each case, within sound discretion of court. Ramold v. Ramold 314
60. In determining whether motion for judgment notwithstanding verdict should have been sustained, evidence must be considered in light most favorable to party who obtained verdict. Haffke v. Grinnell 323
61. In prosecution for rape, while evidence of prompt complaint standing alone insufficient corroboration, such evidence for consideration of jury as corroboration of main facts in issue. State v. Ferguson ---- 330
62. In prosecution for rape, not essential that prosecutrix be corroborated by other witnesses as to particular acts which constitute offense; sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to principal fact in issue. State v. Ferguson ---- 330
63. Under Uniform Commercial Code, adequacy or insufficiency of price for which collateral sold at private sale after default and repossession one of "terms" of sale, and relevant along with other issues in determining whether sale commercially reasonable. First Nat. Bank of Bellevue v. Rose ---- 362
64. General denial available to defendant to challenge one or more of elements essential to recovery by plaintiff and effect of denial to put burden on plain-

tiff to establish by evidence matter denied. First Nat. Bank of Bellevue v. Rose ---------- 362
65. Where answer to petition consists of general denial, defendant may introduce such testimony as will tend to disprove testimony of plaintiff in support of his petition; for such purposes, no other allegations in answer necessary. First Nat. Bank of Bellevue v. Rose ---------- 362
66. Common purpose among two or more persons to commit crime need not be shown by positive evidence but may be inferred from circumstances surrounding act and from defendant's conduct subsequent thereto. State v. Claire ---------- 373
67. Participation in criminal intent may be inferred from presence, companionship, and conduct. State v. Claire ---------- 373
68. In order to obtain review of alleged errors occurring during trial, such errors must be pointed out to trial court in motion for new trial and ruling obtained thereon. State v. Ryan ---------- 381
69. Convictions based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if photographic identification procedure so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Nero ------- 383
70. Not province of Supreme Court in reviewing record in action at law to resolve conflicts in or weigh evidence. Weiner v. Hroch ---------- 389
71. Party who appears pro se subject to and will receive same consideration as if he had been represented by attorney. Martin v. Martin ---------- 393
72. Stipulations voluntarily entered into between parties to cause or their attorneys, for government of their conduct and control of their rights during trial or progress of cause, will be respected and enforced by courts, where such stipulations not contrary to good morals or sound public policy. Martin v. Martin ---------- 393
73. Courts will enforce valid stipulations unless some good cause shown for declining to do so, especially where stipulations acted upon so that parties could not be placed in status quo. Martin v. Martin -- 393
74. Parties bound by stipulations voluntarily made and relief from such stipulations after judgment warranted only under exceptional circumstances. Martin

v. Martin ---------- 393
75. In determining issue of public convenience and necessity, in cases where new or extended operating rights sought, controlling questions whether operation will serve useful purpose responsible to public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in specified operation without endangering or impairing operations of existing carriers contrary to public interest. Petroleum Transport Service, Inc. v. Wheeler Transport Service, Inc. ---------- 400
76. Trial judge vested with broad discretion to properly circumscribe inquiry into criminal defendant's past conduct when that subject raised during cross-examination of defense character witness. State v. Newte ---------- 412
77. While particular facts inadmissible in evidence upon direct examination for purpose of sustaining or overthrowing character, doctrine does not extend to cross-examination. State v. Newte ---------- 412
78. Upon cross-examination of witness who has testified to general reputation, questions may be propounded for purpose of eliciting source of witness' information, and particular facts may be called to his attention. State v. Newte ---------- 412
79. Extent of cross-examination of witness must be left to discretion of trial court. State v. Newte ------ 412
80. Character witness may be cross-examined as to an arrest whether or not it culminated in conviction of defendant. State v. Newte ---------- 412
81. Plaintiff must not only show in breach of contract case his right of recovery, but elements and facts which compose measure of his recovery, and not leave jury to rove without guide or compass through limitless fields of conjecture and speculation. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
82. Duty of district court to refrain from submitting to jury issue of damages when evidence such that it cannot determine such issue except by indulging in speculation and conjecture. Midlands Transp. Co. v. Apple Lines, Inc. ---------- 435
83. Contract restraining person from establishing business competitive with that of other party to it is strictly construed and doubts resolved against latitudinarian construction thereof. Midlands Transp.

Co. v. Apple Lines, Inc. ---------- 435
84. Order of juvenile court regarding custody of children not disturbed unless clear abuse of discretion or decision against weight of evidence. Anderson v. Doeschot ---------- 444
85. Amount by which limit exceeded not essential element of offense of speeding, but point system statute requires magistrate or judge make such finding; finding of information to be shown on abstract for conviction. Melanson v. State ---------- 446
86. In every case, before evidence submitted to jury, there is preliminary question for court to decide, when properly raised, not whether is literally no evidence, but whether is any upon which jury can properly proceed to find verdict for party producing it, upon whom burden of proof imposed. Moats v. Lienemann ---------- 452
87. Motion for directed verdict or for judgment notwithstanding verdict must be treated as admission of truth of all material and relevant evidence submitted on behalf of party against whom motion directed; such party entitled to have every controverted fact resolved in his favor and to have benefit of every inference that can reasonably be deduced from evidence. Moats v. Lienemann ---- 452
88. In determining question of whether evidence sufficient to submit issues of negligence to jury, a party is entitled to have all conflicts in evidence resolved in his favor and benefit of every reasonable inference that may be deduced from evidence; if reasonable minds might draw different conclusions from set of facts thus resolved in favor of a party, issues of negligence for jury. Moats v. Lienemann 452
89. Provisions of cited statute do not contemplate that court which entered judgment declaring invalidity of tax will in class action supervise tax refund or credit procedures. Hansen v. County of Lincoln -- 461
90. Where insurer's defense based upon exclusionary clause in policy, burden on insurer to prove facts which bring it within exclusion. Robinson v. State Farm Mut. Auto. Ins. Co. ---------- 470
91. In granting certificate of public convenience and necessity, Railway Commission, under cited statute, required to find first, that applicant fit, willing, and able to perform proposed service, and second, that service offered is or will be required by present

and future public convenience and necessity. Robinson v. National Trailer Convoy, Inc. ---------- 474
92. Burden of proof on party relying on breach of warranty to show performance of conditions as to which right to assert warranty depends, or waiver thereof, or excuse for nonperformance. Melcher v. Boesch Motor Co. ---------- 522
93. Issue of whether provision of express warranty unconscionable presents question of law for court. Melcher v. Boesch Motor Co. ---------- 522
94. Objections to forms of verdict should be made before or at time verdict returned. Melcher v. Boesch Motor Co. ---------- 522
95. If jury finds defendant not liable in breach of warranty action, error relating to subject of damages necessarily harmless. Melcher v. Boesch Motor Co. 522
96. In testing sufficiency of evidence to support verdict, must be considered in light most favorable to successful party; every controverted fact must be resolved in his favor and he should have benefit of every inference that can be reasonably drawn therefrom. Lake v. Southwick ---------- 533
97. Opinions of experts not binding on trier of facts. Swartz v. Hess, Inc. ---------- 542
98. Testimony by plaintiff as to statements of defendants' agent made to third party and related to plaintiff by third party admissible to show statements were related to plaintiff and that he relied on them. Ristine v. Geigy Agricultural Chemicals 550
99. In every case, before evidence submitted to jury, is preliminary question for court to decide, when properly raised, not whether is literally no evidence, but whether is any evidence upon which jury can properly proceed to find verdict for party producing it, upon whom burden of proof imposed. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
100. While expert will be permitted to express his opinion, or even his belief, he cannot give his opinion upon precise or ultimate fact in issue before jury, which must be determined by it. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
101. Plaintiff may establish its case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence not sufficient to sustain verdict unless circumstances proved by evidence of such nature and so related to each other that conclusion

reached by jury only one that can fairly and reasonably be drawn therefrom. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
102. Conjecture, speculation, or choice of possibilities not proof; must be something more which will lead reasoning mind to one conclusion rather than another. Barkalow Bros. Co. v. Floor-Brite, Inc. -- 568
103. Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
104. Negligence question of fact and may be proved by circumstantial evidence and physical facts; however, law requires that facts and circumstances proved, together with inferences that may properly be drawn therefrom, indicate with reasonable certainty negligent act charged. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
105. Anomie in criminal process is variable not to be forgotten, although its weight is light in any one case. State v. West ---------- 579
106. Findings of court in law action in which jury waived have effect of verdict of jury and will not be disturbed on appeal unless clearly wrong. Squires v. Implement Dealers Mut. Ins. Co. ------ 590
107. Where facts and issues which are ground of motion for post conviction relief known to defendant and his counsel, and raised, heard, and determined at time of trial resulting in conviction but not raised in direct appeal, those issues not ordinarily considered in post conviction review. State v. Wieland 626
108. In determining whether party entitled to directed verdict, evidence must be considered most favorably to other party; every controverted fact must be resolved in his favor, and he is entitled to benefit of every reasonable inference that may be drawn therefrom. Koob v. Long ---------- 640
109. Claimant of substantial damages must furnish appropriate data to enable trier of fact to find amount of damages with reasonable certainty if evidence of damages or amount thereof susceptible of definite proof; damages may not be established by conjecture, speculation, or doubtful proof. Masten v. Campbell Manuf. Co. ---------- 646
110. Admission of executor or administrator not receivable against him as party in his personal capacity.

Degmetich v. Beranek ---------- 659
111. Allowance by executrix of demand against estate based on promissory note executed by executrix and decedent tolls statute as to estate but not as against executrix in individual capacity. Degmetich v. Beranek ---------- 659
112. When driver of motor vehicle turning across highway between intersections fails to look to front and rear for oncoming traffic at time and place when to look would be effective, or looks and negligently fails to see that which in plain sight, or in position where cannot see, question for court usually presented. Rowedder v. Rose ---------- 664
113. Admission or rejection of photographs in evidence largely within discretion of trial court; error may not be predicated thereon in absence of showing of abuse of discretion. Rowedder v. Rose ---------- 664
114. Court in every stage of action must disregard any error which does not affect substantial rights of adverse party; no judgment shall be reversed by reason of error. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669
115. Appeal to Supreme Court in civil action will be considered upon theories presented by parties at trial, provided liberal construction of pleadings, as construed by parties, will permit. Andrews Electric Co. v. Farm Automation, Inc. ---------- 669
116. Where is some circumstantial evidence which tends to support allegation in petition for foreclosure of mortgage that no proceedings at law have been had for recovery of debt, and no contrary showing attempted, decree of foreclosure not reversed without showing that specific objection called to attention of trial court and also that defendant prejudiced by omission of direct proof. The Exchange Bank v. Mid-Nebraska Computer Services, Inc. ---------- 673
117. In cases involving child custody determinations in juvenile court and other courts, findings of trial court, both as to evaluation of evidence and as to matter of custody, not disturbed unless clear abuse of discretion shown or decision against weight of evidence. Healey v. Johnson ---------- 677
118. In cases involving child custody and determinations in juvenile court, findings of trial court, both as to evaluation of evidence and as to matter of custody, will not be disturbed unless clear abuse of discretion

shown. Healey v. Hartman ---------- 682
119. Court may terminate parental rights when it finds such action in best interests of child and it appears from evidence that parent has substantially, continuously, and repeatedly neglected child and refused to give child necessary parental care and protection. Healey v. Hartman ---------- 682
120. In post conviction proceeding, petitioner has burden of establishing basis for relief. State v. Howell -- 687
121. When evidence of guilt clear and exclusion of erroneous evidence obviously would not have resulted in different verdict, admission of such evidence harmless error. State v. Howell ---------- 687
122. Upon appeal to district court from decision of board of supervisors of drainage district, all original objections made to classification and assessment of benefits heard and determined in summary manner as in equity, and upon appeal to Supreme Court, cause tried de novo. Drainage Dist. No. 10 v. Canaday ---------- 701
123. In quo warranto proceeding, ordinarily burden of proof in first instance on defendant who claims right to office. Stasch v. Weber ---------- 710
124. In quo warranto proceeding, no legal presumption arises in favor of defendant merely from his establishment of possession of office which he claims. Stasch v. Weber ---------- 710
125. Generally, in quo warranto proceeding, when challenged official purports to hold office by virtue of election, he must show that election was held and that he was in fact elected. Stasch v. Weber ------ 710
126. Judgment of trial court in action where jury waived has effect of verdict of jury and will not be set aside unless clearly wrong. Johnson v. Roueche -------- 716
127. Under comparative negligence statute, if fact finder determines respective parties to be guilty of actionable negligence and contributory negligence, responsibility then on it to make comparison contemplated by statute. Johnson v. Roueche ---------- 716
128. Credibility of witnesses and weight to be given their testimony for jury's consideration and not for court. Wisnieski v. Harms ---------- 721
129. Threats and expressions of ill will in intentional homicide admissible to show intent, malice, or motive; malice and motive relevant and material not merely as evidence of intent, but also on issue of

guilt or innocence as tending to point to identity of perpetrator or perpetrators. State v. Rice 728
130. In prosecution for intentional homicide committed against one of a class, threats by defendant against class admissible. State v. Rice 728
131. Two or more defendants may be tried together where each of defendants charged with accountability for offense or offenses or where offense part of common scheme, plan, or conspiracy. State v. Rice 728
132. Defendants challenging joint trial must affirmatively demonstrate that joint trial has prejudiced their individual rights. State v. Rice 728
133. Irrelevant and immaterial evidence erroneously admitted not necessarily prejudicial. State v. Rice 728
134. Related instructions must be read and construed as whole and if when so read and construed they correctly state the law there is no error. State v. Rice 728
135. Questions of credibility ordinarily for jury to determine and not for court. State v. Rice 728
136. Where validity of alleged gift between persons occupying confidential relationship attacked, burden of proving confidential relationship existed between parties rests on one attacking gift. Gaeth v. Newman 756
137. Where facts and circumstances show such a confidential, fiduciary, or trust relationship that it would be inequitable to sustain deed in question, then presumption of undue influence arises, and burden of going forward with evidence rests upon grantee to show bona fides thereof. Gaeth v. Newman 756
138. Generally speaking, any presumption of undue influence may be rebutted by competent and sufficient evidence. Gaeth v. Newman 756
139. In interpreting written contract, meaning of which in doubt and dispute, evidence of prior or contemporaneous negotiations or understandings admissible to discover meaning which each party had reason to know would be given to words by other party. Ranchland Auto, Inc. v. Cleveland 804
140. Ordinarily, party entitled to benefit of testimony of other witnesses in contradiction of his own, wherever his own not of character of judicial admission, and concerns only some evidential or constituent circumstance of his case; this is especially so as to circumstances of accident or similar event, because in such

case party's testimony especially subject to inexactness of observation and memory. Sacco v. Gau ---- 808
141. Where party testifies clearly and unequivocally to fact which is within his own knowledge, such testimony may be considered judicial admission; rule has particular application where party so testifying made no effort to retract, qualify, or otherwise explain positive force of his own evidence. Sacco v. Gau ---------- 808
142. Admission in rebuttal of testimony which should have been offered in chief rests in sound discretion of court. Sacco v. Gau ---------- 808
143. Instructions must be confined to issues supported by evidence. Sacco v. Gau ---------- 808
144. Instructions given to jury must be construed together, and if when considered as whole they properly state law, that is sufficient. Sacco v. Gau -------- 808

Trusts.

1. Charitable trusts are special favorites of courts of equity which will preserve and enforce them if possible under rules of law. Garwood v. Drake University ---------- 605
2. If dominant purpose of charitable trust certain, it will not be denied execution because of absence of perfection of detail or presence of immaterial and inappropriate language in instrument creating trust. Garwood v. Drake University ---------- 605
3. In case of informal trust, mingling of funds proper if such is understanding of parties as shown by their agreement or by their custom. Gaeth v. Newman 756

Undue Influence.

1. Burden of proof upon person asserting undue influence to prove by preponderance of evidence: (1) That grantor, testator, or donor was person who would be subject to such influence; (2) that was opportunity to exercise such influence; (3) that was disposition to exercise such influence; and (4) that result was effect of such influence. Gaeth v. Newman 756
2. Affection, confidence, and gratitude of parent to child which inspires gift is natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse judgment and control will of donor. Gaeth v. Newman ------ 756
3. Where facts and circumstances show such a confi-

dential, fiduciary, or trust relationship that it would be inequitable to sustain deed in question, then presumption of undue influence arises, and burden of going forward with evidence rests upon grantee to show bona fides thereof. Gaeth v. Newman ---------- 756
4. Generally speaking, any presumption of undue influence may be rebutted by competent and sufficient evidence. Gaeth v. Newman ---------- 756
5. Mere existence of confidential relationship between grantor and grantee does not of itself show undue influence invalidating deed, and does not render deed void or voidable, when transaction open, honest, and fair, or where deed made by grantor with full knowledge of its nature and effect, and because of deliberate desire of grantor. Gaeth v. Newman ---- 756
6. In determining whether presumption of undue influence rebutted, court may consider whether grantor has received independent advice. Gaeth v. Newman 756
7. Absence of independent advice means absence of opportunity to have independent advice, and not necessary that acts of grantor conform to such advice in order to validate deed. Gaeth v. Newman ---------- 756
8. In order to establish undue influence invalidating deed, must be proof that circumstances of execution of deed inconsistent with any hypothesis but undue influence, which must be proved in connection with conveyance in suit, and not with other things. Gaeth v. Newman ---------- 756

United States.

1. State law applies to leasehold interests under Mineral Leasing Act for Acquired Lands where no important threat to any identifiable federal policy or interest appears. Ohmart v. Dennis ---------- 260
2. Favorable determination by Secretary of Interior essential under Mineral Leasing Act for Acquired Lands to inclusion of federal lands with nonfederal lands in state pooling order. Ohmart v. Dennis -- 260
3. Oil and Gas Conservation Commission possesses power in pooling order concerning federal and nonfederal lands to make order retroactive to date of first production. Ohmart v. Dennis ---------- 260

Vendor and Purchaser.

1. Under cited section of Uniform Commercial Code, buyer given right to reject whole if goods fail in

any respect to conform to contract. Maas v. Scoboda 189
2. After rescission any use of property by buyer for own benefit or convenience will waive right to rescind. Maas v. Scoboda ---------- 189
3. Under provisions of contract for purchase of silo with 1-year warranty of customer satisfaction, buyer's opinion or decision must be made with entire good faith and not captiously or capriciously, and whether he so acts question of fact for jury. Maas v. Scoboda ---------- 189
4. Law regards parties as being competent to contract as they see fit with respect to satisfactory character of equipment sold, and seller assumes hazard of rendering performance according to terms of contract. Maas v. Scoboda ---------- 189

Venue.

Granting of change of venue rests in sound discretion of court. State v. McClelland ---------- 699

Verdicts.

1. In criminal case, Supreme Court will not interfere with verdict of guilty based upon evidence unless so lacking in probative force that it can say as matter of law that is insufficient to support finding of guilt beyond reasonable doubt. State v. Ryan ---------- 381
2. Jury verdict based upon conflicting evidence will not be set aside unless so clearly wrong as to induce belief on part of reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in record. Moats v. Lienemann ---------- 452
3. In determining whether motion for judgment notwithstanding verdict should have been sustained, evidence must be considered in light most favorable to party who obtained verdict; every controverted fact must be resolved in his favor and he is entitled to benefit of every reasonable inference that may be drawn therefrom. Department of Banking v. Colburn ---------- 500
4. Verdict of jury based upon conflicting evidence not set aside unless clearly wrong. Department of Banking v. Colburn ---------- 500
Melcher v. Boesch Motor Co. ---------- 522
5. Objections to forms of verdict should be made before or at time verdict returned. Melcher v. Boesch Motor

Co. ---------- 522
6. If jury finds defendant not liable in breach of warranty action, error relating to subject of damages necessarily harmless. Melcher v. Boesch Motor Co. 522
7. In testing sufficiency of evidence to support verdict, must be considered in light most favorable to successful party; every controverted fact must be resolved in his favor and he should have benefit of every inference reasonably deduced therefrom. Dahl v. Robinson ---------- 547
8. Verdict may be set aside as excessive only when so clearly exorbitant as to indicate was result of passion, prejudice, or mistake or clear that jury disregarded evidence or controlling rules of law. Dahl v. Robinson ---------- 547
9. In determining sufficiency of evidence to sustain verdict, must be considered most favorably to successful party and all conflicts resolved in his favor. Ristine v. Geigy Agricultural Chemicals ---------- 550
10. Plaintiff may establish its case by circumstantial evidence as well as by direct evidence, yet circumstantial evidence not sufficient to sustain verdict unless circumstances proved by evidence of such nature and so related to each other that conclusion reached by jury only one that can fairly and reasonably be drawn therefrom. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
11. Findings of court in law action in which jury waived have effect of verdict of jury and will not be disturbed on appeal unless clearly wrong. Squires v. Implement Dealers Mut. Ins. Co. ---------- 590
12. In determining whether party entitled to directed verdict, evidence must be considered most favorably to other party; every controverted fact must be resolved in his favor, and he is entitled to benefit of every reasonable inference that may be drawn therefrom. Koob v. Long ---------- 640
13. Where party has sustained burden and expense of trial and has succeeded in securing judgment of jury on facts in issue, he has right to keep benefit of that verdict unless there is prejudicial error in proceedings by which it was secured. Koob v. Long ---- 640

Waiver.

1. Engineer's authority under terms of construction contract to observe, inspect, suspend, or reject work,

or make decisions in connection with technical specifications does not extend to waiving general contractual requirements relating to written request for time extensions and waiver of liquidated damages. Abel Constr. Co. v. School Dist. of Seward 166
2. After rescission any use of property by buyer for own benefit or convenience will waive right to rescind. Maas v. Scoboda 189

Warranty.

1. Burden of proof on party relying on breach of warranty to show performance of conditions as to which right to assert warranty depends, or waiver thereof, or excuse for nonperformance. Melcher v. Boesch Motor Co 522
2. Issue of whether provision of express warranty unconscionable presents question of law for court. Melcher v. Boesch Motor Co. 522

Waters.

1. Waters which may be discharged into natural depression, draw, or watercourse without liability under provisions of cited statute do not include waste irrigation waters in quantities injurious to neighboring land. Peters v. Langrehr 480
2. Easement for discharge of waste irrigation waters into natural depression, draw, or watercourse flowing though land of another cannot be acquired until it has been freely exercised without material change under claim of right for full period of 10 years. Peters v. Langrehr 480

Weapons and Firearms.

1. Ordinarily, firearm may be used if reasonably necessary to prevent commission of felony or to arrest felon after felony committed. Wright v. Haffke 270
2. When firearm used, question always is whether force used exceeded permissible limits and is question for jury under proper instructions. Wright v. Haffke 270

Wills.

1. Law favors early vesting of estates; in construing will containing devise of life estate and devise of remainder, inference of vested remainder stronger than inference of contingent remainder if meaning obscure in this respect. Rudy v. Wagner 508

2. Words "in the event of death," "in case of death," or "at his death" do not have effect of postponing vesting of estate in remainder to time of death of life tenant. Rudy v. Wagner ---------- 508
3. In absence of provisions indicating contrary, remainder granted in will to children of life tenant becomes vested at once in children, defeasibly, despite presence of limitation over in event of death of life tenant leaving no child. Rudy v. Wagner -- 508
4. Devise to children as class of remainder over after life estate vests title to estate in remainder in such of them as are living at time of death of testator and in those born during continuance of life estate from moment of their birth; estate in remainder when once vested does not lapse by reason of death of beneficiary prior to expiration of life estate unless will so provides. Rudy v. Wagner ---------- 508
5. Where language conveying remainder interest to class does not provide for defeasance in case of death of one of class during continuance of life estate, vested interest of such member of class does not lapse but descends to his heirs. Rudy v. Wagner 508
6. Under specified testamentary language, devise of remainder over after life estate was to children of life tenant as a class; estate in remainder vested in each of them as they were born during continuance of life estate, and did not lapse as to child who predeceased life tenant; remainder defeasible only in event of death of life tenant, leaving no child or children. Rudy v. Wagner ---------- 508
7. Property owned in joint tenancy passes by reason of nature of title to surviving joint tenant upon death of other and does not pass by virtue of provisions of will of first joint tenant to die. Sheldon v. Watkins ---------- 599
8. In construction of joint and mutual will, intention of testator if ascertainable from language of will and not contrary to law must govern. Sheldon v. Watkins ---------- 599
9. Intention of testator as determined from will must be given effect if not inconsistent with any rule of law. Garwood v. Drake University ---------- 605
10. Basic object of will construction to ascertain intent and purpose of testator as shown by will, and then give that intention effect if not contrary to law. Garwood v. Drake University ---------- 605

11. Charitable gift not permitted to fail because of any mistake or ambiguity in describing intended beneficiary or expressing its purpose if from language of bequest, when construed in light of all facts, intent of donor reasonably apparent. Garwood v. Drake University ---------- 605

Witnesses.

1. Wife's incompetency in criminal proceedings against her husband limited to testimonial utterances; she is competent to supply information for presentence report. State v. Minor ---------- 23
2. Against sound principles of professional ethics for one who knows he is to be called as material witness in case to appear as attorney therein. Sinnett v. Albert ---------- 176
3. Conviction based on eyewitness identification at trial following pretrial identification by photograph and lineup will be set aside on those grounds only if pretrial identification procedures so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Reed ---------- 195
4. Conviction may rest on uncorroborated testimony of accomplice. State v. Oglesby ---------- 211
5. Fact accomplice guilty of willful false swearing on material matter not automatically discredits his testimony as matter of law in all cases; ordinarily, his credibility question for jury under proper cautionary instruction. State v. Oglesby ---------- 211
6. Constitutions of Nebraska and United States provide that no person shall be compelled to give evidence against himself of an incriminating nature. State v. Bittner ---------- 298
7. By statute, witness cannot ordinarily be compelled to answer when to do so would expose him to public ignominy. State v. Bittner ---------- 298
8. Trial court, in exercise of sound discretion, must determine whether witness' claim of privilege justifiable. State v. Bittner ---------- 298
9. Credibility of witness in criminal case cannot be impeached by showing his reputation for morality bad, but such attack must be addressed directly to his reputation for truth and veracity. State v. Bittner ---------- 298
10. When chastity not an issue, evidence of general repu-

tation that female witness is, or has been, not law-abiding, unchaste, or prostitute, inadmissible for purpose of impeaching witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for purpose of impeachment by evidence as to specific acts or instances. State v. Bittner ---------- 298

11. Right to confrontation provided by Sixth Amendment to Constitution of United States not violated when witness' claim of privilege restricts cross-examination on collateral matters bearing only on credibility and not on facts brought out on direct examination or pertaining to defendant's guilt or innocence. State v. Bittner ---------- 298

12. Ordinarily, uncorroborated testimony of accomplice who has been guilty of conscious falsehood may sustain conviction if proper cautionary instruction given. State v. Bittner ---------- 298

13. Under law of Nebraska, accused charged with rape cannot be convicted solely on testimony of prosecutrix. State v. Ferguson ---------- 330

14. In prosecution for rape, while evidence of prompt complaint standing alone insufficient corroboration, such evidence for consideration of jury as corroboration of main facts in issue. State v. Ferguson ---- 330

15. In prosecution for rape, not essential that prosecutrix be corroborated by other witnesses as to particular acts which constitute offense; sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony as to principal fact in issue. State v. Ferguson ---------- 330

16. Convictions based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if photographic identification procedure so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification. State v. Nero -------- 383

17. Actions in equity on appeal to Supreme Court are triable de novo, subject, however, to rule that when credible evidence on material questions of fact in irreconcilable conflict it will consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than the opposite. Martin v. Martin ------ 393

18. Trial judge vested with broad discretion to properly circumscribe inquiry into criminal defendant's past

conduct when that subject raised during cross-examination of defense character witness. State v. Newte 412
19. While particular facts inadmissible in evidence upon direct examination for purpose of sustaining or overthrowing character, doctrine does not extend to cross-examination. State v. Newte ---------- 412
20. Upon cross-examination of witness who has testified to general reputation, questions may be propounded for purpose of eliciting source of witness' information, and particular facts may be called to his attention. State v. Newte ---------- 412
21. Extent of cross-examination of witness must be left to discretion of trial court. State v. Newte ---------- 412
22. Character witness may be cross-examined as to an arrest whether or not it culminated in conviction of defendant. State v. Newte ---------- 412
23. Hypothetical questions propounded to expert, if so framed as to fairly and reasonably reflect facts proved by any of witnesses in case, will be sufficient, provided subject one proper for expert testimony. Moats v. Lienemann ---------- 452
24. Opinions of experts not binding on trier of facts. Swartz v. Hess, Inc. ---------- 542
25. Testimony by plaintiff as to statements of defendants' agent made to third party and related to plaintiff by third party admissible to show statements were related to plaintiff and that he relied on them. Ristine v. Geigy Agricultural Chemicals ---------- 550
26. While expert will be permitted to express his opinion, or even his belief, he cannot give his opinion upon precise or ultimate fact in issue before jury, which must be determined by it. Barkalow Bros. Co. v. Floor-Brite, Inc. ---------- 568
27. Actions in equity on appeal to Supreme Court triable de novo, subject, however, to rule that when credible evidence on material questions of fact in irreconcilable conflict, Supreme Court will, in determining weight of evidence, consider fact that trial court observed witnesses and their manner of testifying, and must have accepted one version of facts rather than opposite. Scripter v. Scripter ---------- 576
28. When, as required by statute, district engineer has examined land and made his report to board of supervisors of drainage district which approved report, report furnishes prima facie evidence of classification and benefits, and in absence of fraud, such

evidence sufficient to sustain decision of board unless decision overcome by competent evidence to contrary. Drainage Dist. No. 10 v. Canaday ------ 701
29. Credibility of witnesses and weight to be given their testimony for jury's consideration and not for court. Wisnieski v. Harms ---------- 721
30. Questions of credibility ordinarily for jury to determine and not for court. State v. Rice ---------- 728
31. Ordinarily, party entitled to benefit of testimony of other witnesses in contradiction of his own, wherever his own not of character of judicial admission, and concerns only some evidential or constituent circumstance of his case; this is especially so as to circumstances of accident or similar event, because in such case party's testimony especially subject to inexactness of observation and memory. Sacco v. Gau 808
32. Where party testifies clearly and unequivocally to fact which is within his own knowledge, such testimony may be considered judicial admission; rule has particular application where party so testifying made no effort to retract, qualify, or otherwise explain positive force of his own evidence. Sacco v. Gau ---------- 808

Words and Phrases.

1. Final settlement not synonymous with final payment; precedes payment and denotes proper administrative determination with respect to amount due. Boyd v. Benkelman Public Housing Authority 69
2. Term family as used in cited statute includes husband who is residing in same household with other members. Nichol v. Clema ---------- 74
3. Stealing defined as taking without right or leave, with intent to keep wrongfully. State v. Blotzer -- 143
4. Words "unavoidably prevented" refer to circumstances beyond control of party desiring to file pleading in our courts; law requires diligence on part of clients and attorneys and mere neglect of either will not enable party to relief on that ground. Vacek v. Marburger ---------- 180
5. Words "arising out of" refer to origin or cause of accident and descriptive of its character, while words "in the course of" refer to time, place, and circumstances of accident. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
6. Referential and qualifying words in statute, where

no contrary intention appears, refer solely to last antecedent. Haiar v. Kessler ---------- 312
7. Issue means first delivery of an instrument to a holder or a remitter. State of Kansas v. Holeb ---- 319
8. Delivery means voluntary transfer of possession. State of Kansas v. Holeb ---------- 319
9. Tax not assessment of benefits; is means of distributing burden of cost of government; only benefit to which taxpayer consequently entitled that derived from his enjoyment of privileges of living in organized society, established and safeguarded by devotion of taxes to public purposes. Sandberg v. State ---------- 335
10. Terms and provisions which control in construction of coverage afforded by temporary insurance "binder" those contained in ordinary form of policy usually issued by company at that time upon similar risks. Robinson v. State Farm Mut. Auto. Ins. Co. ------ 470
11. Woman who is chaste is one who has never had unlawful sexual intercourse with male person; act of sexual intercourse without consent and against her will if she is capable of consent does not destroy her chastity. State v. Brionez ---------- 488
12. Words "in the event of death," "in case of death," or "at his death" do not have effect of postponing vesting of estate in remainder to time of death of life tenant. Rudy v. Wagner ---------- 508
13. Crime of embezzlement of public money as defined by cited statute applies only to officers or persons charged by law with performance of duties therein mentioned, and police patrolman collecting coins from parking meters as part of duties designated by his superior cannot properly be informed against thereunder. State v. Williams ---------- 565
14. Contract carrier one, other than common carrier, which furnishes transportation service to meet special needs of individual shipper or shippers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp. ---------- 584
15. Although "conduct" may entail some elements of expression or speech, when "speech" and "nonspeech" elements combined in same course of conduct, a sufficiently important governmental interest in regulating nonspeech element can justify incidental limitations on First Amendment freedoms. Major Liquors, Inc. v. City of Omaha ---------- 628

16. When nudity employed as sales promotion in establishments purveying intoxicating liquors, it is essentially "conduct" and subject to regulation or prohibition. Major Liquors, Inc. v. City of Omaha -- 628
17. Neglected child is child under 18 years of age who is abandoned by his parent, who lacks proper parental care by reason of fault or habits of parent, or whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for health, morals, or well-being of such child. Healey v. Hartman ---------- 682
18. Words "slight" and "gross" as employed in comparative negligence act comparative terms; test statute provides detailed. Johnson v. Roueche ---------- 716
19. Meaning of gross negligence under comparative negligence rule not same as meaning of gross negligence under guest passenger statute. Johnson v. Roueche ---------- 716

Workmen's Compensation.

1. On appeal of workmen's compensation case to Supreme Court, if reasonable competent evidence to support findings of fact in trial court, judgment, order, or award not modified or set aside for insufficiency of evidence. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
2. Test usually employed in this state to determine whether relationship of master and servant exists whether alleged employer has control of workman and of details, mode, and manner of doing work. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
3. Words "arising out of" refer to origin or cause of accident and descriptive of its character, while words "in the course of" refer to time, place, and circumstances of accident. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
4. Whether accident arises out of and in course of employment must be determined by facts of each case; no fixed formula by which question may be resolved. Johnson v. Hahn Bros. Constr., Inc. ---- 252
5. In determining whether risk arises out of employment, test to be applied to any act or conduct of employee which does not constitute direct performance of his work whether it is reasonably incident thereto or so substantial a deviation as to constitute break in employment and to create formidable inde-

pendent hazard. Johnson v. Hahn Bros. Constr., Inc. 252
6. In workmen's compensation case, burden of proof on defense of intoxication on employer. Johnson v. Hahn Bros. Constr., Inc. ---------- 252
7. Where have been two injuries to employee, question of whether disability sustained by him should be attributable to first or second depends on whether or not disability sustained caused by original injury or by independent intervening cause. Breed v. Interstate Glass Co. ---------- 284
8. Where first injury not proximate cause of disability, second injury constitutes independent intervening cause. Breed v. Interstate Glass Co. ---------- 284
9. Burden of proof upon claimant in workmen's compensation case to establish by preponderance of evidence that personal injury sustained by employee, arising out of and in course of his employment. Breed v. Interstate Glass Co. ---------- 284
10. On appellate review of workmen's compensation case in Supreme Court, cause not considered de novo unless findings of fact not supported by evidence as disclosed by record. Swartz v. Hess, Inc. ---------- 542
11. Unreasonable to conclude that injury not latent merely because plaintiff suffered pain, when thereafter several physicians unable to correctly diagnose his injury. Borowski v. Armco Steel Corp. ------ 654
12. If employee suffers injury, which appears slight but progressive in course, and which several physicians unable to correctly diagnose, his failure to file claim or bring suit within time limited by law will not defeat right to recovery, if he gave notice and commenced action within statutory period after he had knowledge that compensable disability resulted from original accident. Borowski v. Armco Steel Corp. ---------- 654
13. On appeal of workmen's compensation case to Supreme Court, if reasonable competent evidence to support findings of fact in trial court, judgment, order, or award not modified or set aside for insufficiency of evidence. Borowski v. Armco Steel Corp. 654

Zoning.

Where certificate of occupancy properly obtained in accordance with zoning statutes and ordinances, may not be arbitrarily revoked where certificate holder has incurred substantial expenses, commitments, and

obligations in good faith reliance upon certificate.
A. C. Nelson Enterprises, Inc. v. Cook ---------- 184